

IN THE INCOME TAX APPELLATE TRIBUNAL
Special Bench, Mumbai
Before S/Shri G.S. Pannu (AM), Joginder Singh (JM)
& B.R. Baskaran (AM)

I.T.A. No. 6304/Mum/2012 (Assessment Year 2008-09)

M/s. Deepak Sales & Properties Pvt. Ltd. 14, S.V. Road Khar West Mumbai-400 052. PAN : AABCD1298F (Appellant)	Vs.	Addl.CIT Circle-9(1) Room No. 222 Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri M.S. Mathuria
Department by	Shri R.P. Meena
Date of Hearing	14.03.2018
Date of Pronouncement	13.06.2018

ORDER

Per B.R. Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 01-08-2012 passed by Ld CIT(A)-19, Mumbai confirming penalty of Rs.2.00 lakhs levied by the Additional Commissioner of Income tax u/s 271D of the Act for violation of provisions of sec. 269SS of the Act during the year relevant to the assessment year 2008-09. Thus, the solitary issue urged in the appeal related to the imposition of penalty u/s. 271D of the Act.

2. The appeal initially came up before "Mumbai G Bench" of ITAT (referred to as "Division Bench") and the members constituting therein referred the issue to the Hon'ble President for constituting a Special Bench. The back ground of the same is discussed in brief. The Division Bench noticed that the assessee has contended before it that if a transaction of accepting deposits in violation of sec. 269SS is found to be bonafide one, then the penalty u/s 271D of the Act should not be levied. In this regard, the assessee had placed reliance on the decision rendered by Mumbai G bench of ITAT in the case of Zodiac Developers P Ltd (ITA No.31/Mum/2011 dated 10.10.2014), wherein

the Bench has, inter alia, observed that if the Assessing Officer has not doubted the genuineness of the transaction and if no addition is made u/s 68 of the Act, penalty cannot be imposed u/s 271D of the Act. The Division Bench was of the view that the decision so rendered by G bench in the case of Zodiac Developers P Ltd (supra) is directly contrary to the decision rendered by Hon'ble Apex Court in the case of Kum. A.B.Shanti (255 ITR 258), wherein it was observed that existence of genuine or bonafide transaction is not sufficient to attract relief u/s 273B of the Act and it has to be established that on account of some bonafide reasons the assessee could not get loan/deposit by account payee cheque or account payee bank draft. The Division Bench has expressed the view that the provisions of sec. 271D & 271E come into play only in respect of genuine transactions, with an exception provided u/s 273B whereby an assessee can establish bonafide reasons so as to bring the case out of a sweep of provisions of section 271D & section 271E of the Act. Accordingly the Division Bench was of the opinion that the view taken by ITAT "G" Bench (supra) needs to be reconsidered. Accordingly, the Division Bench has requested that the Hon'ble President may constitute a Special Bench, in exercise of power vested in him u/s 255(3) of the Act.

3. Accordingly the Hon'ble President has constituted this Special Bench.

4. However, the record of proceedings revealed that no specific question was framed by the Division Bench for reference to Special bench and the entire issue relating to levy of penalty u/s. 271D of the Act was made subject matter of reference. The Hon'ble President has constituted the Special Bench as such based on the reference note of the Division Bench. Hence, copy of the reference note made by the Division bench was given to both the parties. Accordingly, with the concurrence of both parties, the subject reference is being disposed of considering the entirety of issue relating to the imposition of penalty u/s. 271D of the Act in this case.

5. After going through the reference made by the Division Bench, the Ld Counsel appearing for the assessee, Shri M.S. Mathuria, submitted that he did not agree with the observations made by the Division Bench in paragraph 5 of its reference note, wherein the Division Bench had stated that the assessee had contended that there is no necessity for the assessee to prove the “exigency” of accepting the loan and deposit in contravention of provisions of sec. 269SS of the Act. He submitted that he did not contend so and further submitted that he is agreeing that the assessee is indeed required to show that there was reasonable cause for violating the provisions of sec. 269SS of the Act. Referring to Paragraph 3.2 of the order passed by Ld CIT(A), the Ld A.R submitted that the assessee has earlier demonstrated that there was business emergency for it in accepting loan by way of cash and the same constitutes a reasonable cause in terms of sec. 273B of the Act. Referring to the decision given by Mumbai G bench of ITAT in the case of Zodiac Developers P Ltd (supra), he submitted that the G bench has considered the existence of reasonable cause also in that case while adjudicating the issue relating to levy of penalty u/s 271D of the Act.

6. Since the Learned representative for the assessee consented to the proposition that apart from the bona fides of the transaction, assessee is also required to prove the existence of reasonable cause to come within the immunity provided in sec. 273B of the Act, we do not dwell upon any further with the reservations expressed by the Division Bench in the reference note. This was expressed before the parties, who thereafter have made submissions on merits.

7. We shall first discuss the facts relating to the issue before us. The assessee is a private limited company and is managed by two directors, viz., Shri Moin A.S.Batliwala and Smt. Sherbanoo A.S.Batliwala. During the year under consideration, the assessee had received cash loan of Rs.1.00 lakh on 01-10-2007 and another cash loan of Rs.1.00 lakh on 05-12-2007 from its director Smt. Sherbanoo A.S. Batliwala. Thus the assessee had received

aggregate amount of Rs.2.00 lakhs as loans by way of cash in violation of provisions of sec. 269SS of the Act. Hence the Addl. Commissioner of Income tax initiated penalty proceedings u/s 271D of the Act. Before the Addl CIT, the assessee simply relied upon the grounds urged before Ld CIT(A) in the appeal filed by it challenging the quantum assessment order. In the said grounds of appeal, it was stated that the assessee had taken loan of Rs.2.00 lakhs from its director due to urgent business needs. Since the assessee did not offer any concrete explanations, the Addl CIT levied penalty of Rs.2.00 lakhs u/s 271D of the Act.

8. The contentions made by the assessee before Ld CIT(A) are discussed as under by Ld CIT(A):-

“3.2 In appeal it is submitted that the appellant company deals in imported and local furniture. It had imported goods as well as purchased locally and cash was introduced by one of the directors Smt Sherbanu Abdul Sattar Batliwala in the company as follows:-

1) *Rs.1,00,000/- on 01.10.2007 – returned on 03-10-2007 by payees’s a/c cheque.*

2) *Rs.1,00,000/- on 05-12-2007.*

The subsequent payment was required to pay of the clearing & forwarding towards their bill which consists of custom duty, other charges and octroi and his commission. The fund was falling short and Rs.1,00,000/- was required to be taken on cash. On earlier occasion though it was felt cash would be required it was actually not and hence payment was returned immediately. It is under these circumstances cash was deposited by one of the directors as aforesaid. Thus, the appellant has submitted that the amount brought in by the director in cash from time to time for immediate requirement of the appellant company did not amount to transaction of loan/deposit and thus the penalty u/s 271D is incorrectly levied by the AO.”

9. The Ld CIT(A) was not convinced with the explanations of the assessee. The ld CIT(A) took support of following observations made by Hon’ble Supreme Court in the case of Asst. Director of Inspection (Investigation) Vs. Kum. A.B. Shanthi (255 ITR 258)(SC):-

“...that (1) if there was a genuine and bonafide transaction and (2) if for any reason the taxpayer could not get a loan or deposit by account payee cheque or demand draft for some bonafide reasons, the authority vested with the power to impose penalty has got discretionary power. The existence of a genuine or bona fide transaction is not sufficient to attract the relief under section 273B of the said Act. It must also be established that for some bona fide reasons the assessee could not get a loan or deposit by an account payee cheque or account payee bank draft.”

10. The Ld CIT(A) took the view that the assessee has not satisfied the second condition and observed that without satisfying both the conditions specified by the Hon'ble Supreme Court, it cannot be concluded that the assessee has any “reasonable cause” for its failure to accept the said amount in compliance with section 269SS of the Act. Accordingly the Ld CIT(A) confirmed the penalty with the following observations:-

“There is nothing on record to show that there were bona fide reasons for not accepting the said amounts through account payee cheques or account payee bank draft. And, unless that is established, the shelter of section 273B is not available.”

In this regard, the Ld CIT(A) also took support of the decision rendered by Hon'ble Delhi High Court in the case of M/s Samora Hotels P Ltd (211 Taxman 189). Aggrieved, the present appeal came to be filed by the assessee before the Tribunal.

11. The Ld A.R submitted that the assessee has received the cash loans of Rs.2.00 lakhs from one of its directors. Since they were bonafide transactions, the AO did not make any addition u/s 68 of the Act. He submitted that the provisions of sec 269SS were introduced to curb black money transactions , which was clarified in the Explanatory Notes on the provisions of the Finance Act, 1984 as under:-

“Unaccounted cash found in the course of searches carried out by the Income tax department is often explained by tax payers as representing loans taken from or deposits made by various persons. Unaccounted income is also brought into the books of account in the form of such loans and deposits and tax payers are also able to get confirmatory letters from such persons in support of their explanation.

With a view to countering this device, which enables taxpayers to explain away unaccounted cash or unaccounted deposits, the Finance Act has inserted a new section 269SS in the Income tax Act debarring persons from taking or accepting, after 30th June, 1984, from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft.....”

Placing heavy reliance on the above said Explanatory Note, the Ld A.R contended that the AO did not give any finding that the loan so taken by the assessee constituted its unaccounted income. He further submitted that the tax authorities have not recorded any finding that the impugned loans were taken in cash with malafide intentions and with the sole objective of bringing concealed or undisclosed income into the books in order to avoid or evade tax. By placing reliance on the decision rendered by Hon'ble Bombay High Court (in particular paragraph 25 of its order) in the case of CIT Vs. Triumph International Finance (I) Ltd (2012)(345 ITR 270), the Ld A.R contended that the impugned penalty should be cancelled on the above said reason.

12. The Ld A.R further submitted that the assessee has taken impugned loans from its director. He submitted that the deposits taken by the limited companies are governed by provisions of section 58A of Companies Act, 1956. As per the above said provision, the deposits taken from its directors are not considered as “deposits”. In this regard, he placed reliance on the decision rendered by Delhi bench of Tribunal in the case of Neeraj Shoes Industries P Ltd vs. ACIT (2014)(151 ITD 648).

13. The Ld A.R further submitted that the directors were having running account with the assessee and funds required for the assessee company were contributed/arranged by them from time to time as per the business needs of the assessee company. He submitted that the transactions made through current account of the directors cannot be considered as Loan or advance for the purpose of section 269SS of the Act.

14. With regard to the funds received from the director in the instant case, the Ld A.R offered following explanations:-

(A) Cash was received on 01-10-2007 for payment of Custom Duty/Freight etc., for import of furniture items from Indo-Afrique United Traders (HK) Ltd, 301, Kam On Building, 176, Queens Road Central, Hongkong. As communication was received from the exporter that consignment is delayed, the above said fund was returned back by way of cheque on 03-10-2007.

(B) Actual goods dispatched by the said Indo-Afrique United Traders (HK) Ltd on 11.12.2007 vide their invoice No.0201. As Mrs. Sherbanoo A.S. Batliwala, director/shareholder was to go out of Mumbai for a month, she arranged fund of Rs.1,00,000/- on 05-12-2007 for payment of Custom Duty/Freight etc., on arrival of goods.

The Ld A.R submitted that the assessee has thus explained that the impugned loans were taken on account of urgent business requirements and the same constitutes reasonable cause within the meaning of sec. 273B of the Act. He further submitted that the penalty u/s 271D of the Act could not be levied, if there was reasonable cause for violating the provisions of sec. 269SS of the Act. In support of this proposition, the Ld A.R placed reliance on host of case laws. Accordingly the Ld A.R prayed for cancellation of penalty levied u/s 271D of the Act.

15. The Ld D.R, on the contrary, submitted that the provisions of sec. 273B provide for non-levy of penalty, if reasonable cause is shown by the assessee for violation of provisions of sec. 269SS of the Act. However, in the instant case, the assessee has not shown any reasonable cause before the Addl CIT and hence he was constrained to impose penalty u/s 271D of the Act. He submitted that the assessee has given explanations before Ld CIT(A) that it took the loan by way of cash in order to meet the business requirements. However, the assessee has failed to substantiate the said explanation by furnishing any document to show that there was any urgency for getting loans by way of cash. With regard to the explanations offered before Tribunal also, the assessee did not furnish any documentary evidence to support the same.

16. The Ld D.R submitted that the assessee, before the Tribunal, has only elaborated the explanations already given before Ld CIT(A). However he has

brought in certain fresh facts, i.e., the assessee has given the name of party from whom the goods were expected to have been imported, the sequence of events like delay in shipment, tour program of director, the date of dispatch of goods from Hongkong etc. He submitted that even these fresh facts were also not substantiated with any evidence. The Ld D.R, accordingly, submitted that the assessee has failed to show that there was any reasonable cause for violating the provisions of sec. 269SS and accordingly contended that the penalty u/s 271D of the Act was rightly confirmed by Ld CIT(A). In support of his contentions, the Ld D.R placed reliance on the following case laws:-

- (a) K.V.George vs. CIT (2014)(42 taxmann.com 261)(Kerala)
- (b) CIT, Kanpur Vs. Sunil Sugar Co. (2017)(85 taxmann.com 254)(All)

The Ld D.R further submitted that the Hon'ble Delhi High Court has held in the case of CIT vs. Samora Hotels (P) Ltd (2012)(19 taxmann.com 285) that the provisions of sec. 269SS will be applicable even if the loan or deposit is taken from the directors of the assessee company, as the expression "any other person" in sec. 269SS does not exclude directors or members of company which has received or accepted loans or deposits. The Ld D.R further submitted that it is not only necessary to show that the transactions of loans or deposits are bonafide, but it is also required to be shown that there was reasonable cause in taking or accepting loans or deposits in violations of provisions of sec. 269SS of the Act, as held by Hon'ble Supreme Court in the case of ADI Vs. Ku. A.B. Shanthi (2002)(255 ITR 258). The Ld D.R further submitted that a perusal of the ledger account copy of Smt. Sherbanoo A.S. Batliwala submitted by the assessee would show that the same is not a "Current Account", since during the year under consideration, there was no other transaction other than the impugned loan transactions. Hence there is no substance in the contentions of the assessee that the impugned transactions are current account transactions.

17. We have heard rival contentions and perused the record. We have noticed that the assessee has received loans by way of cash from its director named Sherbanoo A.S Batliwala of Rs.1.00 lakh each on two occasions. Admittedly, the assessee did not offer any explanation before the Addl. CIT except referring to the Grounds of appeal urged before Ld CIT(A) in the appeal filed against quantum assessment proceedings, wherein it was stated that the loans were taken for business requirements. In the appeal filed before Ld CIT(A) challenging the levy of penalty of Rs.2.00 lakhs u/s 271D of the Act, the assessee has further elaborated its explanations that the loans were taken in cash from its director in order to meet the expense relating to payment of Custom duty, freight etc., towards import of furniture. However no specific details of import was given before ld CIT(A). Before us, the assessee has given further details like, from whom the goods were supposed to be imported, when the goods were shipped etc.

18. There is no dispute between the parties that bonafide nature of transactions alone would not be sufficient to escape the clutches of sec. 271D of the Act. As per the decision rendered by Hon'ble Supreme Court in the case of Kum. A.B. Shanthi (supra), it is required to be established that there was some bonafide reasons for the assessee for not taking or accepting loan or deposit by account payee cheque or account payee bank draft, so that the provisions of sec.273B of the Act will come to the help of the assessee. Only in such cases, the AO is precluded from levying penalty u/s 271D of the Act. The Ld A.R took support of Explanatory note given while introducing the provisions of sec. 269SS of the Act. However, the Hon'ble Supreme Court has rendered its decision in the case of Kum. A.B.Shanthi (supra) after considering the same and has expressed the view extracted above. In the case of Triumph International Finance (I) Ltd (supra) also, the Hon'ble Bombay High Court has deleted the penalty only on the ground of existence of reasonable cause.

19. The Ld A.R also contended that the impugned transactions are current account transactions. However, the ledger account of Smt. Sherbanoo A.S.

Batliwala does not support the contentions of the assessee. The Ld A.R also contended that the amount received from the directors cannot be considered as deposits under Companies Act, 1956. However, we are examining the case under the provisions of the Act and the Hon'ble Delhi High Court has held in the case of Samora Hotels (P) Ltd (supra) that the transaction with the directors of the Company are not excluded from the ambit of the provisions of sec. 269SS of the Act.

20. Now the question that boils down is whether the assessee has, in the instant case, demonstrated that there was reasonable cause for taking loan of Rs.1.00 lakh each on two occasions in violation of provisions of sec. 269SS of the Act? For the sake of convenience, and at the cost of repetition, we extract below the explanation furnished by the assessee :-

(A) Cash was received on 01-10-2007 for payment of Custom Duty/Freight etc., for import of furniture items from Indo-Afrique United Traders (HK) Ltd, 301, Kam On Building, 176, Queens Road Central, Hongkong. As communication was received from the exporter that consignment is delayed, the above said fund was returned back by way of cheque on 03-10-2007.

(B) Actual goods dispatched by the said Indo-Afrique United Traders (HK) Ltd on 11.12.2007 vide their invoice No.0201. As Mrs. Sherbanoo A.S. Batliwala, director/shareholder was to go out of Mumbai for a month, she arranged fund of Rs.1,00,000/- on 05-12-2007 for payment of Custom Duty/Freight etc., on arrival of goods.

As rightly pointed out by Ld D.R, the assessee has not substantiated the above said explanation with any documentary evidence, i.e., the assessee has failed show that there was any urgent business necessity and hence the assessee was constrained to take loans by way of cash. We may also analyse the explanations, considering the same as true.

21. As per the explanations of the assessee, the goods were being imported from Hongkong. The assessee received first loan of Rs.1.00 lakh on 01-10-2007. It was repaid on 03-10-2007, since the consignment was stated to be

delayed. The second loan of Rs.1.00 lakh was received on 05.12.2007, since the foreign supplier was expected to ship the goods on 11.12.2007.

22. The above said explanation would show that the goods were not shipped either on 01-10-2007 or on 05-10-2007, i.e., on the dates on which the impugned loans were taken. The question of payment of customs duty etc., would arise only upon shipment or receipt of goods. In fact, the assessee admits that the goods were expected to be shipped on the second occasion only on 11.10.2007, while the cash loan was taken on 05-10-2007. If the director had given cheque on 05-10-2007, the funds would have been credited to the account of the assessee well before 11.10.2007. These facts would show that there was no urgent business necessity for the assessee on both the occasions to accept the loan in cash. Further, the assessee has also failed to demonstrate that on both the dates the assessee was not having sufficient funds in its possession.

23. In view of the foregoing discussions, we are of the view that the assessee has failed to show that there was a reasonable cause for getting loans in violation of the provisions of sec. 269SS of the Act. Accordingly we are of the view that the Ld CIT(A) was justified in confirming the penalty of Rs.2.00 lakhs imposed by the assessee.

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

Order has been pronounced in the Court on 13.06.2018.

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 13/06/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)

4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

PS

Senior Private Secretary
ITAT, Mumbai