

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 2421/MUM/2021 (A.Y: 2011-12)

Apurva Jagdish Nanavati Arunodaya Bungalow, Sarojini Road Vile Parle (W), Mumbai – 400056 PAN: AAAPN4583F (Appellant)	v.	JCIT – Range – 10(3) Aayakar Bhavan, M.K. Road Mumbai - 400020 (Respondent)
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Assessee by	:	Shri Hari S.Raheja
Department by	:	Shri Mehul Jain
Date of Hearing	:	10.05.2022
Date of Pronouncement	:	04.08.2022

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 31.10.2021 for the A.Y.2011-12.

2. Brief facts of the case are, assessee filed its return of income for the A.Y. 2011-12 declaring total income of ₹.28,29,320/-. The case of the assessee was reopened u/s. 147 of Income-tax Act, 1961 (in short "Act") on the basis of information received from Pr.DIT (Inv.) Ahmedabad that assessee has benefited from client code modification resulting into reduced income by ₹.5,24,665/-. The assessment was completed u/s.143(3) r.w.s. 147 of the Act on 27.12.2016, assessing the total income of the assessee at ₹.33,53,985/-. Further, on the basis of information received from DDIT(Inv.), Unit – 5(4), Mumbai the case of the assessee has been reopened u/s. 147 of the Act. The search and survey action u/s.132 carried out in the case of M/s. Evergreen Enterprises unearthed an undisclosed activity of money lending and borrowing in unaccounted cash being operated at the premises of M/s. Evergreen Enterprises by Mr.Nilesh Bharani, the partner. It was observed that the assessee has taken the following cash loan: -

S.No.	Code	Name	Coded Amount As per Ledger	Actual Amount (in. ₹.)	Contact Person	Contact Number	F.Y.
1.	FINESS POWDER	FINESS POWDER	1000	1000000	Apurvabhai	9820061079	2010-11

3. Assessing Officer observed that assessee has violated the provisions of section 269SS of the Act and when the assessee was asked to submit

why the penalty u/s. 271D should not be imposed. In reply assessee has submitted as under: -

"1. Mr. Nilesh Bharani, who has made the statement u/s 132(4) is believed to have retracted his statement subsequently and accordingly a letter in this regard was submitted to the DIT (Inv.)-2, Mumbai.

Though the Assessing Officer has provided the reasons recorded for reopening of the assessment but did not provide statement of Shri Nilesh Bharani, ledger account of the assessee in the books of M/s.Evergreen Enterprises based on which Assessing Officer has concluded about alleged cash borrowings made by the assessee.

3. There was no corroborative evidence that the assessee has borrowed any cash from M/s Evergreen Enterprises/Mr. Nilesh Bharani. It is submitted that if any money has been borrowed by the assessee the same would have been entered in his books of accounts. however there is no such entries found in the books of the assessee. Moreover had the assessee borrowed any money in cash, some evidence in the form of acknowledgement, promissory note etc. should have been found from the office of M/s Evergreen Enterprises/Mr. Nilesh Bharani. In support of above contention, assessee relies upon the decision of Tribunal Calcutta Bench in the case of T.S. Venkatesan (2000) 69 TTJ 66 (Cal), wherein it was held as under:

In view of the fact that a mere entry on a loose sheet found from the possession of a third person and a statement given by another third person in connection with search/assessment proceedings of still another third person without the copy of the statement being furnished to the assessee and thereby allowing the assessee an opportunity to rebut the contentions made in the statement and an opportunity to cross examine the witness coupled with the fact-situation that the statement too is quite vague and general in nature simply stating that the entry represents payment and TSV stands for T.S. Venkatesan without stating that the amount entered therein was paid by him or before him to the assessee together with the fact that the assessee has denied to have received the said sum of Rs. 10 lacs in his sworn statement recorded by Assessing Officer, we are of the considered opinion that it cannot justifiably be assumed/inferred that the sum of Rs. 10 lacs was paid to the assessee. In the circumstances as they stand it cannot also be presumed/inferred that the said payment to the assessee, if at all the same had been there.

4. That Section 269SS was inserted by the Finance Act. 1984. The scope and effect of Section 269SS was explained in the Circular No. 387, dt. 6th July, 1984. In the above Circular, it is mentioned that unaccounted cash found in the course of search is often explained by the taxpayer as representing loans taken from various persons. With a view to countering this device, Section 269SS has been inserted in the IT Act debarring persons from taking or accepting loans or deposits otherwise than by account payee cheques or account payee bank draft. It is stated that there was no search at the premises of the assessee and no unexplained cash was found from the assessee. However in the present case, the AO concluded that the assessee has borrowed the money in cash and initiated penalty. Assessee submits that this was not purpose of introduction of Section 269SS. In view of the above, assessee submits that the levy of penalty under Section 271D in his case is not called for..

5. As stated above. Shri Nilesh Bharani, is believed to have retracted his statement subsequently, wherein he has denied whatever was stated at the time of search. It is also learnt that in his retraction statement he has also explained the reasons for denying his statement recorded during the course of search and survey action carried on by the Investigation Unit of the Department. In this connection, assessee submits that it is a settled law that the statement of any third person cannot be utilized against the other person unless the other person is given an opportunity to cross examine the witness. In the present case no such opportunity was given to assessee to cross examine the witness and therefore penalty u/s 271D of the Act cannot be levied for violation of section 269SS.

Assessee further submits that the Assessing Officer in the assessment order has also mentioned that the DDIT (Inv.), Unit-5(4), Mumbai has found two sets of ledgers relating to lending activity carried on at the premises of M/s Evergreen Enterprises by Mr. Nilesh Bharani, which contained the details of cash amount borrowed by different persons and alleged that assessee was one of the individual who has borrowed in cash Rs.10,00,000/

In this regard, it is submitted that based on the incriminating material found from the third party M/s Evergreen Enterprises during search cannot be used against the assessee unless corroborated by other evidence. In fact presumption under section 132(4A) can be drawn against the person in whose case search is authorized and from whose possession books of accounts and other documents are found in the course of search.

In support of above submission, assessee relies upon the decision of Tribunal, Ahmedabad Bench in the case of Prarthana Construction (P) Ltd., wherein it was held "The presumption under the provisions of

Section 132(4A) would in any case not be applicable to a third party from whose possession such papers and documents have not been found by the Revenue" In view of above, we have no hesitation to hold that the presumption under Section 132(4A) is applicable only against the person from whose possession books of account or other documents were found and not against any other person

In view of above submission, your goodself requested not to levy penalty in this case merely on the basis of statement of Shri Nilesh Bharani partner of M/s Evergreen Enterprises recorded u/s 132(4) of the IT.Act and was retracted by him later on. In case any further details explanations are required in the above matter, we shall be please to furnish the same"

4. After considering the submissions of the assessee the Assessing Officer observed that during search action it was found that two sets of ledgers are maintained at the premises of M/s. Evergreen Enterprises. One is for lenders and other is for borrowers. The Lender Ledger contains the code of the lender, name of the lender, cash amount lent by the lender borrower wise, rate of interest for amount lent and the date up to which interest thereon has been paid in cash. The borrower Ledger contains the code of the lender, name of the borrower, cash amount borrowed by the borrower lender-wise, rate of interest for the amount borrowed, and the date up to which interest thereon has been charged in cash. The Assessing Officer further observed that it is evident from the information found from M/s. Evergreen Enterprises that assessee is one of the beneficiary of cash loan of ₹.10,00,000/- and therefore assessee has

contravened the provisions of section 269SS of the Act. Accordingly, he imposed penalty u/s. 271D of the Act.

5. Aggrieved, assessee preferred an appeal before the National Faceless Appeal Centre, Delhi. Assessee did not make any compliance to the notices issued by National Faceless Appeal Centre, Delhi on two occasions i.e., on 09.03.2021 and 29.10.2021. Since no one complied for the notices issued u/s. 250 of the Act, the Ld.CIT(A) proceeded to confirm the penalty levied by the Assessing Officer by relying on case laws.

6. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1. On the facts and circumstances of the case and in law, the order passed by learned CIT(Appeal), NFAC, Delhi as well as learned Assessing Officer are bad in law and against the facts of the case.

2. On the facts and circumstances of the case and in law, the learned Assessing Officer erred in invoking provisions of section 269SS of the Income Tax Act.

3. On the facts and circumstances of the case and in law, the learned CIT(A) erred in sustaining the penalty u/s 271D of the Income Tax Act while upholding the order levying the penalty u/s 271D amounting Rs.10,00,000/- without appreciating the facts of the case and totally ignoring submission made before him and dismissing the appeal on the basis that no representation has been made by the assessee.

4. On the facts and circumstances of the case and in law, the learned CIT(A) erred in disposing off the appeal by passing ex-parte

order under section 250 of the Income Tax Act, without considering detailed submission made by the appellant on 09.03.2021 and 28.10.2021 in response to notice u/s 250 received from CIT(A), NFAC, Delhi on 25.02.2021 and 26.10.2021 fixing hearing on 09.03.2021 and 29.10.2021 respectively. Appellant submits that action of the CIT(A) in not considering the submission made by the appellant and dismissing the appeal on the basis that no representation has been made by the assessee, despite the fact that in response to notice received from CIT(A) due compliance was done in time and which are available on record, and therefore the order of the CIT(A) is against the cardinal principal of natural justice and accordingly order deserves to be quashed.

5. On the facts and circumstances of the case and in law, the learned CIT(A) erred in sustaining the order of levy of penalty under section 271D of the Income-Tax Act, 1961 even when no proper satisfaction was recorded by the Assessing Officer.

6. On the facts and circumstances of the case and in law, the learned CIT(A) erred in confirming the levy of penalty under section 271D of the Income-Tax Act, 1961 of Rs.10,00,000/- without properly appreciating the facts of the case and submission made before him more so when no such amount of Joan was admitted or found credited in the books of accounts of the appellant and hence levy of penalty/s 271D is absolutely erroneous and bad in law requiring outright annulment."

7. On the facts and circumstances of the case and in law, the learned CIT(A) erred in not following various judgments of High Court and ITAT submitted during the course of appellant proceeding.

8 On the facts and circumstances of the case and in law, the learned CIT(A) erred both in law and on facts in confirming the order of penalty of Rs. 10,00,000/- passed u/s 271D of the Income Tax Act 1961 for violation of the provisions of section 269 SS of the Act ignoring the fact that the authority levying penalty has failed to establish the violation of aforesaid section 269 SS, in view of the proposition that the onus is on the revenue to establish the default, unlike the deeming fiction available by virtue of Explanations in section 271(1)(c) of the Act where onus is fastened on the assessee to prove the absence of default."

9 On the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that appellant has never accepted during assessment/ penalty proceedings that he has taken cash loan from M/s Evergreen Enterprises on whom a search was conducted and based on material found during the search with M/s Evergreen Enterprises and no addition on this count was made in the assessment order but yet penalty u/s 271D has been levied and therefore the alleged finding is absolutely erroneous and bad in law requiring outright annulment."

10 The appellant craves leave to add, amend, alter, modify, delete and/or change all or any above grounds on or before the date of hearing."

7. At the time of hearing, Ld. AR of the assessee brought to our notice submissions made by the assessee before the Ld.CIT(A) and relying upon the above submissions he submitted that the addition made by the Assessing Officer is based on the statement of the third person and assessee was not given any opportunity for cross examination. Further, he submitted that there are no corroborative evidences with the Assessing Officer and merely relying on the statement of third party he has proceeded to levy the penalty u/s. 271D of the Act.

8. On the other hand, Ld.DR brought to our notice the information found during the search in the premises of M/s. Evergreen Enterprises which contain the details of the person who has taken loan as well as their contact number. In the given case it is clearly indicate that the name of the assessee is present in the ledger found in the premises of

M/s.Evergreen Enterprises along with contact Number i.e., Mobile Number of the assessee which clearly proves that the transaction is carried on by the assessee with the above said company. The assessee has claimed that there is no corroborative evidences, however, it clearly indicates that assessee has entered into transactions with the M/s. Evergreen Enterprises involving cash transactions. Ld. DR submitted that the penalty levied by the Assessing Officer is proper.

9. Considered the rival submissions and material placed on record, we observe that during search certain informations were recovered in the premises of M/s. Evergreen Enterprises which contains the transactions involving cash transaction of ₹.10,00,000/- with the information containing details of assessee and contact number of assessee (Mobile No. 9820061079). This clearly indicates that assessee has directly or indirectly involved in this transaction and the assessee has vehemently argued before us that Assessing Officer has merely relied on the statement of third party and also has not given any opportunity for cross examination. This is basically against the natural justice, any proceeding concluded without giving any proper opportunity of cross examination to the other party and we also noticed that assessee has not made any representation before the Ld.CIT(A) and also Ld.CIT(A) has not

considered the written submissions by the assessee. However, we observe that all along assessee was contesting that there are no corroborative evidences involving assessee in these transactions. However, there is a clinching evidence that assessee's name and mobile number is found in the ledger involving cash transactions. Assessee has heavily relied on the written submissions submitted before the Ld.CIT(A). In the written submissions assessee has merely argued on the fact that no cross examination and no opportunity was granted to the assessee and relied on several decisions. Since there is a direct evidences indicating the name and mobile number in the ledger found in the premises of M/s.Evergreen Enterprises that assessee has involved in these transactions, we do not find any reason to remit this issue back to the file of the lower authorities except to find that there is direct corroborative evidence found in the transactions involving the name of the assessee and contact details. At the time of hearing Ld. AR has not denied the fact that the Mobile Number contained in the ledger is not belongs to the assessee. Therefore, there is a clear evidences of involvement of the assessee in this cash transaction of ₹.10,00,000/-. Further, the case laws relied by the assessee before Ld.CIT(A) are factually distinguishable, in those decisions, there was no corroborative evidence found like the case in the

present case and the Assessing Officer has merely relied on the statements of third parties, however, in this case even though the third parties has retracted the statements, still the evidences contained in the ledger copy found during search clearly indicates that assessee has involved in this cash transactions directly or indirectly. Therefore, we are inclined to sustain the addition made by the Assessing Officer. Accordingly, ground raised by the assessee is dismissed.

10. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the open court on 04th August, 2022

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER
Mumbai / Dated 04.08.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum