IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA No.737/Bang/2021
Assessment year: 2016-17

Akash Education & Development Trust, No.22nd Ward, Prashanth Nagar, Devanahalli, Bengaluru – 562 110. **PAN: AACTA 7888E**	Vs.	The Addl. Commissioner of Income Tax, Central Range-2, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Rajeev Nulvi, AR
Respondent by	:	Shri Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	16.02.2022
Date of Pronouncement	:	18.04.2022

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order dated 16.12.2021 of the CIT(Appeals)-11, Bangalore for the assessment year 2016-17.

2. The assessee has raised the following grounds:-

> "1. The order of the Additional Commissioner of Income Tax is against the fact and circumstances of the case and equity.
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> 2. On the fact and circumstances of the case, under the provision of the law, and under the judicial precedence, the Additional Commissioner of Income Tax erred in levying the penalty u/s 271D(2) of the

Income Tax Act, 1961 as the loan is received from the trustee to the trust, who is controlling the financial affairs of his own and the trust, as such the trustee is not any other person for the applicability of Sec. 269SS of the Income Tax Act, 1961.

3. On the fact and circumstances of the case, the Additional Commissioner of Income Tax erred in levying the penalty u/s 271D(2) of the Income Tax Act, 1961 wherein the transaction between the trustee and the trust has not been doubted during the course of scrutiny assessment and found to be genuine.

4. On the fact and circumstances of the case, the Additional Commissioner of Income Tax erred in levying the penalty u/s 271D(2) of the Income Tax Act, 1961 as the Appellant Trust was under the genuine belief that Sec. 269SS of the Income Tax Act, 1961 is not applicable between the trust and the trustee wherein the trustee is maintaining a running account with the trust which is the reasonable cause u/s 273B of the Income Tax Act, 1961.

5. On the fact and circumstances of the case, under the provision of the law, and under the judicial precedence, the Commissioner of Income Tax (Appeals) erred in upholding the penalty levied u/s 271D(2) of the Income Tax Act, 1961 as the loan is received from the trustee to the trust, who is controlling the financial affairs of his own and the trust, as such the trustee is not any other person for the applicability of Sec. 269SS of the Income Tax Act, 1961.

6. For these and other reasons which may be adduced at the time of the hearing, the Appellant prays before this Honourable Bench to delete the penalty levied by the Additional Commissioner of Income Tax u/s 271D of the Income Tax Act, 1961 for substantial cause of justice and equity.

7. The Appellant Trust craves leaves to add, to alter, to amend or to delete any other grounds at the time of the hearing. ”

3. In brief, the facts of this case are that assessment order was passed by the AO vide order dt. 07.12.2018. During assessment proceedings the AO noted that there was violation of provisions of Section 269SS of the Act. So he referred the matter to the Addl. CIT on 20.03.2019. Accordingly, a penalty notice under Section 271D of the Act was issued by the Addl. CIT requiring the appellant to show cause as to why an order imposing penalty should not be made u/s. 271D of the Act. Finally, an order under Section 271D of the Act was passed by the Addl. CIT on 27.09.2019, imposing a penalty of Rs.15,64,50,000/- on the appellant. The appellant challenges this order of penalty under Section 271D of the Act.

4. The reason for the imposition of the penalty is that the during the year the appellant had received an amount of Rs 15,64,50,000/- in cash from one of the trustees namely Sh. K Muniraju. The appellant had argued that Sh. Muniraju was acting in two capacities, one as the Managing Trustee of the appellant trust and other in his individual capacity. It was submitted that he was having a running account with the trust and so he used to contribute his own money towards the trust or withdrew it when required by him. During the year he had made total cash deposits of Rs 15,64,50,000/- in the bank account of the appellant trust for the purpose of construction work of medical college and hospital building and it is submitted that the same could not be treated as a loan or deposit to attract the provisions of Section 269SS of the Act. The words `any other person' in Section 269SS of the Act does not cover the Managing trustee, `any other person' denotes such persons who are not intimately or closely connected with the assessee. The appellant has relied upon CBDT Circular no. 387 dated 06.09.1984 as well as some case laws viz., *CIT v Idhayam*

Publications 285 ITR 281; CIT v Indore Plastics Pvt Ltd 262 ITR 163; to support its contentions.

5. However these arguments of the appellant did not find favor with the AO. He noted that the appellant had failed to show any urgency or any reasonable cause for accepting cash deposits in the bank account by the Managing trustee. He noted that the cash deposits of Rs 15,64,50,000/- were made on 8 different dates and on four such occasions the amounts (total Rs 10,72,78,300/-) were transferred to the bank account of the Managing trustee on the very same day. So this modus operandi was followed to avoid direct deposit of cash in the bank account of the Managing trustee and the appellant was acting as a conduit for the same. The bank accounts of the appellant as well as the Managing trustee were in the same bank. The AO also placed reliance on the decision in the case of *Auto Piston Mfg. Co. Ltd. V CIT [2013) 38 taxmann.com 61 (Punjab & Haryana)* to support his reasoning for imposition of penalty. In addition, he also relied upon the following decisions:

- Mahak Singh v ITO 127 ITD 1
- Hindalco Employees Co-operative Credit Society Ltd v Addl. CIT, 49 taxmann.com 309
- Vasan Healthcare (P) Ltd v Addl. CIT 103 taxmann.com 26 (Mad)
- CIT v Samora Hotels (P) Ltd. 19 taxmann.com 285 (Delhi)
- CIT v Sunil Sugar Co. 85 taxmann.com 254 (All)
- Nandhi Dhall Mills v C1T 61 taxmann.com 97

6. The AO also observed that there was a clear distinction between trust and trustee and the same cannot be considered as one and the same.

7. During appellate proceedings before the CIT(Appeals), the arguments of the appellant are in substance same as made during penalty

proceedings. However, the CIT(Appeals) confirmed the penalty order u/s. 271D of the AO. Against this, the assessee is in appeal before us.

8. The argument advanced by the learned counsel for the appellant was that the intention of legislature while enacting the provisions of ss. 269SS, 269T, 27ID and 27IE was, as explained in Circular No. 387, dt. 6th July, 1984, is to curb the transactions of black money for explaining the genuineness of cash found during the time of search or otherwise — meaning thereby, that, if the transaction in question does not involve the black money rather is found to be genuine then there is no violation of s. 269SS or 269T, as the case may be and consequently, there is no justification for making penalty under s. 271D or 271E of the Act, as the case may be. Reverting to the present case, the counsel for the assessee submitted that since the Revenue has accepted the transaction as genuine, there was no involvement of black money and consequently, this is not a fit case where penalty under s. 271D may be imposed. In support of this submission, reliance was placed on the decision of Tribunal, Agra Bench in the case of Farrukhabad Investment (I) Ltd. vs. Jt. CIT (2003) 80 TTJ (Del) 82 : (2003) 85 ITD 230 (Del), specially the observations at pp. 249 to 253 in para 38 to 48 and at p. 256 para 60 of the order.

9. The next argument, advanced by the ld. counsel for the assessee was that the amount in question received by the trust being from trustee itself, the transaction was neither of loan nor deposits and in any case, was not in contravention of s. 269SS of the Act and in support of this submission, reliance was placed on the following decisions :

- Dillu Cine Enterprises Pvt Ltd v Addl CIT 801TD 484 (Hyd)
- Smt Deepika v Addl. CIT ITA No. 561/Bang/2017 AY 2010-11

- Sri Sanmathi Ambanna v JCIT ITA No. 782/Bang/2017 AY 2009-10 dt. 02.01.2019

10. The ld. AR further relied on the order of the Tribunal in the case of *Citizen Co-operative Society Ltd. v. Addl. CIT, 41 DTR 305*. Thus, the final argument of the ld. AR is that in the present case, assessee was a charitable trust and had received the amount of Rs.15,64,50,000 in cash from one of its trustees, viz., Sh. K Muniraju. The default, if any, was of a technical or venial nature for which the assessee was not liable to penalty u/s. 271D of the Act.

11. On the other hand, the ld. DR submitted that there is no merit in the arguments of the ld. AR that penalty u/s. 271D cannot be levied in the facts of the case in view of the fact that the receipts are genuine. There is no such prohibition under law that no penalty is leviable if the transaction is genuine. The only requirement is the receipt of the amount exceeding Rs.20,000 in cash and once that requirement is satisfied, penalty u/s. 271D is leviable. Further, he relied on the judgment in the case of *Auto Piston Mfg. Co. Ltd. v. CIT [2013] 38 taxmann.com 61 (P&H)* and *CIT v. Sunil Sugar Co., 85 taxmann.com 254 (All)*.

12. The ld. DR further submitted that in the present case during the year under consideration there were 8 number of cash deposits, each exceeding Rs 20,000/-, at different points of time from Managing trustee spread over a period of 8 months. Thus it is matter of routine that the appellant is accepting cash loans. Further on 5 occasions a total amount of Rs 10,72,78,300/- was immediately transferred to the bank account of trustee. These facts show that the purpose was to protect the business interest of the Managing trustee by acting as a conduit for its cash deposits. It is not the case of the appellant that the Managing trustee from whom cash loans were taken was staying in an area where banking facilities were not

available as the bank account of the Managing trustee and the appellant were in the same bank account. As regards genuineness of the transaction, that in itself is not sufficient to absolve the appellant from the rigors of the provisions of Section 26SS and 271D and the appellant is required to show that there was a reasonable cause to accept such amounts in cash. The appellant has failed to show any such reasonable cause in the present case. Further, as pointed out by the AO, the transactions themselves were suspicious as the cash was being deposited by the Managing trustee and then the same was being transferred to his bank accounts.

13. Further, according to the ld. DR, the argument of the appellant that provisions of Section 269SS are not attracted in his case as the lender was Managing trustee of the appellant trust is also devoid of any merit. The only exception provided in Section 269SS is the case where both the persons i.e., the person giving the loan and the person accepting the loan are having agricultural income and neither of them has any income chargeable to tax under the Act. In this case, the appellant as well as the Managing trustee are having income chargeable to tax. So this exception is not available.

14. The ld. DR submitted that reliance of the appellant on CBDT circular is misplaced as nowhere the said circular exempts cash received from Managing trustees or close relatives etc. from the rigor of Section 269SS of the Act. As regards reliance of the appellant on different case laws, the same are found to be rendered on different facts and as such not applicable to the facts of the case under consideration. In the case of *Smt Deepika v Addl. CIT* (supra), the issue involved was transaction between daughter and her mother, the HUF in which she was member and Karta of the said HUF. So that was why the ITAT had held that near relatives were not covered by the provisions of Section 269SS of the Act. In the present

case, it is not so as the Managing trustee is an independent businessman in the field of real estate and the transactions also show his intention of routing money through Trust to unlawfully benefit his own business. The appellant has willingly helped him in doing so. So the transactions are done with the intention of avoiding the detection of the infraction of the law. Similarly in the case of *Sri Sanmathi Ambanna v JCIT (supra)*, the transaction was with father-in-law and that is why the ITAT followed the ratio of the decision in the case of *Smt Deepika v Addl. CIT (Supra)*. So this decision also does not help the appellant. The decisions in the case of *Dillu Cine Enterprises Pvt Ltd (Supra)* and *Mohammadyusuf R Dargad v Addl CIT ITA No. 288 & 289/Bang/2019 Dt. 03.01.2020* are also rendered on different facts and thus not applicable. In the case of *Idhayam Publications (Supra)* the transaction itself was not found to be in the nature of loan or deposit. In the present case it is not disputed by the appellant that the amount received was a treated as a loan from the Managing trustee. So this decision also does not help the appellant. The facts of the *Indore Plastics Pvt Ltd (Supra)* as relied upon by the appellant are also found to be different and as such this decision also does not help the appellant.

15. The ld. DR submitted that the reliance of the AO on various decisions is however found to be well placed. In fact, SLP against the decision in the case of *Vasan Healthcare (P) Ltd (Supra),* has already been dismissed by the Hon'ble Supreme Court in *Vasan Healthcare (P) Ltd v Addl Cit [2021] 125 taxmann.com 266 (SC)*. In this case too, the director of the company had deposited the cash amount with the company but the High Court had upheld the imposition of penalty by holding that there was absence of reasonable cause. Similarly in the case of *CIT v. Chandra Cement Ltd [2016] 74 taxmann.com 75 (Rajasthan)* the imposition of penalty was upheld even when the amount was received from the Managing Director of the company. In the case of *Addl. CIT, [2015] 63*

taxmann.com 196 (Kerala), the HC rejected the argument that the cash was received from the partners of the firm and from sister concerns. The High Court held that once the receipt was in form of loan or deposits, the provisions of Section 269SS got attracted and penalty was leviable under Section 271D if a reasonable cause was not provided. In the case of *Soundarya Textiles v. Assistant Commissioner of Income-tax[2014] 52 taxmann.com 490 (Kerala)* the High Court held that a cash loan from the partner would attract the provisions of Section 271D of the Act. In the case of *Builtec Engineers & Builders v. DCIT, [2013] 31 taxmann.com 406 (Madras)* the High Court didn't accept the argument that the cash was received from the father of the partners in the firm.

16. In view of above, the ld. DR submitted that penalty u/s. 271D of the Act was rightly imposed and the same is required to be upheld and he placed reliance on the following judgments:-

(i) PCIT v. M/s. Shakti Foundation [2017] 107 taxmann.com 460 (SC) wherein, - In appellate proceedings, Tribunal concluded that even though liability recorded in books of account by way of journal entries i.e. crediting amount of party to whom monies payable and debiting account of a party from whom monies were receivable in books of account was in contravention of provisions of section 269T, yet in that case penalty was not leviable for reason that transaction was bona fide and was not to evade taxes - High Court upheld order passed by Tribunal - Whether, on facts, SLP filed against decision of High Court was to be granted - Held, yes [Para 2].

(ii) Pankaj Investments v. Addl. CIT, 88 taxmann.com 4-0 (Mumbai Trib.) wherein it was held that, where assessee-firm had received cash loan from a company which was maintaining bank account with same bank where assessee was maintaining bank account and such loan was utilized by assessee for advancing money to sister concerns, in absence of any reasonable cause shown by assessee, penalty under section 271D was rightly levied on assessee.

(iii) Hindalco Employees Co-operative Credit Society Ltd. v. Addl. CIT (2014) 49 taxmann.com 309 (Cochin Trib.) – wherein – Assessee co-operative society received fixed deposits in cash in contravention of section 269SS - Assessing officer, levied penalty which was confirmed by Commissioner (Appeals) - Whether loan or deposit involved in cash was in excess of amount specified in section 269SS - Held, yes - Whether burden was on assessee to prove that there was reasonable cause for receiving deposits by way of cash from various persons - Held, yes -Whether since assessee failed to bring any proof to show that there existed a reasonable cause for receiving amount in cash, levy of penalty was to be upheld - Held, yes.

(iv) M/s. Chamundi Granites (P) Ltd. v. DCIT (1999) 106 taxman.com 364 (Karnataka) wherein it was held that – Section 269SS has placed restriction on taking any loans or deposits otherwise than by way of an account payee cheque. It is only a reasonable restriction and does not take away the right of any person even to take loan from other person in the manner prescribed under law. It is the mode prescribed under the section which is to ensure prevention of evasion of tax to avoid fictitious entries to be made in the books of account without there being any actual transaction. There is no infirmity in enactment of such a provision since it carries out its object of prevention of evasion of tax and plug possible loopholes. The lender and borrower constitute a different class. For the reason because the borrower has been made liable, it cannot be construed that there is violation of article 14. It is only in the case of the borrower who needs adjustment by book entries only to avoid tax. The loan may be genuine and in a particular case a reasonable hardship might be created to the borrower by such a provision. But the ultimate aim of the section is to prevent evasion of tax. Section 269SS to prevent evasion of tax is ancillary and incidental to the main power to levy the tax. The contention that if the loan is taken again and again and repaid, it may result in levy of penalty more than the loan once taken and, therefore, confiscatory, has also no substance because the Legislature intended to check the transactions which are beyond the prescribed limit and they should be only through account payee cheque. If any

> contravention is made, action could be taken under section 271D. The provisions of sections 269SS and 271 D are the reasonable restrictions in accordance with the powers which are with the Parliament and as such, cannot be considered violative of articles 14 and 19. The writ petitions, therefore, having no force were to be dismissed.

17. We have heard both the parties and perused the material on record. In the present case, the assessee is engaged in the activity of providing education and registered u/s. 12A of the Act. It manages medical college and hostel in addition to school and college. The assessment was completed u/s. 143(3) of the Act dated 7.12.2018 for AY 2016-17. During the course of assessment proceedings, it was noticed that the Chartered Accountant in sl.(h) of Form l0B has reported as under:-

> "An amount of Rs. 74, 48, 75,096/- shown under current liabilities is the amount invested by trustees and their entity for construction & establishment of Hospital, Medical college etc., including a sum of Rs. 15,64,50,000/- deposited by cash during the year. We are unable to examine the personal accounts of the trustees, whether the amount invested by them to the trust or their own funds or borrowed funds."

18. According to the Addl. CIT, the above qualification in Form 3CD makes it clear that Rs. 15,64,50,000/- deposited by the trustees in the books of the assessee herein as cash deposits exceeding Rs.20,000/- invoke provisions of Sec.269SS and penalty provisions u/s 271 D of the I.T. Act 1961. Accordingly, the Addl.CIT invoked the provisions of section 271D and levied penalty at Rs.15,64,50,000 for accepting loan in cash in violation of provisions of section 269SS as per section 271D of the Act.

19. The main contention of the ld. AR is that the transaction is genuine and it is not found that the loan has been taken out of unaccounted cash from the managing trustee, Sh. K Muniraju. Further, it was submitted that the transaction is neither loan nor deposit and the various amounts

received from the trustee was laid out for construction work of medical college and hospital building in a running account maintained with the trust and there is no reason to levy penalty u/s. 271D. If there is a default, if any, it was only of technical or venial nature.

20. Further it was submitted that Sh. K Muniraju being the managing trustee of the trust is looking after the trust and day to day affairs of assessee. When there was shortage of cash in the assessee's account, the assessee was forced to take cash loan from Sh. K Muniraju due to the situation beyond the control of the assessee.

21. At this point, it is appropriate to refer to few judgments on the subject.

22. In the case of *Chandra Cement Ltd. vs. Dy. CIT* , 99 TTJ 212 (Agra) the brief facts were that the appellant-company was setting up mini cement plant at village Paniyala, Tehsil Kotputli, Distt. Jaipur. Shri R.P. Goyal was and has been its promoter-director as well as C.M.D. For establishment of the plant, the appellant approached financial institutions who sanctioned the loan in January, 1992. Pending the disbursement of loan, Mr. Goyal brought his own money from time-to-time for the project work during the two years under consideration. During the course of assessment proceedings, it was noticed by the AO that the balance sheet of the company indicated unsecured loan from Mr. Goyal at Rs. 1,60,70,138 out of which Rs. 79,78,368 was brought by Mr. Goyal in cash during asst. yr. 1992-93 violating the provisions of s. 269SS, thus the proceedings under s. 271D were initiated and ultimately penalty of Rs. 79,78,368 was levied. Similarly, in asst. yr. 1993-94, it was observed by the AO that Shri Goyal brought the amount of Rs. 1,98,55,171 in cash which was credited in the books of the appellant-company. For this year also penalty under s. 271D was levied equivalent to the amount alleged to be in default of s. 269SS of

the Act. The appellant preferred appeals in both the years before the first appellate authority who confirmed penalty in both the years rejecting the plea of the appellant. The Tribunal cancelled the penalty after observing as under:-

> "We have carefully gone through the facts of the case, arguments advanced and written submissions and case laws relied upon. At the outset, we may mention that it has been argued by both the parties that true character/nature of transactions should be determined without being influenced by manner of entries passed in the books of account or, the method of accounting or disclosure made in balance sheet. We agree with this contention put forth by both the parties, and, therefore, we would like to first determine the nature of transactions in the present case in respect of which the penalties under s. 27ID have been levied.
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> Admittedly, Mr. R.P. Goyal, the chairman-cum-managing director, was the promoter-director of the appellant-company, who supervised entire project of the company and who remained actively engaged in looking after the construction and other activities of the company. It is equally undisputed that it was he who managed and arranged resources for the construction activity during the period when company was awaiting disbursement from financial institutions. Mr. R.P. Goyal provided financial assistance to the company by bringing in requisite money from time-to-time in piecemeal during the construction period. The money was not brought in one, two or three instalments but was brought in a number of instalments. It appears that the bringing of money every time was in response to the immediate requirement in the project activity. On going through the details of amounts brought in and spent, it is evident that the *{sic*)period. For this purpose, we perused the utilization of the money brought on pp. 13 to 30 of the paper book for financial year 1991-92. First two receipts of Rs. 10,000 and Rs. 1,270 are for expenditure for the incorporation of the company. The next one on 31st July, 1991, is for the purchase of land where Rs. 4,05,960 is paid and credited to Shri Rajendra Goyal. A number of expenditure are for purchase of machinery, automobile, construction material and so on. These payments cannot be made from office because till then there was no office or the factory. It is obvious that the payments are made by Shri Rajendra Goyal and he rendered the account.

Likewise in the next year 1992-93 where the amounts are credited through journal entry to the amount of Shri Rajendra Goyal and debited to various heads. The details are summarized at pp. 31 and 32 of the paper book. These are for building, plant and machinery, other assets as also revenue expenditure during construction period. Thus, the fact remains that money was brought for its immediate disposal.

It is true that the company has a separate status and entity than its shareholders and directors. It is also true that director's act as agents of the company and are answerable to their principal, i.e., the company. This is the reason why Mr. Goyal undertook all the construction activities of the appellant-company at his instance, as he was responsible and answerable to the company. It was in this background that when he found company being unable to make the resources available for the project work, he decided to involve and utilize his own money for construction work. There were neither compelling reasons nor a compelling force by the so-called artificial person-company to bring in the money, it appears that it was merely a *suo motu* decision of Mr. Goyal to expose himself to such a huge risk of utilizing his personal money for company's purposes, with the hope that he would take it back when the loans are disbursed to the company.

In other words, it is a case where agent utilized his own money in order to fulfil his obligations towards the principal upon which he became entitled to get back the money. This is thus a unilateral transaction on the part of Mr. Goyal to involve and utilize his own money by withdrawing it from his own sources. An unilateral act cannot result in a contract for which existence of two parties is a *sine qua non.* Whether loan or deposit they both are contracts only, originated from bilateral act. We are impressed by the reference of s. 69 of the Indian Contract Act, 1872, which helps on understanding the true character of these transactions. Sec. 69 of said Act falling within Chapter V thereof reads as follows :

> 'Chapter V of certain relations resembling those created by contract
>
> Sec. 69 : A person who is interested in the payment of money which he is bound by law to pay, and who,

> therefore, pays it, is entitled to be reimbursed by the other.'

The transactions under consideration are evidently of the nature referred to in s. 69 of the Indian Contract Act, 1872. The company was bound to pay for the construction expenditure. The director Shri R.P. Goyal paid it because he was interested in the capacity as promoter and also because his personal guarantees are involved in the finances to the company. Thus, he paid the amount and became entitled for the reimbursement by the company.

It is true, neither a loan which is a bilateral transaction at the instance of borrower having predetermined repayment period, nor a deposit which is at the instance of depositor and is repayable on fulfilment of certain conditions. Mr. R.P. Goyal, the director and the agent of the company *suo motu* spent his own money for his principal, i.e., the company, who by way of incorporation of the transaction in its books, undertook the obligation to repay.

Let us also consider as to what would constitute primary evidence of the amount advanced by Mr. Goyal in cash in the present facts. There is no loan agreement and no deposit receipts are issued. In our opinion, if any dispute ever arises about the amount spent by Mr. Goyal on company's construction, the appropriate method for measurement of amounts advanced by Mr. Goyal would be the valuation of construction work, because, firstly, there is a direct nexus between the advance and expenditure, and secondly, hardly any activity other than construction was there during this period. This is for this reason that advances made by Mr. R.P. Goyal in the present case are inseparable from construction activity. Making of advance and spending for construction work cannot be considered to be independent from each other. The person at whose instance amounts were advanced or the construction was carried out was the same individual. Therefore, in the present case, the primary evidence of amount advanced by Mr. Goyal would be the amount spent on construction, whatever be the manner of incorporating them in the books of account.

Thus, going by the nature of transactions, we are satisfied that the impugned transactions were neither loan nor deposits and there is enough material on record to suggest that the amounts were brought by Mr. Goyal for directly incurring on the construction

> expenditure which was not in terms of any agreement with the company, but was *suo motu*. The nomenclature used by the parties is immaterial and would not alter the nature of captioned monies. Having decided that impugned amounts were neither loans nor deposits, all other allegations and arguments become irrelevant to the context since the provisions of s. 269SS are not attracted in the facts of the present case."

23. In the case of *Mohan Kaikare vs. Dy. CIT (52 ITD 236)* the facts were that on 10th Jan., 1989, the assessee had obtained a sum of Rs. 40,000 and on 11th Jan., 1989, another sum of Rs. 30,000 both amounts in cash; from his father to purchase a matador from Bajaj Auto Ltd. Poona. In the assessment proceedings, the transaction was accepted as genuine, but penalty proceedings under s. 271D of the Act were initiated.

24. In the penalty proceedings, the assessee had pleaded another line that the amount was received in cash on account of exigencies because the last date for concessional purchase of matador in Gwalior fair was 14th Jan., 1989 and the assessee was availing that benefit. The assessee had filed an affidavit of his father stating that the amount was given by him to his son for purchase of matador and was directly deposited in the bank account instead of handing over it to the son. The AO did not accept assessee's explanation and imposed penalty under s. 27ID of the Act.

25. Based on above facts and circumstances, the Tribunal deleted the penalty.

26. In the case of *Shrepak Enterprises vs. Dy. CIT (60 TTJ 199)* the brief facts were that during the assessment proceedings, the AO noted that the assessee had received cash deposits of Rs. 2,17,000 as below :

Name of the depositor	*Date of deposit*	*Mode of Deposit & the amount*

M/s Arvind Panalal Investment (P) Ltd.	11-12-1990	In cash Rs. 15,000
-do-	17-12-1990	In cash Rs. 30,000
-do-	8-12-1990	In cash Rs. 1,72,000
	Total	Rs. 2,17,000

27. According to the AO, this was in contravention of the provisions of s. 269SS of the IT Act and after giving the assessee an opportunity of being heard, he came to a conclusion that the assessee was liable to be penalized under s. 27ID of the Act. Accordingly, he imposed a penalty of Rs. 2,17,000. When the matter was taken to the CIT(A), he confirmed the penalty. On the above facts and circumstances that the Hon'ble Tribunal deleted the penalty by holding as under:-

> "2. We have heard the assessee's counsel and Departmental Representative According to the assessee's counsel under s. 269SS, no person shall, after the 30th day of June, 1984, take or accept from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft if the amount of such loan or deposit or the aggregate amount of such loan and deposit on the date of taking or accepting such loan or deposit exceeds Rs. 20,000 or more. He submitted that, in this case, the amount was paid by the firm to the partners and vice versa. It was submitted that under the law of partnership, there is no distinction between the partner and firm. They are one and the same. It was submitted that a firm is a compendious name of all the partners taken together. Therefore, the payment, in this case, is not from one person to another. It is a payment to self. It may be treated as loan or deposit for the purposes of accounting only and not for. the purposes of general law. He relied upon the following decisions :
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> *CIT* vs. *R.M. Chidambaram Pillai* 1977 CTR (SC) 71 : (1977) 106 ITR 292 (SC), *Sunil Siddharthbhai* vs. *CIT* (1985) 49 CTR (SC) 172 : (1985) 156 ITR 509/23 Taxman 14W (SC), *Malabar Fisheries Co.* vs. *CIT* (1979) 12 CTR (SC) 415 :

(1979) 120 ITR 49 : (1979) 2 Taxman 409 (SC), *ITO* vs. *Arunagiri Chettiar* (1996) 134 CTR (SC) 167 : (1996) 220 ITR 232 : (1996) 86 Taxman 330 (SC), 74 ITR 526JGuj) (sic), *CIT* vs. *Madhukant M. Mehta* (1980) 19 CTR (Guj) 130 : (1981) 132 ITR 159 : (1981) 5 Taxman 11 (Guj), *Vir Sales Corpn.* vs. *Asstt. CIT* (1994) 121 CTR (Trib)(Ahd) 46 : (1994) 50 TTJ (Ahd) 130 *and Mohamad Ali* vs. *Karji Koudho Rayaguru AIR* 1945 Pat 286.

The Departmental Representative invited our attention to the provisions of ss. 188 and 189, of the IT Act to submit that a specific mention has been made in the Act where the firm and the partners are treated as separate entities. As far as s. 269SS is concerned, the firm and partners are separate entities for the purposes of income-tax and for the purposes of application of the provisions of the IT Act. He invited our attention to the decisions *CIT* vs. *A.W. Figgies & Co. & Ors.* (1953) 24 TTP 405 (SC), 200 ITR 505 (sic), *Chief Controlling Revenue Authority* vs. *Manohar Lai Dudeja* (1991) 189 ITR 186 (All)(FB), Narayandas *Kedamath* vs. *CIT* (1952) 22 ITR 18 (Bom) and *CIT* vs. *R.Rangaswamy Naidu* (1997) 140 CTR (Mad) 38 (1997) 224 ITR 113 (Mad). The assessee's counsel in reply submitted that s. 188A has been specifically brought into existence to clarify what has already been taken for granted in general law. He invited our attention to s. 48 of the Partnership Act.

We are of the opinion that in view of the Departmental Circular No. 387, dt. 6th July, 1984, this provision was brought in to cover those situations where unaccounted cash found in the course of search or was even explained by the taxpayers as representing loans taken or deposits made by various persons. This particular section was brought in with a view to counter such tactics of the assessee in question. The clarification has been given in the Department Circular No. 387, dt. 6th July, 1984, which is a clarification of binding nature on the Departmental authorities. There is no dispute in this case that it is not a case where any search and seizure had taken place and it is also not a case of explaining deposits or loans taken through cash in past. The Hon'ble Supreme Court in the case of *R.M. Chidambaram Pillai* (supra) held that a firm is not a legal person even though it has some attributes of personality. In IT law a firm is a unit of

assessment, by special provisions, but is not a full person. Thus, in that case, it was held that the payment of salary to a partner represents a special share of profits. Salary paid to a partner retains the same character of the income of the firm. The Hon'ble Supreme Court, therefore, relying on the commentary of *Lindley on partnership* held that the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities. A partner may be a debtor or a creditor of his co-partners, but he cannot be either debtor or creditor of the firm of which he is himself a member, nor can he be employed by his firm, for a man cannot be his own employer. Therefore, it is obvious that in this case there cannot be a relationship of a debtor and creditor between the firm and the partners. The Hon'ble Bombay High Court in the case of *Narayandas Kedarnath* (supra), held that there is no presumption that all the payments by the firm and the partners are separate payments. But in that case the Hon'ble High Court was not required to decide as to whether the firm and the partners are the same. It was a very narrow compass, which was to be decided. The reliance of the Department on the case of *A.W. Figgies & Co.* (supra) is also of no help to it. At p. 409, the Hon'ble Supreme Court have held that the partners of the firm are distinct assessable entities, while the firm as such is a separate and distinct unit for purpose of assessment. It has been held that the provisions of the IT Act go to show that the technical view of the nature of a partnership, under English Law or Indian Law, cannot be taken in applying the law of income-tax. Therefore only for the purpose of making an assessment that the IT Act has made distinction between the firm and the partners. In general law, they continue to be one and the same. Therefore, the decision of the Hon'ble Supreme Court also does not help the Department. Reliance of the Department on the decision of the Madras High Court in the case of *R. Rangaswamy Naidu* (supra) is also not helpful. The Hon'ble Madras High Court have held that under the IT law, the position is different from general law and the firm and the partners are distinct assessable entities. The law has for some specific purposes relaxed its general rigid notions and extended a limited personality to a firm, Therefore, the Hon'ble Madras High Court

has only stated that the firm and the partners are distinct assessable entities, but it has nowhere said that the firm is not a separate legal entity. The Hon'ble Gujrat High Court in the case of *Madhukant M. Mehta* (supra) had also held that a firm has no distinct legal entity apart from the partners except that in IT Act a firm is a unit of assessment and has certain attributes simulative of a personality. The Hon'ble Supreme Court in the case of *CIT* vs. *Ramniklal Kothari* (1969) 74 ITR 57 (SC)held,"...,., although for purpose of Income-tax a firm has certain attributes simulative of personality, we have to take it that a partnership is not a person but plurality of a person". In the classic decision of the Hon'ble Supreme Court in *Malabar Fisheries Co.'s* case (supra) it has been held, "there is no transfer of assets involved even in the sense of any extinguishments of the firm's rights in the partnership assets when distribution takes place upon dissolution". The Hon'ble Tribunal- Ahmedabad Bench "C" in the case of *Vir Sales Corpn.* (supra), have held that transactions *inter se* between the sister-concern made with a view to meet the business necessity and made under the *bona fide* belief and with reasonable cause and no penalty is imposable under such circumstances. In this case, the Department has nowhere challenged that the loans advanced are not genuine. The loans are genuine and they have not been made by one person to another person. As discussed above, they have been made by that person to himself in the eyes of law. The reliance of the Department in the case of *Lachhiram Puanmal & Ors.* vs. *ITO* (1990) 184 ITR 186 (MP) is also not helpful for the Department as the firm and partners are separate assessable units in the IT Act. Therefore, if a disclosure was made in the hands of the firm, the benefit would go to the firm and not to the partners. This judgment of the Hon'ble High Court was on the facts of the case. We are, therefore, of the opinion, that the payment of the amount made by a partner to a firm is the payment itself to self and does not partake the character of loan or deposit in general law. Therefore, the provisions of s. 269SS are not applicable to the facts of the case, and no penalty imposable under s. 271D. We also feel that the assessee could be under genuine impression that advancing of loan by a partner to firm is not a transfer from one person to the another and hence, there is no violation of provisions of s. 269SS. In view of the above, we cancel the penalty imposed and allow the assessee's appeal."

28. In the case of *Dillu Cine Enterprises* (*P*) *Ltd.* vs. *Addl. CIT,* 87 TTJ 1098 (Hyd), the assessee was a domestic company in which public are not substantially interested. The assessee derived income from two cinema theatres and a shopping complex. The assessee-company was managed by three directors, one of whom since expired. All the three directors had personal accounts in the form of current account in the books of the assessee-company. Mr. P.K. Swamy, one of the directors was actively looking after the affairs of the assessee-company. Whenever the assessee-company was in requirement of funds, Mr. P.K. Swamy, brought in the funds from his personal account and was also withdrawing this money as and when he required the same. So, money was both taken by him and given back to him. During the previous year relevant to the assessment year in question, the director Mr. P.K. Swamy had given a total amount of Rs. 12,63,500, to the company, other than by way of account payee cheque or bank draft. The assessee-company claimed that Mr. P.K. Swamy, directly deposited these amounts in the bank account of the assessee-company. The Addl. CIT rejected the contention and explanation given by the assessee and levied a penalty of Rs. 12,63,500 under s. 271D of the Act holding that the assessee had contravened the provisions of s. 269SS. The CIT(A) confirmed the penalty. On these facts, the Tribunal as per para 6(*e*) to para 7 of its order, has held as under:-

> "On the question of legislative intent, the CBDT has explained the object of introduction of s. 269SS by the Finance Act, 1984, in its Circular No. 387, dt. 6th July, 1984, (*1984*) *43 CTR* (*St*) *3 :* (*1985*) *152ITR* (*St*) *1* thus :
>
> 'Unaccounted cash found in the course of searches carried out by the IT Department is often explained by taxpayers 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 taxpayers are also able to get confirmatory letters from such persons in support of their explanation.

> With a view to circumventing this device, which enables taxpayers to explain away unaccounted cash or unaccounted deposits, the bill seeks to make a new provision in the IT 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, if the amount of such loan or the aggregate amount of such loan and deposit is Rs. 10,000 or more. This prohibition will also apply in cases where on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), and the amount or the aggregate amount remaining unpaid is Rs. 10,000 or more. The proposed prohibition would also apply to cases where the amount of such loan or deposit together with the aggregate amount remaining unpaid on the date on which such loan or deposit is proposed to be taken, is Rs. 10,000 or more."

29. The Tribunal further referred to the case of *Industrial Enterprises* vs. *Dy. CIT* (2000) 68 TTJ (Hyd) 373 : (2000) 73 ITD 252 (Hyd), wherein it was held in para 17 of its order, as follows :-

> 'Provisions of S.269SS were brought in the statute book to counter the evasion of tax in certain cases, as clearly stated in the heading of Chapter XX-B of the IT Act, 1961 which reads "requirement as to mode of acceptance, payment or repayment in certain cases to counteract evasion of tax". Legislative intention in bringing s. 269SS in the IT Act was to avoid certain circumstances of tax evasion, whereby huge transactions are made outside the books of account by way of cash. As far as the case on hand before us is concerned, there is no case against the assessee-firm that these transactions had anything to do with evasion of tax or concealment of income. As rightly pointed by the CIT(A) himself, it may be a case of negligence. But a negligent person does not have any intention or *mens rea* to purposely violate any provision of law so as to be visited with stringent punishment of heavy penalty.
>
> We find force in the argument of the learned counsel for the assessee that the object of the provisions being unearthing of unaccounted money 49 not applicable to any transaction which is

done in an open manner, which is genuine and in which no unaccounted money is involved. Mere technical breach of the provisions, while the transactions are held to be genuine, do not attract the provisions of s. 269SS. It is not the case of the Revenue that the amount involved were unaccounted transactions. It is an undisputed fact that the transactions are genuine. Both the assessee and the director were on the records of the IT Department and both declared these transactions to the Department. The [Chapter XX-B and s. 269SS begins with the heading "Requirement as to-mode of acceptance, payment or repayment in certain cases to counteract evasion of tax". The term "certain" used therein, when read along with the legislative intent of curbing tax evasion, clearly means that all loans are not attracted. This section attracts only "certain" loans that are brought in by the taxpayer to explain away his unexplained cash or unaccounted deposit. This section is definitely not intended to penalize genuine transactions, where no tax evasion is involved. It is well-settled that the headings prefixed to sections or set of sections in some modern statutes are regarded as "preambles" to those sections. This view was approved by Farewell L.J. in *Fletcher* vs. *Birkenhead Corporation (1907) 1 KB. Enterprises* case (*supra*), we hold that the transactions between the assessee and Mr. P.K. Swamy do not fall within the mischief sought to be remedied by the section as there is no case against the assessee that these transactions had anything to do with evasion of tax or concealment of income."

"On the contention of the assessee that the words "any other person" does not denote the director of the company, we are of the considered view that the same is correct when read with legislative intent as reproduced in the previous paragraphs i.e., Board Circular No. 387, dt. 6th July, 1984, (supra). We are convinced with the learned assessee's counsel's arguments that the Finance Act, 1984, states the legislative intent and describes a situation where explanation of taxpayer of loans obtained from "various persons". It also speaks of confirmatory letters from "such other person" during the course of search. This scheme of the section, the context in which the section is introduced and the legislative intend definitely do not mean "husband and wife", "director" and "company" or "partner and firm". The legislature was not referring to confirmatory letters produced to explain unaccounted money found during search operations from

"spouse" in case of "individual" or "director" in case of "company" or "partner" in case of "firm": The term "any other person" in the context of introduction of this section as appears to us means persons who are not very intimately or very closely connected to the assessee as in the present case, as in a search and seizure operation under s. 132, all these persons are invariably searched together. The legislature was intending to curb tax evasion in a "search situation" and referred to confirmatory letters produced in such situations to counter "cash found". The term "various persons" and "such persons" is to be understood only in relation to "search situation" as the section itself was introduced to meet such situations only. The learned counsel argued that it is unthinkable that the Department would search a husband and the wife will not be covered in the search proceeding. The same is the case of every director' of a private limited company or a company in which public are 'not substantially interested or partner and firm. These categories would definitely be covered by simultaneous search operations. The unaccounted cash found is definitely not thought of as sought to be explained off by the persons who are in the dragnet of search operations. So, we are convinced that the term "other person" as appearing in this section means, other than those intimately connected as in the present case.

We do not agree to finding of the learned CIT(A) on p. 4 para 3 of her order that provisions of s. 2(21) are applicable when considering this term "any other person". The "context" in which the Chapter and section was introduced by the legislature and the legislative intent are very clear in this regard and we agree with the argument of the learned counsel for the assessee.

Thus, we hold that the active director of the assessee-company is clearly not covered by the expression "any other person" occurring in s. 269SS of the Act."

30. The Hon'ble Madhya Pradesh High Court has in the case of Patiram Jain (225 ITR 409) held that :-

"It has also been accepted by the respondents that the transactions made between the two sister-concerns were under exceptional circumstances to accommodate the emergency needs of the sister-

concern for a very short and temporary period. As such, it did not amount to a loan or deposit as defined under s. 269SS of the IT Act. Therefore, the proceedings initiated under. ss. 276DD and 276E of the IT Act were against the provisions of law."

31. The Cochin Bench of the Tribunal in *Muthoot M. George Bankers"* case (*47 TTJ 434*) held as under :-

"Against this background, we examine the transactions between the sister-concerns and the assessee. There are transfer of funds from and to the sister-concerns. There is no evidence to show that money was loaned or kept deposited for a fixed period or repayable on demand. Further, the sister-concerns and the assessee are owned by the same family group of people with a common managing partner with centralized accounts under the same roof. Transfer of funds has taken place, in a whimsical manner. Therefore, it is rather difficult to say that the transactions are in the nature of deposits or loans with certain conditions attached to them, either as regards the period of such deposits or loans or with regards to their repayments. From the copies of the accounts furnished before us, all that can be gathered is that funds have been transferred from and to the sister-concerns as and when required and since the managing partner is common to all the sister-concerns, the decision to transfer the funds from one concern to another concern or to repay the funds could be said to have been largely influenced by the same individual. In other words, the decision to give and the decision to take rested with either the same group of people or with the same individual. In such circumstances of the case, we hold that the transaction *inter se* between the sister-concerns and the assessee cannot partake the nature of either "deposit" or "loan" though interest might have been paid on the same. Excepting for the transfer of funds being witnessed in the books of account of the concerned firms, no material is on record to show issue of receipt or pronote in evidence of accepting deposits or loans as understood in common parlance. It only represents diversion of funds from one concern to another depending upon the exigencies of the business."

32. The Mumbai Bench of the Tribunal in the case of *Karnataka Ginning & Pressing Factory* vs. *Jt. CIT* (2001) 72 TTJ (Mumbai) 307 : (2001) 77 ITD 478 (Mumbai), at p. 487, held as follows :-

> "Quite apart from the question of existence of reasonable cause, we are not sure whether the amounts received by the assessee from VE can be termed as "loans" or "deposits". The words are not defined in the Expln. (*iii*) below s. 269SS except saying that "loan" or" deposit" means loan or deposit of money. The terms "loan" and "deposit" are not mutually exclusive there are a number of common features between the two. It was held by the Madras High Court in *Abdul Hamid Sahib* vs. *Rahmat Bi AIR* 1965 Mad 427, that a loan is repayable the moment it is incurred while it is not so with the deposit. In a deposit, unlike a loan, there is no immediate obligation to repay. Normally a deposit is for a fixed tenure. The amounts taken by the assessee in the present case from VE are temporary advances and there is no evidence that there was any stipulation as to the period or any stipulation for interest. It is, therefore, a matter of grave doubt as to whether the amount received from VE can be characterised as loans or deposits. In our view, they can be more appropriately referred to as temporary advances. Such temporary advances are outside the purview of s. 269SS."
>
> Thus, in our considered opinion, and in view of the various judicial pronouncements on this matter, we hold that the transaction of this case on hand cannot be considered as "loan" so as to attract s. 269SS and s. 27ID of the Act.
>
> "We are also of the considered opinion that the transaction can be attributable to various exigencies and vicissitudes of business and thus constitutes a "reasonable cause" as contemplated by s. 273B of the Act, as the company had issued certain cheques and as they were coming up for encashment. The active director of the company considered it expedient to deposit cash in the bank account of the company to save the situation. The expression "reasonable cause" has to be considered pragmatically and as it is an open transaction done, to meet exigencies of business, it can be said to constitute "reasonable cause". Penalty provisions have been held by the Hon'ble Supreme Court of India, as penal in character and quasi-judicial in nature. An order imposing penalty for failure to carry out a statutory obligation is the result of a

> quasi-criminal proceedings and penalty will not be ordinarily imposed unless the party has either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligations. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on considerations of all relevant circumstances— *Hindustan Steel Ltd.* vs. *State of Orissa* (*supra*).
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> 7. We can safely infer that the default, in any, can be said to be "technical" and "venial" one. The *"bona fides"* of the assessee can also be said to be there when we examine the facts of the case. The assessee had a *"bona fide"* belief that no offence was committed. The levy of penalty is not automatic since the Hon'ble Supreme Court of India in the case of *Moti Lai Padampat Sugar Mills Co. Ltd.* vs. *State of U.P.* (1979) 118ITR 326 (SC) has observed that there is no presumption that every person knows the law.
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> In the light of the above, we hold that both on law and on facts, the penalty levied by the Addl. CIT under s. 27ID and confirmed by the learned CIT(A) is not maintainable. Accordingly, we delete the penalty levied."

33. *In Paras Brass Extrusion Ltd.* vs. *Dy. CIT* (3 SOT 554), the brief facts were that the assessee had taken various amounts in cash – each exceeding Rs. 20,000 from seven persons – a totalling to Rs. 10,00,000. The AO imposed penalty under s. 271D of the Act. Before the Tribunal, the assessee submitted that keeping in view the object of introduction of s. 269SS, the case was not searched and seizure case where unaccounted money had been found. The other argument was that amount was deposited in cash by the directors or members of the assessee-company and the same were declared under the VDIS scheme in the personal capacity as they did not have any bank account. In view of these facts, the Tribunal cancelled the penalty after relying on the various decisions listed in the order itself.

34. In the present case, similarly, the assessee's plea that in view of the intention of the legislature while enacting the provisions of s. 269SS and 269T as well as 271D and 271E, which, as explained in Circular No. 387, dt. 6th July, 1984, was to curb the transaction of black money, is also liable to be accepted because in the present case, the Revenue has accepted the transaction as genuine and has not found the deposit being out of unaccounted cash or the deposit having been made with an effort to explain or introduce cash in the garb of loan/deposit. In view of all these facts, we, after following the decision of Tribunal in the case of *Farrukhabad Investment India Ltd.* (80 TTJ 82, Del) accept the assessee's plea that there was no violation of the provisions of s. 269SS and cancel the penalty.

35. Further, in the case of *Citizen Co-operative Society Ltd., 41 DTR 305 (Hyd),* the Hyderabad Tribunal held as follows:-

> "17. In the present case, assessee is subject to rules laid down by cooperative society Act and the assessee has been carrying out banking operation which are under audit of various authorities and therefore the assessee could not be put at par with the other cases of other concerns since the assessee have no control in respect of the amounts received from the customers in the form of deposits. The customer usually go to the bank to make deposits with an intention of earning interest and the assessee is to maintain the same and the depositor operate those accounts and the deposits repayable on expiry of specific period. There is no dispute in these assessment years that the assessee has been carrying on the banking transactions which may be with or without approval of the Reserve Bank of India. If the carrying on the operations of the banking activities is not at all approved by the Reserve Bank of India or the assessee is having no requisite licence from the authorities, the concerned authorities could have stopped the same or taken action against the assessee. Once the assessee is permitted to carry on the banking activities, then the assessee is bound by the relevant provisions of the Banking Regulations Act. The bank, for all its banking activities is strictly

governed by the Banking Regulation Act 1949. 'Banking' is described as accepting, for the purpose of lending or investment of money, due from the public repayable on demand or otherwise and withdrawal by cheque, draft order or otherwise. The deposits held by the assessee are its stock in trade. The deposits and loans are just like buying and selling of goods/products. The amounts in account maintained by the assessee bank were not in the control of the assessee. In the sense that the bank may be required to pay at any point of time. In case of banks, like present assessee, the customer identity required to be taken with proper introduction, photographs and address etc. This is so because, any person from general public can come and open a deposit account with the bank. The acceptance of deposit by this assessee cannot be equated with other kind of assessees. In other cases, normally, deposits are accepted from the people connected with are known to the depositees. It is in accordance with the terms of section 131 of the Negotiable Instruments Act. The customer introduction had to be been taken to avoid any kind of fraud. The assessee like present is not obliged to question the source of deposit made by its customers. Also, the customer can keep the deposit for a period which is according to their convenience . The amount has to be repaid by the assessee to its customer immediately on demand. These features distinguish the case of the assessee from other ordinary assessees. Therefore, the provisions of section 271D/271E to be viewed in the background of these aspects. Further, the assessee is subject to periodical inspects and audits by various statutory authorities and in case of any default assessee is liable for having penalty besides cancellation of its licence. This is not the case with other assessees. Further, the assessee has to maintain confidentiality in respect of the information collected by it from its customers, such information is not to be divulged to outsiders.

There is no such obligation with other assessee. In spite of this, the assessee has furnished the information as available with it. Now if the address of the customers of the assessee found to be incomplete, this cannot form the basis for levying the penalty. There is no finding by the lower authorities that the assessee violated any guidelines issued by the Regulatory authorities. Usually, the bank was not required to go for detailed verification of addresses, whereabouts of its customers. There is no absolute obligation to assessee to make enquiries about the proposed

customer so as to examine the genuineness/sources of the deposits. Bank usually rely in the introduction of any old customer and that if the bank bona fide acted on the reference of a customer, it can avail of the protection under section 131 of the Negotiable Instrument Act. Further, the bank is accepting the deposits and there is no involving of any risk to the bank, even the rule of proper introduction did not operate strictly. It is to be noted that the assessee while doing the business in ordinary course, if it puts various conditions, the expected business may not be able to achieve. Therefore, it cannot be said that assessee did commit any infringement or it is incorrect to say that there was any deliberate attempt on the part of the assessee to accommodate tax dodgers. The deposits accepted and repaid by the assessee were part of its Banking activities and the depositors were its Members. The deposits received by the assessee, which was carrying on the banking business, were not in the nature of taking of any loan or deposits for the purpose of funding its project as a source of investment, that rather, it was in the business of accepting deposits that in view of the nature of such business, the scrutiny of the deposits could not be the same as in the case of assessee making entries of deposits on account of loan etc. The authority vested with the power to impose penalty as a discretionary power not to levy the penalty. It is all very well to paint justice blind, but she does better without a bandage round the eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth and the less dust there is about the better. We made attempt to examine the truth. We found that there is no addition on account of these impugned deposits in the return of income it means that deposits are genuine. Veracity of creditor not doubted by the Revenue. Assessing Officer did accept the deposit as genuine. The breach of provisions of sections 269SS/269T from a bona fide belief. Ex facie it is a venial breach. The law takes no notice of trivialities. Cash payments and receipts made because of business exigencies. The mere violation of a statutory obligation is not liable for any penalty more so, undisputedly the penal action is quasi criminal nature. The income of the assessee is exempt under section 80P of the Act and more so, there is no establishment of deliberate and intentional violation of the provisions by the assessee, that too, in order to hide any income or to evade any payment of tax. Usually penalty will not be imposed unless the party concerned

has acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation and that penalty will also not be imposed merely because it is lawful to do so. The imposition of penalty for failure to perform statutory obligation is only a discretionary power of the authority exercising judicial functions on consideration of all the relevant circumstances. If the assessee acted on genuine belief that penal provisions have no application to deposits and it applied only to other kind of assessees, then penalty could not be levied. As such, in present case, there exists reasonable cause in accepting the deposits in cash and paying by cash. Assessee may therefore be exonerated from the levy of penalty. The other contention of the assessee counsel is that the words 'any other person' in section 269SS or 269T does not denote the director of the assessee or members of the assessee society, when read with the legislative intent as reproduced in Board circular No. 387, dated 6-9-1984. The term 'any other person' in the context of introduction of section 269SS appears to means persons who are not very intimately or very closely connected with the assessee. In the present case the assessee accepted the deposits and repaid the same either to the members/directors or to their dependents children or their associated concerns or their relatives. Further, we have carefully pursued bye-law of the assessee society. As seen from the bye-law, it is working on the concept of mutuality. Where a number of persons coming together and contribute a common fund for financing of some venture or object and will in this respect have no dealing or relation with any outside body, then any transactions with those persons cannot be regarded in any sense as loan. There must be complete identity between the contributors and the participators. If these requirements are fulfilled it is immaterial what particular form the association takes. Trading between people associating together in this way does not give rise levy of penalty. Where the trade or activity is mutual, the fact that, as regards certain activities, certain members only of the association take advantage of facilities which it offers does not affect the mutuality of the enterprise. The contributor of the fund are entitled to participate in the surplus, thereby creating an identity between the participators and contributors and acceptance of deposits and repayment of the same is incidental to the attainment of the main object of the assessee society. The concept of mutuality is primarily based on

the principle that one cannot make profit from himself . Thus, when the facilities are provided to only to members of the society, who provide the funds to the society and their identity with the funds and their participation in the surplus arising from the said fund is unmistakably found then the principles of mutuality will apply. The fact of the present case, are akin to the above position and all the ingredients necessary for holding the application of the concept of mutuality are satisfied because there is complete identity between the contributors and participators and the requirement of the law is that contributors of the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund that or that each member should participate in the surplus or get back from the surplus precisely what he has paid. What is required is that the members as a clause must be able to participate in the surplus. It is immaterial whether the surplus is paid back to the members in cash or is put to reserve with the society for his development and for providing better amenities to the member. In view of the transaction took place between the assessee and its member, the strict provisions of the section 269SS/269T cannot be applied.

17.1 Further, the Legislature was intending to curb the tax evasion in a 'search situation' and referred to confirmatory letters produced in such situations to counter 'cash found'. A statute is an edict of the legislature and the conventional way of interpreting or constituting a statute is to seek the intention of its maker. A statute is to be constitute according to the intent of them who make it. The legislature in a modern state is actuated with some policy to curb some evils or to some public benefits. A bare mechanical interpretation of the words without the application of a legitimate intent, devoid of any concept or purpose will reduce most of the remedial and beneficial legislation to futility. Keeping in view of the intent of the legislature behind the enacting sections 269SS/269T, it is clear that the loan or deposit brought in by the assessee was not to explain its unaccounted cash and, therefore the question of violating these provisions did not arise. The term 'various persons' and 'such persons' is to be understood only in relation to 'such situation' as the section itself was introduced to meet such situations only. Thus, the director or member of the assessee society is clearly not covered by the expression 'any other person' occurring in section 269SS. The

transaction in question cannot be considered as 'loan' or 'deposit' so as to attract section 269SS or section 269T of the Act. The transactions can also be attributed various exigencies of business carried on by the assessee and thus constitutes a 'reasonable cause' as contemplated by section 273B. The expression 'reasonable cause' has to be considered pragmatically and as it is transactions are openly done, to meet the exigencies of business, it can be said to constitute 'reasonable cause'. The bona fide business of transaction cannot be considered for levying the penalty under section 271D or 271E. More so, the assessee has been carrying on the banking business and it is having bona fide belief that provision of section 269SS/269T is not applicable to the assessee case and same is coupled with genuineness of the transaction constitute a reasonable cause and in such case the default on the part of the assessee is merely of a technical or venial nature and no penalty be levied.

18. To sum up, a harmonious construction of the relevant provisions of sections 271D, 271E and 273B clearly reveals the use of expression 'shall be liable to pay' in sections 271D and 271E and the provisions of section 273B providing that no penalty would be leviable if the person concerned proves that there are reasonable cause or the said failure clearly indicates these provisions give a discretion to the authority to impose the penalty or not to impose the penalty. Such a discretion has to be exercised in a just and fair manner having regard to the entire facts and materials existing on record. Ordinarily, a plea as to be ignorance of law cannot support the breach of a statutory provision but the fact of such an technical break due to ignorance of the relevant provisions of law or on account of bona fide belief, coupled with the fact that transactions in question are genuine and bona fide transaction were undertaken during the regular course of its business will not result in levy of penalty under sections 271D and 271E.

19. In view of the above discussion, we inclined to delete the penalty levied under sections 271D and 271E of the Income-tax Act for the assessment years 2006-07 and 2007-08."

36. In the present case, the assessee is a registered society u/s. 12AA of the Act and its income is exempt u/s. 11 of the Act. The assessee in the stage of establishment of educational institution has undertaken the construction activity of building for the purpose of achieving the object of assessee society. In the course of construction of the building, the assessee needed urgent funds to meet the day to day requirement of the construction. In that course of time, the assessee received Rs.15,64,50,000 in cash from the managing trustee viz., Shri K. Muniraju. This happened 8 times in the assessment year under consideration. As seen from the above, it is not a deliberate and intentional violation of the provisions of section 269SS of the Act. Penalty like 271D of the Act will not be imposed unless the party concerned has acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation and penalty will not be imposed merely because it is lawful to do so. Imposition of penalty for failure to perform statutory obligation is only a discretionary power of the authority exercising judicial functions in consideration of all the relevant circumstances. If the assessee acted on genuine belief that penal provisions have no application to deposits when it is between the trustee and assessee, then penalty could not be levied. In the present case, in our opinion, there exists reasonable cause in accepting loan in cash. Therefore, the assessee is exonerated from levy of penalty.

37. Further, the term “any other person” in the context of section 269SS appears to mean persons who are not very closely and independently connected with the assessee. In the present case, the assessee accepted loan from its managing trustee, who is looking after the day to day affairs of the present assessee. This being so, the transaction between the assessee and managing trustee cannot be termed as loan so as to apply the provisions of section 269SS of the Act. The transaction between the

assessee and managing trustee is in the course of discharge of duty of the managing trustee in the day to day affairs of the assessee trust and when the assessee needed some funds to meet the day to day operation of the construction of the college building, it was facilitated by the managing trustee and assessee is having running account with the managing trustee and the transaction between these two parties cannot be termed as loan transaction so as to levy penalty u/s. 269SS of the Act. More so, the transaction undertaken by the assessee with managing trustee is incidental to attainment of main object of assessee society and in this context, if the assessee has not paid money to the contractors who have undertaken construction of the building, the managing trustee himself is liable for all the consequences of non-payment even bouncing of cheques for insufficient funds and in that view the money advanced by the managing trustee to the assessee to meet the urgent business exigency amounts to reasonable cause within the purview of section 273B of the Act and on this count also, the penalty cannot be levied. Further, the concept of mutuality is primarily based on the principle that one cannot profit from himself. Thus, when the managing trustee provided funds to the society to meet urgent business exigency, it cannot be said that it was a loan transaction so as to attract penalty u/s. 269SS of the Act. Further, as held by the Hyderabad ITAT in the case of *Citizen Co-operative Society Ltd. (supra)*, the term “various persons” and “such other persons” which relates to “such situation” as the section itself was introduced to meet such situation only. Thus, the managing trustee of the society is not covered by the expression “any other persons” occurring in section 269SS or 269T of the Act. The transaction also is attributed to various exigencies relied by the assessee which constitute reasonable cause contemplated by section 273B of the Act.

38. With respect to assessee's claim that the transaction in question was neither loan nor deposit because the amount having been received from the trustee, was receipt to oneself, there was no reason for levy of penalty under s. 271D of the Act and that the default, if any, was of technical and venial nature; in the absence of any decision, contrary to the decision relied upon by the counsel for the assessee, such as the decision of Tribunal, Jaipur Bench, in the case of *Chandra Cement Ltd.,* 68 TTJ 35 (Jp), decision of Tribunal Indore Bench in the case of *Mohan Karkare* (51 TTJ 599 (Indore), decision of Tribunal Ahmedabad Bench in the case of *Shrepak Enterprises* , 60 TTJ 199 (Ahd) and the decision of Hon'ble Supreme Court in the case of *Hindustan Steels Ltd.,* 83 ITR 26 (SC), we are of the opinion that the assessee's case is fully covered by the proposition of law, laid down in the aforesaid decisions and consequently, following these decisions, cancel the penalty.

39. In the totality of facts and circumstances of the case, we, after following the decision relied upon by the counsel, cancel the penalty imposed in this case.

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

Pronounced in the open court on this 18th day of April, 2022.

Sd/-	Sd/-
(BEENA PILLAI)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 18th April, 2022.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.