आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 69/JP/2023
निर्धारण वर्ष/Assessment Years : 2017-18

Sh. Shiv Kumar Agarwal 4A, Prem Nagar Corne, Khatipura Road, Jaipur	बनाम Vs.	Addl. Commissioner of Income-tax, Range-03, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AEJPA 5799 M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Sh. K. L. Moolchandani (ITP)
राजस्व की ओर से/ Revenue by : Smt. Monisha Chaudhary (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 22/03/2023
उदघोषणा की तारीख/Date of Pronouncement: 29/03/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by assessee and is arising out of the order of the National Faceless Appeal Centre, Delhi dated 22/12/2022 [here in after (NFAC)] for assessment year 2017-18, which in turn arise from the order of the ITO Ward 3(1), Jaipur dated 31.03.2018 passed under section 271D r.w.s. 274 of the Income Tax Act, 1961 [here in after Act].

2. In this appeal, the assessee has raised following grounds: -

"(i) On the facts and in circumstances of the case The Hon'ble NFAC has erred in dismissing the appeal in the assessment year 2017-18 not penalty Order u/s 271D of the Act was passed in this year. Thus, the Appeal Order so passed in the Asstt. Yr. 2017-18 is factually and legally incorrect and is bad in law. The same deserved to be quashed summarily.

(ii) On the facts and circumstances The H'ble NFAC has erred in dismissing the appeal in the Asstt. Yr. 2017-18 as no Penalty Order u/s 271D of the Act was passed in this year. Thus, the Appeal Order so passed in the Asstt. Yr. 2017-18 is factually and legally incorrect and is bad in law. The same deserved to be quashed summarily.

(iii) The H'ble NFAC has erred in not taking note of the fact that Demand Notice as issued in this year was bad in law in absence of any Penalty order passed in this year. The H'ble NFAC has grossly erred in not taking note of this legal flaw; rendering the entire appeal order illogical and bad in law.

(iv) Subject to above legal and factual flaws, the H'ble NFAC has erred in appreciating the fact that the 'un-dated' instruments which were never presented in the Bank for encashment; were accordingly 'deaf and dumb' papers; leading nowhere. Thus these documents carried no evidentiary value to be acted upon. The H'ble NFAC has erred in giving any finding on this fact. Thus the order so passed was not a well reasoned and logical order and was therefore bad in law to be quashed summarily.

(v) The H'ble NFAC has erred in interpreting the provisions of section 292B of the Act by relying upon certain findings of H'ble Supreme Court incorrectly to dismiss this appeal. In fact these judgments have no bearing on the facts of the present case. It is a settled Law that penalty proceedings are required to be initiated in a particular and a specific Asstt. Year as every assessment year is individual and separate unit of legal proceedings. Initiation of penalty proceedings in one assessment year and levying penalty in another assessment year is a clearly a fundamental flaw which is not a mistake curable as per provisions of section 292B of the Act.

(vi) The H'ble NFAC has erred in not dealing with the other facts which could conclusively demonstrate that the appellant had secured 'loans' or 'deposits' within the meaning of section 269SS of the Act. In absence of any clinching evidences, which were not forthcoming in the present case, no penalty u/s 271D of the Act is sustainable.

(vii) The appellant craves to add, amend or withdraw any of the ground of appeal either before or at the time of hearing of appeal."

3. Succinctly, the fact as culled out from the records is that the a search and seizure action u/s 132 of the I.T. Act 1961 was conducted on 21.07.2016 at the premises of Shanti Kumar Sethi Group of Jaipur by DDIT

(Inv.)-1, Jaipur. Sh. Shantikumar Sethi is engaged in the business of financing and finance broking. In reply to question 13 of his statements recorded during the course of search Sh. Shanti Kumar Sethi admitted the fact of advancing of loans to different persons during F.Y 2016-17 against undated signed on revenue stamp Hundis and simultaneously accepting undated signed Cheques from the persons to whom money was advanced. During the course of search undated signed cheques & hundies of the assessee of Rs. 10,45,000/- were also found and seized from the residence of Shri Shanti Kumar Sethi. Accordingly, the DDIT (Inv.)-1, Jaipur vide his letter no. 113 dated 28.04.2017 intimated the fact of assessee accepting loan of Rs. 10,45,000/- in cash in violation of section 269SS seeking initiation of penal proceeding u/s. 271D of the Act. The ld. AO have passed an order for levy of penalty and relevant observation of the ld. AO is reproduced here in below:

> "Considering all the facts and detailed discussion it is quite clear that the assessee has accepted / obtained cash loan/amount of Rs. 10.45,000/- from Shri Shanti Kumar Sethi during the F. Y. 2013-14, which is violation of provision of section 269 SS of the Act, therefore, the assessee is liable for imposition of penalty u/s. 271D of the Act."

4. Being aggrieved, the assessee carried the matter in appeal before the National Faceless Appeal Centre (NFAC). The NFAC has dismissed the appeal of the assessee holding that there is violation of provisions of

section 269SS of the Act and accordingly the assessee is liable for imposition of penalty u/s. 271D of the Act.

5. Aggrieved from the order of the ld. NFAC the assessee has preferred this appeal on the grounds as stated in para 2 above. In support of the various grounds so raised by the assessee the ld. AR of the assessee has relied upon on the following written submission:

> "In this case, the penalty proceedings u/s 271D were initiated in the Asstt. Yr. 2017-18 on account of the alleged loan of Rs.10,45,000/- allegedly accepted by the appellant in violation of the provisions of section 269SS of the Act during the Asstt. Yr. 2017-18(Copy of Show cause letter dated 6.9.2017 enclosed at Page No. 1 of Paper Book). However the penalty order u/s 271D of the Act was passed in the Asstt. Yr. 2014-15 with clear and specific findings that the alleged default pertained to the Asstt. Yr. 2014-15 and not to the Asstt. Yr. 2017-18. (Kindly refer to the Penalty Order annexed with the Appeal Memo – Placed at Page No. 10-17 of Paper Book). Again in respect of such penalty order passed in the Asstt. Yr. 2014-15, the Demand Notice was issued for the Asstt. Yr. 2017-18. (Copy enclosed for ready reference at Page No. 18 of Paper Book). Having considered such anomalies and inconsistencies in respect of the 'Actual Assessment Year of the Default', two appeals had to be filed as a precautionary measure; one in the Asstt. Year 2014-15 and second in the Asstt. Year.2017-18 simultaneously; taking the same ground in both the appeals pointing out the above discrepancies and inconsistencies which had necessitated to file two appeals. The H'ble NFAC (Hereinafter referred as 'Appeal Centre') had however taken up only one appeal filed for the Asstt. Yr. 2017-18. The other appeal filed in the Asstt. Yr. 2014-15 is yet to be taken up by the Appeal Centre. Thus appeal filed in the second year on the same ground is yet to be decided on date. As common and inter-connected point is involved in both the appeals so it was in the interest of equity and natural justice to decide both the appeals simultaneously. Thus deciding only one appeal is obviously bad in law and contrary to the principles of judicial discipline and the same deserves to be quashed in limine. On merits of the case also, the H'ble Appeal Centre did not address various contentions and objections as made during the course of Penalty and Appeal proceedings (Copies of which are enclosed for ready reference and record at Page No. 2-5 of Paper Book). Thus the Penalty Order is not a well reasoned and logical order and is bad in law as per plethora of judicial citations before the Competent Authority. In the above back-ground the Appeal Order is assailed on the following counts:

(i) As evident from the show-cause notice as submitted herewith, the penalty proceedings were initiated for the alleged default u/s 269SS of the Act allegedly committed in the Asstt. Yr. 2017-18. However during the course of the penalty proceedings, it was noted by the Competent Authority that the alleged default did not pertain to the Asstt. Year 2017-18 for which the penalty proceedings were initiated. Accordingly, the Competent Authority had suo-motto modified the Assessment Year of the default as Asstt. Yr. 2014-15 (Kindly refer to para 6 of the Penalty Order) and had imposed penalty of Rs. 10,45,000/- u/s 271D in the Asstt. Yr. 2014-15 without initiating the penalty proceedings in the Asstt. Yr. 2014-15 and also without allowing any opportunity to the appellant or issuing any show cause notice for such modification in the year of default. Thus imposing the penalty in the Asstt. Yr. 2014-15 in place of the Asstt. Yr. 2017-18 is patently and obviously bad in law. The same deserves to be quashed summarily on this count alone.

(ii) As the alleged incriminating material as sought to be relied upon by the Competent Authority were deaf and dumb papers being un-dated (as contended by the appellant in the Penalty and Appeal Proceedings) so no exact period of the alleged default could be ascertained or brought on record by the Revenue with the help of such incriminating papers. As a result of such missing links in the incriminating papers the 'ambiguity' regarding the exact period of the default had crept in resulting in the 'modification' of the exact year of the default. Thus the modification as made by the Competent Authority was not the result of the procedural lapse or clerical mistake within the meaning of provisions of Section 292B of the Act as incorrectly opined by the H'ble Appeal Centre to dismiss this appeal. Thus the findings of the H'ble Appeal Centre on this point are factually and legally incorrect and the same do not hold good.

(iii) Further, as the incriminating papers as relied upon by the Revenue did not demonstrate the exact period of the alleged default conclusively (as admitted by the Revenue itself in the Penalty Order), so the Competent Authority had to presume that the default was committed in the relevant period of the Asstt. Yr. 2014-15 and not of the relevant previous of the Asstt. Yr. 2017-18. (Kindly refer to Para 6 of the Penalty Order Placed at Page No. 10-17 of Paper Book). It is a settled Law that no valid penalty can be imposed under presumption.

(iv) Again on the basis of such alleged incriminating papers no 'adverse view' was taken by the Revenue while finalizing/processing the assessments of the appellant relevant to the Asstt.Yr. 2014-15 & 2017-18 as evident from the Assessment Records of the appellant; suggesting thereby that the alleged incriminating papers did not warrant any adverse view.

(v) It is also an undisputed fact that no penalty proceedings u/s 271D of the Act had been initiated to impose the penalty of Rs.10,45,000/- in the Asstt. Yr. 2014-15. In absence of initiation of any penalty proceedings for the alleged default, no valid penalty can be imposed as per provisions of Law.

(vi) As pointed out in the fore-gone paras, imposing of a penalty in a different assessment year as against the assessment year of initiation of penalty proceedings was neither a procedural lapse nor it was a clerical mistake curable within the provisions of section 292B of the Act as opined by the H'ble Appeal Centre. In the circumstances, the provisions of section 292B of the Act do not come into play on the basis of various judicial citations as relied upon by the H'ble Appeal Centre. More-over, all the judicial citations as relied upon by the H'ble Appeal Centre in support of their above findings are irrelevant and immaterial having no bearing on the point at issue in the present appeal. In the citations as relied upon by the honorable Appeal Centre the points involved were regarding issuing of the notices of re-assessments and other procedural lapses etc. Thus all these citations have no bearing on the facts of present case.

(vii) Without prejudice to the above legal and factual objections, on merits also, the H'ble Appeal Centre have also erred in not addressing the various objections and contentions as made during the penalty and appeal proceedings. Thus to this extent the appeal order is not a 'well reasoned' and 'logical' order and is therefore, not legally maintainable. On perusal of the Appeal Order it is noted that the honorable Appeal Centre had summarily brushed aside various objections and contentions of the appellant as made vide written submission dated 28.8.2019 (at Page No. 6-9 of Paper Book) and letter dated 28.3.2018(at Page No. 3-5 of Paper Book) (copies enclosed for ready reference) merely referring to certain judicial citations in the concluding para of the Appeal Order; without specifying and elucidating therein as to how and under what circumstances such objections and contentions of the appellant were not maintainable. In order to appreciate the contentions and various objections vide above communications, it would be in the fitness of things to reproduce such facts once again in 'synopsis' to refresh the facts and to appreciate the same in right perspective at a glance as under:

(a) As on date it is a settled Law that the alleged incriminating papers as found and seized from the custody of 'third party' on the back of the assessee carry no evidentiary value in absence of any corroborative material brought on record. In the present case, the alleged papers were seized from the custody of third party and no corroborative material in support of such material could be brought on record by the Revenue.

(b) Again in the interest of equity and natural justice, proper opportunity should have been allowed to the appellant to cross examine the witness as per directions of H'ble Supreme Court in the case of M/s Andman Timber Industries. In the present case, the appellant had never been confronted in respect of the alleged incriminating papers nor the appellant was given any opportunity to cross examine the witness.

(c) At no stage, the Revenue had denied the fact that the alleged incriminating papers were 'deaf' and 'dumb' papers. During the course of Penalty and Appeal proceedings, number of missing links were pointed out vide our above communications but the Revenue did not dispute such missing links in any manner at any stage

(d) No material what-so-ever was brought on Record by the Revenue in support of its 'Presumption' that the loans were actually accepted by the Appellant in cash in violation of the provisions of section 269SS of the Act. In absence of any material brought on record such presumption was unfounded warranting no adverse view.

(e) Again no material what-so-ever was forthcoming to suggest that any transaction had actually been taken place on the basis of such alleged incriminating papers.

(f) Again the presumption of the Revenue that the loan/deposit was accepted in cash by the Appellant did not find support either from the Regular Books of the alleged depositor or from the Regular Books of the appellant. In absence of such corroborative details, the presumption of the Revenue is not legally maintainable.

(g) No details what-so-ever was forthcoming to suggest as to when and how the presumed cash loan was repaid by the appellant. In absence of such vital details, no logical and definite findings could be arrived at.

(h) In the Penalty Order, the Competent Authority had heavily relied upon the admission made by the witness u/s 132(4) of the Act during the course of search operations to impose this penalty. However, such admission of the searched party made during the course of search operations u/s 132(4) of the Act is binding in his own case only. Such admission has no evidentiary value in the case of the appellant as held by number of judicial Authorities in number of cases.

(i) The Circumstantial Evidence had also suggested that the presumed alleged transaction of the cash loan had never taken place in reality as the alleged instruments were not presented for encashment even after the lapse of one year. Thus the alleged incriminating papers were rough papers only carrying no legal obligation to make any payment. Thus for all purposes, the alleged incriminating papers were only rough papers and nothing else to warrant any adverse view.

2. In the Penalty and Appeal Orders, none of the above vitals facts were addressed by the Concerned Authorities Below. In the circumstances, the Penalty of Rs.10,45,000/- as imposed u/s 271D of the Act and confirmed by the Authorities Below are factually and legally incorrect. The same deserves to be deleted in limine."

6. In addition to the above written submission, the ld. AR appearing on behalf of the assessee submitted that

"During the course of hearing held yesterday i.e. on 21.3.2023, your honors had desired to know about the observations as made by the honorable Appeal Centre vide para 4 & 5 of the Appeal Order. In this regard, following facts are brought on record for your kind perusal and record:

(1) Vide para 4 of the Appeal Order, the H'ble Appeal Centre had observed that no compliance was made by the appellant during the appeal proceedings.. However, in the Chart appended below of such observations, compliance of two notices issued u/s 250 of the Act was mentioned on two occasions i.e. on 15.11.2021 and 18.6.2021. No compliance was mentioned against the hearing notice for 6.12.2022. From this chart, it would be noted that the observation as made above by the H'ble Appeal Centre are self contradictory. Again it is also incorrectly mentioned that no compliance was made on 6.12.2022. As evident from the E-proceedings Portal, compliance of the notice dated 29.11.2022 for hearing on 6.12.2022 was also made by the appellant as per copy of the acknowledgment submitted herewith for your kind perusal and record. In this regard, it would also be pertinent to submit that at none of the occasion the appellant had ever defaulted in making compliance of such hearing notices. As evident from the E-Portal, on all the occasions, compliance of all these notices were made repeatedly on '6' occasions. Copies of acknowledgments of such 'full' responses are submitted herewith for your kind perusal and record. In view of above facts, the observations as made by the H'ble Appeal Centre are obviously and patently incorrect and are not factually maintainable.

(II) Again in sub para-5 of the Order, it had been incorrectly mentioned that the appellant had accepted cash loan of Rs.10.45,000/-. In this regard, it is pertinent to inform that the appellant had been denying from day one that he had not accepted any loan or deposit in cash in violation of the provisions of section 269SS of the Act. As evident from the written explanations as submitted before the Authorities Below on 25.9.2017 28.3.2018 (lying at S.No. 2 & 3), the appellant had been denying consistently and repeatedly that he had not accepted any loan or deposit of Rs. 10,45,000/- in cash from Sh. Shanti Kumar Sethi. Thus such observation as made in this para is also factually incorrect and is not maintainable.

This is for kind information of the Hon'ble Bench."

6. The ld. AR of the assessee submitted for the same transaction the penalty is levied for A. Y. 2014-15 and the order is still pending before the ld. CIT(A)/NFAC. Since, there is no financial transaction in this year the levy of penalty for A. Y. 2017-18 not correct and this issue was raised by the

assessee but the ld. CIT(A) has not discussed this important aspect. Since the appeal of the A. Y. 2014-15 is still pending and the levy of year of penalty is not finalized and therefore, ld. AR prayed the matter may be set back to the file of the ld. CIT(A) to decide as to the year of levy of penalty in this case.

7. The ld. DR heard who has relied on the findings of the lower authorities but at the same time accepted the issue of levy of penalty is to be decided by the ld. CIT(A) as to whether it would be for A. Y. 2014-15 or 2017-18 and the issue for A.Y. 2014-15 is pending the same is remanded back to the file of the ld. CIT(A) to decide the year of chargeability of the penalty.

8. We have heard the rival contentions and perused the material placed on record. The appeal of discord in this case is that whether the assessee liable for penalty for A. Y. 2014-15 or A. Y. 2017-18. This issue is raised by the assessee before ld. CIT(A) in A. Y. 2017-18 appeal filed but there is no finding of the ld. CIT(A) on the issue and the issue of penalty levied for A. Y. 2014-15 is still under consideration with the ld. CIT(A). Based on these set of fact we set-a-side the impugned order of ld. NFAC dated 22.12.2022 and

direct the ld. CIT(A) to decide the issue for levy of penalty combined. At the same time assessee is directed to comply the notices in time and file the submission so as to decide the issue on merits before the ld. CIT(A)/NFAC.

In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 29/03/2023.

Sd/-	Sd/-
(संदीप गोसाई)	(राठौड कमलेश जयंतभाई)
(Sandeep Gosain)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 29/03/2023
*Ganesh Kumar
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. The Appellant- Sh. Shiv Kumar Agarwal, Jaipur
2. प्रत्यर्थी/ The Respondent- Addl. Commissioner of Income-tax, Range-03, Jaipur
3. आयकर आयुक्त/ The ld CIT
4. आयकर आयुक्त(अपील)/The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 69/JP/2023)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar