IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI A. D. JAIN, VP AND SHRI RAJESH KUMAR, AM

ITA No.622/Mum/2018
(Assessment Year: 2012-13)

Code Engineers Pvt. Ltd. B-204, Sai Sangam, Plot No. 85, Sector 152, CBD Belapur, Navi Mumbai-400 614	Vs.	Dy. CIT, Circle 8(3), Aaykar Bhavan, 6th Floor, M. K. Road, Churchgate, Mumbai-400 020
PAN/GIR No. AACCC 7318 L		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Shri Vipin K. Gajarathi & Shri Kushal D. Jain
Respondent by	:	Shri A. M. Mittal

Date of Hearing	:	24.09.2019
Date of Pronouncement	:	27.09.2019

O R D E R

Per A. D. Jain, VP:

This is assessee's appeal for assessment year 2012-13, against the order dated 16.12.2016, passed by the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A)', for short), confirming the levy of penalty of Rs.1,14,50,000/-, levied u/s. 271D of the Income Tax Act, 1961 ('the Act', for short) on the assessee.

2. The facts, as available from the record, are that the assessee is a Private Limited Company. A survey was conducted on its office premises on 04.12.2012 by the Income Tax Department. Certain loose papers were found and impounded and inventor-zed as Bundle No.1, which contains 7 pages. A statement of Shri Abiraj Rajan, one of the Directors of the assessee company, was recorded during the survey. He was confronted that, page no. 7 of the impounded papers contains details of loans taken from various

persons by the assessee. The total loan amount reflected on the seized paper was of Rs.1,56,50,000/-, out of which, loan amounting to Rs.42 lacs was accepted by the Directors of the assessee company, by account payee cheque and it was accounted for in their regular books of account. The deponent admitted that the balance loan, aggregating to Rs.1,14,50,000/-, was accepted in cash from different persons. However, the deponent failed to furnish the particulars of those creditors. Shri Abiraj Rajan was not sure as to whether or not the depositors would confirm having given the loan in cash. He*, inter alia*, accepted that he was unable to explain these cash loans. He, therefore, offered the said amount of Rs.1,14,50,000/- as the assessee's additional income for A.Y. 2012-13. As such, the assessee revised its return of income on 28.03.2013 and declared the total income at Rs.5,93,200/-, in place of the original returned loss of Rs.1,08,56,805/-. An order u/s. 143(3) of the Act was passed by the A.O. on 31.03.2015, assessing the total income of the assessee at Rs.36,48,350/-, making an addition of Rs.30,26,831/- under the provisions of section 43B of the Act and that of Rs.28,328/- under the provisions of section 14A of the Act. Vide order passed on 08.09.2015, penalty of Rs.1,14,50,000/- was imposed on the assessee u/s. 271D of the Act, on the basis that the assessee company had accepted the cash loan of Rs.1,14,50,000/- during the financial year 2011-12, corresponding to the A.Y. 2012-13, in-contravention of the provisions of section 269SS of the Act.

3. The ld. CIT(A) has confirmed the levy of penalty, by virtue of the impugned order, holding as follows:

> *6.5.2. I find that the appellant had filed an additional sum of Rs. 1,14,50,000/- in the revised return of income. The AO completed the assessment based on the*

revised income. The mere fact that a sum of Rs.1,14,50,000/- was not excluded by the Assessing Officer from the return of income, cannot come in the way of imposition of penalty under section 271D. It was clearly established in the course of the survey that the appellant had accepted cash loan of Rs, 1,14,50,000/-in cash during the previous year 2011-12. The appellant cannot pre-empt the imposition of penalty under section 27 ID simply by including the loan amount in its total income. Further, manner of treatment in any assessment order cannot change the facts. In the case of contradiction, the actual facts must prevail over how the AO or the appellant treat them in case of contradiction.

6.5.3 The appellant claimed that the omission on the part of the Assessing Officer to exclude the loan amount from the total income of the appellant amounts to finding by the Assessing Officer that the alleged loan amount actually represents appellant's income. After careful consideration, I have come to the conclusion that the claim of the appellant is not correct and non-exclusion of the sum of Rs 1,14,50,000/- from the total income of the appellant does not amount to holding that the said sum does not represent loan accepted by the appellant. This is because the Assessing Officer does not have the power to exclude an amount of what as part of the total income by the assessee while determining the total income under section 143(3) of the Act. Under the provisions of the Act, a notice under section 143(2) of the Act is issued to ensure that the appellant has not understated his income or overstated his loss. This implies that the Assessing Officer can only enhance the total income or reduce the loss in an order under section 143(3) of the Act passed pursuant to issue of notice under section 143(2).

6.5.4 As mentioned above, the appellant had included a sum of Rs. 1,14,50,OOO/- in its total income. In the computation of total income, the Assessing Officer has clearly mentioned that the sum of Rs. 1,14,50.000/- has been included in the total income "as per assessee's computation".

6.5.5 The appellant claimed that treatment of the sum of Rs. 1,14,50,000/-as cash loan accepted by the appellant and at the same time inclusion in the total income (or rather omission to exclude the sum from the total income) are contradictory because the two cages are mutually exclusive. I have considered this contention of the appellant. In/this case, it is the appellant, who included the sum of Rs.1,14,50,000/- in the total income (of the appellant) forcing thereby, so to say, the Assessing Officer to include the said sum in its total income. Therefore, the appellant cannot take shelter under the technical issue that once the sum is included in total income, it cannot be treated as loan. Even if, it is presumed that omission to exclude the loans received from the total income in the assessment order amount to finding by the Assessing Officer that the sum do not represent loan and, therefore, the order u/s 271D and the order u/s 143(3) contain conflicting findings, the findings given in the order under section 27ID shall prevail over the findings of the order u/s 143(3) in view of the clear finding of facts in the course of the survey. Therefore, in my view, there is no error in the order u/s 27 ID. Error, if there is any, is in the order u/s 143(3). However, I am not going to examine that aspect in this proceedings, as this appeal is not against the order under section 143(3).

6.5.6 Secondly, as per the provisions of section 68.- the Assessing Officer charge certain sums to income tax as income of the assessee if he is not satisfied by the explanation given by the assessee regarding the source of the sum. However, the assessee cannot himself offer a sum u/s 68 because the power to invoke that section lies only with the AO. Further, the assessee is aware of the source of the money, the question of offering it u/s 68 does not arise. While offering any sum for income, the assessee must specify the nature of the income so that the correct total income can be arrived at. For example, if the income is derived from speculation business, then, the income will not be eligible for set off against loss from sources other than speculation business. Therefore, it is necessary for the AO to know the nature of the income. It, therefore, follows that the appellant must furnish the nature of the income to enable the AO to ascertain his total income. If the sum offered by the appellant represented its income and not loan taken in cash, the appellant should have established that in the course of the penalty proceedings by furnishing the manner in which the income was earned along with evidence in support thereof.

6.5.7 I agree with the appellant's contention that nobody can be harassed twice for the same cause. In case of conflicting findings in two orders, the actual facts will decide which order will prevail. In this case, the actual fact is that the appellant had taken loans in cash^ In case of dispute over the actual facts, the manner of treated given in the assessment order who have been vital. But in this case, there is no dispute over the fact that the sum of Rs. 1,14,50,000/- represents loan received by the appellant. Therefore, the order u/s 27ID will prevail.

6.5.8 I, therefore, hold that notwithstanding the fact that the Assessing Officer omitted to exclude the sum of Rs. 1,14,50,000/- from the total income of the appellant, the Additional Commissioner was justified in imposing penalty u/s 27 ID of the Act. Therefore, all the three grounds of appeal are dismissed.

4. Before us, challenging the impugned order, the ld. Counsel for the assessee has contended that while wrongly confirming the penalty imposed, the ld. CIT(A) has failed to appreciate that the declaration made by the assessee stood accepted by the survey party itself; that the ld. CIT(A) also did not take into consideration the fact that even the A.O., in the remand proceedings, had accepted the additional income offered by the assessee as its income, due to which, the same could not be treated as a loan; and that the ld. CIT(A) also failed to see that the genuineness of the loan taken by the assessee company nowhere stood doubted. The ld. Counsel of the assessee has placed reliance on the following case laws:

- *CIT vs. Standard Brands Ltd. 285 ITR 295 (Del);*
- *Diwan Enterprises vs. CIT 246 ITR 571 (Del);*
- *CIT vs. R. P. Singh Co. (P.) Ltd. 340 ITR 217 (Del)*

5. On the other hand, the ld. Departmental Representative ('ld. DR', for short) has strongly supported the impugned order, contending that as rightly held by the ld. CIT(A), it does not lie in the mouth of the assessee to contend that non exclusion of the amount of Rs.1,14,50,000/- from the total income of the assessee, amounts to holding that the sum did not represent the loan accepted by the assessee; that it was the assessee itself who included the amount in its total income; that this did not absolve the assessee from the burden of proving that the transaction was not a loan; that the findings recorded in the penalty order directly emanate from the findings of fact recorded during the survey; that when the assessee offers any amount as its income, it is the assessee's burden to specify the nature of such income; that in the absence thereof, the assessee ought to have established such nature during the penalty proceedings, by furnishing whatever evidence supported the assessee's case; that this has no-where been done by the assessee and so, its burden remains hitherto un-discharged; and that in these facts, there being no merit whatsoever in the appeal of the assessee, the same be ordered to be dismissed and the levy of penalty, as confirmed by the ld. CIT(A), be upheld.

6. Heard. The facts, as discussed hereinabove, are nowhere in dispute. The question up for decision is as to whether the ld. CIT(A) has rightly confirmed the penalty levied on the assessee under the provisions of section 271D, where the assessee had accepted the

amount of Rs.1,14,50,000/- and offered it for tax as income by revising its return of income originally filed.

7. In this regard, in *Standard Brands Ltd.* (supra), the Hon'ble Delhi High Court has held that the Revenue could not, on the one hand, contend that the amount was undisclosed income in the hands of the assessee and, at the same time, seek to initiate the proceedings against the assessee for alleged violation of the provisions of section 269SS of the Act; and that the Revenue having taken the stand that the income was undisclosed income in the hands of the assessee, it could not resort to the proceedings u/s. 269SS r.w.s 271D of the Act.

8. In *Diwan Enterprises* (supra), where the assessee had surrendered the amount of alleged loan as its income, and the A.O. had accepted the surrendered amount and had treated it as the income of the assessee, the Hon'ble Delhi High Court has held that the A.O. cannot treat the amount as a loan for the purpose of section 269SS r.w.s. 271D of the Act and levy penalty; and that the amount having ceased to be a loan, the very foundation for initiating the proceedings, for and levying the penalty u/s. 271D was lost.

9. In *R. P. Singh Co. (P.) Ltd.* (supra), the Hon'ble Delhi High Court, again, has held that once the A.O. has treated the share application money received by the assessee in cash, as undisclosed income of the assessee, he could not have proceeded on the basis that it was deposit; and that there was no question of levy of penalty u/s. 271D of the Act.

10. No decision contrary to the above case laws has been cited before us on behalf of the department.

11. In view of the above, in the facts and circumstances of the present case, respectfully following the above un-rebutted case laws relied on, on behalf of the assessee, the grievance of the assessee is found to be justified and it is accepted as such. The impugned order is reversed and the penalty imposed on the assessee is deleted.

12. In the result, this appeal filed by the assessee is allowed.

Order pronounced in the open court on 27.09.2019

Sd/-	Sd/-
(Rajesh Kumar) Accountant Member	(A. D. Jain) Vice President

Mumbai; Dated : 27.09.2019
Roshani, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai