IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: B: NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.1306/Del/2020
Assessment Year: 2016-17

The DCIT, Central Circle-1, Gurugram, Haryana 122016	vs.	Deepak Kumar, H.No. 13/2, DLF Phase-1, Lower Ground Floor, Gurugram, Haryana PAN **AAAPK 4112 D**
(Appellant)		(Respondent)

For Revenue :	Shri T. James Singson, CIT(DR)
For Assessee :	Shri Parikshit Aggarwal, cA

Date of Hearing :	11.05.2023
Date of Pronouncement :	13.06.2023

ORDER

PER CHANDRA MOHAN GARG, J.M.

This appeal has been filed against the order of CIT(A)-34, New Delhi dated 27.06.2019 for AY 2012-13.

2. The grounds of appeal raised by the revenue are as follows:-

i) Whether on the facts and in the circumstances of the case, the Ld. CIT(4) has erred in deleting the penalty us 271D of the Act relying on the order of the Hon 'ble ITAT wherein it was held that the payment of Rs.2,38,00,000/- made by M/s Spaze Towers Put. Ltd. to the assessee was not a loan transaction made in contravention of the provisions of section 269SS of the Income Tax Act.

ii) Whether on the facts and in the circumstances of the case, the Id. CIT(A)has erred in deleting the penalty us 271D of the Act despite the fact that from the funds flow submitted by Ms Spaze Tower Put. Ltd. before the Hon'ble Settlement Commission it is evident that Ms Spaze Tower Put. Ltd. had discharged the liabilities of the assessee by making payments in cash which is violation of the provisions of section 269SS of the Act.

iii) Whether on the facts and in the circumstances of the case, the Id. CIT(A)has erred in deleting the penalty relying on the order of the Hon'ble ITAT wherein it was held that since Ms Spaze Towers Pvt. Ltd. incurred expenditure towards the personal needs of the directors/promoters, the same was acknowledged as liability by them but

the same cannot be construed as loan or deposit despite admission of the assessee before the CIT(A) in quantum appellate proceedings that these cash transactions were made between two separate entities on returnable basis as loan deposits in violation of the provisions of section 269SS of the Act.

iv) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the penalty relying on the order of the Hon'ble ITAT wherein it was held that penalty us 271D is without any satisfaction and therefore, no such penalty can be levied.

3. Supporting the penalty order the ld. CIT(DR) submitted that the Ld. CIT(4) has erred in deleting the penalty us 271D of the Act relying on the order of the Hon 'ble ITAT wherein it was held that the payment of Rs.2,38,00,000/- made by M/s Spaze Towers Put. Ltd. to the assessee was not a loan transaction made in contravention of the provisions of section 269SS of the Income Tax Act. He further submitted that the Id. CIT(A)has erred in deleting the penalty us 271D of the Act despite the fact that from the funds flow submitted by Ms Spaze Tower Put. Ltd. before the Hon'ble Settlement Commission it is evident that Ms Spaze Tower Put. Ltd. had discharged the liabilities of the assessee by making payments in cash which is violation of the provisions of section 269SS of the Act. It has also been contended that the Id. CIT(A)has erred in deleting the penalty relying on the order of the Hon'ble ITAT wherein it was held that since Ms Spaze Towers Pvt. Ltd. incurred expenditure towards the personal needs of the directors/promoters, the same was acknowledged as liability by them but the same cannot be construed as loan or deposit despite admission of the assessee before the CIT(A) in quantum appellate proceedings that these cash transactions were made between two separate entities on returnable basis as loan deposits in violation of the provisions of section 269SS of the Act. The ld. CIT(DR) also pointed out that the Ld. CIT(A) has erred in deleting the penalty relying on the order of the Hon'ble ITAT wherein it was held that penalty us 271D is without any satisfaction and therefore, no such penalty can be levied. The ld. CIT(DR) finally submitted that the first appellate authority has deleted penalty without any justified reason therefore the same may kindly be set aside by restoring that of the Assessing Officer.

4. Replying to the above, the ld. assessee's authorized representative (AR), supporting the first appellate order, submitted that the penalty was imposed by ignoring the fund flow statement submitted before income tax settlement commission by the M/s. Spaze Towers Pvt. Ltd., which has provided cash fund to the assessee and the ld. CIT(A) considered the same on the right prospective and by considering the order of ITAT Delhi Bench in the case of M/s. K S Chawla & Sons in ITA No. 5614/Del/2019 dated 28.08.2019 and therefore the same may kindly be upheld.

5. On careful consideration of above submission first of all, we note that the ld. CIT(A) has granted relief to the assessee by considering the submissions of assessee noted in para 7 and with following observations and findings:-

8. Decision:-

For the cases under consideration in this common appellate order. On perusal of the Fund Flow Statement submitted before Hon'ble ITSC, it was revealed that M/s Spaze Towers Pvt. Ltd. has provided cash funds to the appellant(s) as discussed in the penalty order(s) u/s. 271D of the Act as hereunder:-

Sr.No	*Name of the appellant*	*A.Y.*	*Particulars*	*Payments/expenditure*	*Penalty u/s 271D Imposed*
(i)	*Shri Aman Sharma*	*2016-17*	*Personal household expense (additional) in cash and unrecorded investment in diamond solitaire*	*Rs. 16,66,833/- (actually Rs. 83,00,000/- as given in grounds of appeal)*	*Rs. 16,66,833/- (actually Rs. 83,00.000/- as given in ground of appeal)*
(ii)	*Shri Bharat Bhushan Kumar*	*2016-17*	*Unaccounted Investment in jewellery and unaccounted cash seized*	*Rs. 1,85,00,000/-*	*Rs. 1,85,00,000/-*
(iii)	*Shri Deepak Kumar*	*2016-17*	*Unaccounted Investment in jewellery and unaccounted cash seized*	*Rs. 2,38,00,000/-*	*Rs. 2,38,00,000/-*

I have gone through the assessment order and submissions filed by the appellant for the year under consideration and the following observations are made:-

(i) The underlying facts in all the appeals in this consolidated appellate order are identified for levy of penalty u/s 271D r.w.s. 269SS of the Act.

(ii) Search and seizure operation us 132 of the Act was carried out on 17.02.2016 in the case of M/s Spaze Towers Pvt Ltd. Pursuant to the search proceedings u/s 153A of the Act were initiated.

(iii) The Assessing Officer in the assessment order us 153A of the Act made addition of the amount in the case of appellant by treating the personal expenses incurred by

M/s Spaze Towers Pvt Ltd and relating to appellant during the year under consideration as income of the appellant.

(iv) CIT(A) deleted the addition made by the Assessing Officer in the hands of the appellant in view of the Hon'ble ITS order in the case of Spaze Towers Pvt Ltd.

(v) Thereafter, the A initiated penalty proceedings us 271D of the Act in the case of the appellant on the ground that by accepting loans from M/ Spaze Towers Pt Ltd the appellant had violated the provisions of section 269SS of the Act, thereby making him liable for penalty provisions u/s 271D of the Act.

(vi) Penalty u/s 271D amounting Rs. 16,66,833/-, Rs. 1,85,00,000/- and Rs. 2,38,00,000/- was thereafter imposed by JCIT, Central Range, Gurgaon in the case of appellant (s for the year under consideration, in the case of Shri Aman Sharma, Shri Bharat Bhushan Kumar and Shri Deepak Kumar for A.Y. 2016-17.

(vii) Hon'ble ITAT, Delhi 'D' Bench in the case of M/s K.S. Chawla & Sons (HUF) ITA No. 5614/Del/2019 (lead judgment) & others dated 28.08.2019 has adiudicated as under on similar facts in other group cases as hereunder:-

"16. We have heard the rival submissions and have given thoughtful consideration to the orders of the authorities below. We have also carefully perused the assessment order and order of the first appellate authority in quantum proceedings. The undisputed fact is that the Settlement Commission, while accepting the settlement offer of additional income of Rs. 52.74 crores on account of bogus purchases has also accepted the telescoping of personal expenses of the promoters/ directors aggregating to Rs. 16.43 crores. The relevant findings of the Settlement Commission read as under:

"An action of Search / Survey was conducted on applicant us 132 of the Income Tax Act, 1962 (Act) on 17.02.2016. The applicant submitted letter d. 11.3.2016 to Ld DD1T-Investigation Unit-Ill, Gurgaon (even well before receiving copies of seized documents), Stating the discrepancies in records totaling to Rs. 81.00 crs. (and not undisclosed income or surrender as stated in the rule-9 report by Ld Pr CIT). It is respectfully submitted that the applicant has addressed and considered each and every issue stated in the said letter dt. 11.3.2016 and offered a sum of Rs. 53.04 cr., in the present SOF, which shall be dealt with, in the subsequent paras apart from additional surrender of Rs. 1.65 crs in the hands of Sh Arvinder Dhingra (which is also pending for adjudication before the Hon'ble Bench). Therefore, the total amount offered before the Hon'ble Settlement Commission pertaining to both the applications comes to Rs.54.69 cr. The applicant accepted that it had recorded inflated purchases to the tune of Rs.52.74 crs (app) under the head of construction expenses apart from another surrender of Rs.30.00 lacs and thereby suppressed the profits by Rs. 53.04 cr (app). The applicant used to pay to the said Vendors towards the inflated purchases in question by account payee cheques and the applicant used to get cash after deducting nominal charges as stated in detail in SOF.

Para 2.2.1 to para 2.2.4 Telescoping Of Cash Expenses of Directors/Promoters The Ld Pr CIT has objected to telescoping of such cash expenses in para No, 2.2.1 to 2.2.3 on the ground that such cash is utilized by Directors/Shareholders for their personal use. The applicant has admitted to have spent cash (out of cash received through inflated

purchases) on various activities as stated in detail in SOF totaling to Rs. 14,70,67,358/-. Since, the cash is spent out of available cash in hand generated out of additional income offered for tax, which has been duly recorded in Cash Elow statement submitted at page No. 27-30 of SOE, and the cash expenses so incurred have not been claimed as expenses in computing additional income offered before Hon'ble Bench, the same deserves be deducted out of Cash Flow and thereby telescoping set off of cash should be allowed to the extent.

17. It is also not in dispute that taking a leaf out of the statement of facts and fund flow statement filed by Ms Spaze Towers Pvt Ltd, the Assessing Officer had made addition in the hands of the captioned appellants by treating the telescoped personal expenses as income of the promoters/directors. This means that at this stage, the Assessing Officer was convinced that the telescoped personal expenses, incurred by M/s Spaze Towers Pt Ltd, were nothing but income of the promoters/directors.

18. When this addition was agitated before the Id. CIT(A), the Id. CIT(A), taking a leaf out of the decision of the Settlement Commission, came to the conclusion that the same income cannot be taxed in two hands in the same assessment year and, accordingly, deleted the additions.

19. However, while deleting the addition, the Id. CIT(A) though observed that the same should be considered as loans/deposits in the hands of the promoters/directors in the light of the relevant provisions of the Act. It is true that the Id. CIT(A) nowhere directed the Assessing Officer to initiate penalty proceedings but it is equally true that prior to this decision of the Id. CIT(A), the Assessing Officer never took a view that the impugned telescoped expenses incurred by M/s Spaze Towers Put Ltd was in fact, loan/deposit given by the said company to the promoters/directors.

20. Dehors the fate of quantum additions, the Assessing Officer cannot treat the same amount as income of the appellants as well as loans/deposits in the hands of the appellants.

21. The Hon'ble Delhi High Court in the case of Standard Brands Ltd [supra] held as under:

"6. Against the order dated 6-9-2000, the revenue preferred an appeal before the Income Tax Appellate Tribunal. By an order dated 6-10-2004, the Tribunal (in paragraph 9 of the said order) upheld the view taken by the Commissioner (Appeals) in his order dated 6-9-2000. The Tribunal held that the receipt was outside the scope of undisclosed income defined under section 158B(b) of the Act.

7. On these facts, we are of the view that the revenue could not on the one hand, contend that the amount of Rs. 3 lakhs is undisclosed income in the hands of the assessed and at the same time seek to initiate proceedings against the assessed for violation of the provisions of section 269SS of the Act which deals with cash deposits or loans in excess of Rs. 20,000.

8. The revenue, having taken the stand that the income was undisclosed income in the hands of the assessed, it could not resort to proceedings under section 269SS read with section 271D of the Act, as held by the Tribunal."

22. Similar view was taken by the Hon'ble High Court of Delhi in the case of R.P. Singh & Co. [P] Ltd 340 ITR 217 wherein the Hon'ble High Court had the occasion to decide on the fact that once the share application money is treated as an undisclosed income of the assessee us 68 of the Act, whether the initiation of proceedings us 269SS r.w.s 271D of the Act is valid?

23. On these facts, the Hon'ble High Court observed as under:

"6. Mr. Kochar, learned counsel for the assessee, submitted that the said question does not arise in the case at hand inasmuch as both the Commissioner of Income-tax (Appeals) and the Tribunal have recorded a finding that once the Assessing Officer has treated it as an undisclosed income, it could not have proceeded on the foundation that it is a deposit. In our considered opinion, this submission canvassed by Mr. Kocnar has substantial force and the question raised by the Revenue really does not arise in this case. Needless to say that the said question may arise where the facts would be different but the same has no relevance to the case at hand. In view of the aforesaid analysis the appeal being devoid of merit stands dismissed without any order as to costs"

24. The co-ordinate bench in the case of G.S. Entertainment ITSS 437 MUM/2004 had the occasion to consider similar issue. The relevant findings of the co-ordinate bench read as under:

"2. The learned Departmental Representative has relied on the order of the A0. He submitted that the amount of Rs. 15 lakhs was received by the assessee in cash as is recorded in the CD seized by the Department. He submitted that Shri Gautam Gupta has failed to confirm the transaction in the form of affidavit before the Revenue authorities. He submitted that CIT(A) should have taken note of the fact that cash receipt of Rs. 15 lakhs was towards part payment of the finance agreement dt. 28th July, 1998.

3. The learned Counsel for the assessee has opposed the submission of the learned Departmental Representative. He submitted that the amount of Rs. 15 lakhs was assessed by the A0 as undisclosed income of the assessee for the block period of the assessee and therefore, the provision of Section 269SS of the IT Act, 1961 does not apply to the facts of the case. He submitted that the issue is covered in favour of the assessee with the decision of the Hon'ble Delhi High Court CIT v. Standard Brands Ltd. (2006) 204 CTR (Del) 48 : (2006) 285 ITR 295 (Del).

4. We have considered the rival submissions. We find that it is not a case of regular assessment of the assessee. The block assessment of undisclosed income for the block period was framed by the A0 and the amount of Rs. 15 lakhs was added as undisclosed income of the assessee for the financial year 1998-99. Once the amount in question is assessed as the undisclosed income of the assessee in the block assessment for the block period of the assessee, the provision of Section 269SS r/w Section 271D cannot be resorted to. The issue in the present case is covered in favour of the assessee with the decision of Hon 'ble Delhi High Court in the case of Standard Brands Ltd., cited supra, wherein held that where the amount was undisclosed income in the hands of the assessee, it could not resort to proceedings under Section 269SS r/w Section 271D of the Act. Accordingly, the issue is decided in favour of the assessee and the order of the CIT(A) is confirmed and the ground of appeal of the Revenue is dismissed."

25. The aforesaid decisions are squarely applicable to the facts of the present appeals.

26. Coming back to the facts of the case as mentioned elsewhere, when the penalty proceedings were initiated by the]CIT, even the]CIT proceeded with the observations of the Id. CIT(A) who has advised to take necessary action as per the provisions of the Act. The]CIT then analyzed the provisions of section 269SS of the Act and after referring to one decision of the Supreme Court and two decisions of the Hon'ble High Court of Kolkata and Karnataka High Court, was convinced that there is a violation of provisions of section 26955 of the Act and, therefore, penalty u/s 271D of the Act is leviable and levied penalty accordingly.

27. It is a matter of fact that Spaze Towers was inflating its purchases and cash so generated was spent on the personal needs of the directors/promoters in the form of ceremonial functions, farm house construction etc. Nowhere the actual cash changed hands, but were spent on personal expenses of the promoters/directors. Merely because the promoters/directors agreed to repay the liability, the same cannot be construed as taking loans from Spaze Towers. Since Spaze Towers has incurred personal expenses of the promoters/ directors, the same cannot be construed as loans.

28. In our considered opinion, there must be a clear finding based on cogent and reliable material that the appellants took or accepted any loan or deposit in cash from Spaze Towers. In the absence of any cogent finding, it cannot be assumed that the appellants took or accepted loans/deposits otherwise than by an account payee cheque to invoke the provisions of section 269SS of the Act. Facts on record clearly show that Spaze Towers categorically declared admitted of having incurred personal expenditure on behalf of the promoters/ directors before the Settlement commission which has been accepted by the Settlement Commission in its order dated 24.05.2018.

29. The Assessing Officer, at first, treated the said transaction as income of the assessee which is evident from the appellate proceedings in respect of the quantum additions. This also clearly shows that the Assessing Officer was not sure whether Spaze Towers has given any cash loan to the promoters/directors. Since Spaze Towers incurred expenditure towards the personal needs of the directors/promoters, the same was acknowledged as liability by the directors/promoters but the same cannot be construed as loan or deposit within the framework of section 269SS of the Act.

30. Considering the facts in totality, in our considered opinion the transaction is devoid of any lender - borrower relationship. In other words, the amount which is the subject matter of consideration in the present cases is out of tax paid from income/disclosed sources of Spaze Towers.

31. The Hon'ble Karnataka High Court in the case of Chamundi Granite 239 IT 694 relied upon by the JCIT has also held that the ultimate aim of section 269SS is to prevent evasion of tax. Whereas, the facts of the appellants clearly shows that the taxes have been paid by Spaze Towers as per the order of the Supreme Court and there is no evasion of tax.

32. The Hon'ble Supreme Court in the case of Kum. A.B. Shanthi 255 ITR 258 has held that the object of introducing the provisions of section 269SS of the Act is to ensure that the tax payer is not allowed to give false explanation for his unaccounted money.

33. In the present cases, there is no dispute about the sources of money wherefrom the expenditure had been incurred which has already suffered taxation in the hands of the company Spaze Towers and the very same money cannot be considered as representing undisclosed income of the appellants for which false explanation is being given as loan to attract the provisions of section 2695S r.w.s 271D of the Act.

34. On a perusal of the assessment order in the quantum proceedings, the order of the first appellate authority deciding the quantum additions and also the order of the]CIT levying penalty us 271D of the Act, we find that the assessment order as well as the order of the]CIT are devoid of any satisfaction regarding initiation of penalty proceedings us 271D of the Act.

35. The Hon'ble Supreme Court in the case of Jai Laxmi Rice Mills Ambala City [supra] has held that penalty us 271D is without any satisfaction and, therefore, no such penalty can be levied. The relevant findings of the Hon 'ble Supreme Court read as under:

"In these appeals, we are concerned with the question as to whether penalty proceeding under Section 271D of the Income Tax Act (hereinafter referred to as "the Act") is independent of the assessment proceeding and this question arises for consideration in respect of Assessment Years 1991-1992 and 1992-1993 under the following circumstances: In respect of Assessment Year 1992-1993, assessment order was passed on 26.02.1996 on the basis of CIB information informing the Department that the assessee is engaged in large scale purchase and sale of wheat, but it is not filling income tax return.

Ex-parte proceedings were initiated, which resulted in the aforesaid order, as per which net taxable income of the assessee was assessed at Rs. 18,34,584/-. While framing the assessment, the Assessing Officer also observed that the assessee had contravened the provisions of Section 2695S of the Act and because of this the Assessing Officer was satisfied that penalty proceedings under Section 271E of the Act were to be initiated.

3. The assessee carried out this order in appeal. The Commissioner of Income Tax (Appeals) allowed the appeal and set aside the assessment order with a direction to frame the assessment de novo after affording adequate opportunity to the assessee.

4. After remand, the Assessing Officer passed fresh assessment order. In this assessment order, however, no satisfaction regarding initiation of penalty proceedings under Section 271E of the Act was recorded. It so happened that on the basis of the original assessment order dated 26.02.1996, show cause notice was given to the assessee and it resulted in passing the penalty order dated 23.09.1996. Thus, this penalty order was passed before the appeal of the assessee against the original assessment order was heard and allowed thereby setting aside the assessment order itself. It is in this backdrop, a question has arisen as to whether the penalty order, which was passed on the basis of original assessment order and when that assessment order had been set aside, could still survive.

4. The Tribunal as well as the High Court has held that it could not be so for the simple reason that when the original assessment order itself was set aside, the satisfaction recorded therein for the purpose of initiation of the penalty proceeding under Section

271E would also not survive. This according to us is the correct proposition of law stated by the High Court in the impugned order.

5. As pointed out above, insofar as, fresh assessment order is concerned, there was no satisfaction recorded regarding penalty proceeding under Section 271 of the Act, though in that order the Assessing Officer wanted penalty proceeding to be initiated under Section 271(1)(c) of the Act. Thus, insofar as penalty under Section 271E is concerned, it was without any satisfaction and, therefore, no such penalty could be levied.

These appeals are, accordingly, dismissed. "

36. The Id. DR had relied upon the decision of the Hon'ble Supreme Court in the case of Adinath Builders Put Ltd [supra]. We are of the considered opinion that the Hon'ble Supreme Court has dismissed the SLPs filed by the revenue and the Id. DR has relied upon the head notes, which cannot be considered as judgment of the Hon'ble Supreme Court as the Hon'ble Supreme Court has simply dismissed the SLPs without assigning any reason.

37. Considering the facts of the cases in hand from all possible angles, we do not find them to be fit cases for levy of penalty us 271D of the Act. We, accordingly, direct the Assessing Officer to delete the penalty levied in respect of the captioned appellants for all the assessment years under consideration. By this consolidated order, all the appeals are allowed and disposed off accordingly.

38. In the result, all the above captioned appeals are allowed.

In view of the judgment of Hon'ble ITAT in other group cases of the appellant on similar facts as reproduced above, respectfully following the said order, penalty imposed by the A0 cannot be sustained in the cases under consideration and hence deleted.

Hence on similar grounds, penalty u/s. 271D of the Act imposed in the following cases in this consolidated order are deleted.

(i)	*Shri Aman Sharma*	*2016-17*	*16,66,833/-*
(ii)	*Shri Bharat Bhushan Kumar*	*2016-17*	*1,85,00,000/-*
(iii)	*Shri Deepak Kumar*	*2016-17*	*2,38,00,000/-*

8. As a result, the appeal of the appellant(s) in all the cases under consideration are allowed.

6. The Id. CIT(A) has considered various aspects including order of ITAT Delhi Bench in the case of M/s. K S Chawal & Sons (supra). The Id. CIT(A) has categorically held that the order of Tribunal in other group cases on similar facts persuaded him to delete the penalty. The Id. CIT(A) at page 13 & 14 underlined seven observations for deleting the penalty. He observed therein that the Id. CIT(A) has deleted the addition made by Assessing Officer in the hands of appellant in view of order of ITSC in the case M/s. Spaze Towers Pvt. Ltd. and therefore he concluded that the penalty imposed on

assessee and two other persons by JCIT Central Range Gurgaon after said assessment order is not sustainable in view of order of co-ordinate bench of Tribunal in the case of M/s. K S Chawla & Sons (supra). The ld. CIT(DR) has not shown any contrary order or judgment by co-ordinate bench of Tribunal or Hon'ble High which may lead us to take a different view to support the penalty order. Hence we are inclined to hold that there is no ambiguity perversity or any valid reason to interfere with the findings arrived by the ld. CIT(A) and, thus, we uphold the same. Accordingly, grounds of revenue are dismissed.

6. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 13.06.2023.

Sd/-	Sd/-
(PRADIP KUMAR KEDIA)	(CHANDRA MOHAN GARG)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 13th June, 2023.

NV/-

Copy forwarded to :
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

// By Order //

Asstt. Registrar, ITAT, New Delhi