

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI**

**Before Dr. B. R. R. Kumar, Accountant Member
Sh. Yogesh Kumar US, Judicial Member**

ITA No. 7128/Del/2018 : Asstt. Year : 2013-14

ACIT, Central Circle-15, New Delhi	Vs	Ruhil Developers Pvt. Ltd., DSMT-538, DLF Towers, Shivaji Marg, Moti Nagar, New Delhi-110015
(APPELLANT)		(RESPONDENT)
PAN No. AAECR9458E		

**Assessee by : Sh. Akshat Jain, CA &
Sh. Rajat Jain, CA
Revenue by : Sh. T. Kipgen, CIT DR**

Date of Hearing: 01.08.2022	Date of Pronouncement: 30.08.2022
------------------------------------	--

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Revenue against the order of Id. CIT(A)-XXVI, New Delhi dated 29.08.2018.

2. Following grounds have been raised by the Revenue:

"1. The Id. CIT(A) has erred in law and on facts in deleting the penalty u/s 271D of the Income Tax Act, 1961 taking a view that the amount is assessed as undisclosed income of assessee and the provision of section 269SS r.w.s. 271D cannot be resorted for.

2. The Id. CIT(A) has erred in law and on facts in deleting the penalty u/s 271D of the Income Tax Act, 1961 ignoring the facts that the assessee has accepted the deposits in cash of more than Rs.20,000/- in clear violation of Section 269SS of the Income Tax Act, 1961."

3. A search & seizure operation u/s 132 of the Income-tax Act, 1961 was conducted in the Allied Strips (ASL) Group of cases on 17.12.2013. Thereafter, consequential search in the case of the assessee was also conducted on the same day. Notices u/s 153A of the I.T. Act, 1961 were issued on 22.04.2015. Shri Neeraj Ruhil, the Director of the company had admitted in the statement recorded u/s 132(4) of the Act during the search that entries of Rs. 5.30 crores in the books of company on account of advances were not genuine. This amount was admitted as undisclosed income of the said Director, which was introduced in the books of company. However, in the return filed u/s 153A of the Act Sri Neeraj Ruhil did not include the undisclosed income of Rs. 5.30 crores, as admitted during search.

4. During the assessment proceedings, the assessee was asked to produce the list of parties' along with their respective addresses, who have claimed to have been given advance in cash. The assessee provided a list of these parties. The assessee was given sufficient opportunity during the course of assessment proceedings, to put the facts and evidences in this regard. Notices u/s 133(6) was issued to all such parties of whom list was provided. The analysis of replies/summons of these parties is as under:

Sl No.	Name of the person	Amount received	In response to notice u/s 133(6) replies of advance giver are as under:
1.	Samunder Singh	40,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee.
2	Rajesh	40,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Perusal of document reveals that the name of Sh. Rajesh is not mentioned on the document. Not income tax assessee.
3	PardeepDalal	25,00,000	Stating that the said amount paid from retirement funds of his father but no

			documentary evidence enclosed. Not income tax assessee.
4	Subhas Chander	25,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee.
5	Devender Kumar	10,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee. Not income tax assessee.
6	Mukesh Kumar	10,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee.
7	Yashveer Joon	45,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Perusal of document reveals that the name of Sh. Yashveer Joon, is not mentioned on the document. Not income tax assessee.
8	Purshotam	10,00,000	Stating that the said amount paid from retirement funds of his father but no documentary evidence enclosed. Not income tax assessee.
9	Joinder	50,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. No documentary evidence regarding holding of agricultural land enclosed, Not income tax assessee.
10	Sandeep	50,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee.
11	Sanjay	30,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee.
12	Rajiv	10,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. No documentary evidence regarding holding of agricultural land enclosed. Not income tax assessee.
13	Rajinder	25,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. No documentary evidence regarding sale of agricultural product is enclosed. Not income tax assessee.
14	Sukhbir Singh	40,00,000	Source of advance is stated from agricultural income and sale of milk. Not income tax assessee.
15	Naveen	20,00,000	Source of advance is stated from agricultural income and mason work. No documentary evidence regarding holding of agricultural land enclosed. Not income tax assessee.

16	Ajit Singh	40,00,000	Both Notices u/s 133(6) dated 03.03.2016 and are returned back unserved but the reply of the 133(6) has been received on stating that he has earned agriculture income on his ancestral agricultural land but no documentary evidence enclosed in this regard.
17	Amit Dalal/Daya Ram	10,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee.
18	Daya Ram/Amit Dalai	50,00,000	Source of advance is stated from agricultural income on ancestral agricultural land. Not income tax assessee.

5. Keeping in view the above replies of the parties, summons u/s 131 of the Act were issued by the AO and the assessee was also asked to produce these parties in persons, who have not replied to summons.

6. Out of the said 18 parties, only two Shri Sanjay Kumar and Shri Purushotam responded to the summons and their statements were recorded. As per the AO, both the parties failed to prove their creditworthiness to advance such huge amounts to the assessee company as in their statements they have explained that they are doing the agricultural activities on lands not belonging to them and which in some cases it has been explained to be out of retirement funds and masonry which showed that their creditworthiness as doubtful to advance such huge cash advances. In the rest of the cases, there was no compliance nor have these parties been produced by the assessee for verification. In view of these facts the said sum of Rs. 5.30 crore being the credits in the books of the assessee company, was treated as undisclosed income of the assessee u/s 68 and added as such to its income for the year under assessment.

7. Thereafter, notice for levying penalty under Section 271D of the Act was issued to the assessee company on 26.09.2016 and in response to which the assessee filed its reply vide letter dated 29.09.2016 which stated that,

"With reference to your letter dated 28.09.2016 in which your honour proposed to levy penalty u/s 271D for violation of Provisions of Section 269SS of the Income Tax Act 1961 for which we would like to mention that penal provision of section 271D shall not applicable in our case, because we did not violate section 269SS provisions, Provided further that provisions of this section shall not apply to any advance accepted from customers. The assessee company is in business of trading of immovable property, company has received a sum of Rs. 5.3 crores from various persons during the period 1.04.2012 to 17.12.2013 being advance against property. We therefore request your good self to keep the said Penalty Order dropped."

8. The AO relying on the decision of Hon'ble High Court of Kerala in the case of Parayil Balan Nair Vs. CIT (63 taxmann 26) wherein the High Court has confirmed the penalty u/s 271D read with section 269SS of the Income Tax Act, 1961. The AO also relied on the order of Hon'ble High Court of Gujarat in the case of CIT Vs. Shyam Corporation in Civil Application No. 293/2013 and held that the assessee accepted cash advances of Rs. 5.30 crores and imposed a penalty of Rs. 5.30 crores upon the assessee which is a sum equal to the amount of advances accepted in contravention to the provisions of section 269SS of the I.T. Act.

9. The Id. CIT(A) deleted the addition holding that since the same amount has been treated as undisclosed income, no further penalty u/s 271D is called for. The operative part of the order of the Id. CIT(A) is reproduced below for ready reference:

"f. A receipt can be vested with singular nomenclature and cannot be taxed twice. It is pertinent to note in the same context that it is well settled law that once an amount is assessed as undisclosed in of assessee than provision of Section 269SS read with Section 271D of the Income Tax Act, 1961, cannot be resorted for levying penalty under said section. It is also settled law that (before amendment in Section 269SS of the Income Tax Act, 1961), for imposing penalty u/s 271D, it is necessary that the assessee has received cash in the form of loan or deposit. Though the AO has taken contradictory positions, but the appellant has also taken similarly dual and contradictory positions. The appellant has taken the defence that the transaction was a customer advance, it being paid in cash. This position has been upheld in respect of the quantum addition; hence the invocation of section 269SS and 271D would be contrarian. There cannot be two contradictory proceedings. The singular action on the issue under section 68 having been upheld, this penalty cannot be imposed as the basic classification is altered. This appeal is allowed and the penalty is directed to be deleted."

10. Aggrieved the revenue filed appeal before us. It was argued that the proceedings u/s 68 and the proceedings u/s 271D are totally different and one doesn't interpolate into the other one. It was argued that the undisclosed income of the assessee and the provisions of Section 269SS r.w.s. 271D would operate concurrently.

11. On the other hand, the Id. AR argued that the provisions of Section 269SS as existing as relevant to the Assessment Year in question do not envisaged the provisions for any advances received but was applicable only to any loan or deposit received otherwise than by an account payee cheque or account payee bank draft.

12. Heard the arguments of both the parties and perused the material available on record.

13. The provisions of the Act with regard to Section 269SS applicable to the A.Y. 2013-14 are as under:

CHAPTER XX-B
REQUIREMENT AS TO MODE OF ACCEPTANCE, PAYMENT OR]
REPAYMENT IN CERTAIN CASES TO COUNTERACT EVASION OF
TAX

[Mode of taking or accepting certain loans and deposits.

269SS. No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor), **any loan or deposit otherwise than by an account payee cheque or account payee bank draft** [or use of electronic clearing system through a bank account] if,—

- (a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or
- (b) 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), the amount or the aggregate amount remaining unpaid ; or
- (c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b),

is [twenty] thousand rupees or more :

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by,—

- (a) Government;
- (b) any banking company, post office savings bank or co-operative bank ;
- (c) any corporation established by a Central, State or Provincial Act;
- (d) any Government company- as defined in section 617 of the Companies Act, 1956 (1 of 1956)
- (e) 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 :

[Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.]

Explanation.—For the purposes of this section,—

[(i) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in section 51 of that Act;]

(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 loan or deposit of money.]

14. The word "advance" has been specifically omitted/not mentioned in the provisions of the Act. A "loan" is taken at the instance or for the benefit of the person requesting the money. Loan are payable only when the obligation to repay the amount arises, as per the loan agreement whereas "deposit" is taken at the instance and for the benefit of the person depositing the money and the deposit is payable on demand of the depositor.

15. According to Webster dictionary Deposit means to place especially for safekeeping or as a pledge. In simple words, Deposit means when you safe keep something with someone. Companies Act, 2013 defines deposit as "deposit" includes any receipt of money by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. The basic differences of loan and deposit is based on the method of receiving money, repayments and treatment accorded as per the provisions of the Companies Act.

16. As per Companies Act, 2013, the following types of money received by a company are termed as "loans":

- Money received from the Central Government or a State Government or Local Authority or Statutory Authority, or any amount received from any other source whose repayment is guaranteed by the Central Government or a State Government.
- Money received from foreign Governments, foreign or international banks, multilateral financial institutions (including, but not limited to, International Finance Corporation, Asian Development Bank, Commonwealth Development Corporation and International Bank for Industrial and Financial Reconstruction), foreign

Governments owned development financial institutions, foreign export credit agencies, foreign collaborators, foreign bodies corporate and foreign citizens, foreign authorities or persons resident outside India subject to the provisions of Foreign Exchange Management Act, 1999.

- Money received as a loan or facility from any banking company.
- Money received as a loan or financial assistance from Public Financial Institutions notified by the Central Government.
- Money received against issue of commercial paper or any other instruments issued in accordance with the guidelines of Reserve Bank of India.
- Money received by a company from any other company;
- Money received and held towards subscription to any securities, including share application money or advance towards allotment of securities pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities.
- Money raised by the issue of bonds or debentures or bonds or debentures compulsorily convertible into shares of the company within five years.
- Money received from an employee of the company not exceeding his annual salary.
- Non-interest bearing money received or held in trust.
- Money received in the course of doing business.
- Money held as advance for the supply of goods or provision of services.
- Money brought in by the promoters of the company by way of unsecured loan.
- Money accepted by a Nidhi company.

17. Thus, there is much difference between the loans and deposits which has been a subject matter of provisions of Section 269SS. Further, the advances are given for specified purchases in lieu of immediate or subsequent transfer of goods & services and settled fully after the conclusion of the transactions. The loan is a debt instrument whereas the advance is a credit instrument on the part of the recipient.

18. In this connection, we find that the Act squarely covered the issue of loans & deposits till the Finance Act, 2015 w.e.f. 01.06.2015. It was only after 01.06.2015 in addition to the loan or deposit, "any specified sum" was also brought under the ambit of Section 269SS. The earlier provisions could not envisage the utilization of provisions of Section 269SS for the "advances" taken or accepted. This mischief has been addressed w.e.f. 01.06.2015 only by adding the words "any specified sum". In a stricter sense "any specified sum" means any sum of money receivable, whether as advance or otherwise in relation to transfer of immovable property, whether or not the transfer takes place. In one way, the "specified sum" restricted the applicability of the provision to the advances taken or accepted or receivable only in relation to transfer of immovable property. However, at this juncture, it would be suffice to hold that the similar transactions entered by the assessee w.e.f. 01.06.2015 would be liable to the provisions of Section 269SS as well as Section 271D. For the sake of ready reference, the relevant portion of the Finance Act, 2015 is reproduced as under:

CHAPTER XX-B
REQUIREMENT AS TO MODE OF ACCEPTANCE, PAYMENT OR
REPAYMENT IN CERTAIN CASES TO COUNTERACT EVASION OF
TAX

[Mode of taking or accepting certain loans, deposits and specified sum.

269SS. No person shall take or accept from any other person (herein referred to as the depositor), any loan or deposit or any specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, if—

(a) the amount of such **loan or deposit or specified sum** or the aggregate amount of such loan, deposit and specified sum; or

(b) on the date of taking or accepting such loan or deposit or specified sum, any loan or deposit or specified sum taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or

(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b),

is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit or specified sum taken or accepted from, or any loan or deposit or specified sum taken or accepted by,—

(a) the Government;

- (b) any banking company, post office savings bank or co-operative bank;
- (c) any corporation established by a Central, State or Provincial Act;
- (d) any Government company as defined in clause (45) of section 2 of the Companies Act, 2013 (18 of 2013);
- (e) 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:

[Provided further that the provisions of this section shall not apply to any loan or deposit or specified sum, where the person from whom the loan or deposit or specified sum is taken or accepted and the person by whom the loan or deposit or specified sum is taken or accepted, are both having agricultural income and neither of them has any income chargeable to tax under this Act.]

Explanation.—For the purposes of this section,—

[(i) "banking company" means a company to which the provisions of the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in section 51 of that Act;]

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

(iii) "loan or deposit" means loan or deposit of money;

(iv) "specified sum" means any sum of money receivable, whether as advance or otherwise, **in relation to transfer of**

an immovable property, whether or not the transfer takes place.

19. Since, the amendment to the provisions of Section 269SS have been brought w.e.f. 01.06.2015 with regard to the "advances" received in relation to transfer of immovable property, and since the appeal before us pertains to the A.Y. 2013-14 and since the amendment is not retrospective in operation, we hereby hold that the appeal of the revenue is liable to be dismissed.

Order Pronounced in the Open Court on 30/08/2022.

Sd/-
(Yogesh Kumar US)
Judicial Member
Dated: 30/08/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR