

**आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**INDORE BENCH, INDORE**

**BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**  
**AND**  
**SHRI B.M. BIYANI, ACCOUNTANT MEMBER**

*(Conducted through Virtual Court)*

**ITA No.283/Ind/2021**  
**Assessment Year: 2008-09**

Prakash Asphaltings & Toll of Highway (India) Ltd., 76, Mall Road, Mhow	<b><u>बनाम/</u></b> Vs.	ACIT (Central)-1 Indore
(Appellant / Assessee)		(Respondent / Revenue)

**ITA No.20/Ind/2021**  
**Assessment Year: 2008-09**

ACIT, Central-1, Indore	<b><u>बनाम/</u></b> Vs.	Prakash Asphaltings & Toll of Highway (India) Ltd., 76, Mall Road, Mhow
(Appellant / Revenue)		(Respondent / Assessee)

**CO No.47/Ind/2021**  
**(arising out of ITA No.20/Ind/2021)**  
**Assessment Year: 2008-09**

Prakash Asphaltings & Toll of Highway (India) Ltd., 76, Mall Road, Mhow	<b><u>बनाम/</u></b> Vs.	ACIT (Central)-1, Indore
(Appellant / Assessee)		(Respondent / Revenue)
<b>PAN: AABCP 0398 N</b>		
Assessee by	Shri Madhur Agrawal, AR	
Revenue by	Shri P.K. Mitra, CIT-DR	
Date of Hearing	19.10.2022	
Date of Pronouncement	10.01.2023	

## आदेश / O R D E R

### Per Bench:

Feeling aggrieved by the appeal-orders passed by Ld. CIT(A), detailed hereafter, the assessee/revenue has filed these appeals/cross-objection for assessment-year **["AY"]** 2008-09.

ITA No. 283/Ind/2021 is a quantum-appeal filed by assessee against the appeal-order dated 18.08.2020 passed by learned Commissioner of Income-Tax (Appeals)-3, Bhopal **["Ld. CIT(A)"]**, which in turn arises out of assessment-order dated 03.03.2016 passed by learned ACIT, Central-1, Indore **["Ld. AO"]** u/s 143(3) /147 of Income-tax Act, 1961 **["the act"]**. ITA No. 20/Ind/2021 and Cross-Objection No. 47/Ind/2021 are penalty-matters filed respectively by the revenue and assessee against the appeal-order dated 06.07.2020 passed by Ld. CIT(A), which in turn arise out of penalty-order dated 30.09.2016 passed by learned Addl. CIT / Joint CIT, Central, Indore **["Ld. Addl. CIT"]** u/s 271D of Income-tax Act, 1961.

2. Since the factual backdrop and basis for adjudication of all these matters is same, we proceed to decide by this common order for the sake of convenience.

3. Heard the learned Representatives of both sides at length and case-records perused.

4. The registry has informed that there is a fling-delay of 439 days in ITA No. 283/Ind/2021 and 94 days in ITA No. 20/Ind/2021, therefore these appeals are time-barred. The Ld. AR prayed that the delay has occurred due to Covid-19 Pandemic. The Ld. AR further placed reliance on the order of Hon'ble Supreme Court in **Suo Motu Writ Petition (C) No. 3 of 2020 read with Misc. Applications**, by which suo motu extension of the limitation-period for filing of appeals w.e.f. 15.03.2020 under all laws has been

granted and hence there is no delay in fact. We confronted the Ld. DR who agreed to the submission of Ld. AR. In view of this, the appeals are proceeded with for hearing, there being no delay.

**Quantum-matters upto first-appeal:**

5. The original assessment of assessee was completed vide order dated 30.12.2010 u/s 143(3) of the Act. Subsequently, a search was conducted on 27.08.2014 at the premises of M/s PATH Oriental Highways Public Limited, Mhow during which an incriminating document marked as “LPS-1, Page No. 21 to 23” was seized which contained the details of cash-transactions done between M/s Prakash Asphalttings & Toll Highways (India) Ltd. [Hereinafter referred to as **“the assessee” or “PATL”**] and M/s Agroh Infrastructure Developers Pvt. Ltd. [**“AIDPL”**] were found. On analysis of document, the Ld. AO framed a view that the assessee had given a loan of Rs. 1,15,00,000/- to AIDPL, which has not been recorded in the books of account. Therefore, treating the same as payment made out of undisclosed income, the Ld. AO re-opened assessment u/s 147 of the Act vide notice dated 18.03.2015 u/s 148. For the sake of immediate reference, the reason of re-opening, as reproduced by Ld. AO in Para No. 3 of the assessment-order, is as under:

*“3. The reason recorded u/s 148(2) of the IT Act in which produced here below:*

*1. A search and seizure action u/s 132 of the Income-tax Act, 1961 were carried out at the premises of M/s PATH Oriental Highways Public Limited, situated at 76 Mall Road on 27.08.2014.*

*2. During the course of search action u/s 132 of the Income Tax Act, 1961 was carried out at the business premises of your company. During the course of search various incriminating documents were found and seized as LPS-1. Page no. 21 of LPS-1 contains details of cash paid and received since June, 2003 to 15.09.2019 from the business premises of the company at Aqua point, AB Road, Umaria, Mhow. Similarly, page no. 23 of the same LPS contains certain transaction between M/s. Prakash Asphaltting & Toll Highways (India) Ltd. and M/s Agroh Infrastructure Developers Pvt. Ltd. On perusal of details appearing on these loose papers it was revealed that M/s*

*Prakash Asphaltting & Toll Highways (India) Ltd. has given cash amount of Rs. 1,15,00,000/- to M/s Agro Infrastructure Developers Pvt. Ltd. in the F.Y. 2007-08 i.e. A.Y. 2008-09 but these papers were neither found recorded in the books of your company nor in the books of M/s. Agroh Infrastructure Developers Pvt. Ltd. Therefore, it is clear that these payments have been made by M/s Prakash Asphaltting & Toll Highways (India) Ltd. from its unaccounted income.”*

6. Finally, the Ld. AO completed re-opened assessment vide order dated 03.03.2016 after making an addition of Rs. 1,15,14,659/- by observing and holding thus:

*“14. Therefore, it is clear and evident that the assessee company has given the loan of Rs. 1,15,00,000/- to the company M/s AIDPL out of undisclosed income and charged total interest of Rs. 14,659/- for A.Y. 2008-09 and the same transaction has not been incorporated in the regular books of account. Hence, an addition of Rs. 1,15,00,000/- and interest charged of Rs. 14,659/- is made on account of unexplained cash credit to the total income of the assessee for A.Y. 2008-09. Penalty proceeding u/s 271(1)(c) of the Act is initiated separately on this issue. **Further, the matter is being referred to Addl. Commission of Income-tax (Central), Indore for issuing notice and imposing penalty u/s 271D and 271E of the “Act”.***

7. Against assessment-order, the assessee filed first-appeal to Ld. CIT(A) wherein the challenge was made to the legality of re-assessment as well as the addition of Rs. 1,15,14,659/- on merit. While deciding appeal, the Ld. CIT(A) upheld the legality of re-assessment. However, he deleted the addition of Rs. 1,15,14,659/- on merit by observing and holding thus:

*“Ground No.3: Through this ground of appeal, the appellant has challenged addition of Rs.1,15,14,659/- on account of unexplained cash credit. During the course of appellate proceeding the AO vide letter F.No. ACIT(Cen)-1/Ind/Remand Report/2017-18 dated 29.05.2017 has stated as under:*

*i. The search and seizure action u/s 132 of the Act were carried out on the business as well as residential premises of the Agroh group and PATH Group on 27.08.2014.*

*ii. During the course of search, a set of incriminating documents (page no.21-23 of LPS-1) were seizure from the office premises of Agroh Infrasturcture Developers Pvt. ltd. (AIDPL) at Aqua point, AB Road, Umaria, Mhow. On perusal of these seized documents page nos. 21 to 23 of LPS-1, cash loan of Rs.1,15,00,000/- has been given by AIDPL to*

*Prakash Asphalting & Toll Highways (I) Ltd. (PATH(I) LTD) and subsequently which was repaid along with the interest of Rs.14,659/-*

*iii. On the basis of these seized documents (page no.21 to 23 of LPS-1), the cases of PATH(I) LTD and AIDPL were reopened for scrutiny and the assessment orders were passed u/s 143(3) r.w.s. 147 of the act on 03.03.2016 in both the cases for AY 2008-09. In the assessment orders, it was wrongly taken as the loan was given by PATH (I) Ltd. to AIDPL and addition was made in the hands of PATH (I) Ltd.*

*iv. Subsequently, during the assessment proceedings of AIDPL in AY 2008-09 the seized documents namely LPS 1 (page no. 21-23) seized from office premises at Aqua Point, AB road Umaria Mhow were confronted to AIDPL. During the assessment proceeding for A.Y. 2009-10, AIDPL has given cash loan at Rs. 1,22,05,000/- to PATH(I) Ltd. which has been received back from PATH (I) Ltd. in A.Y. 2008-09. It is to be mentioned here that the AIDPL has also accepted the same facts in the submission dated 21.01.2017 filed before the Pr. CIT(Central), Bhopal in response to the notice u/s 263 of the Act for AY 2008-09.*

*v. From the seized documents page no.21 of LPS-1, it is seen that total cash loan given by AIDPL is Rs.1,22,05,000/-. Similarly, from page no. 23 of LPS-1, it is seen that the AIDPL has received interest of Rs.14,659/-. The total undisclosed income in these seized documents is Rs. 1,22,19,659/- which is admitted by AIDPL in AY 2008-09 and order u/s 263 has been passed accordingly.*

*3. Considering the above facts, the addition of Rs.1,15,14,659/- was wrongly been made in the assessment order of PATH(I)Ltd which may kindly be deleted.”*


*4.2.1. From the report of the AO, it is clear that the additions in AY 2008-09 were wrongly made in the assessment order passed dated 03.03.2016 u/s 143(3) r.w.s. 147 which is under consideration. Therefore, addition made by the AO amounting to Rs. 1,15,14,659/- is deleted. Therefore, appeal on this ground is allowed.”*

**Penalty-matters upto first-appeal:**

8. As observed earlier, while completing assessment the Ld. AO made a reference to Ld. Addl. CIT for imposing penalty u/s 271D and 271E of the act. Based on such reference made by Ld. AO, the Ld. Addl. CIT issued two separate notices, both dated 23.03.2016, one for penalty u/s 271D and

other u/s 271E, which are placed in the Paper-Book at Page No. 47 and 48,  
scanned copies thereof being reproduced below:

ANNEXURE-12.01 Ametha (47)

  
OFFICE OF THE  
ADDL. COMMISSIONER OF INCOME TAX (CENTRAL), INDORE  
AAYAKAR BHAWAN, MAIN BUILDING, OPP. OF WHITE CHURCH, INDORE-452001

PAN : AABCP0398N | 508 Dated: 23.03.2016

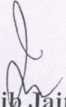
To  
M/s Prakash Asphaltting & Toll Highways (India) Ltd.  
76, Mall Road,  
Mhow

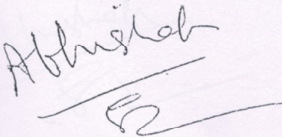
**NOTICE UNDER SECTION 274 READ WITH SECTION 271 D OF THE  
INCOME TAX ACT, 1961**

The assessment proceedings u/s 143(3) for A.Y. 2008-09 has been completed on 03.03.2016 and it is revealed that a violation of provision of section 269SS of the Income Tax Act, 1961 appears in your case, which may invoke a penalty u/s 271D.

You are hereby requested to appear before me 11:00 am on 06.04.2016 and show cause why an order imposing a penalty on you should not be made u/s 271D of I.T. Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing on or before the said date which will be considered before any such order is made section 271D.

(Seal)

  
(Rajib Jain)  
Addl. Commissioner of Income Tax (Central)  
Indore



ANNEXURE-12.02

48



OFFICE OF THE  
ADDL. COMMISSIONER OF INCOME TAX (CENTRAL), INDORE  
AAYAKAR BHAWAN, MAIN BUILDING, OPP. OF V. V. T. CHURCH, INDORE-452001  
PAN : AABCP0398N / 508 Dated: 23.03.2016

To  
M/s Prakash Asphaltting & Toll Highways (India) Ltd.  
76, Mah Road ,  
Mhow

**NOTICE UNDER SECTION 274 READ WITH SECTION 271 E OF THE  
INCOME TAX ACT, 1961**

The assessment proceedings u/s 143(3) for A.Y. 2008-09 has been completed on 03.03.2016 and it is revealed that a violation of provision of section 269T of the Income Tax Act, 1961 appears in your case, which may invoke a penalty u/s 271E.

You are hereby requested to appear before me 11:00 am on 06.04.2016 and show cause why an order imposing a penalty on you should not be made u/s 271E of I.T. Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing on or before the said date which will be considered before any such order is made section 271E.

(Seal)

(Rajib Jain)


Addl. Commissioner of Income Tax (Central)  
Indore

Akhil  
[Signature]

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30/3/16

9. Subsequently, the Joint Commissioner of Income-tax (Central), Indore also issued two separate notices, both dated 08.07.2016, one for penalty u/s 271D and other u/s 271E, which are placed in the Paper-Book at Page No. 49 and 50, scanned copies thereof being re-produced below:

ANNEXURE-12.03 (49)


  
OFFICE OF THE  
JOINT COMMISSIONER OF INCOME TAX (CENTRAL), INDORE  
Aayakar Bhawan, Main Building, Room No.307, Opp. White Church, Indore  
PAN: AABCP0398N / 189 Dated: 08.07.2016

To,  
M/s Prakash Asphaltting & Toll Highways (India) Ltd.  
76, Mall Road ,  
Mhow

NOTICE UNDER SECTION 274 READ WITH SECTION 271 D OF THE  
INCOME TAX ACT, 1961

The assessment proceedings u/s 143(3) for A.Y. 2008-09 has been completed on 03.03.2016 and it is revealed that a violation of provision of section 269SS of the Income Tax Act, 1961 appears in your case, which may invoke a penalty u/s 271D.

You are hereby requested to appear before me 11:00 am on 16.07.2016 and show cause why an order imposing a penalty on you should not be made u/s 271D of I.T. Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing on or before the said date which will be considered before any such order is made section 271D.

  
(Dr. Satyapal Singh Meena)  
Jt. Commissioner of Income Tax (Central)  
Indore

Note: As per CBDT Circular No. 10/2016 dated 26/04/2016 the limitation period is not dependent on the pendency of appeal against the order or other order referred to in section 275(1)(a) of the I.T. Act., if any. Please also refer to the Hon'ble Delhi High Court decision in the case of Commissioner of Income Tax v. Worldwide Township Projects Ltd.I, vide its order dated 21-5-2014 in ITA No. 232/2014, wherein court has considered the issue and observed that, "It is well settled that a penalty under this provision is independent of the assessment. The action inviting imposition of penalty is granting of loans above the prescribed limit otherwise than through banking channels and as such infringement of Section 269SS of the Act is not related to the income that may be assessed or finally adjudicated.

CA Abhishek  
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ANNEXURE-12.04 (50)

OFFICE OF THE  
JOINT COMMISSIONER OF INCOME TAX (CENTRAL), INDORE  
Aayakar Bhawan, Main Building, Room No.307, Opp. White Church, Indore  
PAN: AABCP0398N / 1189 Dated: 08.07.2016

To,  
M/s Prakash Asphaltting & Toll Highways (India) Ltd.  
76, Mall Road,  
Mhow

NOTICE UNDER SECTION 274 READ WITH SECTION 271 E OF THE  
INCOME TAX ACT, 1961

The assessment proceedings u/s 143(3) for A.Y. 2008-09 has been completed on 03.03.2016 and it is revealed that a violation of provision of section 269T of the Income Tax Act, 1961 appears in your case, which may invoke a penalty u/s 271E.

You are hereby requested to appear before me 11:00 am on 26.07.2016 and show cause why an order imposing a penalty on you should not be made u/s 271E of I.T. Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing on or before the said date which will be considered before any such order is made section 271E.



(Dr. Satyapal Singh Meena)  
Jt. Commissioner of Income Tax (Central)  
Indore

Note: As per CBDT Circular No. 10/2016 dated 26/04/2016 the limitation period is not dependent on the pendency of appeal against the order or other order referred to in section 275(1)(a) of the I.T. Act., if any. Please also refer to the Hon'ble Delhi High Court decision in the case of Commissioner of Income Tax v. Worldwide Township Projects Ltd.1, vide its order dated 21-5-2014 in ITA No. 232/2014, wherein court has considered the issue and observed that, "It is well settled that a penalty under this provision is independent of the assessment. The action inviting imposition of penalty is granting of loans above the prescribed limit otherwise than through banking channels and as such infringement of Section 269SS of the Act is not related to the income that may be assessed or finally adjudicated.

A. Abhinav  
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09/11/16

10. In response, the assessee submitted a reply dated 26.07.2016, wherein the assessee raised, among others, a legal plea that penalty u/s 271D is applicable for violation of section 269SS i.e. where the loan is taken and penalty u/s 271E is applicable for violation of section 269T i.e. where the loan is repaid. But, however, in the present case the allegation of department is that the assessee has given loan to AIDPL. Hence, neither section 271D nor section 271E is applicable *qua* the assessee.

11. Based on above pleading made by assessee, the Ld. Addl. CIT sought a factual-report from Ld. AO on the nature of transaction, whereupon the Ld. AO submitted factual-report dated 28.09.2016 as mentioned in Para No. 5 / Page No. 7 of the penalty-order. The contents of factual-report are also extracted by Ld. Addl. CIT in Para No. 5 of the penalty-order, according to which it was reported by Ld. AO that AIDPL has given loan to the assessee i.e. the assessee has taken loan from AIDPL. The said extract of factual-report is re-produced below in entirety for an immediate reference:

*“In this connection, it is submitted that the required factual report in the above mentioned assessee for levy of penalty u/s 271D & 271E of the Income Tax Act, 1961 (hereinafter referred to as the Act) is as under:*

1. *The Search and seizure action u/s 132 of the Act was conducted on the business premises of Agroh Infrascucture Developers Pvt. ltd. (AIDPL) and Prakash Asphaltting and Toll Highways (India) Ltd. (PATH). Subsequently, the assessment order was passed u/s 143(3) r.w.s. 147 of the I.T. Act 1961 on 03.03.2016 for A.Y. 2008-09 in both the cases.*

2. *On the basis of seized material as LPS-1 (pages 21 to 23) seized from office premises of at Aqua Pint, A.B. Road, Umaria Mhow, the case was reopened for scrutiny for A.Y.2008-09. The impugned document which formed the basis for reopening of the cases of AIDPL and PATH was page 21 to 23 of LPS-1, same is mentioned as under:*

*XXX (not reproduced for brevity)*

*It is evident that these three LPS are correlated to each other. As the entry in table no. 2 of page-23 as mentioned above, the total of cash loan of Rs.1,15,00,000/. is exactly matching with the entry of cash received of dated 29 March and 31 March 2008 of table in page-21. It is also worth mentioning*

that the hand written jottings on page-23 (mentioned in bottom) share buyback 13/1/9 3,66,25,000 is also getting correlated with the entry mentioned in Page No. 21 of LPS-1 relating to entry in 15 Jan, 09.

During the course of assessment proceedings, the submission of the assessee Agroh Infrastructure Developers Pvt. Ltd (AIDPL) is as follows: \_

b. The first table Contains calculation of interest On Rs. 85.00 Lacs given by Agroh infrastructure Developers Private Limited to Prakash Asphaltings and Toll Highways India Limited. The Amount of Advance Rs. 85.00 Lacs is Correct and was given by the Agroh Infrastructure Developers by way cheque on 25/03/2008, however, total interest charged from PATH for the year is Rs 1159466/- which has been included in books and TDS also has been deducted on same. Copy of account of Prakash Asphalting and Toll Highways India Limited is enclosed herewith.

From this Submission of the assessee, it is clear that in page no. 23 of LPS-1 the entry of Rs. 85 lakhs is a valid entry and is a loan given by AIDPL to PATH. Obviously, if the left-hand side column on upper side of page.23 is correct and if it means that AIDPL has given loan to PATH from bank account. Then, it automatically follows that in the bottom side of page- 23 of LPS-1 is also correct and it means that the cash loan has been given by AIDPL to PATH.”

12. Finally, Ld. Addl. CIT passed penalty-order dated 27.09.2016 imposing a penalty of Rs. 1,15,00,000/- u/s 271D read with section 269SS of the Act, by concluding thus:

“6. Taking into consideration the facts of the case and the discussion made above, I am satisfied that the assessee has breached the provisions of section 269SS and made itself liable for levy of penalty u/s 271D r.w.s. 269SS of the Act. I, therefore, levy a penalty of Rs. 1,15,00,000/- (Rupees one crore fifteen lakh only) u/s 271D of the Income-tax Act, 1961 for the Assessment-Year 2008-09.”

13. Against penalty-order, the assessee filed first-appeal to Ld. CIT(A). The Ld. CIT(A) deleted the penalty by observing and holding thus:

“4. After taking into consideration the AO's findings and appellant's oral and written submission made in the course of hearing as well as the facts of the case the issues involved in appeal are discussed and decided as under:-

**4.1 Ground No 1 to 3:-** Through these grounds of appeal, the appellant had challenged levy of penalty of Rs. 1,15,00,000/- in A.Y. 2008-09 u/s 271D of the Act. The penalty has been imposed relying upon the loose paper sheets i.e. page no 21-23 of LPS-1 found from premises of M/s Agroh Infrastructure Developer Pvt Ltd (In short AIDPL) located at Aqua point, AB Road, Umariya, Indore. The JCIT while passing penalty order has held that appellant has

accepted initial entry of the said loose paper, therefore, all the remaining entries of the loose paper are true and genuine and are not recorded in books of account of the appellant. During the course of search statement of Shri Shalendra Singhal, Director of AIDPL was recorded on oath, wherein he failed to furnish any satisfactory reply. The appellant has strongly contended that the said reply was never confronted to the appellant. The AO during the course of assessment proceedings u/s 147 r.w.s 143(3) found that appellant has paid interest on the said cash loan and the same is also not recorded in books of accounts. The relevant extract of loose papers i.e. 21-23 of LPS-1 is scanned on page no 5-7 of the penalty order.

**4.1.1** The appellant during the course of appellate proceedings submitted that a loan of Rs. 85 lakhs was taken from AIDPL in FY 2007-08 (AY 2008-09) through cheque and appellant has paid total interest on the said loan at Rs. 1159466/- which is fully recorded in books of account. However, for the other amounts mentioned on the said loose papers no such loan was taken or interest was paid by the appellant. The appellant has further contended that the statement of Shri Shailendra Singhal was never confronted with the appellant. The appellant has also taken a plea that presumption applied by the AO u/s 132(4A) & 292C of the Act that the onus of explaining the contents of the seized documents is on the appellant, is baseless, because the said loose paper was found from third party premises i.e. AIDPL.

**4.1.2** I have considered the facts of the case, evidences on record and findings of the AO. After considering the entire factual matrix and evidence/material on record inter alia written submissions filed, I reach to conclusion that impugned imposition of penalty was made on the basis of assumption and presumption which neither sustainable on facts nor in law. The AO has reached to conclusion that few of the entries in printouts and books of appellant are matching and therefore imposed the penalty. These documents have been scanned on page 5-7 of penalty order. On a plain and cursory look would make it amply clear that this paper is relating to **“some excel sheets containing notings of cash, month, interest and balance amount”**. It is stated in Remand report Dated 29/05/2017 that Director of Agroh (AIDPL) has admitted during proceedings u/s 263 before the Pr. CIT vide its submission dated 21/01/2017 for the A.Y. 2008-09 that Agroh has given loan in cash but the said statement has not been shared nor opportunity to cross examination was given to Appellant. The said loose papers were found from premises of AIDPL. As far as legality of the addition, it is settled position of law that no addition/ disallowance can be made to the total income of the appellant in absence of any incriminating documents/material found during the course of search from **premises of appellant**. In the instant case the loose papers were found and seized from the premises of AIDPL (third party).

**4.1.3** It is clear that the impugned loose papers and documents were found from third party premises and therefore, presumption u/s 292C will apply to AIDPL only and not to the assessee. Thus, the JCIT was not justified in levying penalty u/s 271D of the Act simply on the basis of some loose papers/sheet found from third party premises. The JCIT in the page no. 3-5 of the penalty order has reproduced the said excel sheets. While analysing, the JCIT himself

at the page No. 7 & 8 admitted that the data is **getting partially corroborated** and in support has stated that both the parties have accepted transactions of the first table and has denied transaction of the second table because the accepted transaction were done through banking channels and the unaccepted transaction were done in cash. The presumption of the AO has no wings to fly. There exist not a single independent evidence or admission by any person who/which could establish exchange of cash of Rs. 1.15 crores between appellatant and AIDPL during AY 2008-09.

It is onus on the department to prove that actual transaction of cash i.e. movement of cash actually taken place with the help of documentary and oral evidence. The penalty order does not discuss any such attempt by the department to conclusively establish that the transaction whereby debtor creditor relationship has been created between the two parties. The reciprocity which is a fundamental necessity of existence of transaction was never proved or attempted by the department.

**4.1.4** This is settled legal position that any 'dumb document' cannot be used as an evidence to draw an adverse inference against the assessee. Case laws supporting this proposition are as under:-

*XXX (not reproduced for brevity)*

**4.1.8** The AO during the course of appellate proceedings vide letter dated 29.05.2017 has stated that the apepllant has accepted cash of Rs. 1,22,19,659/-, therefore, penalty u/s 271D ought to have been levied at Rs. 1,22,19,659/-. However, penalty was levied at Rs. 1,15,00,000/- only. Therefore, the AO has requested to enhance the penalty by Rs. 7,05,000/-. The facts of the case has been discussed in depth in above mentioned paras, therefore, I do not find any merit in enhancing the penalty by Rs. 7,05,000/- which has been levied on the basis of impugned loose papers as discussed above. Thus, penalty levied by the AO is not being enhanced.

**4.1.9** In view of the above discussion, material evidences on record and case laws cited, the AO failed to establish the nexus on receipt or repayment of impugned loans. It is settled legal pronouncement, that presumption how strong cannot take place of evidence. It is stated in remand report that AIDPL has admitted that cash loan is given by way of submission dated 21.01.2017 filed before the Pr.CIT in response to notice u/s 263, which cannot bind the assessee. Penal provisions have to be construed strictly. There is no corresponding paper or document which is seized from premises of Appellant, during the course of its search, to substantiate that transaction is real and cash is actually received by appellatant. From the remand report Dated 29/05/2017 it is clear that document was interpreted in a manner that loan was given by appellatant to AIDPL in re-assessment proceedings but during penalty proceeding, it was treated as cash loan is taken/accepted by appellatant. Therefore, such document which laid two interpretation within department cannot be said a speaking one. Thus, from the above discussion, it is very clear that none of the transaction as mentioned in the second table, materialized. Thus, the AO was not justified in imposing the penalty on

*account of dumb documents which were found during the course of search from third party premises. Therefore, the penalty imposed by the AO amounting to Rs.1,15,00,000/- (correctly Rs. 1,22,19,659/-) is **Cancelled**. Therefore appeal on these grounds is **Allowed.***

**Appeals before us:**

14. Challenging the order of first-appeal referred to in above paragraph No. 7, the assessee has come in ITA No. 283/Ind/2021 before us, on the following ground:

*“Ground. No.1: order dated 03.03.2016 under section 143(3) read with section 147 income tax Act 1961 (“the Act) is without jurisdiction:*

*On the fact and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeal)-3, Bhopal (hereinafter referred to as the ld. CIT(A)) erred in not holding that reassessment order dated 03.03.2016 under section 143(3) read with section 147 of the Act was without jurisdiction.*

*The appellant prays that the order dated 03.03.2016 under section 143(3) read with section 147 of the Act be quashed as without jurisdiction.”*

15. Challenging the order of first-appeal referred to in above paragraph No. 13, the revenue has come in ITA No. 20/Ind/2021 before us, on the following grounds:

*“1. On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the penalty of Rs. 1,15,00,000/- levied by JCIT u/s 271D on account of violating the provisions of section 269SS of the Act.*

*2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in holding that then penalty was imposed on the basis of dumb documents despite the fact that the data on the said documents was duly corroborated as per the findings in the penalty-order.”*

The assessee has also filed Cross-Objection No. 47/Ind/2021 on the following ground:

*“Ground No.1 Penalty order under section 271D of the Income Tax Act 1961(the Act) is bad in law:*

*On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeal)-3, Indore (hereinafter referred to as the*

Ld. CIT(A)) erred in not holding that penalty order dated September 30, 2016 under section 271D of the Act is bad in law.

The appellant prays that the penalty order dated September 30, 2016 under section 271D of the Act be quashed as without jurisdiction and bad in law.”

**Submissions of Ld. AR:**

16. Ld. AR representing the assessee took the lead to argue all matters. He straightaway carried us to the remand-report submitted by Ld. AO to Ld. CIT(A), which we have already reproduced here-in-above in Paragraph No. 7, and requested us to peruse contents thereof which, according to him, is self-speaking and self-explanatory. We repeat the same again while emphasizing the contents directly relevant to us:

“Ground No.3: Through this ground of appeal, the appellant has challenged addition of Rs.1,15,14,659/- on account of unexplained cash credit. During the course of appellate proceeding the AO vide letter F.No. ACIT(Cen)-1/Ind/Remand Report/2017-18 dated 29.05.2017 has stated as under:

i. The search and seizure action u/s 132 of the Act were carried out on the business as well as residential premises of the Agroh group and PATH Group on 27.08.2014.

ii. During the course of search, a set of incriminating documents (page no.21-23 of LPS-1) were seizure from the office premises of Agroh Infrastructure Developers Pvt. Ltd. (AIDPL) at Aqua point, AB Road, Umaria, Mhow. On perusal of these seized documents page nos. 21 to 23 of LPS-1, cash loan of Rs.1,15,00,000/- has been given by AIDPL to /Prakash Asphaltngs & Toll Highways (I) Ltd. (PATH(I) LTD) and subsequently which was repaid along with the interest of Rs.14,659/-

iii. On the basis of these seized documents (page no.21 to 23 of LPS-1), the cases of PATH(I) LTD and AIDPL were reopened for scrutiny and the assessment orders were passed u/s 143(3) r.w.s. 147 of the act on 03.03.2016 in both the cases for AY 2008-09. **In the assessment orders, it was wrongly taken as the loan was given by PATH (I) Ltd. to AIDPL and addition was made in the hands of PATH (I) Ltd.**

iv. **Subsequently, during the assessment proceedings of AIDPL in AY 2008-09 the seized documents namely LPS 1 (page no. 21-23) seized from office premises at Aqua Point, AB road Umaria**

**Mhow were confronted to AIDPL. During the assessment proceeding for A.Y. 2009-10, AIDPL has given cash loan at Rs. 1,22,05,000/- to PATH(I) Ltd. which has been received back from PATH (I) Ltd. in A.Y. 2008-09. It is to be mentioned here that the AIDPL has also accepted the same facts in the submission dated 21.01.2017 filed before the Pr. CIT(Central), Bhopal in response to the notice u/s 263 of the Act for AY 2008-09.**

v. From the seized documents page no.21 of LPS-1, it is seen that total cash loan given by AIDPL is Rs.1,22,05,000/-. Similarly, from page no. 23 of LPS-1, it is seen that the AIDPL has received interest of Rs.14,659/-. The total undisclosed income in these seized documents is Rs. 1,22,19,659/- which is admitted by AIDPL in AY 2008-09 and order u/s 263 has been passed accordingly.

**3. Considering the above facts, the addition of Rs.1,15,14,659/- was wrongly been made in the assessment order of PATH(I)Ltd which may kindly be deleted.**

4.2.1. From the report of the AO, it is clear that the additions in AY 2008-09 were wrongly made in the assessment order passed dated 03.03.2016 u/s 143(3) r.w.s. 147 which is under consideration. Therefore, addition made by the AO amounting to Rs. 1,15,14,659/- is deleted. Therefore, appeal on this ground is allowed.”

He then carried us to the factual-report submitted by Ld. AO to Ld. Addl. CIT, as reproduced here-in-above in Paragraph No. 11, and requested us to peruse contents thereof which, according to him, is self-speaking and self-explanatory. We repeat the same again while emphasizing the contents directly relevant to us:

“In this connection, it is submitted that the required factual report in the above mentioned assessee for levy of penalty u/s 271D & 271E of the Income Tax Act, 1961 (hereinafter referred to as the Act) is as under:

1. The Search and seizure action u/s 132 of the Act was conducted on the business premises of Agroh Infrascucture Developers Pvt. ltd. (AIDPL) and Prakash Asphaltting and Toll Highways (India) Ltd. (PATH). Subsequently, the assessment order was passed u/s 143(3) r.w.s. 147 of the I.T. Act 1961 on 03.03.2016 for A.Y. 2008-09 in both the cases.

2. On the basis of seized material as LPS-1 (pages 21 to 23) seized from office premises of at Aqua Pint, A.B. Road, Umaria Mhow, the case was reopened for scrutiny for A.Y.2008-09. The impugned document which formed the basis for reopening of the cases of AIDPL and PATH was page 21 to 23 of LPS-1, same is mentioned as under:

*XXX (not reproduced for brevity)*

*It is evident that these three LPS are correlated to each other. As the entry in table no. 2 of page-23 as mentioned above, the total of cash loan of Rs.1,15,00,000/. is exactly matching with the entry of cash received of dated 29 March and 31 March 2008 of table in page-21. It is also worth mentioning that the hand written jottings on page-23 (mentioned in bottom) share buyback 13/1/9 3,66,25,000 is also getting correlated with the entry mentioned in Page No. 21 of LPS-1 relating to entry in 15 Jan, 09.*

*During the course of assessment proceedings, the submission of the assessee Agroh Infrastructure Developers Pvt. Ltd (AIDPL) is as follows: \_*

*b. The first table Contains calculation of interest On Rs. 85.00 Lacs given by Agroh infrastructure Developers Private Limited to Prakash Asphalttings and Toll Highways India Limited. The Amount of Advance Rs. 85.00 Lacs is Correct and was given by the Agroh Infrastructure Developers by way cheque on 25/03/2008, however, total interest charged from PATH for the year is Rs 1159466/- which has been included in books and TDS also has been deducted on same. Copy of account of Prakash Asphaltting and Toll Highways India Limited is enclosed herewith.*

*From this Submission of the assessee, it is clear that in page no. 23 of LPS-1 the entry of Rs. 85 lakhs is a valid entry and is a loan given by AIDPL to PATH. **Obliviously, if the left-hand side column on upper side of page.23 is correct and if it means that AIDPL has given loan to PATH from bank account. Then, it automatically follows that in the bottom side of page- 23 of LPS-1 is also correct and it means that the cash loan has been given by AIDPL to PATH.***

17. Referring to above, Ld. AR argued that it is quite clear that the alleged document "LPS-1, Page No. 21 to 23" was found and seized from the premise

of M/s PATH Oriental Highways Public Limited, Mhow / AIDPL and not from assessee. That apart, the authorities initially framed a conclusion that the assessee had given loan to AIDPL (**Hereafter referred to as “original-conclusion”**), but subsequently they reversed their conclusion to the effect that AIDPL has given loan to the assessee, in other words the assessee has taken loan from AIDPL (**Hereafter referred to as “reversed-conclusion”**). Then, Ld. AR submitted that the assessment of assessee was re-opened on the basis of “original-conclusion”. Ld. AR submitted that the “original-conclusion” was absolutely incorrect, hence the action taken u/s 148 as well as order of re-assessment is bad. Ld. AR submitted that although the Ld. CIT(A) has deleted the addition on the basis of “reversed-conclusion” and granted relief to the assessee on merit, yet the primary grievance of assessee that the re-assessment itself was invalid, is not suitably settled. Ld. AR prays us to annul the order of re-assessment therefore.

18. Regarding penalty-matter, although Ld. AR harped on the legal submission that if the reassessment-order is declared as invalid, the penalty-proceeding initiated therefrom would automatically be invalid. Alternatively, the Ld. AR submitted, even if the reassessment-order is held to be valid for any reason, then also the penalty-proceeding would be invalid for the simple reason that penalty proceeding of section 271D and 271E were initiated on the basis of “original-conclusion” made in re-assessment order that the assessee had given cash-loan to AIDPL, but neither section 271D nor 271E have application to the transaction of “loan given”.

**Submissions of Ld. DR:**

19. Ld. DR representing the revenue claims that the proceeding of re-assessment were taken on the basis of incriminating document “LPS-1, Page No. 21 to 23” which is found to be a genuine-document incorporating cash-transactions done between assessee and AIDPL, yet it does not disclose exactly whether the assessee had given loan to AIDPL or AIDPL has given

loan to assessee. Hence the Ld. AO, based on a mindful understanding gained at that time, made up an “original-conclusion” that the assessee had given loan to AIDPL and initiated the process of re-assessment / passed order of re-assessment. Ld. DR submitted that when the picture was subsequently clear that AIDPL has given loan to assessee, the AO himself made correct remand-report to Ld. CIT(A) and based thereon, the Ld. CIT(A) deleted the addition in first-appeal. According to Ld. DR, the assessee has also got relief from Ld. CIT(A) based on remand-report made by Ld. AO and as far as legality of re-assessment is concerned, since the process of re-assessment was started on the basis of a fair and reasonable understanding gained by Ld. AO at the time of issuing notice u/s 148, his action cannot be viewed as faulty or illegal at initiation stage. Ld. DR submitted that the re-assessment proceeding must be held as valid in such a scenerio.

20. Regarding penalty-matter, Ld. DR dutifully supported the penalty-order, though he agrees that neither penalty u/s 271D nor u/s 271E applies to the transaction of “loan given”.

**Our analysis:**

21. After a careful consideration of the material placed before us, we find that the present-appeals have a clear-cut history. Learned Representatives of both sides agrees that on the basis of “LPS-1, Page No. 21 to 23”, the authorities made an “original-conclusion” that the assessee had given loan to AIDPL, but at a later stage it was observed that AIDPL has given loan to the assessee. They further agree that the re-assessment proceedings as well penalty-proceedings u/s 271D / 271E were initiated on the basis of “original conclusion”. With such undisputed fact, we are required to check the validity of assessment-order and penalty-order.

22. We observe that the “original-conclusion” was such that the assessee had given loan to AIDPL but the “reversed-conclusion” was just opposite i.e. AIDPL had given loan to assessee. Now, if we give weightage to “original-

conclusion”, which could not be said to faulty as per understanding gained by authorities at that time, the result would be such that the order of re-assessment would be valid but the penalty-proceeding would be invalid because penalty u/s 271D / 271E are not attracted in case of “loan given”. As against this, if we give weightage to “reversed-conclusion” i.e. the AIDPL has given loan to assessee, the consequences would be just opposite i.e. the re-assessment proceeding would be invalid but the penalty-proceeding shall be valid. Thus, if one proceeding is saved, other has to be quashed. Hence we have given our anxious thought in the matter. After a mindful consideration, we are of the view that the “original-conclusion” was not faulty at the time of initiating re-assessment / passing of order of re-assessment / launching of penalty-proceedings. It is a subsequent matter that the dust was clear about the nature of transaction and “original-conclusion” was reversed. Hence, it would be apt to give preference to the “original-conclusion” which has set the proceedings in motion. Since the “original-conclusion” was to the effect that the assessee had given loan to AIDPL, the fate of present appeals / cross-objection, in our considered view, would be as under:

- (i) The order of re-assessment shall be valid for the reason that ‘loan given’ was believed to be undisclosed income of assessee. Accordingly, we upheld the validity of reassessment and dismiss the ITA No. 283/Ind/2021 of assessee.
- (ii) The order of penalty u/s 271D and 271E shall be invalid for the reason that “loan given” neither attracts section 271D nor section 271E. We, therefore, quash the penalty-order and allow the Cross-Objection No. 47/Ind/2021 of assessee.
- (iii) Since the penalty-order is quashed, the revenue’s ITA No. 20/Ind/2021 becomes infructuous. Accordingly, we dismiss the said ITA.

**23. In the result, assessee's ITA No. 283/Ind/2021 and revenue's ITA No. 20/Ind/2021 are dismissed. Assessee's Cross-Objection No. 47/Ind/2021 is allowed.**

*Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 10/01/2023.*

*Order pronounced in the open court on ...../...../.....*

Sd/-

(SUCHITRA KAMBLE)  
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)  
ACCOUNTANT MEMBER

**Indore**

दिनांक /Dated : 10.01.2023

Patel/Sr. PS

Copies to: (1) The appellant  
(2) The respondent  
(3) CIT  
(4) CIT(A)  
(5) Departmental Representative  
(6) Guard File

*By order*

*Sr. Private secretary  
Income Tax Appellate Tribunal  
Indore Bench, Indore*

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the approved draft is placed before other Member	
5.	Date on which the fair order is placed before the Dictating Member for pronouncement	
6.	Date on which the file goes to the Bench Clerk	
7.	Date on which the file goes to the Head Clerk	
8.	Date on which the file goes to the Assistant Registrar for signature on the order	
9.	Date of dispatch of the Order	