

**IN THE INCOME TAX APPELLATE TRIBUNAL
CIRCUIT BENCH, VARANASI**

**BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA No. 106/VNS/2019
Assessment Year: 2012-13

Smt. Bandana Pandey w/o Shri Shyam Chandra Pandey, 29-B, Betihata South, Awas Vikas Colony, Gorakhpur-273001, U.P.	v.	Addl. Commissioner of Income Tax , Range-1, Gorakhpur, U.P.
PAN:ATOPB4997J		
(Appellant)		(Respondent)

Assessee by:	Shri P.K Srivastava, Advocate
Revenue by:	Shri A.K. Singh, Sr. DR
Date of hearing:	26.05.2022
Date of pronouncement:	03.06.2022

ORDER

PER SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER:

This appeal, filed by assessee, being ITA No.106/VNS/2019, is directed against appellate order passed by Id. Commissioner of Income Tax (A), Gorakhpur (hereinafter called "the CIT(A)") in Appeal No. CIT(A)/GKP/2016-17 for assessment year (ay) 2012-13, the appellate proceedings had arisen before learned CIT(A) from penalty order dated 14.09.2016 passed by learned Assessing Officer (hereinafter called "the AO") under Section 271D of the Income-tax Act, 1961 (hereinafter called "the Act"). We have heard both the parties in Open Court through physical hearing mode.

2. The grounds of appeal raised by assessee in memo of appeal filed with Income Tax Appellate Tribunal, Varanasi (hereinafter called "the tribunal"), reads as under:

"1. That the transactions were between family members/spouse for acquiring a house for their living and all had pooled their resources which were genuine transactions for acquiring the property for mutual benefit of the family and the intention was not to evade taxes.

2. That transactions of loan between husband and wife for genuine reason and necessity does not attract the provisions of section 269SS in Income Tax Act, 1961. That transaction is between the family for genuine case and genuineness of the transactions has not been doubted. A Sri Nikhil Banik Mazumdar Vs. JCIT (ITAT Kolkatta) b. Punjab And Haryana High court in the case of CIT Vs. Sunil Kumar Goel reported in 315 ITR 163.

3. That bona fides and genuiness of the transaction would constitute a "reasonable cause" for not invoking the provisions of sections 271D of the Act, Relying upon the judgment rendered by this court in CIT v. Saini Medical Store [2005] 277 ITR 420. The assessee had been successful to show "reasonable cause" and there was no avoidance of tax or tax evasion at the hands of the assessee.

4. That order passed by the CIT(A), Gorakhpur by conferring the penalty impose by the Assessing officer is not justified from any corner and its erroneous on the fact and law.

That the learned CIT(A) has erred in law and facts in sustaining penalty of Rs. 16,75000 imposed by the AO under Section 271D without properly appreciating the fact, circumstances and the submissions of the appellant.

That on facts, and in law, the initiation of proceedings u/s 271D are invalid and void ab initio.

5. That the appellant craves leave to add, amend or alter any of the grounds of appeal."

3. The assessee is an individual. During the course of assessment proceeding under Section 144/147 of the 1961 Act conducted by AO against the assessee , for the assessment year 2012-13, the AO noticed that the assessee has taken cash loan of Rs. 16,75,000/- from M/s. Industrial Power Solutions, Gorakhpur , during the year under consideration , which is in violation of provisions of Section 269SS of the Act. The show cause notice under Section 271D r.w.s. 269SS was issued by the AO on 04.04.2016, which was duly served on the assessee on 04.04.2016 . In response thereof , the assessee did not submitted any reply before the AO. The AO gave one more opportunity to the assessee, but the assessee did not comply with the said

notice also. The AO levied penalty of Rs. 16,75,000/- u/s 271D , as the assessee has taken loan of Rs. 16,75,000/- in cash during the year under consideration , in violation of provisions of Section 269SS read with Section 271D of the Act, vide penalty order dated 14th September , 2016 passed by ld. AO u/s 271D of the 1961 Act.

4. Aggrieved by penalty of Rs. 16,75,000/- levied by the AO u/s 271D of the 1961 Act, the assessee filed first appeal before Ld. CIT(A) who dismissed the appeal filed by the assessee. It was submitted by assessee before Ld. CIT(A) that the assessee has taken loan in cash from husband , for the purposes of purchase of residential property. It was also submitted that Section 269SS has no applicability, if the loan is taken by wife from husband , and vice versa , as they are close family members. It was submitted that the residential house was purchased for self use and the husband of the assessee provided financial help to the assessee for purchase of the residential house. It was submitted that total loan of Rs.22,75,000/- was taken from husband Proprietary concern namely Industrial Power Solution(IPS), out of which loan of Rs. 16,75,000/- was in cash. The assessee relied upon decision of Kolkatta-tribunal Kolkata in the case of Shri Nikhil Banik Mazumdar v. JCIT, in ITA Nos. 453 and 454/KOAL/2016, dated 10th January, 2018 . It was observed by ld. CIT(A) that the loan of Rs. 22,75,000/- granted to wife was duly shown by her husband in his Balance Sheet of Proprietary concern, IPS .The Balance Sheet and tax audit report of IPS was filed . The ld. CIT(A) observed that out of total loan of Rs. 22,75,000/- advanced by Proprietary concern of husband IPS , a loan of Rs. 6,00,000/- was transferred through RTGS , while rest of amount of Rs. 16,75,000/- was advanced through amounts withdrawn from the current account of the Proprietary concern IPS and given to the assessee by husband

namely Shyam Chandra Pandey, Prop. of M/s. IPS in cash. The Ld. CIT(A) rejected the contentions of the assessee , as the assessee has failed to show reasonable cause for accepting cash loan of Rs. 16,75,000/- , which in view of ld. CIT(A) could have been easily taken by assessee through banking channel. Thus, the ld. CIT(A) confirmed the penalty of Rs. 16,75,000/- levied by AO against the assessee u/s 271D of the 1961 Act, for accepting cash loan of Rs. 16,75,000/- in violation of provision of Section 269SS of the 1961 Act.

5. Aggrieved by appellate order passed by ld. CIT(A), the assessee has filed an appeal before the tribunal. The Ld. counsel for the assessee submitted that the assessee has received cash loan from her husband of Rs. 16,75,000/-, during the year under consideration . It was submitted that the written submissions have been filed by the assessee, before the tribunal . It was also submitted that assessee has shown reasonable cause and her case is covered under Section 273B of the Act read with Section 271D/269SS, wherein if assessee is able to show a reasonable cause, no penalty is exigible u/s 271D read with Section 269SS of the 1961 Ac. The Ld. counsel for the assessee submitted that cash loan of Rs. 16,75,000/- was taken by assessee from her husband , and since it is a transaction between close family members , Section 269SS will not be attracted . The assessee relied upon decision of Kolkatta tribunal in ITA Nos. 331 and 332/KOL/2010 in the case of Anant Himatsingka v. Addl. CIT . The assessee also relied upon decision of Kolkatta-tribunal in ITA Nos. 453 and 454/KOL/2016 in the case of Sri Nikhil Banik Majumdar v. JCIT. The assessee also relied upon decision of Kolkatta-tribunal in ITA Nos. 1839/KOL/2010 in the case of Manisha Prakash Amin v. JCIT. The assessee also relied upon judgment and order of Hon'ble Punjab and Haryana High Court in the case of CIT v. Saini Medical Store , reported in 2005

LawSuit(P&H) 228. The assessee also relied upon decision of Jaipur-tribunal in the case of Smt. Meena Devi Kumawat v. JCIT , in ITA no. 1201/JP/2019. The Ld. Sr. DR ,on the other hand, submitted that Section 269SS is applicable even to loans / deposits between husband and wife . It was submitted by ld. Sr. DR that in the instant case, both husband and wife are businessmen , and the wife has taken cash loan from husband in violation of Section 269SS , and penalty was rightly levied u/s 271D. Our attention was drawn by ld. Sr. DR to provisions of Section 269SS , and more specifically to second proviso to Section 269SS of the Act. The ld. Sr. DR made prayers before Division Bench to confirm the penalty levied by the AO u/s 271D of the 1961 Act.

6. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is an individual. The AO had observed that the assessee has taken loan from M/s Industrial Power Solution (IPS), 29-B, New Awas Vikas Colony, Betial Hata(South) , Gorakhpur, in cash to the tune of Rs. 16,75,000/- during the year under consideration, in violation of provisions of Section 269SS. The AO issued SCN dated 04.04.2016 (served on assessee on 04.04.2016 itself) as to why penalty u/s 271D read with Section 269SS, be not levied against the assessee as the assessee has taken loan in cash to the tune of Rs. 16,75,000/- in violation of Section 269SS of the 1961 Act. The assessee did not submitted any reply/explanation to the AO in response to SCN dated 04.04.2016. One more notice was issued by AO , and that too remained un-complied with. The assessee despite two opportunities provided by the AO, did not submit any explanation before the AO. Section 269SS at the relevant time , inter-alia, provided that no loan or deposit can be taken by any person otherwise than by an account payee cheque or account payee bank draft , if the loan or

deposit or aggregate amount of such loan or deposit , is twenty thousand or more. The violation/contravention of Section 269SS leads to levy of penalty u/s 271D , of a sum equal to the amount of the loan or deposit so taken or accepted in contravention/violation of provisions of Section 269SS. The AO levied penalty of Rs. 16,75,000/- against the assessee by invoking provisions of Section 271D read with Section 269SS, as the assessee did not furnished any details whatsoever before the AO. The assessee filed first appeal before Id. CIT(A) , and came forward for the first time with explanation that the assessee had purchased residential house during the year under consideration , which she claimed is for self use. The assessee has submitted before Id. CIT(A) that she took loan of Rs.22,75,000/- from proprietary concern of her husband Shri Shyam Chandra Pandey, namely M/s Industrial Power Solution(IPS), for acquiring residential house. It is claimed that the said loan of Rs. 22,75,000/- advanced by IPS to the assessee, is duly reflected by her husband proprietary concern namely IPS in its audited accounts. The Balance Sheet of IPS as well tax-audit report were filed by assessee for the first time, before Id. CIT(A), although no explanations/details or evidences whatsoever were furnished by the assessee before the AO. The assessee has claimed that the transactions between husband and wife are not covered/hit by Section 269SS. The Id. CIT(A) although dismissed the appeal of the assessee and confirmed the penalty levied by AO against the assessee. No doubt , powers of Id. CIT(A) are co-terminus with powers of the AO, but any additional evidences which are submitted by assessee before Id. CIT(A) for the first time , is regulated by Rule 46A of the Income-tax Rules, 1962 , which reads as under:

“[Production of additional evidence before the [Deputy Commissioner (Appeals)] [and Commissioner (Appeals)].

46A. (1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing Officer], except in the following circumstances, namely :—

- (a) where the [Assessing Officer] has refused to admit evidence which ought to have been admitted ; or
- (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer] ; or
- (c) where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal ; or
- (d) where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.

(3) The [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a reasonable opportunity—

- (a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or
- (b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the [Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.]”

From the perusal of the orders of the authorities below, it transpires that the assessee has submitted additional evidences before Id. CIT(A) for the first time, but, however, Id. CIT(A) did not complied with Sub-Rule (1), (2) and (3) of Rule 46A of the 1962 Rules, and proceeded to adjudicate the appeal of the assessee, although same stood dismissed by Id. CIT(A). The purpose and purport of Rule 46A of the 1962 Rules, is that the assessee is required to explain and justify as to why the evidences could not be produced in the

proceedings before the AO , and reasons and justification for producing the evidences for the first time before ld. CIT(A). Secondly, the ld. CIT(A) has to pass a speaking order in writing as to his decision as to admission or refusal to admit additional evidences. Thirdly, ld. CIT(A) is obligated to forward these additional evidences to the AO for his examination / cross examination , as well for filing by AO of evidences in rebuttal thereof. No remand report from AO on the additional evidences submitted by assessee for the first time before ld. CIT(A), was called for by ld. CIT(A). These additional evidences/explanations filed by the assessee before ld. CIT(A) for the first time, remained unverified. Thus in nut-shell , what emerges from records before us, is that ld. CIT(A) did not comply with Rule 46A of the 1962 Rules. Under these circumstances, we are of the considered view that matter may be restored to the file of ld. CIT(A) for fresh adjudication on merits in accordance with law, after complying with Rule 46A. We order accordingly.

7. In the result, appeal filed by the assessee is allowed for statistical purposes .

Order pronounced on 03/06/2022 at Allahabad, U.P, in accordance with Rule 34(4) of Income Tax (Appellate Tribunal) Rules, 1963

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

Sd/-
[RAMIT KOCHAR]
ACCOUNTANT MEMBER

DATED: 03/06/2022
KD Azmi

Copy forwarded to:

1. Appellant –Smt. Bandana Pandey, W/o Shri Shyam Chandra Pandey, 29-B, Betihata, South , Awas Vikas Colony, Gorakhpur, U.P.
2. Respondent –Addl.CIT , Range-1 , Gorakhpur, U.P.
3. Sr. DR , ITAT, Varanasi, U.P.
4. CIT, Varanasi,U.P.
5. The CIT(A), Gorakhpur, U.P.

Sr. P.S.