

**IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH
MUMBAI**

**BEFORE SHRI C.N. PRASAD, JM
&
SHRI M.BALAGANESH, AM**

**ITA No.43/Mum/2017
(Assessment Year : 2011-12)**

M/s. Rohan Developers Pvt. Ltd., 2 nd Floor, 12/14, Govardhan Building Parekh Street, Prarthana Samaj, Mumbai	Vs.	Addl. CIT CC-10, Aayakar Bhavan, Mumbai
PAN/GIR No.AACCA7661A		
(Appellant)	..	(Respondent)

Assessee by	Shri Vijay Mehta
Revenue by	Shri A.K.Srivastava
Date of Hearing	03/07/2019
Date of Pronouncement	30/08/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.43/Mum/2017 for A.Y.2011-12 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-50, Mumbai in appeal No.CIT(A) 50/IT-723/2014-15 dated 2011-12 (Id. CIT(A) in short) in the matter of imposition of penalty u/s.271D of the Income Tax Act, 1961.

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in confirming the levy of penalty u/s.271D in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is a real estate developer. A search and seizure action u/s.132 of the Act was carried out on 26/05/2011 at the premises of the assessee and other companies and entities promoted by Shri Harresh N Mehta and late Shri Jitendra N Mehta alongwith Directors and employees of the companies etc. "Rohan Group" headed by Shri Harresh N Mehta is one of the leading builders of the South and the Central Mumbai and mainly engaged in construction of residential buildings and redevelopment of old and dilapidated buildings. The group has redeveloped over 50 buildings and constructed over 2.5 million sq.ft of residential space. Apart from M/s. Rohan Developers Pvt. Ltd., i.e. assessee herein, other main concerns are M/s. Goodwill Properties Pvt. Ltd; M/s. Silver Arch Builders and Promoters Pvt. Ltd.

3.1. During the course of search and seizure action, certain loose papers were found and seized by the search team. One Shri Samir Shah, finance broker who was arranging funds for the assessee, assessee's group companies and entities through various parties was also searched u/s.132 of the Act simultaneously. During the course of search proceedings, various loose papers relating to loans arranged by him for his clients including the assessee were found and seized. Out of the said seized papers, loose paper bearing page No.206 of Annexure -1 pertained to the assessee herein. According to the Id. AO, this page indicated payment of cash loans amounting to Rs.20,24,50,000/- by Shri Samir Shah to the assessee. Shri Samir Shah submitted his explanation in the post search proceedings and thereafter, in the hands of Shri Samir Shah, the assessment order was passed u/s.143(3) r.w.s. 153A of the Act on 31/03/2014 wherein a separate addition on account of alleged cash loans given to the assessee in the sum of Rs.20,24,50,000/- based on loose paper sheet page No.206 of Annexure-1 was made. In addition to this,

another addition of Rs.3,47,81,569/- was also made on account of alleged receipt of interest in cash by Shri Samir Shah. It is pertinent to note that both assessee as well as Shri Samir Shah were assessed by the very same Assessing Officer. Based on this assessment proceedings and the seized document loose paper sheet page No.206 of Annexure A-1, penalty proceedings were initiated u/s.271D of the Act on the assessee for receipt of cash loans in the sum of Rs.20,24,50,000/- allegedly from Shri Samir Shah for violation of provisions of section 269SS of the Act. The assessee in reply to the show-cause notice vide letter dated 11/09/2014 stated as under before the Id. AO:-

"i) Page No. 206 of Annexure A-1 does not represent any cash loan.

ii) The addition was made in the case of Samir Shah because they could not furnish the details before the AO.

iii) During the post assessment proceedings, the identity of various loan parties as mentioned on page 206 along with creditworthiness was substantiated before the AO with documentary evidence.

iv) It is contended that the loans appearing on page No. 206 are accepted through banking channel and shown in the books of account of the assessee company and hence penalty u/s. 271D cannot be levied."

3.2. The Addl. CIT (the Id. AO herein) did not heed to the aforesaid contentions of the assessee and proceeded to levy penalty u/s.271D of the Act amounting to Rs.20,24,50,000/- in the hands of the assessee by observing as under:-

"6. It is evident from the above discussion that the assessee had accepted loans in cash in contravention of provisions of section 269SS of the Income Tax Act and hence, liable for penalty u/s. 271D of the Income Tax Act. Reliance is placed on decisions of

Hon'ble Bombay High Court in the case of Dhanji R. Zalte (136 taxman 644) and Hon'ble Kerala High Court in the case of K.V. George (42 taxmann. com 261).

7. Hence, I am satisfied that the assessee had accepted loans in cash of Rs. 20,24,50,000/- as per page No. 206 of Annexure A-1 seized from the residence of Shri Samir Shah in contravention of provisions of section 269SS of the Income Tax Act, 1961. No satisfactory explanation is given by the assessee for contravention of provisions of section 269SS of the Income Tax Act, 1961. Hence, I hereby levy penalty of Rs. 20,24,50,000/- u/s. 271D of the Income Tax Act, 1961."

3.3. The Id. CIT(A) confirmed the levy of penalty by observing as under:-

"6.3.1 I have considered the submissions of the appellant. The appellant claims that Mr. Samir Shah has furnished evidence to show that all the loans transactions entered into by the appellant were genuine. But the appellant has not produced the evidence ^ purportedly furnished by Mr. Shamir Shah before me for my examination.

6.3.2 The Addl CIT has established beyond reasonable doubt that the appellant had accepted the loans in cash. The appellant has denied receiving such loans in cash in spite of the evidences brought on record. The appellant has claimed that:

*(i) the loans were accepted through cheque;
(ii) the loans are reflected in the books of the appellant;
(iii) the names of the creditors written in the seized document are different from the names appearing in the books of the appellant because Shri Samir Shah had written the names of the creditors differently.*

6.3.3 Since the Addl CIT has established beyond reasonable doubt that the appellant had accepted the loans in cash, the onus was on the appellant to establish, in respect of each loans recorded in the seized document, how each of the loans are reflected in its books as claimed and by what mode they were

received thereby rebut the evidences gathered by Addl. CIT. Instead, the appellant has given a reply which is vague and unspecific. Therefore, the appellant's claim is not acceptable especially in view of the fact that Mr. Samir Shah had stated in the course of his statement u/s. 132(4) that the loans were given in cash. Therefore, I hold that the appellant accepted loans in cash in violation of the provisions of sec. 269SS of the Act.

6.3.4 Now, I will see whether or not there was any reasonable cause for violation of the provisions of section 269SS. I find that neither in the course of the penalty proceedings nor in the course of the appeal proceedings, the appellant has been able to put forward any reasonable cause for violation of the provisions of section 269SS. Therefore, I am of the view that the Additional CIT was justified in imposing the penalty under section 271 D., therefore, confirm the penalty order and dismiss the first ground of appeal

4. Aggrieved, the assessee is in appeal before us.
5. We have heard rival submissions and perused the material available on record. The crucial document to be seen in this regard is loose sheet page No.206, Annexure A-1 which apparently indicates loan transactions of the assessee. This seized document admittedly was seized from the premises of Shri Samir Shah during his search action u/s.132 of the Act. Hence, undoubtedly the presumption in terms of Section 292C of the Act would go in favour of Shri Samir Shah and it is for him to rebut the said presumption that the said contents of the said seized document in page No.206 does not belong to him and in fact it belongs to a third party including the assessee. It would be crucial to address the issue of alleged

receipt of cash loan by the assessee from Shri Samir Shah in the sum of Rs.20,24,50,000/- on merits. In this regard, we find that Shri Samir Shah pursuant to the assessment framed in his hands u/s.143(3) r.w.s.153A of the Act on 31/03/2014 had preferred an appeal before the Id. CIT(A)-47, Mumbai wherein among other grounds one of the specific grounds raised by him before the Id. CIT(A) was as under:-

"4. The learned Assessing Officer has erred in law and in facts, in making an addition of Rs. 20,24,50,000/- on account of alleged cash loan provided to M/s. Rohan developers Private Limited.

5.1. In the said proceedings before the Id. CIT(A), Shri Samir Shah had filed certain additional evidences which addresses the entire issue in dispute before us in terms of Rule 46A of the Income Tax Rules and the said additional evidences were duly forwarded to the Assessing Officer of Shri Samir Shah for carrying out necessary verification at his end. The Assessing Officer of Shri Samir Shah duly conducted verification of the replies filed by Shri Samir Shah together with all the evidences submitted by him with regard to the entries appearing in loose sheet page No.206, Annexure A-1 and categorically stated in his remand report that the said entries matched with the book entries in the regular books of accounts of Rohan group of companies. Besides the Assessing Officer of Shri Samir Shah also issued summons u/s.131 of the Act to the lenders, and recorded their statements. Based on the same, the Id. AO concluded that identity, genuineness and creditworthiness of the loan given by them to

the Rohan Group were duly established. In this regard, the remand report submitted by the Assessing Officer before the Id. CIT(A) in the first appellate proceedings to Shri Samir Shah is reproduced hereunder which would also address the issue in dispute before us.

"With respect to the addition made towards cash loans and cash interest of Rs. 20,24,50,000/- and Rs. 66,64,442/- respectively, the appellant had vide his letter filed in your office on 11.04.2017 had furnished additional evidences by way of copies of written submission made before the then AO in the course of penalty proceedings, reconciliation of seized page no. 206 of annexure A-1 and statement of loan parties recorded during the penalty proceedings.

In order to examine the issue in the remand proceedings; a letter dated 23.08.2017 was issued to the assessee to allow him to submit his explanation proving his claim for the fresh evidences submitted before your goodself.

During the remand proceedings it was seen from the records submitted by the assessee that a search u/s. 132 of the Income Tax Act, 1961 was carried out at the premises situated 1404, Shivtapi Building, Opp. T. K. Compound, Gamdevi, Mumbai - 400 007 on 26.05,2011. During the course of search proceedings; the statement of Shri Samir Indralal Shah was recorded u/s. 132(4) of the Act and various loose papers and documents were seized from the residential premises.

The replies of the assessee filed during the penalty proceedings and during the remand proceedings have been perused carefully. The detailed observations regarding the claim of the assessee are as follows:

1. *The alleged page no. 206 of annexure A-1 contains the names of the parties along with the amount of principal loan appearing in the 3rd column given by each of them to Rohan Group entities (all amount apparently appearing in lakhs) and the presumably some amounts appearing in the 4th column as claimed*

by the assessee as interest payable by him in cash. The amounts are appearing to be pertaining to the period from 01.07.2010 to 30.09.2010.

2. During the penalty proceedings before the assessing officer the assessee had submitted various details like names, address, PAN of the parties and amount of loan given by each of them to Rohan Group during the assessment proceedings. The page no. 62, 63 and 64 of the paper book filed dated 14/03/2017 before your goodself glides the clear cut picture of the loan transactions happened between the parties which through their respective front faces who in turn invested their amounts with the Rohan group (so far as the principal loan amount is concerned). The party wise details of cheque numbers, date of payment, amount and the gross total of all these counts are matching exactly with the contents mentioned on the alleged page no. 206 of the annexure A-1 seized during the search action. It has also been verified that the entries reflected on page no. 206 are mentioned in regular books of accounts of Rohan group companies as seen from the books of those companies.

3. During the penalty proceedings the statements of the parties from whom loans were tendered to Rohan group was also verified by the then AO by issuing summons to all the parties and the statements u/s. 131 were also recorded and the copies of which were also perused during the remand proceedings. Thus identity, genuineness and creditworthiness of parties in respect of loan given by them to Rohan Group were established and copy of PAN, copy of bank statement reflecting the amount of loan, loan confirmations and ITR acknowledgment were also submitted.

4. In regard to the cash interest part of Rs. 66,64,441/- presumably appearing in the 2nd column (which has been arrived after giving the set-off of Rs. 2,81,17,128/- on account of income declared by the assessee in his return of income for that year on account of jewellery, daughter's wedding and travelling expenses incurred by him against the seized document amount reflecting some interest working of the assessee on page no. 206 of annexure A-1 of Rs. 3,47,81,569/-). The factual matrix of the case appears that the assessee Shri Samir Indralal Shah vide his sworn in statement dated 21/07/2011 recorded u/s. 132(4) of the IT Act 1961 has in

his answer to Q. No. 39 stated that people who had invested the money with the builders were asking for higher rate of interest and thus there were numerous such workings and notings prepared by him to be presented before the builders for negotiation. He has also mentioned he had habit of writing the names of persons who referred (always few in numbers) the cheque depositors and not the actual cheque depositors (who generally are large in numbers and difficult to keep the records of the same). He however claims that these cash expenses were actually not paid by the builder to his clients and were only workings. Thus it is difficult to ascertain the nature of said notings as no cash movement or dates or quarters or person to whom it was handed over has been explicitly mentioned in the said noting.

5. Further Late Shri Jitendra N Mehta vide his sworn in statement dated 22/07/2011 recorded u/s. 132(4) of the IT Act 1961 has in his answer to Q. No. 4 (wherein he was confronted to the statement of Shri Samir Shah) has stated that he has denied the allegation made by the department and has stated that Shri Samir Shah was claiming for additional interest payable to him citing several reasons including that of market conditions however he has categorically denied for having paid any cash interest to Shri Samir Shah in his statement recorded which proves the version of Shri Samir Shah mentioned in above explanation to notings found on page no. 206 of annexure A-1 was correct that it was just a noting and rough working of the interest amount payable to his clients who had invested the money through him.

The narration of the above facts is based on the material available on records and various statements recorded during the search and post search and penalty proceedings under the IT Act 1961."

5.2. The Id. CIT(A) based on the said remand report deleted the addition made in the sum of Rs.20,24,50,00/- on account of alleged cash loan given by Shri Samir Shah to M/s. Rohan Developers Pvt. Ltd i.e. the assessee herein before us by observing as under:-

"14.1 The addition of Rs. 20,24,50,000/- had been made by the AO on account of cash loans u/s. 68 of the Act, based on the c. seized Page No. 206 of Annexure A-1 found during the course of search operation at the appellant's residential premises. The Page No. 206 of the seized material being important for the adjudication of the issue at hand is reproduced hereunder:

14.2 At the outset, I have noted that the appellant had filed additional evidence vide letter dated 30.03.2017 on this issue. The said additional evidence in respect of loans given by the various parties to the Rohan Group were remanded to the AO, vide this office letter dated 17.04.2017. The contents of the said letter issued by this office are reproduced hereunder:.....'

14.4 To summarize, the AO had in the Remand Report after cam/ing out due investigation and verification returned a categorical finding that the appellant had been able to prove that the loans written on the sized Page No. 206 had been given by cheque and are also reflected in bank statement of the lenders. As per the AO's Remand Report, the entries on Page No. 206 of Annexure A-1 tallies with the figures mentioned in the regular books of accounts maintained by the Rohan Group of concerns. Thus, the addition made by the AO in the assessment order by holding that these are cash loans is factually incorrect, as per the Remand Report of the AO.

14.5 The AO had made further investigations by issuing summons u/s. 131 of the Act to the variotis lenders, who had appeared before him. On this account also, I have noted that the AO had returned a categorical finding in the Remand Report that the identity, genuineness and credit worthiness of the lenders had been duly proved in the Remand Proceedings conducted by the AO. I have also noted that the AO had based his finding on cogent material and evidences namely, copy of PAN, copy of bank statement reflecting the amount of loan, loan confirmations and ITR acknowledgment etc, of the various lenders. It is clear from these facts and circumstances that the principal amount mentioned on Page No. 206 of Annexure A-1 represent loans not in cash but are loan transactions, which are duly recorded in the regular books of accounts of both the lenders and the Rohan Group o/ concerns.....

14.22 Accordingly, the addition made by the AO in the assessment order needs to be deleted, in view of the Remand Report given by the AO in the appellant's favour. Hence, the ground No. 4 of the present appeal is allowed." (Emphasis supplied)

5.3. We find from the aforesaid narration of facts and findings given by the Id. CIT(A) in the appellate order passed for Shri Samir Shah that the disputed loans were not received in cash and rather they were received through normal banking channels. Hence, this fact is also accepted by the Assessing Officer of Shri Samir Shah in his remand report. Hence, it goes to prove beyond doubt that there is no receipt of any cash loan by the assessee from Shri Samir Shah in violation of provisions of Section 269SS of the Act. Accordingly, the penalty u/s.271D of the Act levied in the hands of the assessee in the sum of Rs.20,24,50,000/- deserves to be deleted.

5.4. In view of our aforesaid observation of facts, we do not deem it fit to adjudicate the other alternative local arguments advanced by the Id. AO with regard to the presumption of seized documents in terms of Section 292C of the Act and placing reliance on the said seized document which were seized from the third party premises etc., as they would be academic in nature. Similarly adjudication of reliance placed by the Id. AR on various decisions including co-ordinate bench decision of this Tribunal on similar set of facts also would become academic in nature as the entire

issue had been dealt by us hereinabove on facts. The same analogy would apply for the reliance placed by the Id. DR on certain decisions. Accordingly, we direct the Id. AO to delete the penalty levied u/s.271D of the Act in the facts and circumstances of the instant case. Accordingly, the grounds raised by the assessee are allowed.

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

Order pronounced in the open court on this 30/08/2019

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 30/08/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai