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

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

| ITA No.98/Bang/2022 |
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| Assessment year: 2013-14 |

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| Karnataka Agro Chemicals Pvt. Ltd.,<br>No.43C, Hoskote Industrial Area,<br>Hoskote, Bengaluru – 562 114.<br>**PAN: AAACK 5533F** | Vs. | The Additional Commissioner of Income Tax,<br>Range 4(1),<br>Bengaluru. |
| APPELLANT | | RESPONDENT |

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| Appellant by | : | Shri SreeHariKutsa, Advocate |
| Respondent by | : | Shri Priyadarshi Mishra, Jt.CIT(DR)(ITAT), Bengaluru. |

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| Date of hearing | : | 30.03.2022 |
| Date of Pronouncement | : | 29.04.2022 |

**O R D E R**

*Per Chandra Poojari, Accountant Member*

This appeal by the assessee is against the order of the CIT(Appeals), NFAC, Delhi dated 17.12.2021 for the assessment year 2013-14 on the following grounds:-

> "1. The Order of the learned Commissioner of Income-tax (Appeals), passed under section 250 of the Act in so far as it is against the Appellant, is opposed to law, equity, weight of evidence, probabilities and the facts and circumstances in the Appellant's case.

2. The learned Commissioner of Income Tax (Appeals) is not justified in dismissing the appeal without adjudicating all the submissions made on the facts and circumstances of the case.

3. The learned CIT(A) failed to appreciate that the order levying penalty is bad in law on the facts and circumstances of the case.

4. The learned CIT(A) failed to appreciate that the provisions of section 271E are not attracted on the facts and circumstances of the case.

5. The learned CIT(A) erred in upholding the penalty of Rs.5,13,798/- under section 271E on the facts and circumstances of the case.

6. The learned CIT(A) failed to appreciate that the AO lacked the requisite jurisdiction and consequently the order levying penalty is bad in law on the facts and circumstances of the case.

7. The Appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

8. In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity."

2. The facts of the case are that the assessee has availed cash loan of Rs.4.4 lakhs in two tranches and repaid the same back in cash in two tranches. The AO initiated penalty proceedings under section 271E of the Income Tax Act, 1961 ('the Act') vide notice dated 27/04/2016 to explain why the transaction by the Company with the director of the company in relation to the loan repayment was made otherwise than by account payee cheque. It was submitted before the AO that the transactions do not assume the nature of transactions that are covered within the purview of the section 271E of the Act. It was undertaken as a business expediency and there was no element of undue advantage taken from the company's

financial resources in order to engage in any of the transactions prohibited by the Act which was only a short term arrangement without any interest charged. The transaction was neither in the nature of loan nor deposit and the persons involved are the Directors and hence provisions of section 269T are not attracted. The transactions are recorded in the books of account and duly audited.

3. However the AO levied a penalty of Rs.5,13,798 which was confirmed by the CIT(Appeals). Against this, the assessee is in appeal before us.

4. The ld. AR submitted that during the period the assessee was assisted by its *Director and Shareholder* Shri Ashok Nair with cash loan of Rs.4,40,000/- as follows :-

| Amount (Rs.) | Date of receipt | Date of repayment |
|---|---|---|
| Rs.2,00,000/- | 04/05/2012 | 31/05/2012 |
| Rs.2,40,000/- | 07/06/2012 | 30/06/2012 |

5. The ld. AR submitted that that the impugned transactions were undertaken as a matter of business expediency. It was neither in the nature of loan nor deposit and the persons involved herein are the Directors and therefore the provisions of section 269T are not attracted to the impugned transactions. Under the Companies (Acceptance of Deposits) Rules, 1975, under r. 2(b)(ix), deposit does not include any amount received from a director or a shareholder of a private limited company. Hence such amount would not be either deposit or loan within the meaning of s. 269SS and hence penalty under s. 271E could not be imposed on the facts and circumstances of the case.

6. It is further submitted that the transactions involved herein are bonafide transactions carried out of trade exigency and therefore the provisions of section 271E are not attracted and would have relied on the following judicial precedents in this regard:-

i. CIT vs. Bhagwati Prasad Bajoria (HUF) reported in (2003) 263 ITR 487 (Gau) where it was held that penalty under s. 271D is not leviable where the transaction in question is found to be genuine;

ii. Director of IT (Exemption) vs. All India Deaf & Dumb Society reported in (2005) 198 CTR (Del) 376, CIT vs. Maheshwari Nirman Udyog reported in (2007) 211 CTR (Raj) 579; CIT vs. Raj Kumar Sharma reported in (2007) 294 ITR 131 (Raj) also held same as (i) above;

iii. Omec Engineers vs. CIT (2008) reported in 217 CTR (Jharkhand) 144 where it was held that where there is no finding of AO, CIT(A) or Tribunal that the transactions in violation of s. 269SS were not genuine, assessee's return having been accepted under s. 143(3) after scrutiny, and further there being no finding that transactions were mala fide aimed at disclosing concealed money, imposition of penalty under s. 271D merely for technical mistake could not be sustained;

iv. CIT vs. Lakshmi Trust Co. reported in (2008) 303 ITR 99 (Mad) where it was held that if there were genuine and bona fide transactions and the taxpayer could not get a loan or deposit by account payee cheque or demand draft for some bona fide reason, the authority vested with the power to impose penalty has a discretion not to levy penalty;

v. Commissioner Of Income Tax vs. Deccan Designs (India) P. Ltd. reported in (2012) 347 ITR 580 (Mad), where the Hon'ble Chennai High Court observed that where there was enough evidence offered by the assessee to justify cash transactions made with its sister concern, in absence of any contradictory evidence to the fact that the loan was taken

under conditions of business exigency, penalty u/s. 271D and 271E were held to be not imposable.

7. It is submitted that there were only two transactions of Rs.2 lakhs and Rs.2.40 lakhs both of which were carried out of commercial expediency. There was reasonable cause under Section 273B of the Act and therefore penalty ought not to have been levied on the facts and circumstances of the case.

8. He drew our attention to the provisions of section 271E reproduced below:-

Penalty for failure to comply with the provisions of section 269T.

271E. (1) If a person repays any 1pan or deposit or specified advance referred to in section 269T otherwise than in accordance with the provisions of that section, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit or specified advance so repaid.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.

9. Thus the penalty under section 271E is consequence to failure to comply with provisions of section 269T of the Act. Section 269T is reproduced below :-

Mode of repayment of certain loans or deposits.

269T. No branch of a banking company or a co-operative bank and no other company or co-operative society and no firm or other person shall repay any loan or deposit made with it, otherwise than by an account payee cheque or account payee bank draft drawn in the name of the person who has made the loan or deposit if—

(a) the amount of the loan or deposit together with the interest,' if any, payable thereon, or

(b) the aggregate amount of the loans or deposits held by such person with the branch of the banking company or co-operative bank or, as the case may be, the other company or co-operative society or the firm, or other person either in his own name or jointly with any other person on the date of such repayment together with the interest, if any, payable on such loans Or deposits, is twenty thousand rupees or more:

(c) Provided that where the repayment is by a branch of a banking company or co-operative bank, such repayment may also be made by crediting the amount of such loan or deposit to the savings bank account or the current account (if any) with such branch of the person to whom such loan or deposit has to be repaid :

Provided further that nothing contained in this section shall apply to repayment of any loan or deposit taken or accepted from —

i. Government;

ii. any banking company, post office savings bank or co-operative bank;

iii. any corporation established by a Central, State or Provincial Act;

iv. any Government company45 as defined in section 617 of the Companies Act, 1956 (1 of 1956);

v. such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette.]

Explanation. —For the purposes of this section,—

i. "banking company" shall have the meaning assigned to it in clause (i) of the Explanation to section 269SS;:

ii. "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949);

iii. "loan or deposit" means any loan or deposit of money which is repayable after notice or repayable after* a period and, in the case of a person other than a company, includes loan or deposit of any nature.

10. Thus it is clear from the above two provisions that for the penalty under section 271E of the Act to be leviable, it is necessary that there is a violation of provisions of section 269T and the section 20T is applicable in the case where repayment of any loan or deposit is made otherwise than by way of account payee cheque or account payee draft.

11. The Appellant submits that the following are the issues that arise for your consideration —

(a) There was no deposit or loan between the Appellant and its director and consequently the provisions of section 269T are not applicable on the' facts and circumstances of the case.

(b) The Appellant was prevented by reasonable cause and therefore pursuant to section 273B of the Act no penalty can be levied on the facts and circumstances of the case.

12. The ld. AR submitted that there was no deposit or loan between the Appellant and its director and consequently the provisions of section 269T are not applicable on the facts and circumstances of the case. There were only two transactions of Rs.2 lakhs and Rs.2.40 lakhs both of which were carried out of commercial expediency in order to meet the expenses of the company. There was very short interval between the borrowing and repayment and therefore the AO ought to have appreciated that it is a genuine transaction and does not attract the rigors of section 269T of the Act.

13. It is submitted that the primary requirement of section 269T is that the transaction must be of the nature of loan or deposit. The meaning of the two terms have been given under explanation to the said section as

meaning any loan or deposit of money which is repayable after notice or repayable after a period and, in the case of a person other than a company, includes loan or deposit of any nature. Thus, the primary requirement is that the money should be of the nature that is repayable.

14. In the present case, the transaction has been done with the Director and Shareholder of the company and not with third-party. Therefore, the bonafides of the transaction cannot be doubted. What has happened is only a technical breach which certainly should not lead to levy of penalty, on the facts and circumstances of the case. Therefore when the transaction is neither loan nor deposit the question of applicability of section 269T does not arise on the facts and circumstances of the case.

15. It is submitted that it is necessary to appreciate the legislative intent behind provisions of section 269T of the Act. Finance Act 1984 in its Memorandum explaining provisions of the Bill has clearly provided that it is in order to curb unaccounted cash transactions and tax evasion and attempts to defraud Revenue, that the section is introduced into the Act.

16. Reliance is placed on the decision of Madras High Court in re *CIT v. Idhayam Publications Ltd* reported in. 285 ITR 221 (Mad) where the Hon'ble Court held that 'transaction between the Company and the director cum shareholder is not a loan or deposit and it is only a current account in nature and no interest is being charged for the above transaction, the same does not attract provisions of section 269SS of the Act. Copy of this decision is enclosed herewith.

17. Reliance is further placed on the parity of reasoning in the following decisions :-

- ITO v. Sunder Synthetics Pvt Ltd reported in [2015] 041 ITR (Trib) 0618

- Lodha Builders Pvt Ltd v. ACIT reported in [2014] 034 ITR (Trib) 0157
- DCIT v. Chetan M Kakaria reported in [2014] 032 ITR (Trib) 0024
- Canara Housing Development Co. v. Addl. CIT reported in [2010] 001 ITR (Trib) 0165
- CIT v. Balaji Traders reported in 303 ITR 312 (Mad)
- OMEC Engineers v. CIT reported in 294 ITR 599 (Jhar)
- CIT v. Idhayam Publications Ltd., reported in 285 ITR 221 (Mad)
- Asst. Director of Inspection (Investigation) v. Kum. A B Shanthi reported in [2002] 255 ITR 0258 (SC)

18. The Appellant was prevented by reasonable cause and therefore pursuant to section 273B of the Act no penalty can be levied on the facts and circumstances of the case.

19. The Hon'ble Delhi High Court in *Azadi Bachao Andolan v. UOI reported in 252 ITR 471 (Delhi)* expressed its understanding of the expression reasonable cause in Para 6 as under :-

> "Reasonable cause, as applied to human action, is that which would constrain a person of average intelligence and ordinary prudence. The expression 'reasonable' is not susceptible to a clear and precise definition; for an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space. It can be described as rational according to the dictates of reason and is not excessive or immoderate. The word 'reasonable' has in law the prima facie meaning of reasonable with regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know - Re. A Solicitor [1945] KB 368. Reasonable cause can be reasonably said to be a cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bona fides."

20. The Hon'ble Delhi High Court in the matter of *Woodward Governers India (P.) Ltd., v. CIT reported in [2002] 253 ITR 745 (Delhi)* has

laid down the following in respect of reasonable cause for the purpose of Section 273B. The Hon'ble Court held as under —

> "5. Section 273B starts with a non obstante clause and provides that notwithstanding anything contained in several provisions enumerated therein including section 271C, no penalty shall be imposable on the person or the assessee, as the case may be, for failure referred to in the said provisions, if he proves that there was reasonable cause for the said failure. A clause beginning with 'notwithstanding anything' is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict, an over-riding effect over the provision or Act mentioned in the non obstante clause - Orient Paper & Industries Ltd. v. State of Orissa AIR 1991 SC 672. A non obstante clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the non obstante clause, or to override it in specified circumstances - T. R. Thandur v. Union of India AIR 1996 SC 1643. The true effect of the non obstante clause is that in spite of the provision or the Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment - Smt. Parayankandiyal Eravath Kanapravan Kalliani Ammo v. K. Devi AIR 1996 SC 1963. Therefore, in order to bring in application of section 271C in the backdrop of section 273B, absence of reasonable cause, existence of which has to be established by the assessee, is the sine qua non.
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> 6. Levy of penalty under section 271E is not automatic. Before levying penalty, the concerned officer is required to find out that even if there was any failure referred to in the concerned provision, the same was without a reasonable cause. The initial burden is on the assessee to show that there existed reasonable cause which was the reason for the failure referred to in the concerned provision. Thereafter the officer dealing with the matter has to consider whether the explanation offered by the assessee or the person, as the case may be, as regards the reason for failure, was on account of reasonable cause. 'Reasonable cause' as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. It can be described as a probable cause. It means an honest belief founded

upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation; the prescribed consequences will follow."

21. The Hon'ble Supreme Court in the case of Hindustan Steel Ltd. v. State of Orissa [1972] 83 ITR 26 held as follows:-

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard to its obligation. 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 a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or a bona fide belief that the offender is not liable to act in the manner prescribed by the statute".

22. The Hon'ble High Court of Madras in *Kalakrithi v. ITO* reported in 253 ITR 754 (Mad) observed as follows :-

"5. The words 'reasonable cause' in the section must necessarily have a relation to the failure on the part .of the assessee to comply with the requirements of the law which he had failed to comply with. In case of delay in compliance, the cause shown must be for the whole of the period of the delay and not merely for a part thereof If the cause shown is such as to explain the delay as a Whole and constitutes a good reason for the non-compliance, no penalty would be leviable. However, in cases where the cause shown is such as to explain a part of the delay, or the cause shown is only to mitigate the gravity of the non-

> compliance, such a cause cannot be extrapolated and treated as being a good cause for the whole of the period of the delay in its entirety."

23. Reliance is placed on the parity of reasoning in the decision of the Hyderabad Bench of the ITAT in the matter of Branch Manager, SBI v. Addl. CIT (TDS) reported in 62 SOT 119 (Cuttack) has held as under :-

> "10. We find that Hon'ble apex Court in the case of Hindustan Steel Ltd vs. State of Orissa, 83 ITR 26,held that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of 'its obligation. Penalty will not be imposed because it is lawful to do so. Therefore, following the decision of Hon'ble Supreme Court in the case Hindustan Steel Ltd (supra), we are of the view that assessee has reasonable cause for non-filing the e-TDS return in time."

24. Wherefore it is submitted in the present case that commercial expediency constitutes reasonable cause and the Appellant company therefore cannot be levied with penalty u/s 271E on the facts and circumstances of the case.

25. On the other hand, the ld. DR submitted that the assessee has received the impugned loans in cash and repaid them in cash. The assessee has not given any specific reason or cause leading to commercial expediency of the transactions in cash. The credit balance of the concerned director is shown as a borrowing in the Balance Sheet and hence the contention of the assessee that no interest was payable cannot be accepted. There is no reasonable cause within the meaning of 273B for violation of the provisions of section 269T of the Act. He therefore supported the orders of the lower authorities.

26. We have heard both the parties and perused the material on record. The loan transaction of Rs.4.40 lakhs is taken by the assessee from its director, Mr. Ashok Nair which includes the amount of Rs.2 lakhs and Rs.2.20 lakhs. The assessee explained before us that the transaction between the assessee company and its director and that the director himself is responsible for the day to day affairs of the assessee company and its business exigencies. The assessee has taken the loan from its director and there is a running account between them and the transaction cannot be termed as loan transaction. In our opinion, the transaction between the assessee company and the director cannot be termed as loan transaction when the business of the assessee company is being looked after by the same director. When there is urgent need of money it is taken as loan from the director who himself is the authorised signatory of the assessee company and as such it is not in the nature of loan. If there is any failure on the part of the assessee to meet the regular payment, the director himself is responsible for all the consequences. As such, the director was forced to lend money to meet the business urgency and it could be considered as reasonable cause because for advancing this money to meet the business exigency. Even otherwise, the transaction between the assessee company and the director who is in-charge of the company cannot be considered as loan as enumerated in section 269SS of the Act. Further, recently the coordinate Bench of this Tribunal in the case of Akash Education & Development Trust in ITA No.737/Bang/2021 considered similar issue of money lent between the assessee trust and the managing trustee and the Tribunal vide order dated 18.04.2022 deleted the penalty observing as follows:-

> "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.

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 :

*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 526 (Guj) (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 *Kedarnath* 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*).

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.

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.

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."

27. Accordingly, placing reliance on the above order of the Tribunal, we are inclined to delete the penalty levied u/s. 271E of the Act.

28. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 29th day of April, 2022.

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

Bangalore,
Dated, the 29th 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.