

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Abraham P.George, AM & Shri George George K, JM

ITA No.142/Coch/2015 : Asst.Year 2009-2010

M/s.Infra Housing Private Limited C/o.M/s.ASA & Associates LLP, Chartered Accountants 207-208, 2 nd Floor Marine Drive, Kochi-682031 PAN : AAACI8298K.	Vs.	The Addl.Commissioner of Income-tax, Range-1 Kochi.
(Appellant)		(Respondent)

Appellant by : Sri. Nithyananda Kamath
Respondent by : Sri. A.Dhanaraj, Sr.DR

Date of Hearing : 13.11.2017	Date of Pronouncement : 01.12.2017
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ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against the CIT(A)'s order dated 30.09.2014. The relevant assessment year is 2009-2010.

2. There is a delay of 20 days in filing this appeal. The assessee has filed a petition to condone the delay in filing this appeal. The concerned Chartered Accountant has also filed an affidavit stating that the delay was caused because he was having health problem leading to the delay of 20 days in filing the appeal. It is further stated in the affidavit of the Chartered Accountant that papers were furnished by the assessee in the Chartered Accountant's office well before the time limit of

filing the appeal before the Tribunal. On perusal of the petition for condonation of delay and the accompanying affidavit of the Chartered Accountant, we are convinced with the delay in filing the appeal is not on account of any lapses on the part of the assessee. Therefore, we condone the delay of 20 days in filing this appeal and proceeded to dispose off the same on merits.

3. The grounds raised read as follows:-

"1. The Order of the CIT Appeals is erroneous and against the facts and circumstances applicable to the case.

2. The learned Commissioner of Income Tax (Appeals), was not justified in upholding the order of The Assessing officer imposing a penalty of Rs. 45 lakhs under section 271D, for the reason that the share application money received by the company from its directors, against which shares have actually been issued during the financial year were transactions in the nature of loans or deposits attracting the provisions of Section 269SS of the Income Tax Act, 1961. The imposition of penalty under section 271D of the Income Tax Act on such transactions is illegal and ultra vires the provisions of law.

3. Without prejudice to the grounds stated above the learned Additional Commissioner ought to have noted the fact that the amount received by the company by the directors were credited to their current accounts, although misleadingly styled as loan accounts, and therefore do not attract the provisions of Section 269SS as held in Income Tax V s Idhyam Publications Limited reported in (2006) ITR 221 (Mad).

4. *For grounds stated as above and such other grounds as may be urged at the time of hearing, the appeal may be allowed and justice rendered."*

4. Briefly stated the facts of the case are as follow:-

4.1 The assessee is a company engaged in the business of development and construction of residential flats and villas. It was noticed that the assessee had received in cash a sum of Rs.45,00,000 as loan from two of its Directors during the period 07.11.2008 to 05.01.2009. Since the assessee-company had received loan amount of Rs.45 lakh in cash, notice u/s 271D of the Income-tax Act was issued calling for the assessee's objection for imposition of penalty under the said section. The assessee raised the following arguments / objections against the imposition of penalty u/s 271D of the Act.

"During the year the company has increased the paid up Share capital from Rs. 11,91,000 to 61,92,000 by issuing Shares to various allottees including the directors John George and George E George. The money was brought in by the directors for the purpose of Share Capital on various dates by ways of Cash, through known sources, as it is Share Application Money. The accountant made an inadvertent clerical error by accounting the same in their respective Ledger a/c namely "John George Loan a/c" and "George E George Loan a/c". The shares were allotted on 31.03.2009 and till date it has not been in used for any other purpose, as it is Share Application Money received pending allotment. These amounts which are received in cash are not in the nature of deposits/loan accepted as the company is already having other loans due to the directors and they are all

transacted in A/c payee cheques or A/c payee drafts. The cash receipts are in the nature of Capital receipts for the purpose of increasing paid up Share Capital of the company."

4.2 The above objection of the assessee-company was rejected by the Addl.CIT. The Addl.CIT held that the money was received by the assessee-company initially as loan and subsequently it was converted as share application money on 31.03.2009. It was held by the Addl.CIT that it was only an afterthought to get over the provisions of section 269SS the amount was converted as share application money. It was further held by the Addl.CIT that there was no reasonable cause as mentioned in section 273B of the Income-tax Act, for violation of provisions of section 269SS of the Act. The relevant finding of the Assessing Officer in imposing the penalty reads as follow:-

"1. The Company accepted money in cash and credited it into the Loan a/c of the two directors. The money was not paid by the directors through A/c Payee cheques, or drafts, as is evident from the Loan a/c ledger produced by the assessee itself during the course of assessment proceedings. I am attaching the copies of the Ledger a/c of Shri John George and Shri George E George in support of the same. Though the assessee argues that this is a clerical mistake, it only seems to be an afterthought raised by the assessee. No confirmation was produced by the assessee from the person who had made the clerical mistake. The burden of proof lies on the assessee to prove that money was introduced in cash under circumstances beyond the control of the assessee.

2. The assessee has not given any explanation for the source of cash brought in through sources other

than normal banking channels. When money is introduced other than through banking channel it is imperative on the assessee to explain the source of the same. No explanation has been offered by the assessee on the source of cash introduced by the directors of the company on the various dates.

3. Just because the money was utilized towards Share Application Money does not alter the character of the a/c into which the money was originally deposited. Money was deposited into Loan a/c. The assessee also agrees to this fact. The Ledger a/c copies of Loan a/c is ample proof for this.

4. The assessee's argument that since it is Capital receipt, it is not hit by the provisions of 269SS is also liable to be rejected. The section clearly say that "no person shall take or accept from any other person any loan a deposits otherwise than A/c payee cheques or A/c payee bank drafts." Loan is itself a Capital receipt. So the assessee's argument .that being a Capital receipt it should be exempted from section 269SS, is not correct.

5. The assessee has not explained any "reasonable cause" for the said failure on the part of the assessee for having received loan in cash. As per section 273B, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was "reasonable cause" for the said failure. The assessee has not given any "reasonable cause" as prescribed under section 273B. In fact the assessee has not given any reason for having violated the provisions of section 269SS. If only a reason is given then it can be considered whether it is reasonable or not. Without giving any reason it is not possible to consider whether the assessee's case falls under the clause of "reasonable cause" mentioned in section 273B.

4.3 Aggrieved by the order of the Addl.CIT, imposing penalty u/s 271D of the Income-tax Act, the assessee preferred an appeal to the first appellate authority.

4.4 The CIT(A) dismissed the appeal of the assessee. The relevant finding of the CIT(A) reads as follow:-

"5.3. I have gone through the assessment order and the submissions of the assessee. It is seen that the loan in cash was accepted by the assessee company' from November, 2008 to January, 2009. The assessee could furnish any explanation as to why such loans were received in cash. Although assessee has taken plea that these payments were not in the nature of loan and that these amounts were given for share application money, but the entry in the books of account are very clear. Since these payments were originally received in cash as loan, even if such loan was later converted into share application money, the basic nature of acceptance of this amount in cash at the point of inception cannot be changed. Therefore, Assessing officer is correct in treating the same as loan accepted in cash from the two Directors and invoking the provisions of section 269SS read with section 271D.

As regards case of CIT Vs Idhayam Publications Ltd, 285 ITR 221 (Mad), it is seen that in that case directors were paying money in the current account and also withdrawing from the same. It was held in this case that deposit and withdrawal from the current account can not be considered as loan or advance. However, in the case of the assessee, it is the loan taken in cash, which was later converted into share application money and shown as "John George Loan a/c" and "George E. George Loan a/c". Since the nature of deposit in the present case is loan, and it is not the running account of the directors, therefore ratio of this case is not applicable to the facts and circumstances of this case. Since

loan is taken/accepted in cash, and no explanation has been offered by the assessee on the source of cash introduced by the directors on various dates, AO is justified in imposing this penalty under section 271 D.

Accordingly, the penalty of Rs. 45 lakhs levied by the assessing officer under section 271D is hereby confirmed."

4.5 Aggrieved by the order of the CIT(A), the assessee has preferred the present appeal before the Tribunal.

4.6 The learned AR reiterated the submissions made before the Income-tax Authorities.

4.7 The learned Departmental Representative, on the other hand, supported the order of Addl.CIT imposing penalty u/s 271D of the Act and the order of the CIT(A) confirming the imposition of penalty.

5. We have heard the rival submissions and perused the material on record. Undoubtedly, the assessee-company had received a sum of Rs.45 lakh in cash from the two Directors during the period November 2008 to January 2009. When the amounts were received by the assessee-company, the entries in the books of account was recorded as 'advances / loans from the Directors'. The above payments were converted into share application on 31.03.2009. Since these payments were originally received in cash as loan, even if such loan was later converted into share application money, the basic nature of acceptance of these amounts in cash at the point of inception

cannot be changed. The assessee has not given any explanation as regards the urgent necessity to have received the above sum in cash. Since there is no proper explanation on the part of the assessee as regards the urgency of receiving these amounts as cash, there is a clear violation of provisions of section 269SS and penalty has been rightly imposed u/s 271D of the Act. The case laws relied on by the assessee are distinguishable on facts. Those case laws are concerning the existence of a reasonable cause as mentioned u/s 273B of the Income-tax Act for cancelation of penalty u/s 271D. In those cases, factually it was found that there was a reasonable cause for having accepted amounts in cash, unlike in the instant case there was no explanation on the part of the assessee as regards the urgent necessity / need for receiving the amount of Rs.45 lakh from two Directors of the assessee-company in cash. For the aforesaid reasons, we see no reason to interfere with the order of the CIT(A) and we confirm the same. It is ordered accordingly.

6. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 01st day of December, 2017.

Sd/-
(Abraham P.George)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 01st December, 2017.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT, Kochi.
4. CIT(A)-II, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

True copy

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin