

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
&
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.-1650/Del/2009
(Assessment Year: 2003-04)**

Sarvottam Construction P. Ltd. 31/15, East Patel Nagar, New Delhi. PAN No. AAGCS3124G	vs	ACIT Range-7, New Delhi.
Assessee by	Sh. Tarandeep Singh, Adv.	
Revenue by	Sh. K. Tewari, Sr. DR	

Date of Hearing	11.07.2018
Date of Pronouncement	11.07.2018

ORDER

PER K. NARASIMHA CHARY, J.M.

Assessee preferred this appeal challenging the order dated 09/02/2009 in appeal No. 8/08-09 on the file of the learned Commissioner of Income Tax (Appeals)-X, New Delhi (Ld. CIT(A)).

2. Brief facts of the case are that, the assessee is a company. The original assessment was complete under section 143(3) of the Act on 28/02/2006 determining the income at Rs. 53,97,726/- against the returned income of Rs. 86, 966/-. During the scrutiny Learned Assessing Officer (Ld. AO) found that the assessee received a sum of Rs. 25 lakhs from one Smt.

Kavita Aggarwal as advance for sale of property, but the assessing officer treated the same as loan. Stating that the assessee violated the provisions of section 269 SS of the Act, Ld. AO initiated penalty proceedings under section 271 D of the Act. During the penalty proceedings Smt. Kavita Aggarwal stated that she has not given any money to the assessee and she was not in town from August 2006 to 28/10/2006.

3. Basing on this statement of Smt. Kavita Aggarwal case was reopened under section 147 of the Act. During the reassessment proceedings Smt. Kavitha Aggarwal turned around and confirmed that she had entered into an Agreement with the assessee for purchase of property and paid a sum of Rs. 25 Lacs in cash as advance. Again basing on this statement of Smt. Kavita Aggarwal, the Ld. AO passed the order assessing the income as was decided on 28/02/2006. However subsequently by order dated 20/06/2008 under section 271D of the Act and the additional Commissioner of Income Tax levied a penalty of Rs. 25 lakhs on the assessee company.

4. Assessee preferred appeal before the Ld. CIT(A) and the impugned order reveals that the assessee challenged the same both on the technical ground of limitation and also on merits. Ld. CIT(A) by way of impugned order held that the order dated 30/06/2008 passed by the additional Commissioner of Income Tax was within limitation period prescribed under section 275 (1) (c) of the Act as it was within 6 months from the end of the month in which action for imposition of penalty was initiated. On merits also Ld. CIT(A) held that Rs. 25 Lacs was taken by

the assessee in cash from Smt. Kavitha Garhwal was a loan to meet the day-to-day expenses of the company, but the loan was camouflaged as part advance for sale of the property at 193 Jor Bagh for Rs. 80 lakhs only to get out of the ambit of section 269 SS and section 271 D of the Act.

5. The assessee, therefore, challenged the impugned order before us stating that the order passed under section 271D of the Act is barred by limitation and is liable to be annulled. It is further stated that the authorities below ought to have accepted the acceleration of the assessee that in the sum of Rs. 25 Lacs was received by the assessee from Smt. Kavita Aggarwal towards the advance for purchase of property and the authorities erred in holding that it was loan.

6. In support of the submission that the penalty order was barred by limitation, Ld. AR submitted that the show cause notice under section 271-D of the Act was issued on 09/03/2006 and the penalty was levied on 20/06/2008 whereas the limitation prescribed in section 275 of the Act is only 6 months. He further submitted that the penalty under section 271-D has nothing to do with the assessment or other order inasmuch as section 271-D states that if a person takes on accepts any loan or deposit or specified sum in contravention of the provisions of section 269-SS he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit are specified sum so taken on accepted. In view of this wording of section 271-D read with section 275 (1) (c) of the Act, the penalty proceedings should be complete

within 6 months from the date of initiation of proceedings. For this purpose he placed reliance on the edition reported in CIT vs. Hissaria Bros. [2007] 291 ITR 244 (Raj), which was upheld by the Hon'ble Supreme Court in civil appeal No. 5254 of 2008.

7. In respect of the merits of the case, it is the submission of the Ld. AR that what was really there was an Agreement with one Sibel, but since Mr Sibel did not like the interior of the property and wanted extensive renovation, as an alternative, the assessee entered into an Agreement with Smt. Kavitha Aggarwal and received an advance of Rs. 25 Lacs but subsequently the Agreement with Mr Sibel was materialised, as a consequence of which the advance received from Smt. Kavitha Aggarwal was returned.

8. Per contra, it is the argument of the Ld. DR that in this matter by initiation of proceedings under section 147 of the Act, the nature and character of the proceedings was changed and the nature of the amount was in doubt because of the 1st statement made by Smt. Kavitha Aggarwal but is only with her statement during the proceedings under section 147 of the Act, there is clarity further authorities to determine the nature of receipt from Smt. Kavita Aggarwal, as such it is the date of issuance of notice by the additional Commissioner of Income Tax on 26/05/2008 under section 271-D of the Act, the present penalty proceedings were initiated. It is, therefore, a matter of record that the penalty order dated 20/06/2008 is within 6 months from 26/05/2008 on which the current penalty proceedings were initiated.

9. Ld. DR further submitted that the Ld. AO was not competent to initiate proceedings under section 271-D of the Act and it is only the joint Commissioner that alone is competent to initiate such proceedings, as such, the penalty proceedings cannot be said to have been commenced on 09/03/2006 when an incompetent officer issued the show cause but the penalty proceedings are properly initiated only when the competent authority issued notice under section 271-D on 26th May 2008. Insofar as the merits of the case are concerned, Ld. DR heavily relied on the orders of the authorities below.

10. In reply, Ld. AR submitted that in this matter the proceedings of penalty under section 271-D are initiated on the day on which the show cause notice dated 09/03/2006 was issued. In support of this argument he placed reliance on the edition reported in verses Jitendra Singh Rathore (2013) 31 taxmann.com 52 (Rajasthan) wherein it was held that even though the authority competent to impose penalty under section 271-D is a joint Commissioner, period of limitation for purpose of penalty proceedings cannot be recommended from the issue of 1st show cause notice by joint Commissioner, but from the date of issue of 1st show cause, even by Ld. AO, for initiation of penalty proceedings.

11. We have gone through the record in the light of the submissions on either side. Insofar as the facts pleaded, absolutely there is no dispute. Original assessment was completed by order dated 28/02/2006 were under it was stated

that the proceedings under section 271-D were initiated. Show cause notice was issued on 09/03/2006. Initially Smt. Kavitha Aggarwal denied to have paid any advance to the assessee and she pleaded total ignorance to the transaction, basing on which the Ld. AO started reassessment proceedings under section 147 of the Act. However during such proceedings Smt. Kavitha Aggarwal gave a go bye to her earlier statement and stated that as a matter of fact she paid the advance amount of Rs. 25 lakhs to the assessee and further stated that whatever she had stated on earlier occasion was incorrect. Ld. AO, therefore, passed order under section 147 of the Act determining the income of assessee as he did in the original assessment proceedings. Virtually proceedings under section 147 of the Act were dropped.

12. Subsequently, however, a notice dated 26/05/2008 was issued by the Additional Commissioner Of Income Tax and the proceedings were concluded by the order dated 20/06/2008 with the levy of penalty of Rs. 25 lakhs. The preliminary issue in this matter revolves around the question whether the penalty proceedings were commenced with the issuance of the 1st show cause notice dated 09/03/2006, or those were commenced when the additional Commissioner of income tax issued the show cause notice dated 26/05/2008.

13. This question had fallen for consideration before the Hon'ble Rajasthan High Court and by order dated on 21 July, 2006, in Commissioner Of Income-Tax vs Hissaria Bros. [2007]

291 ITR 244 (Raj), Hon'ble Rajasthan High Court elaborately considered this issue and held that,

23. Under the Income-tax Act, 1961 as originally enacted, no limitation was prescribed for completion of the penalty proceedings. However, considering that there should not be any inordinate delay in imposing penalty and to streamline the levy of penalty within reasonable time in the Act of 1961, Section 275 was enacted as a new provision for regularising imposition of penalty. It is pertinent to notice that if at the relevant time when the scheme for levy of penalty was enacted in the 1961 Act, the case in which the penalty was envisaged under Chapter XXI, the penalty proceedings were required to be initiated during the course of relevant assessment proceedings or its appellate proceedings by the appellate authority. Attention may be invited to the provisions contained in Sections 271 and 273 which were the principal provisions for imposing penalty. The simple provision which was enacted was that no order in this Chapter shall be passed after the expiration of two years from the completion of proceedings, in the course of which the proceedings for imposition of penalty have been commenced. Thus, the limitation for imposing penalty under Section 275 as originally enacted was directly linked with the completion of proceedings in the course of which the penalty proceedings were initiated in terms of Section 271 or Section 273 which were the principal provisions for imposing penalty under Chapter XXI. Since the initiation of penalty proceedings was linked with assessment proceedings and the orders in such assessments were subject to appeal, the findings in such proceedings ordinarily became the foundation for initiating proceedings for penalty and remained relevant evidence to reach a final conclusion in penalty proceedings which were otherwise independent. Where assessment proceedings in the course of which penalty proceedings were initiated became the subject-matter of appeal and there was modification or reversal of findings, it affected final result of penalty proceedings also.

24. Section 275 was substituted by the Taxation Laws (Amendment) Act, 1970 which came into effect with effect from April 1, 1971. The change was explained by the Board vide circular 56 dated March 19, 1971. Significantly, it postulated that Section 275 of the Income-tax Act which specified the time-limit for completion of penalty proceedings has been substituted by a new section. Under the existing section, penalty proceedings for concealment of income or defaults in furnishing the return or accounts called for by notice or failure to pay advance tax on the taxpayer's own estimate, etc., are required to be completed within two years from the date of completion of the proceedings in the course of which the penalty proceedings were commenced. The operation of this time-limit has resulted in practical difficulties in cases where the Appellate Assistant

Commissioner remands the appeal against the assessment for further enquiry by the Income-tax Officer or deletes or reduces the addition made on account of concealed income and the Department takes up the matter in further appeal before the Appellate Tribunal. Sometimes, a final decision on the quantum of the concealed income becomes available only after the expiry of the two-year time limit.

25. Section 275 as substituted aims at obviating difficulties in such cases, reducing avoidable work and avoiding hardship to the assesseees. It provides that the time-limit for making an order imposing a penalty under the provisions of Chapter XXI of the Income-tax Act will, ordinarily, be two years from the end of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed. However, in a case where the relevant assessment or other order is the subject-matter of an appeal to the Appellate Assistant Commissioner or an appeal by the Income-tax Officer to the Appellate Tribunal, the time limit for completing the penalty proceedings will be either the two-years period as stated above or a period of six months from the end of the month in which the order of the Appellate Assistant Commissioner or, as the case may be, of the Appellate Tribunal is received by the Commissioner, whichever period expires later. It may be noted that the two year period will henceforth expire at the end of a financial year, instead of on different dates during the financial year, and the six month period will expire at the end of a calendar month. This facilitates the exercise of vigilance by the tax administration on the expiry of the limitation period and ensure that penalty proceedings are completed in all cases in time.

26. Secondly, the Direct Tax Laws (Amendment) Act, 1987 which came into effect with effect from April 1, 1989, Section 275 was amended. Vide amendment, the time limit for completion of penalty proceedings which was generally two years from the end of financial year in which such proceedings were completed or six months from the end of the month in which action for imposition for penalty was initiated, whichever period expired later.

27. By these amendments, the three categories were made for applying limitation for completing the penalty proceedings taking into consideration the various penalty proceedings for default of certain provisions of the Income-tax Act which are not necessarily linked with proceedings for any particular assessment year in the course of which only penalty proceedings were required to be initiated. Such consequences of default were not linked with the principal assessment proceedings for any specific assessment year but were independent of it.

28. *By substituting Section 275(1), which became operative from April 1, 1989, the provision divided cases for the purpose of prescribing limitation for completing penalty proceedings into three categories:*

(i) Category I covers cases where the assessment to which the proceedings for imposition of penalty relate is the subject-matter of an appeal to the Deputy Commissioner (Appeals) or the Commissioner (Appeals) under Section 246 or with effect from June 1, 2000 Section 246A or an appeal to the Appellate Tribunal under Section 253;

(ii) Category II covers cases where the relevant assessment is the subject-matter of revision under Section 263 ; and

(iii) Category III covers all other cases not falling within Category I and Category II which is governed by Clause (c).

29. *By dividing into three categories the period of limitation for cases falling under category (i) i.e. Clause (1)(a) is the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed or six months from the end of the month in which the order of the Deputy Commissioner (Appeals) or the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Chief Commissioner or Commissioner whichever period expires later.*

30. *The period of limitation for the cases falling under Category (II) is six months from the end of the month in which such order on revision is passed and the period of limitation for the cases falling under the above Category III is the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later. In the last category filing of appeal in respect of order passed in proceedings during which penalty proceedings were initiated is not relevant.*

31. *To this effect, a Circular No. 551 dated January 23, 1990 see [1990] 183 ITR (St.) 7 and another Circular No. 554 dated February 13, 1990 (see [1990] 183 ITR (St.) 130) were issued by the Central Board of Direct Taxes.*

32. *A close scrutiny of Section 275 which reproduced hereinabove shows that Clause 1(a) covers those cases where the penalty proceedings are in respect of a default related to principal assessment for a particular assessment year and the penalty proceedings are required to be initiated in the course of that proceedings only. In such case where the relevant assessment order or other orders are the subject-matter of an appeal to the Commissioner (Appeals) under Section 246 or an appeal to the*

Appellate Tribunal under Section 253, after the expiry of the financial year in which the proceedings in the course of which action for the imposition of penalty has been initiated, are completed, or 6 months from the end of the month in which the order of Commissioner (Appeals) or, as the case may be, of the Appellate Tribunal is received by the Chief Commissioner or Commissioner, whichever period expires later.

33. Apparently, Clause (a) governs the categories which are integrally related to the assessment proceedings and are not independent of it.

34. We have also noticed that this provision was brought into effect in 1970 with effect from April 1, 1971, so that proceedings may not require rectification or modification depending on the outcome of the appeal against the orders passed in the relevant assessment proceedings or the other proceedings in the course of which the penalty proceedings are required to be initiated.

35. We have also noticed that Sections 271 and 273 were the two original penalty provisions, which require the penalty proceedings to be initiated during the course of relevant assessment proceedings or the other relevant proceedings as the case may be. The penalty proceedings could also be initiated during the appellate proceedings arising out of the relevant assessment proceedings. It is only where the assessment proceedings are independent and not directly linked to the assessment proceedings that the result of such proceedings in the course of which the penalty proceedings were initiated does not affect the levy of penalty. On such penalty proceedings, independent of the assessment proceedings Clause (c) has been made applicable. In this category the period of limitation for completing the penalty proceedings is linked with the initiation of the penalty proceedings itself.

36. In such cases, the penalty proceedings can be initiated independent of any proceedings but obviously, the penalty proceedings can be initiated only when the default is brought to the notice of the concerned authority which may be during the course of any proceedings and, therefore, for this type of cases where the penalty proceedings have been initiated in connection with the defaults for which no statutory mandate is there about any particular proceedings during the course of which only such penalty proceedings can be initiated, a different period of limitation has been prescribed under Clause (c) as a separate category. In cases falling under Clause (c) penalty proceedings are to be completed within 6 months from the end of the month in which the proceedings during which the action for imposition of penalty is initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later. There is no provision under Clause (c) for the extended period of limitation

commensurating with completion of the appellate proceedings if any arising from the proceedings during the course of which such penalty proceedings are initiated as in the case where the penalty proceedings are linked with the assessment proceedings or the other relevant proceedings.

37. The expression other relevant thing used in Section 275(1)(a) and Clause (b) of Sub-section (1) of Section 275 is significantly missing from Clause (c) of Section 275(1) to make out this distinction very clear.

38. We are, therefore, of the opinion that since penalty proceedings for default in not having transactions through the bank as required under Sections 269SS and 269T are not related to the assessment proceeding but are independent of it, therefore, the completion of appellate proceedings arising out of the assessment proceedings or the other proceedings during which the penalty proceedings under Sections 271D and 271E may have been initiated has no relevance for sustaining or not sustaining the penalty proceedings and, therefore, Clause (a) of Sub-section (1) of Section 275 cannot be attracted to such proceedings. If that were not so Clause (c) of Section 275(1) would be redundant because otherwise as a matter of fact every penalty proceeding is usually initiated when during some proceedings such default is noticed, though the final fact finding in this proceeding may not have any bearing on the issues relating to establishing default e.g. penalty for not deducting tax at source while making payment to employees, or contractor, or for that matter not making payment through cheque or demand draft where it is so required to be made. Either of the contingencies does not affect the computation of taxable income and levy of correct tax on chargeable income; if Clause (a) was to be invoked, no necessity of Clause (c) would arise.

14. This finding of the Hon'ble Rajasthan High Court was upheld in appeal by the Hon'ble Apex Court in civil appeal No. 50 to 54 of 2008.

15. Further in CIT vs. Jitendra Singh Rathore (supra) the Hon'ble Rajasthan High Court held in unequal local terms that even when the authority competent to impose penalty under Section 271D was the Joint Commissioner, the period of limitation for the purpose of such penalty proceedings was not to be reckoned from the issue of first show cause by the Joint

Commissioner; but the period of limitation was to be reckoned from the date of issue of first show cause for initiation of such penalty proceedings.

16. In view of the above decisions, it is clear that penalty proceedings for default in not having transactions through the bank as required under Sections 269SS and 269T are not related to the assessment proceeding but are independent of it, and therefore, the completion of appellate proceedings arising out of the assessment proceedings or the other proceedings during which the penalty proceedings under Sections 271D and 271E may have been initiated has no relevance for sustaining or not sustaining the penalty proceedings and, therefore, Clause (a) of Sub-section (1) of Section 275 cannot be attracted to such proceedings. It is also further clear that even though the authority competent to impose penalty under section 271-D is a joint Commissioner, period of limitation for purpose of penalty proceedings cannot be recommended from the issue of 1st show cause notice by joint Commissioner, but from the date of issue of 1st show cause, even by Ld. AO, for initiation of penalty proceedings.

17. In view of this settled legal position, we are of the considered opinion that the order passed on 20/06/2008 levying the penalty of Rs. 25 Lacs on the assessee is clearly beyond 6 months from 09/03/2006 when the proceedings of penalty were initiated with issuance of show cause notice, and , therefore, is barred by limitation. On this score itself the penalty cannot be sustained and has to be quashed. Since we

hold that the penalty order was barred by limitation, we do not propose to delve deeper into the merits of the case. Suffice it to say that the penalty cannot be sustained and is, therefore, quashed.

18. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 11.07.2018

Sd/-

(G.D. AGRAWAL)
PRESIDENT

Dated: 11.07.2018

*Kavita Arora

Sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

TRUE COPY

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	11.07.2018
Date on which the typed draft is placed before the dictating Member	11.07.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	11.7.18
Date on which the fair order is placed before the Dictating Member for pronouncement	11.7.18
Date on which the fair order comes back to the Sr. PS/PS	11.7.18
Date on which the final order is uploaded on the website of ITAT	11.7.18
Date on which the file goes to the Bench Clerk	11.7.18
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	