

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

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.252 TO 256/Ind/2021
Assessment Years: 2012-13 TO 2016-17
&
ITA No.257 TO 261/Ind/2021
Assessment Years: 2012-13 TO 2016-17

Shri Laxmi Narayan Shivhare B-17, Ashok Vihar, Tansen Road Gwalior	<u>बनम/</u> Vs.	ACIT- Central Bhopal
(Appellant / assessee)		(Respondent / Revenue)
PAN: AHIPS 2394 E		
Appellant by	Shri Anil Kamal Garg, & Arpit Gaur, ARs	
Revenue by	Shri P.K. Mishra, CIT-DR	
Date of Hearing	17.11.2022 / 22.02.2023	
Date of Pronouncement	18.05.2023	

आदेश / O R D E R

Per B.M. Biyani, AM:

Feeling aggrieved by a consolidated appeal-order dated 03.09.2021 passed by learned Commissioner of Income-Tax (Appeals)-3, Bhopal [**“Ld. CIT(A)”**], which in turn arises out of a consolidated penalty-order dated 30.10.2019 passed by learned Addl. CIT, Central Range, Bhopal [**“Ld. AO”**] u/s 271D & 271E of Income-tax Act, 1961 [**“the Act”**] for assessment-year [**“AY”**] 2012-13 to 2016-17, the assessee has filed these ten appeals. Since these appeals emanate from a common penalty-order and common order of first-appellate authority and the issues involved are also identical, they were heard

together and are being disposed of by this common order for convenience and clarity.

2. Heard the Ld. Representatives of both sides at length and case records perused.

3. The registry has informed that all these appeals have been filed after a delay of 13 days and therefore time-barred. Ld. AR prayed that the delay has occurred due to Covid-19 Pandemic. 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 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 in fact.

4. Briefly stated the facts leading to present appeals are such that the assessee is engaged in the business of sale of liquor and assessed regularly by Income-tax Department. A search u/s 132 was conducted on 07.01.2016 upon the assessee. It is informed that multiples searches were conducted at that time on several other persons and a search was also conducted on one Shri Brijmohan Kushwaha, who was by profession an accountant, doing accounting and financial work of assessee as well as other persons. During search proceeding upon Shri Brajmohan Kushwaha, the authorities seized diaries inventorized as "BS-4" and "BS-5". Based on contents of those diaries, Ld. AO framed a view that the assessee had taken/repaid loans in cash in contravention of sections 269SS/269T which attracted penalties u/s 271D/271E for AY 2012-13 to 2016-17. Therefore, Ld. AO issued show-cause notice dated 12.04.2019 to assessee, in response to which the assessee filed reply dated 11.09.2019. In reply, the assessee objected to the proposed imposition of penalties by contending that he had never carried any transaction of taking/repaying loan in cash. However, Ld. AO did not accept

assessee's submission and finally passed order dated 30.10.2019 in which penalties u/s 271D/271E were imposed as under:

A.Y.	Penalty u/s 271D	Penalty u/s 271E
2012-13	12,00,000	25,00,000
2013-14	75,00,000	1,24,55,650
2014-15	3,81,82,840	1,93,21,300
2015-16	1,26,00,000	70,32,500
2016-17	4,68,50,000	3,11,17,500

5. Aggrieved, the assessee carried matter in first-appeal but could not succeed. Still aggrieved, the assessee has come in these appeals before us assailing the orders of lower authorities.

6. Learned Representatives of both sides agree that the issue and facts involved in all these ten appeals are identical except change of figures; therefore we take up ITA No. 252/Ind/2021 and No. 257/Ind/2021 for first AY 2012-13 as lead cases. The grounds raised in these appeals are as under:

ITA No. 252/Ind/2021:

"1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in confirming penalty of Rs. 12,00,000/- on account of cash loan received which is illegal, unjustified and bad in law.

2. On the facts and circumstances, the order of the Ld. CIT(A) is illegal, unjustified and bad in law."

ITA No. 257/Ind/2021:

"1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in confirming penalty of Rs. 25,00,000/- on account of cash loan re-payment which is illegal, unjustified and bad in law.

2. *On the facts and circumstances, the order of the Ld. CIT(A) is illegal, unjustified and bad in law.”*

7. Learned AR representing the assessee carried us to various pages of penalty-order passed by AO and submitted that during the search conducted upon Shri Brijmohan Khushwaha on 07.01.2016, the authorities found and seized diaries marked as “BS-4” and “BS-5”. On the basis of those diaries, the AO drew inference that the assessee had taken/repaid loans from/to various persons in cash. Ld. AO made a listing of such transactions on Page No. 2 to 17 of penalty-order. When the AO show-caused assessee, Shri Gajendra Jain, authorized representatives of assessee filed submissions primarily contending that (i) During assessment-proceeding itself, the assessee had filed reply to AO in response to notice dated 10.07.2018 issued by AO and thereafter the assessee presumed that AO had accepted his reply; and (ii) The assessee is engaged in liquor business and cash had been received from various shops as well as there were refunds of cash advances given by assessee; there was no loan taken or repaid by assessee. However, Ld. AO rejected assessee’s submissions and imposed penalty u/s 271D/271E treating the impugned transactions as loan transactions. Then, drawing our attention to the order of first-appeal, Ld. AR submitted that though the assessee made a detailed submission to CIT(A) which is re-produced in Para No. 6 to 11 by CIT(A) himself in his appeal-order, yet the Ld. CIT(A) has merely stated *“The appellant violated the provisions of section 269SS of the IT Act and section 269T of the IT Act by receiving unsecured cash loans and re-paid cash loans. During the course of penalty proceedings the appellant has not filed the reason for accepting the loan in cash.”* Thereafter, the Ld. CIT(A) has simply re-produced the provisions of section 269SS/269T and upheld penalties.

8. With such background, Ld. AR raised several contentions and argued very strongly that the lower-authorities have saddled the assessee with

heavy penalties ignoring the submissions made before them. We summarize below the contentions raised by Ld. AR:

- (i) It is submitted that the impugned diaries marked as BS-4 and BS-5 were not seized from assessee although a search was conducted upon assessee. Those diaries were found and seized during a search carried out upon Shri Brijmohan Kushwaha, a third person, who was not in full time employment with assessee. He was only a part-time accountant and looking accounting affairs of many other traders besides assessee. This fact is clearly evident from reply to Q.No. 4 and Q.No. 5 given by Shri Brijmohan Kushwaha in statement recorded u/s 131 on 09.03.2016 (Page No. 105 of Paper-Book). Therefore, the presumption u/s 132(4A) as well as 292C *qua* those diaries do not apply against the assessee in view of decision in **PCIT Surat Vs. Gaurangbhai Pramodchandra Upadhyay 2020 (3) TMI 882 (Guj)**. Ld. AR strongly relied upon this decision wherein the Hon'ble Gujrat High Court was concerned with an identical case of penalty u/s 271D & 271E imposed on the basis of documents seized from possession of a third party. While deciding, the Hon'ble High Court upheld the order of ITAT quashing the penalties on the footing that no presumption u/s 132(2A) and 292C could be drawn on the basis of material seized from a third party. Further reliance is placed on following decisions:
- (a) Dharmraj Prasad Bibuti (2019) 266 Taxman 281 (Pat HC)
 - (b) PCIT Vs. Umesh Ishrani (2019) 108 Taxman 437 (Bom HC)
 - (c) PCIT Vs. Ajanta Footcare (India) P. Ltd. (2017) 84 Taxman 109 (Cal HC)
 - (d) Ashwani Kumar Vs. ITO (1992) 42 TTJ (Del) 644
- (ii) It is submitted that, in the entire penalty-order, Ld. AO has not uttered a single word about the statement, version, stand or explanation of Shri Brijmohan Khushwaha *qua* the diaries or contents

of diaries. When the diaries were found from possession of Shri Birjmohan Khushwaha, the AO was duty bound to bring on record the averments of Shri Brijmohan Khushwaha *qua* those diaries and confront assessee with respect to the transactions alleged as pertaining to assessee but, however, it was not done. Ld. AR strongly contended that no opportunity of examination or cross-examination of Shri Brijmohan Khuswaha was provided to assessee which was a sine-qua-non for using the material found in his possession against assessee. Reliance is placed on following decisions:

- (a) M/s Kishinchand Chellaram Vs. CIT (1980) 125 ITR 713 (SC)
 - (b) M/s Andaman Timber Industries Vs. Commissioner of Central Excise, Kolkata (2016) 15 SCC 785 (SC)
 - (c) Ayaaubkhan Noorkhan Pathan Vs. The State of Maharashtra and Ors. 2013 AIR 58 (SC)
 - (d) CIT Vs. Smt. Sunita Dhadda (2018) 3 TMI 1610 (SC)
- (iii) It is submitted that if the AO believed that the assessee had taken loans from different persons, the AO should have made enquiries from those very persons. Moreover, it was legally incumbent upon the AO to call for those persons to explain the sources of loans having been given to assessee and make necessary additions in their own hands u/s 69/69A/69B of the act as well as interest-income. The AO has not carried out any such exercise.
- (iv) It is submitted that although a search was also conducted upon assessee wherein extensive investigation was carried out but not a single document, paper or slip was found by which it could have been observed that the assessee was indulged in accepting cash loans from anyone. Had the assessee indulged in taking cash loans, at least some piece of evidence like promissory note, cheque, paper, slip, agreement, etc. would have been found but there was no iota of any such

evidence. Ld. AR submitted that the AO has alleged the aggregate receipts of cash loans to the whopping tune of Rs. 10,63,32,840/- and repayment of Rs. 7,24,26,950/- by assessee in all 5 assessment-years and that too without any piece of corroborative evidence, how it is possible? Ld. AR pointed out that the AO has not made any addition on account of interest payment u/s 69C while framing assessments of assessee u/s 153A. Ld. AR posed a question – How such hefty amount of loan can be taken without any payment of interest?

- (v) It is submitted that the diaries are not books of account. It is not discernible that for what purpose and on whose instructions, those diaries were maintained by Shri Brijmohan Kushuwah. The diaries also contain stray jottings from which it cannot be established conclusively as to whether those jottings denoted receipts or payments. Therefore, those diaries cannot be equated with the books of account so as to fall within the ambit of admissible evidence in accordance with the Indian Evidence Act, 1872. The Hon'ble Supreme Court has held in CBI Vs. V.C. Shukla and Others (1998) 3 SCC 410 that the diaries cannot be regarded as books of account and without corroborative evidence, no reliance can be placed on such diaries.
- (vi) That without assigning any reason whatsoever in penalty-order, many of the figures written in the diaries in single or double digits have been interpreted in lacs.
- (vii) Then, the Ld. AR submitted that although a search u/s 132 was also conducted upon assessee but the assessee never claimed to have taken loans for explaining source of any cash, jewellery, asset, investment found during search or any entry in the books of account in any of the assessment-years involved. When section 269SS and 269T were introduced through Finance Act, 1984, the CBDT issued

Circular No. 387 dated 07.06.1984 explaining the objective of these sections as under:

“Prohibition against taking or accepting certain loans and deposits in cash:

32.1 Unaccounted cash found in the course of searches carried out by the Income-tax Department is often explained by taxpayers as representing loans taken from or deposits made by various persons. Unaccounted income is also brought into the books of account in the form of such loans and deposits and taxpayers are also able to get confirmatory letters from such persons in support of their explanation.

32.2 With a view to countering this device, which enables taxpayers to explain away unaccounted cash or unaccounted deposits, the Finance Act has inserted a new section 269SS in the Income-tax Act debarring persons from taking or accepting, after 30th June, 1984, from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft if the amount of such loan or deposit or the aggregate amount of such loan and deposit is Rs. 10,000 or more. This prohibition will also apply in cases where on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), and the amount or the aggregate amount remaining unpaid is Rs. 10,000 or more. The prohibition will also apply in cases where the amount of such loan or deposit, together with the aggregate amount remaining unpaid on the date on which such loan or deposit is proposed to be taken, is Rs. 10,000 or more.”

Ld. AR contended that the legislative intent of bringing section 269SS/269T as explained by CBDT clearly encompasses the assessee's case. Therefore also, the lower-authorities are not justified in imposing/confirming the penalties.

- (viii) Without prejudice, Ld. AR submitted that even if it is assumed that a few transactions recorded in the diaries pertained to assessee, the assessee is engaged in liquor business and the impugned transactions in the nature of cash received from various shops as well as refunds of cash advances given by assessee which nevertheless did not attract section 269SS/269T in any case.

9. With above submissions, Ld. AR strongly contended that the authorities have merely acted on the conjecture and surmise that the assessee has taken/repaid loans in cash. Ld. AR argued that the penalty proceedings are quasi-criminal in nature; therefore there was a heavy onus on the AO to establish that assessee has made contraventions of section 269SS/269T but the AO has miserably failed to do so. Further, the CIT(A) has also ignored the detailed submission running over 6 pages made by assessee before him and simply quoted the provision of section 269SS/269T and upheld the penalties imposed by AO. Ld. AR submitted that the penalties imposed upon assessee are not sustainable and the same must be deleted.

10. Replying to above, Ld. DR representing the revenue placed a strong reliance on the orders of lower-authorities. He submitted that although the diaries were seized in a search conducted upon third person but the AO has carefully analysed the contents of diaries; only then and thereafter the AO concluded that the assessee had taken/repaid loans in cash. Ld. DR submitted that the conclusion drawn by AO is perfect, justified and sustainable. He submitted that by taking/repaying loans in cash in excess of limits prescribed in section 269SS/269T, the assessee has committed defaults which attracted section 271D/271E; therefore the AO's action to impose penalties is very much correct and must be upheld.

11. We have considered rival submissions and perused the material held on record. After a careful consideration, we find several meritorious contentions raised by Ld. AR. The *first and foremost* contention of Ld. AR, as we find, is that although a search was also conducted upon assessee, the impugned diaries BS-4 and BS-5 were not seized from assessee, they were seized during a search conducted upon Shri Brijmohan Kushwaha, a third person who was part-time accountant of many traders including assessee. Therefore, at the first instance, the presumption u/s 132(4A) as well as 292C *qua* those diaries do not apply against the assessee. We find that

holding this proposition, the Hon'ble Gujrat High Court has also upheld the deletion of identical penalties u/s 271D & 271E imposed by revenue-authorities in **PCIT Surat Vs. Gaurangbhai Pramodchandra Upadhyay 2020 (3) TMI 882 (Guj)**. The relevant paras of decision are extracted below:

"6. We straightway go to the findings of the fact recorded by the Appellate Tribunal in its impugned order:

"8. We have heard the rival submissions and perused the material available on record. We have gone through the assessment order and penalty order in the assessment years under consideration. It is observed that the addition of interest payment under [Section 69C](#) was made on account of documents seized from third party which were reflected some cash loans transactions i.e. receipts and payments. However, these documents were not found from the possession of the assessee. Therefore, presumption under [Section 132\(4A\)](#) as well as under [Section 292C](#) is not available in the case of assessee. Further, the statement on which the Assessing Officer has based his findings has not found to be acceptable due to changing stand of the parties concern which were also third party. Further, the transactions were not found to be true as these were not deciphered by persons from whose possession these were recovered. Therefore, the charge of the Assessing Officer that loans were rightly taken and repaid in cash has not been established. The Ld. CIT(A) has given this clear cut findings in quantum appeal in the case of assessee against which the appeal is also dismissed at the level of ITAT. Hence, Ld. CIT(A)'s order has attained finality in the quantum proceedings. Therefore, just because the assessee has business relations with a persons (not even the person from whom the documents were recovered) nor it is proved that unsubstantiated entry found recorded in the similar name is true and belongs to the assessee. We are therefore inclined to agree with the findings recorded by the Ld. CIT(A) in penalty proceedings that no corroborative or substantive evidence has been brought on record to suggest that he assessee has taken any loan in cash or repaid any loan in cash and done the transactions reflected in the seized material recovered from third party. Therefore, considering the totality of the facts, we find no reason to deviate from findings recorded by the Ld.CIT(A). Accordingly, the appeal of the Revenue in respect of penalty under [Section 271D](#) and [271E](#) is dismissed. Consequently, all the grounds of appeal of the Revenue as reproduced above are dismissed."

7. Thus, the learned Tribunal took into consideration the following aspects:

A. The addition of interest payment under [Section 69C](#) of the Act1961 was made on the basis of the documents seized from a third party.

B. Such documents seized from the third party reflected loan transactions in cash.

8. The Tribunal took notice of the fact that such documents were not found or recovered from the possession of the assessee. In such circumstances, no presumption under [Section 132\(4A\)](#) as well as under [Section 292C](#) of the Act 1961 could be drawn. The Tribunal also took notice of the fact that the Assessing Officer had based his findings on the basis of a statement, but the statement has not been found to be acceptable in view of the conflicting stance. The Tribunal concurred with the findings recorded by the CIT(A) that it is not established that the loans were obtained and repaid in cash. The Tribunal also took notice of the fact that the quantum proceedings had attained finality. In short, in view of the concurrent findings of the fact recorded by the two authorities, there is nothing to substantiate the case of the Revenue that the assessee had obtained the loan in cash and the same was also repaid in cash.

9. In view of the aforesaid findings of fact recorded by the Tribunal, we are of the view that none of the questions, as proposed by the Revenue, could be termed as substantial questions of law. In the result, all the captioned Tax Appeals fail and are hereby dismissed.”

Secondly, we again note an important pleading of Ld. AR that nowhere in the penalty-order, the AO has given any finding as to the version, stand, explanation or statement of Shri Brijmohan Khushwaha from whose possession those diaries were seized. We believe that when the authorities are taking action against assessee on the basis of diaries found from a third person, the authorities must have sought explanation from that person as to the diaries and confront it to the assessee, but such minimum exercise was not even done. Interestingly, no opportunity has been given to assessee to examine or cross-examine Shri Brijmohan Khuswaha and still the material found from his possession has been used against assessee. *Thirdly*, we also find merit in AR's submission that if the AO really believed that the assessee had taken loans from different persons, the AO ought to have made enquiries from those persons and examined whether they had explainable sources of giving loans to assessee or not. Further, in absence of explainable sources, the AO must have made necessary additions in their hands u/s 69/69A/69B and also assessed interest earned by them from assessee. Needless to mention that the enquiries from those persons would have unearthed the truth. But the AO has not carried out any such exercise. *Fourthly*, we also find that although a search was also conducted upon assessee but there is no single document, paper, slip, promissory note,

agreement, etc. found by authorities to corroborate the indulgence of assessee in taking loans. It is also noteworthy that the AO has not made any addition on account of payment of unaccounted interest by assessee. *Fifthly*, the contention of Ld. AR that many of the figures written in the diaries in single or double digits have been baselessly interpreted in lacs, is also having substance. Thus, we find that the AO's action is based on mere surmises and conjectures without having any valid, positive, cogent or corroborative evidence.

12. The Ld. AR has also relied upon CBDT Circular No. 387 dated 07.06.1984 to advance an argument that the intention behind introduction of section 269SS/269T as explained by CBDT clearly encapsulates, rather guards, the assessee's case. On perusal of Circular, we find the opening para itself "*Unaccounted cash found in the course of searches carried out by the Income-tax Department is often explained by taxpayers as representing loans taken from or deposits made by various persons*". It conveys that the provisions of section 269SS/269T would trigger where the assessee explains the source of cash or any other asset found during search as representing the cash loans taken from various persons. Although we do understand that the intention behind introduction of section 269SS/269T as clarified in this Circular cannot obliterate the applicability of sections 269SS/269T which are statutory provisions once enacted, but in numerous decisions this clarification has been taken as an aid for interpreting the law and it can be certainly used, as we believe, in the present case of assessee where the situation directly fits in the circular. As a matter of fact, Ld. AR has made a clear assertion standing at the Bar that the assessee has not explained the source of any cash, jewellery, asset, investment, etc. found during search or any entry in the books of account in any of the assessment-years involved pursuant to search as sourced from alleged cash loans taken by assessee. Had the assessee declared the source of any cash, jewellery, asset, investment etc. found during search as acquired by utilizing loans taken in cash, the AO would have been justified to impose penalty u/s 269SS/269T. But the situation is just opposite. In the

present case, there is no such declaration by assessee. Therefore, going by Circular also, one can conclude that the sections 269SS/269T and consequently sections 271D/271E can't be applied in present case.

13. In view of above discussions and for the reasons stated therein, we are of the considered view that the penalties imposed/confirmed by lower-authorities upon the assessee are not sustainable. Therefore, we are inclined to quash the penalties in all assessment-years. The assessee succeeds in these appeals.

14. Resultantly, all these appeals of assessee are allowed.

<i>Order pronounced in the open court on 18/06/2023.</i>
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Sd/-

(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Sd/-

(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 18.05.2023

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	11.05.2023
2.	Date of typing & draft order placed before the Dictating Member	11.05.2023
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	11.05.2023
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	