

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'A' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. No. 2138/KOL/2018
Assessment Year: 2010-2011**

***Assistant Commissioner of Income Tax,.....Appellant
Circle-11(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069***

-Vs.-

***M/s. Sunplant Construction Limited,.....Respondent
3rd Floor, RTC House,
Dr. Suresh Sarkar Road,
Moulali, Kolkata-700014
[PAN:AAKCS9090D]***

Appearances by:

*Shri Subhrajyoti Bhattacharjee, CIT (DR), appeared on
behalf of the Revenue
None, appeared on behalf of the assessee*

**Date of concluding the hearing : February 02, 2023
Date of pronouncing the order : 9th February, 2023**

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The Revenue is in appeal before the Tribunal against the order of ld. Commissioner of Income Tax (Appeals)-4, Kolkata dated 30.07.2018 passed for A.Y. 2010-11.

2. The grounds of appeal taken by the Revenue read as under:-

“(1) That on the facts and in circumstances of the case the Ld. CIT(A) has erred in allowing the appeal of the assessee ignoring the finding of the AO while completing the assessment proceedings that, if the parties were shareholders then, they were required to be informed about the AGM meeting and other statutory meetings of the company. The Ld. CIT(A) has also not considered the fact that none of the statutory functions required by law to be performed by a company in respect of shareholders as per the Provision of Companies Act, were done by the Assessee Company.

(2) That on the facts and in circumstances of the case the Ld. CIT(A) has erred incompletely ignoring the facts summarized by the Ld. AO in the penalty order vide which it is clearly established that the share application money was only a colorable device and the amount is nothing but deposits in the garb of share application money and Penalty u/s. 27ID has to be levied for violation of the provisions of section 269SS of the Income Tax Act 1961”.

3. In response to the notice of hearing, no one has come present on behalf of the assessee. Neither any one appeared before the ld. CIT(Appeals).

4. With the assistance of ld. D.R., we have gone through the record carefully and proceed to decide the appeal *ex-parte qua* the assessee. The order of the ld. CIT(Appeals) is self-explanatory, therefore, we deem it appropriate to take note of this order, which is a brief one and reads as under:-

“1. The appellant is a Public Limited Company engaged in the business of executing civil contract. The assessee company has also started Chit Fund business (Collective Investment Scheme). During the Assessment year 2010-11 the appellant company with a view to broadbase its business activities, raised the capital by issuing

1,01,85,760 no. of preference shares of Rs. 10 each, collected Rs.10,18,57,600/- as preference shares application money from various share applicants. In the captioned year the same amount was reflected in audited balance sheet as at 31.03.2010 as "share application money" under Preference share. Nobody attended in response to various notice of hearing.

2. During the penalty proceedings, the AO sought details of share application money during which were submitted before him. The AO issued notices u/s 133(6) 8.131 to several shares holders. In response to the notice several shareholders complied 133(6) notices & admitted to have given money against share application money and obtained preference share certificates from company against their subscription. Nevertheless, Ld.AO treated the receipt of share application money as deemed deposits and considered it as violation of section 2695S and accordingly imposed penalty u/s 271D.
3. The company had received cash Rs. 4,86,960/- from its group company M/s SunPlant Agro Ltd., the company explained about execution of construction work for Sunplant Construction Ltd. Rs. 22,61,534/- against which payment in cash was received and recorded in a single ledger a/c as the company maintained single group ledger in respect of all transactions with the group companies including Current A/c. AO treated this as violation of Section 269SS & 269T and imposed penalty u/s 271D. The various grounds taken by the appellant is as under:

(i) That the Ld. JCIT erred in disposing the penalty proceeding u/s 271D without allowing sufficient opportunity to being heard despite adjournment was sought for want of certified copies of deposition taken by AO u/s 131.

(ii) That under the facts & circumstances of the case AO erred in considering the receipt of Redeemable Pref. Share Application Money of Rs.10,26,32,600/- as deemed deposit u/s 269SS, despite Statutory Compliances under Companies Act were made against issue of shares.

(iii) That under the facts & circumstances of the case Ld. JCIT erred in imposing the penalty Rs.10,18,57,600/- u/s 271D being receipt of

preference share application money in cash against alleged violation of 269SS, therefore order imposing penalty is illegal, unjustified, beyond the provision of law & liable to be quashed.

(iv) That under the facts & circumstances of the case Ld. JCIT erred in imposing the penalty Rs.4,86,960/- being the receipt of consideration against construction work Rs. 22,61,534/- executed for & on behalf of Sunplant Agro Ltd & credited the receipt in single / running ledger account.

(v) That the JCIT erred in imposing penalty u/s 271D when profit was estimated upon rejection of books & accounts.

(vi) That the appellant craves to add or amend any grounds of appeal on or before the date of hearing.

4. Ground No. 1 to 6: Penalty proceeding u/s 271D is bad In law

4.1. During the assessment year 2010-11 the appellant company raised the capital by issuing 1,01,85,760 preference shares of Rs. 10/- each and collected Rs. 10,18,57,600/- as preference shares application money from various share applicants for which the assessee company has submitted Form-2 to ROC, West Bengal. But without examining whether the share application amount can be treated as loan" or "deposit" within the meaning of Section 269SS of the Act and in spite of the response given by the shareholders of the notice which was issued u/s 133(6), A.O. brushed aside all the facts and treated the application amount as deposits and consequently alleged that provision u/s 269SS were violated in taking / accepting share application & imposed penalty u/s 271D.

4.2. Findings of CIT(Appeals)

4.2.1. I have gone through the submission of the Ld. AR of the appellant and order of the A. O. The provision of Sec. 271D triggers if a person takes or accepts 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. Therefore, the first precondition for invocation of penal provision of Sec. 271D is that there a person should obtain a Loan or deposit. Thereafter, the 2nd precondition comes into picture which is that the said loan or deposit must be received in cash. From the facts as narrated

above it is not in dispute that money has been received in cash. This position is discernible from the copy of the penalty order and also accepted by the AR of the appellant. The sole issue which is in dispute in this appeal is whether the appellant had received deposit in disguise of share application money or not.

4.2.2. From the facts available on record it is clearly evident that what appellant had received is share application money and not deposit or loan. The above finding is supported by following facts available on record:

In the Balance Sheet the appellant had disclosed the said sum as Share Application Money, shown under the head Share Capital;

In ROC the appellant has filed Return in Form 2 which is filed in case of issue of shares by issuer company;

In the deposition statement made by the applicant they have admitted that they have been allotted share and given share certificate. They denied the fact that they have given any deposit to company;

Further, no interest has been paid on said sum received from various applicant which is usually paid in case of deposits.

In response to the notice u/s 133(6), all the notice shareholders confirmed the AO owing the amount subscribed by them against issue of preference shares. Few of them are being reproduced as hereunder:

(a) Sudhir Sarkar - "I have taken 12000 Preference shares of Rs. 10/- each having Total Amount Rs. 1,20,000/-. I am holding those shares as on today".

*(b) Mukul Singh Dutta - "I have purchased the preference shares of Rs. 10/- total amount Rs. 50,000/-*2= Rs. 1,00,000/- and today I am holding those Shares."*

*(c) Rama Bhadra - "I have applied for Preference Shares in Sunplant Construction Ltd. & have given Rs. 50,000*6= Rs. 3,00,000/- & enclosing Necessary documents related to this."*

(d) *Kanchankaran (Rana) - "I have applied Preference shares of Rs. 10 each of Sunplant Construction Ltd. with amount Rs. 25,000/- as application money & those as on today."*

(e) *Gouri De - "I have applied for Preference shares of Rs. 10 each of M/s. Sunplant Construction Ltd. with amount Rs. 30,000/- as application money. I am holding those shares as on today."*

4.2.3. I had also gone through the decisions relied upon by the Ld. AR in support of his contention that the provision of Sec. 271D does not apply in case of Share application money. The decision of Hon'ble Madras High Court in the case of CIT -vs.-Rugmini Ram Raghav Spinners Pvt. Ltd 304 ITR 417 is squarely applicable on the facts of the case wherein the Hon'ble Court has categorically held that the share application money is not loan or deposit and hence not falls u/s 269T of the Act and deleted penalty u/s 271E of the Act.

4.2.4. In view of the above discussion and in the absence of any contrary material available on record, I do not find any cogent reason to treat share application money received by the appellant company as loan and deposits. Accordingly, I delete the penalty levied by the AO u/s 271D of the Act.

4.2.5. It may also be noted that SEBI has directed companies of the group to refund the money to the investors. Therefore the company would probably be not left with any money to pay tax dues if any.

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

Sd/-
(ANAND KUMAR KEDIA)
C.I.T. (APPEALS)-4, Kolkata

5. After perusal of the above order, we confronted the ld. D.R. as to how a penalty under section 271D of the Income Tax Act can be imposed upon the assessee in these given facts. He was unable to controvert the finding of the ld. CIT(Appeals). It is pertinent to observe that a penalty under section 271D can be imposed upon the assessee if assessee has accepted any loan or

deposit otherwise than by an account payee cheque or an account payee Bank Draft. For the facility of reference, we note the relevant part of this section 269SS as is applicable in the present year:-

“269SS. Mode of taking or accepting certain loans, deposits.- 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 or through such other electronic mode as may be prescribed, 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”.

6. The Id. 1st Appellate Authority has examined this aspect and observed that the assessee has accepted the share application money and not any loan or deposit. The share capital money is an irreversible entry. It is not to be repaid by the assessee.

Similarly the first part is relating to expenditure incurred by the Group. For intra-group services, this is also not loan or deposit. The ld. Assessing Officer has presumably failed to construe the transaction as well as meaning of section 269SS read with section 271D. The more surprising factor is that ld. Principal CIT (Admin.), who has given permission to file the appeal, failed to appreciate the order of the ld. CIT(Appeals) before authorizing the revenue to file the appeal before the Tribunal. It is unnecessarily wastage of resources.

7. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 9th February, 2023.

Sd/-

(Manish Borad)
Accountant Member

Sd/-

(Rajpal Yadav)
Vice-President (KZ)

Kolkata, the 9th day of February, 2023

Copies to : (1) ***Assistant Commissioner of Income Tax,
Circle-11(2), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700069***

(2) ***M/s. Sunplant Construction Limited,
3rd Floor, RTC House,
Dr. Suresh Sarkar Road,
Moulali, Kolkata-700014***

- (3) *Commissioner of Income Tax (Appeals)-4,
Kolkata;*
- (4) *Commissioner of Income Tax- ;*
- (5) *The Departmental Representative*
- (6) *Guard File*

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By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.