# आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक
**IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK**

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER**
**AND**
**SHRI MANISH AGARWAL, ACCOUNTANT MEMBER**

आयकर अपील **सं/ITA No.205 to 207/CTK/2022**
(**निर्धारण वर्ष** / A.Y. : 2009-2010, 2012-2013 & 2013-2014)

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| DCIT Central Circle-2, Bhubaneswar | Vs | M/s Hotel Sukhamaya Pvt. Ltd., A-1/9, A-1(A) & A-14, IRC Village, Nayapalli, Bhubaneswar-751014 |
| | | **PAN No. :AAACH 8114 M** |

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| (**अपीलार्थी /Appellant**) | .. | (**प्रत्यर्थी / Respondent**) |

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| **राजस्व की ओर से** /Revenue by | : | Shri Sanjay Kumar, CIT-DR and Srhi S.C.Mohanty, Sr.DR |
| **निर्धारिती की ओर से** /Assessee by | : | Shri S.C.Bhadra, CA |
| सुनवाई की तारीख / **Date of Hearing** | : | 18/09/2024 |
| घोषणा की तारीख/**Date of Pronouncement** | : | 18/09/2024 |

## आदेश / O R D E R

***Per Bench*** :

These are the appeals filed by the revenue against the separate orders all dated 12.09.2022, passed by the CIT(A)-2, Bhubaneswar in I.T. Appeal No. Bhubaneswar-2/10455/2018-19, Bhubaneswar-2/10461/2018-19 & Bhubaneswar-2/10457/2018-19 for the assessment years 2009-2010, 2012-2013 & 2013-2014, respectively.

2. The revenue in ITA No.205/CTK/2022 for A.Y.2009-2010 has raised the following grounds :-

1. *Whether the Ld. CIT(A) was correct in accepting the unsecured loan as share capital despite evidence to contrary including the submission of the assessee itself.*

2. *Whether the Ld. CIT(A) was correct in holding that since no addition of unaccounted income has been made, question of levying penalty for violation of section 269SS and 269T does not arise, when the addition on account of cash loan has been duly made and confirmed in the hands of the sister concern of the assessee.*
3. *Whether the Ld. CIT(A) was correct in overlooking the ratio of the judgment in Grihalakshmi Vision vs. Additional Commissioner of Income-tax, Range-1, Kozhikode [2015] and*

*Commissioner of income-tax-1, Kanpur vs. Sunil Sagar Co. [2017]?*

4. *Any other ground of appeal that may arise at the time of hearing.*

3. The revenue in ITA No.206/CTK/2022 for A.Y.2012-2013 has raised the following grounds :-

1. *Whether the Ld. CIT(A) was correct in accepting the unsecured loan as share capital despite evidence to contrary including the submission of the assessee itself.*

2. *Whether the Ld. CIT(A) was correct in holding that since no addition of unaccounted income has been made, question of levying penalty for violation of section 269SS and 269T does not arise, when the addition on account of cash loan has been duly made and confirmed in the hands of the sister concern of the assessee.*

3. *Whether the Ld. CIT(A) was correct in overlooking the ratio of the judgment in Grihalakshmi Vision vs. Additional Commissioner of Income-tax, Range-1, Kozhikode [2015] and Commissioner of income-tax-1, Kanpur vs. Sunil Sagar Co. [2017]?*

4. *Any other ground of appeal that may arise at the time of hearing.*

4. The revenue in ITA No.207/CTK/2022 for A.Y.2013-2014 has raised the following grounds :-

1. *Whether the Ld. CIT(A) was correct in accepting the unsecured loan as share capital despite evidence to contrary including the submission of the assessee itself.*
2. *Whether the Ld. CIT(A) was correct in holding that since no addition of unaccounted income has been made, question of levying penalty for violation of section 269SS and 269T does not arise, when the addition on account of cash loan has been duly made and confirmed in the hands of the sister concern of the assessee.*
3. *Whether the Ld. CIT(A) was correct in overlooking the ratio of the judgment in Grihalakshmi Vision vs. Additional Commissioner of Income-tax, Range-1, Kozhikode [2015] and Commissioner of income-tax-1, Kanpur vs. Sunil Sagar Co. [2017]?*

4. *Any other ground of appeal that may arise at the time of hearing.*

5. Since all the appeals are related to the penalty levied u/s.271D & 271E of the Act in contravention to the provisions of Section 269SS & 269T of the Act and the facts in all the three years are common as there were documents found as a result of search in the case of the assessee group indicating certain transactions in cash. Based on these transactions, it was held by the lower authorities that these are the loan transactions carried out between the assessee and its holding company and accordingly the penalties were levied u/s.271D & 271E of the Act for accepting and repayment of the loan in cash which stood deleted by the ld. CIT(A) against which revenue is in appeal for different years. Therefore, for the sake of convenience, all the three appeals are clubbed together for disposal.

6. Brief facts of the case are that the assessee is a company engaged in the business of running a hotel. A search and seizure operation u/s.132 of the Act was carried out on 21.11.2012 at the premises of M/s RKD Construction Pvt. Ltd. which incidentally is the holding company of the assessee. During the course of search at the business premises of the holding company namely M/s RKD Construction Pvt. Ltd., certain loose papers in the shape of vouchers were found and seized which related to the transactions in cash between the assessee and M/s RKD Construction Pvt. Ltd. During the course of search in the statements recorded u/s.132(4) of the Act, Managing Director of the company Shri Rohit Kumar Das has stated that these vouchers related to the loan transactions. Accordingly, the AO was of the opinion that since these

transactions are in cash, therefore, the assessee has violated the provisions of Section 269SS & 269T of the Act and vide letter dt. 08.09.2015 referred the matter to the Joint Commissioner of Income Tax for initiating the penalty u/s.271D & 271E of the Act, though no satisfaction was recorded in the assessment order passed for all the three years for violation of the provisions of section 269SS and 269T of the Act.

7. Before the lower authorities, the assessee contended that those receipts are related to the share application money and, therefore, do not fall under the category of loan transaction for the purpose of Section 269SS & 269T of the Act. However, the ld. JCIT has not accepted the contention solely for the reason that the Managing Director of the company in his statement recorded u/s.132(4) of the Act has accepted that these transactions are loan transactions and, therefore, the assessee has violated the provisions of Section 269SS & 269T of the Act. Thereafter the JCIT has proceeded to levy the penalty u/s.271D & 271E of the Act for the respective assessment years. In first appeal, the ld. CIT(A) after considering the submissions of the assessee, was of the opinion that since no additions have been made on account of these loan transaction in the hands of the assessee company and there were reasonable cause for the accepting/repayment of such amounts in cash and also considering the fact that these transactions are carried out between the holding and subsidiary company, he deleted the penalty so levied u/s.271D & 271E of the Act for all the years under appeals.

8. Before us, ld. CIT-DR along with Sr. DR submitted that the transactions carried out by the assessee were of the loan transactions and during the course of search in the statements the Managing Director also accepted this fact. They further submitted that even otherwise the claim of the assessee that it is a current account where the closing balance was converted into share capital is not of any help to the assessee as the Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works(P.) Ltd., reported in [2005] 275 ITR 399 (Jharkhand), has held that even if share application money cannot be considered as loan within meaning of section 269SS of the Act, it partakes of character of deposit, since it is repayable in specie on refusal to allot shares and is repayable if recalled by the assessee/applicant, before allotment of shares and conclusion of contract. Ld. CIT-DR and ld. Sr. DR submitted that the assessee's contention that the transactions of loan is a share application money does not devolve its liability for penalty u/s.271D & 271E of the Act for various years for violation to provisions of Section 269SS & 269T of the Act.

9. With regard to the observations of the ld. CIT(A) that the transactions were carried out between the holding and subsidiary company, since it is a sister company, the provisions u/s.269SS & 269T of the Act are not applicable. Ld. Sr. DR placed reliance on the decision of Hon'ble Kerala High Court in the case of Grihalakshmi Vision, passed in ITA No.83 of 2014, dated 7th August, 2015, wherein the Hon'ble Kerala High Court has held as under :-

> *15. The third contention that was raised by the assessee was that if money is taken from partners or sister concerns, it could not be treated as loans or deposits. In support of this contention, counsel for the assessee relied on judgments in Commissioner of Income Tax v. T.Perumal (Indul.) [2015] 370 ITR 313 (Mad) and Commissioner of Income Tax v. Muthoot Financiers and another [2015] 371 ITR 408 (Delhi). Reading of these judgments show that these cases were decided on the basis of the documents that were available before the Court. On the other hand, insofar as these cases are concerned, though it is the admitted case that amounts were received from partners and other sister concerns of the assessee and were repaid, there is no material whatsoever to infer that these receipts were anything other than loans or deposits. There is no law that every receipt from a partner or a sister concern cannot, in all circumstances, be treated as a loan or deposit. On the other hand, the nature of the receipt would depend upon the agreement between the parties and the evidence that is produced. As we have already stated, there is no material whatsoever to accept the case of the assessee that these are loan or deposit. In such circumstances, the findings of the Assessing Officer confirmed by the Appellate Commissioner and the Tribunal that it was a loan or deposit that was received by the assessee also has to be upheld and we do so.*
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> *In the result, the questions of law framed by the assessee are answered against it and in favour of the Revenue. Appeals are accordingly rejected.*

10. The ld. CIT-DR/Sr. DR also placed reliance in the case of CIT Vs. Bazpur Co-operative Sugar Factory Ltd., reported in [1988] 172 ITR 321 (SC), wherein the Hon'ble Supreme Court has held as under :-

> *13. If the provisions of the unamended bye-law are to be applied, it is clear that these amounts which were deducted by the respondent from the price payable to its members on account of supply of sugarcane were deducted in the course of the trading operations of the respondent and these deductions were a part of its trading operations. The receipts by way of these deductions must, therefore, be regarded as revenue receipts and are liable to be included in the taxable income of the respondent. It is urged by Mr. Manchanda, that these receipts have been described in the bye-law 50 as deposits, but we fail to see how they can really be regarded as deposits. It was held by this Court in Chowringhee Sales Bureau (P.) Ltd. v. CIT (1973) 87 ITR 542 that it is the true nature and quality of the receipt and not the head under which it is entered [in the account books as would prove decisive. if a receipt is a trading receipt, the fact that it is not so shown in the account books of the assessee would not prevent the assessing authority from treating it as a trading receipt. The same principle can be*

*derived from the decision of this Court in Punjab Distilling industries Ltd. v. CIT (1959) 35. ITR 519. In that case, the assessee carried on business as a distiller of country liquor and sold the produce of its distillery to licensed wholesalers. Under a scheme devised by the Government, the distiller (assessee) was entitled to charge the wholesaler a price for the bottles in which the liquor was supplied, at rates fixed by the Government, which he was bound to repay when the bottles were returned. In addition to the price fixed under the Government scheme, the assessee took from the wholesalers certain further amounts, described as security deposits without the Government's sanction and entirely as a condition imposed by the assessee itself for the sale of its liquor. The moneys described as security deposits were also returned as and when the bottles were returned but in this case the entire sum taken in one transaction was refunded when 90 per cent of the bottles covered by it were returned.*

*The price of the bottles received by the assessee was entered by it in its general trading account while the additional sum was entered in the general ledger under the heading "Empty bottles return security deposit account" The question was whether the assessee could be assessed to tax on the balance of the amounts of these additional sums left after the refunds made out of the same. It was held that the additional amount described as security deposit by the assessee was really an extra price for the bottles and was a part of the consideration for the sale of liquor it did not make any difference that the additional amount was entered in a separate ledger termed empty bottles return deposit account it was held that these additional amounts, which remained after the refunds were made, were trading receipts of the assessee and liable to tax. Applying these principles to the present case, in our opinion, it makes no difference that in the bye-law, these amounts have been referred to as deposits and the account in which these receipts were entered has been called loss equalization and capital redemption reserve fund". The essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it is made on the fulfillment of certain conditions. Under the amended bye-law, the amounts deducted from the price and credited to the said fund were first liable to be used in adjusting the losses of the respondent society in the working year; thereafter in the repayment of initial loan from the Industrial Finance Corporation of India and then for redeeming the Government share and only in the event of any balance being left, it was liable to be converted to share capital. The primary purpose for which the deposits were liable to be used were not to issue shares to the members from whose amounts the deductions were made but for the discharging liabilities of the respondent society. In these circumstances, the receipts constituted by these deductions were really trading receipts of the assessee-society and are liable to be included in its taxable income. In our view, the learned judges of the High Court, were, with respect, in error in answering the question referred in the negative. In our*

> *opinion, the question referred must be answered in affirmative and in favour of the revenue.*

11. In the last, it was submitted by ld.CIT-DR that the ld.CIT(A) has deleted the penalty by holding that the assessee has reasonable cause for making such transaction in cash. However, ld. CIT(A) has failed to appreciate the fact that it has to be seen at the point when the violation has taken place and, therefore, the order of ld. CIT(A) deleting the penalty deserves to be struck down. Accordingly both the ld. CIT-DR and ld. Sr. DR vehemently supported the order of the JCIT and prayed for restoration of imposition of penalty levied u/s 271D/271E in the respective assessment years.

12. On the other hand, ld.AR supported the orders of the ld. CIT(A) and reiterated the submissions made before the ld. CIT(A), which has been incorporated by the ld. CIT(A) in para 5.2, which reads as under :-

> *5.2 The AR in his submission 11.05.2019 has mentioned the following on this issue:*
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> *A search operation was conducted in the premises of both the companies on 21.11.2012 During the search in the premises of RKDCPL, some loose vouchers are seized, showing payment/repayment of loan to the appellant for which the Learned AO initiated penalty proceeding u/s 271E These loose vouchers seized in course of search from the premises of RKDCPL, written and prepared by the cash Dept. These vouchers are not verified and passed by the Finance Dept. Even the vouchers have not been numbered. At the time of entering in the Books of account, these vouchers are verified and properly entered as Share application the Books of Account of RKDCPL. As contained in the Penalty Order, statement of R. K. Das, MD of RKDCPL, was recorded during search. As per the Penalty Order, RK Das has admitted that the seized documents of loose sheets containing repayment of loan to the appellant company is not recorded in the Books of Account, which is actually not the fact Subsequently, it is realized that the said admission is made under a mistaken understanding of law and facts and also under tremendous mental stress A bona fide mistake due to wrong impression of law can be corrected in reorganisation of the principle that there is no estoppel of law. In reality, in the*

*Books of Account of both the appellant and RKDCPL, these transactions are recorded as Share Application During the year share application money recorded at Rs.74,15,000/-, under the head Share Application. It happened when at the end of the year the shares are not allotted. In fact, the penalty proceeding is initiated against RKDCPL and penalty is imposed u/s 271E, on RKDCPL on the basis of loose vouchers seized from its premises and again the same loose vouchers are used against the appellant company for imposing penalty u/s 271D, by issue of notice referring to the same loose vouchers.*

*5.2.1 Share Application Money*

*As mentioned in Para 1 of the submission, statement recorded in course of search, Shri R K. Das has admitted that seized documents of loose sheets containing repayment of loan to the appellant company is not recorded in the Books of account, which is actually not the fact Subsequently, it is realised that the said admission is made under a mistaken understanding of law and facts and also under tremendous mental stress In reality, in the Books of Account of both the appellants and RKDCPL these transactions are recorded as Share Application During the year share application money recorded at Rs. 74,15,000/-, under the head Share Application. It happened when at the end of the year the shares are not allotted.*

*And also as mentioned by the Learned JCIT. R K Das has made declaration voluntarily during the course of search operation. The same amount has been retracted subsequently The Learned Assessing Officer in the Assessment Order has not taken cognizance of the loan share application No addition is made on account of share application transaction treating the same as genuine one in course of assessment The Assessment Order is placed in page no 52 to 54 of Paper Book Whatever addition and disclosure is made in the hand of RKDCPL, the Learned JCIT has dragged the issue and initiated the penalty proceeding in the hand of the appellant, only because a proposal was issued by the AO subsequently to take action w/s 271D/E*

*In course of hearing, the appellant submitted a ledger copy of transaction in between the appellant and RKDCPL The ledger copy is placed in page no. 55 to 57 of Paper Book In the Books of account of RKDCPL, it is recorded that the said transaction as share application money and also in the account of appellant, the said transaction as share application money.*

*These are running transaction Balance at the end of the year is transferred to the share application money and allotted to share capital conveniently. The share application and share capital appears in the Balance Sheet. And also share allotted filed in MCA placed in page no. 58 to 60 of Paper Book Copy of Balance Sheet is placed in page no. 61 to 63 of Paper Book These were submitted*

*before the Learned JCIT. The submission of the appellant was supported by plethora of judgments, which shall be submitted before Your Honour with analysis of the judgments. The Learned JCIT brushed aside all the citation relying upon the decision of the Jharkhand High Court in the case of Bhalotia Engineering Works (P) Limited vs Commissioner of Income Tax, 275 ITR 399*

*The case of the Jharkhand High Court has been overruled by the following court.*

*CIT vs Eqbal Inn & Hotels Ltd (High Court of Punjab & Haryana)*
*CIT vs 1. P. India (P) Ltd. 343 ITR 0353 (Delhi High Court)*
*CIT vs Speedways Rubber (P) Ltd., 326 ITR 0031*

*In the case of the appellant as mentioned in paragraph -1, in 2003 when, RKDCPL acquired shares of Sri Durga Construction, a resolution was passed that whatever fund required for the appellant, shall be invested by the RKDCPL A chart is enclosed disclosing pattern of share holding from A. Y. 2008-09 to 2013-14, which indicates only RKDCPL, the holding company is investing in share capital in the appellant company Hence in almost all the years, RKDCPL's contribution towards investment is kept in a separate account as share application and also same is returned whenever not required or when RKDCPL requires fund urgently As mentioned earlier, the appellant is running Hotel and sometime needs cash for purchase of materials and payment to bank, when the payment is overdue RKDCPL, which carrying out Road work in remote localities, needs cash sometime urgently to send its work sites Reference may be made to the voucher (Ref page no 64 of the Paper Book) of RKDCPL where it is mentioned that on 16.09.10, the RKDCPL paid Rs 1,50,000/-, to the appellant The voucher is neither passed by the Managing Director nor signed by the recipient. Only somebody is signed as prepared Hence, these vouchers were prepared loosely and recorded in the Books of Account under the heading share application since RKDCPL has an obligation to pay and receive as per resolution made. The account is made like a current account*

*Certain cases similar to the case of the appellant are as under*

*The CIT vs Eqbal Inn & Hotels Lid. (High Court of Punjab & Haryana) decision date: 21 09.2015 (Ref page no. 65 to-79 of Paper Book)*

** 13 In the instant case, assessee accepted share application money in cash from its Director who has a substantial interest in the company. Receipt of share application money and allotment are maintained like a current account The Tribunal held that" when the money has been received in current account, it cannot be covered under the definition of loan or deposit and consequently penal provision w/s 271D of the Act could not be attracted and that money contributed by various Directors and their relatives was to be*

*treated as share application. The Honourable High Court has also referred Rule-2(b) of deposit Rule. As per definition, deposit not includes "any amount received by a private company from a person who, at the time of the receipt of amount, was a Director, relative of Director or member"*

*In the case of the appellant, whatever amount received under the head share application, is like a current account from where share application money is refunded, when it could not be allowed in the Assessment Order, no additions have been made on account of share application money, which clearly means that source of share capital were found to be genuine. The same was done to meet the requirement of fund. The assessee was under the bona fide belief that no violation has taken place. The transaction is bona fide and default was of technical nature for which penalty should not be justified. The case of Eqbal Inn & Hotels Lad is squarely applicable to the case of the appellant. In the said case, in page no.8 of the order, it has referred to case of to CIT vs. Rugmini Ram Ragav Spinners P. Limited. The case is placed in page no. 87 to 92of Paper Book.*

*Penalty under section 271E-Contravention of 2691-Refund of share application money-Money retained by the company was neither deposit nor loan-When the amount is neither deposit nor loan, provision of 13 26955 and 2697 have no application at all Assessee has not paid any interest at all us the advances-If the intention was to receive them as loans or deposits, the lenders would not have made the advances gratuitously Assessee was not called upon to explain the default under s. 269SS on receipt of said advances in the earlier years-This shows that she assesse's case was not governed by the said governed by the said provision Further, authorities below have given a factual finding to the effect that it is not a deposit or loan- Moreover, bona fide belief that the receipt of advances against allotment of shares would not be termed as loans or deposits is sufficient to drop the penalty-Therefore, there is no error or legal infirmity in the order of the Tribunal holding that penalty under s. 171E is not leviable.*

*In this case refund of share application money not being repayment of depositor loan, provisions of s. 2697 have no application, further, bona fide belief that the receipt of advances against allotment of shares would not be termed as loans or deposits is sufficient to drop the penalty under & 271E*

*CIT VL. MA Pride Remedies (P) Ltd. In the High Court of Judicature at Madras, 3 December, 2014. (Ref. page no. 95 to 95 of Paper Book)*

*In this context, it has been considered by the CIT (A) in CIT vs. Rugmini Ram Ragav Spinners (P) Limited., 304 ITR 0417. The Hon'ble jurisdictional Madras High Court held in this case (304 ITR 0417) that share application money is neither deposit nor loan and*

*therefore, provisions under section 26955 and 2697 have no application and consequently, there cannot be penalties under section 271D and section 271E. In view of the above, we find that these two appeals filed by the Revenue are liable to be dismissed*

*5.2.2 Genuine Transaction not covered within the ambit of section 271D/271E of the IT Act, 1961 mentions the following on this issue:*

*Genuine transaction shall not come within the ambit of 271DIE There is no case covered the section 271D/E relating to genuineness of transaction by the jurisdictional High Court. There is an ITAT order bearing appeal no. 136/CTK/2007 in the case of Mamata Patra vs. JCIT, Bhubaneswar. The case is placed in page no. 96 to 102 of the Paper Book In the above case, it was held that when assessee has no intension to violate provision & the cash transaction between two parties are genuine the penalty u/s 271D is deleted. Various cases cited in the said judgment are:*

*CIT vs. Maherwari Nirman Udyog (2008) 302 ITR 201 (Rajastan)*
*CIT vs. Bhagwati Prasad Bajoria (HUF) (2003) 26 ITR 0487*
*CIT vs Saini Medical Store (2005) 275 ITR 79*

*b. No penalty u/s 2710/E should be impossible on the assessee for any failure referred in provision which include section 2710, if it is proved that there is a reasonable cause for failure of Reasonable causes was sufficiently made out and when transaction was never doubted by the Revenue Authority breach was to be treated as mere technical transactions were reflected in the Books of account of those persons from whom loan war received*

*Citation: CIT vs Maa Kihodiyar Construction, Gujarat High Court (2014) 363 ITR 474 (Guj). (Ref page no. 103 to 107 of Paper Book)*

*Both CIT (A) and tribunal having found that transaction of cash loan and its repayment were genuine and there was no intention to evade tax, no interference was called for with the order deleting penalty under & 271D&E*

*Citation: CIT và Lakshmi Trust company (2008) 303 ITR, High Court of Madras. (Ref page no. 108 to 110 of Paper Book)*

*We find that the learned CIT (A) has made a finding of fact that creditors from whom cash was received and cash was repaid were genuine and he has also made a finding of facts that a confirmation to that act was obtained from these persons and the transactions were not made for attempting to evade tax, therefore, he held that there was a reasonable cause for entering into such transactions. The learned CIT (A) has passed an exhaustive and elaborate speaking order and we do not find any infirmity in the order of learned CIT (A), therefore, the appeals filed by revenue are dismissed.*

*Citation: Pr. CIT vs M/s Tehal Singh Khara & Sons, In the High Court of Punjab and Haryana Date of decision 17.07.2017. (Ref: page no. 111 to 117 of Paper Book)*

*e. Even though the assessee had not taken a specific plea of reasonable cause, it must be considered as applied to human action. Where the transactions are bona fide, penalty cannot be imposed*

*Citation: CIT vs. M. Yesodha 351 ITR 0265 (Ref: page no. 118 to 120 of Paper Book)*

*To sum up, a harmonious construction of the relevant provision of Sections 271D. 271E and 273 B clearly reveals the use of expression" shall be liable to pay" in section 271D and 271E and the provision of section 273B providing that no penalty would be leviable if the person concerned proves that there are reasonable cause or the said failure clearly indicates these provisions give a discretion to the authority to impose the penalty or not to impose the penalty Such a discretion has to be exercised in a just and fair manner having regard to the entire facts and materials existing on record. Ordinarily, a plea as to be ignorance of law cannot support the breach of a statutory provisions but the fact of such an technical break due to ignorance of the relevant provision of law or on account of bonafide belief, coupled with the fact that transactions in question are genuine and bonafide transaction were undertaken during the regular course of its business will not result in levy of penalty u/s 271D and E Citation: MS Lokaiah vs Addl. CIT. ITAT (Hyd) date of pronouncement 03/08/2016 (Ref page no 121 10128 of Paper Book)*

*5.2.3 Transaction with the Sister concern shall not come within the ambit of section 271D/271E of the IT Act, 1961 mentions the following on this issue:*

*Transaction with the Sister concern shall not come within the ambit of section 271D/E As submitted in para-1 of this submission, RKDCPL is only infusing fund in shape of either share capital or unsecured loan. Upto A.Y. 2013-14, The RKDCPL, the holding company has invested Rs.9,44,36,000/- and R. K. Das has invested Rs. 67,00,000/- Both the R. K. Das, who is the Chairman-cum-Managing Director of appellant company and Managing Director of RKDCPL have 89.39% of total share. In Both the company the Managing Director is common. The change signing lies with MD of both companies. The entire finance and Management of both the companies are under the control of R. K. Das Under this situation cash transaction which is genuine shall not covered /s 271D/E, since the fund is being changed from one hand to other and vise-versa. The above issue is narrated in more detail in the case of Muthoo M. George Brothers Vs Asst. CIT (1993) 46 ITD 0010. The case is placed in page no. 129 to 132 of Paper Book.*

*It is not in dispute that the assessee has accepted moneys in cash from its sister concerns or repaid the same in cash. Many of them are partnership firms and one of them is a limited company It is also not in dispute that the managing partner of the assessee firm is also the Managing partner of sister concern. It is also not in dispute that the managing partner of the assessee firm is also the Managing director of the limited company, nor is it in dispute that the transactions of alleged deposits are alleged loans or the repayments thereof are among the sister concern inter se. It is also on record that the accounts of these concerns are managed from K where the senior partners are residing. Nor is it in dispute that the assessee and the sister concerns with which it had dealing are all assessed to income-tax. In the circumstances, can it be said that the taking of moneys from one firm by another firm or repayment thereof constituted deposits or loans so as to attract the provisions of ss. 269SS and 269T? To make a deposit or loan there must be at least two parties- The giver and the receiver both in physical existence and in legal existence. It is also pertinent to note that is only w.ef. 1" April 1989 and not before that the meaning of "deposit" is enlarged so as 10 include "deposit of any nature in the case of a person other than a company. Against this background, the transactions between the sister concerns and the assessee are to be examined There are transfer of funds from and to the sister concerns. There is no evidence to show that money was loaded or kept deposited for a fixed period or repayable on demand Further the sister concerns and the assessee are owned by the same family group of people with a common managing partner with centralised accounts under the same roof Transfer of funds has taken place in a whimsical manner. Therefore, it is rather difficult to say that the transaction are in the nature of deposits or loans with certain conditions attached to them, either as regards the period of such deposit or loans or with regard to their repayment. From the copies of the accounts furnished all that can be gathered is that funds have been transferred from and to the sister concerns as and when required and since the managing partner is common to all the sister concerns, the decision to transfer the funds from one concern to another concern or to repay the funds could be said to have been largely influenced by the same individual. In other words, the decision to give and the decision to take rested with either the same group of people or with the same individual. In such circumstances of the case, it is held that the transactions inter se between the sister concerns and the assessee cannot partake of the nature of either "deposit" or "loan", though interest might have been paid on the same. Excepting for the transfer of funds being witnessed in the books of accounts of the concerned firms, no material is on record to show issue of receipt o promote in evidence of accepting a loan Therefore, deposits or loans as understood in common parlance. It only represents diversion of funds from one concern to another depending upon the exigencies of the business Further, the transactions have not been impeached as non-genuine or bogus, the provision of ss 269SS and 269T are not attracted in the facts of the case. Even if they were to apply, in the facts and circumstances*

*explained above, the action of the assessee firm in accepting the funds in cash or making refunds of such funds in cash can be ascribed to its bona fide belief that it would not attract the provisions of ss 269SS or 259T given the nature of the transactions and the circumstances of its case Bona fide belief coupled with the genuineness of the transactions will constitute reasonable cause for not invoking the provision of ss. 271D and 271E. In this view of the matter also the order of penalty under ss. 271D and 271E is cancelled... CIT Vs. Bazpur, Cooperative Sugar Factory Ltd. (1988) 70 CTR (SC) 94: (1988) 172 ITR 321 (SC) relied on.*

*Hence, the case of appellant is squarely covered by the above decision. Even in case of transaction between sister concerns carries no interest, no terms and conditions of repayment and no other conditions*

*5.2.4 Definition of Loan or Deposit u/s. 269T of the IT Act, 1961 mentions the following on this issue:*

*Definition of loan or deposit u/s 269 of the Income Tax Act and explanation (iii) to the said section is as under:*

*"Any loan or deposit of money which is repayable after notice or repayable after a period and case of a person other than the company includes loan or deposit of any nature*

*The loose cash payment vouchers seized from the premises of RKDCPL do not contained above mention conditions Le*

*a It is repayable after notice*
*b. Repayable after a period*

*The so-called loose vouchers do not contain any of above conditions. In course of search, no other materials are discovered where loans or deposits made through these vouchers. Therefore, the loan statement prepared from the loose vouchers is not covered under loans and deposit The loose voucher prepared in a haphazard and in general not signed by authorised person. As mentioned, the so-called loose vouchers do not contain any conditions ie repayable after notice or repayable after period. Hence, the initiation of penalty proceedings u/s 271D is unwarranted and not tenable under the law"*

13. In addition to the above, ld.AR also filed a written submission before the Tribunal, which reads as under :-

*Ground 1- Whether the Ld. CIT (A) was correct in accepting the unsecured loan as share capital despite evidence to contrary including the submission of the assessee itself.*

*Compliance:*

*Your Honour may refer to page no -18, para-5.3, of the CIT(A) order, which are his findings after detail discussion upto para 5.2, his order.*

*i The sister concerned and the Respondent company are owned by the same family group with a common Chairman-cum-Managing Director with a centralized account under the same roof. Late R. K. Das was the CMD of the Respondent company as well as RKD Construction Pvt Limited RKD Construction Pvt. Limited along with its CMD was holding 89.31% of share of the Respondent's company. In fact, the entire finance and management of both the companies were under the control of late R. K. Das and he was the sole cheque signing authority. (Ref: Page No. 86 containing Financial Statement and Page No. 1 &1A, containing Annual Return)*

*ii. The transaction between the holding company and the subsidiary company is running like a current account and at the end of the year whatever balance is left was either transferred to share capital or squared up in the account of RKD Construction Pvt. Limited (RKDCPL), the holding company and the company of the Respondent which is a subsidiary to RKDCPL.*

*iii. Though late R. K. Das's statement in the course of search reflected that seized documents of loose sheets containing repayment of loan to the assessee company was not recorded in books of accounts, the AO has observed that in the books of account of both the assessee and RKDCPL, these transactions are duly recorded as share application. In the same assessment order of the assessee, no addition has been made on account of share application money which indicates that source of share capital was found to be genuine by the AO. (Ref: Page No 18, para - iii) of CIT (A) order).*

*Reference may kindly be made to page no. 79 to 81 of the Paper Book. submitted before the Commissioner of Income Tax (Appeals). It contains the transactions between the appellant and RKDCPL. In page no.81, on 31.03.2013, vide journal voucher it is specifically mentioned that application money of RKDCPL accounted share allotted of Rs. 2,9500,000.00, leaving balance of Rs.81,495, which disclosed in note 7 as advance from related parties.*

*The transaction in question were genuine and bona fide and undertaken during the regular course of its business. Moreover, the transactions have taken place between the appellant and sister concerns. (Ref: page no. 18, last para of CIT (A) order). The Ld. CIT (A) has cited plethora of judgments establishing that the transactions are genuine coupled with reasonable cause. The Respondent also cited number of cases which speaks that the transactions are genuine coupled with reasonable cause.*

*Similar issue was decided by the Honourable Cuttack Bench in case of Mamata Patra vs Jt. CIT, Bhubaneswar, vide ITA No. 136/CTK/2017. The said order was placed in page no.120 to 126 of the Paper Book, filed before CIT. In the said order it was held that*

*"We find the assessee has filed the return of income disclosing income from house property, business and profession and other sources and balance sheet was filed along with supportive financial statement. The Id AR's contention that the assessee was holding the cash for the business operations at Jaipur and there is no malafide intension and the said transaction was disclosed in the income tax return. Further the Id. AR emphasized that the assessee has no intention to violate the provisions and has a reasonable cause in accepting cash as the business transaction performed at Jaipur to be on cash to cash basis (Ref page no. 123 of Paper Book)"*

*The operating part of the order is as under*

*"We find strength in the arguments of id. AR on genuineness of transaction and circumstances of the case. Accordingly, we set aside the order of the CIT(A) and delete the addition and the grounds of appeal of the assessee are allowed. (Ref: page no. 125 of Paper Book)"*

*The Ld. CIT (A) has cited number of cases which speaks the share application transactions between the sister concerns coupled with genuineness..*

*The CIT (A) in his order discussed in the last para of page no. 18, the case of CIT vs Sunil Kumar Goyel (21 DTR 43) in which it was held by the Punjab and Haryana High Court, which relates to the transactions between the sister concerns. There is another case contained in page no. 21 of CIT (A) order is Dillu Cine Enterprises (P) Ltd. vs. Addl. CIT (80 ITD 484), where it speaks about the genuine transaction shall not covered under section 271E*

*He has also quoted in page no. 27, last para of his order the cases which are furnished by Respondent before him,*

*In page no.12 of his order he discussed the case is in the case of CIT vs Eqbal Inn and Hotels Ltd. (High Court of Punjab & Haryana)*

*In the instant case, assessee accepted share application money in cash from its Director who has a substantial interest in the company. Receipt of share application money and allotment are maintained like a current account. The Tribunal held that When the money has been received in current account, it cannot be covered under the definition of loan or deposit and consequently penal provision u/s 27.1D of the Act could not be attracted and that money contributed by various Directors and their relatives was to be treated as share application. The Honourable High Court has also*

*referred Rule 2(b) of deposit Rule. As per definition, deposit not includes "any amount received by a private company from a person who, at the time of the receipt of amount, was a Director, relative of Director or member*

*The JCIT in page no. 7. para 4 (IV), has cited only one case I.e, Bhalotia Engineering vs CIT, Jharkhand 275 ITR 399. The same was overruled in the case of CIT vs Speed Ways Rubber (P) Ltd., 326 ITR Para 5 and 6 of the same order is reproduced as under*

*5. The only point which has been pressed is that the amount should have been held to be loan or deposit, as held in Bhalotia Engineering Works (P) Ltd. (Jharkhand).*

*6. We do not find any merit in the contention raised. The finding to the effect that the transaction was bona fide and the default was of technical nature which did not justify levy of penalty is not shown to be, in any manner, perverse or unreasonable.*

*The said order contained in the Paper Book, from page no. 108 to 110, submitted before the Commissioner of Income Tax (Appeals) (Ref: page no. 13 of CIT (A) Order). In the same page, citation referred by the CIT, in case of CIT vs I. P. India (P) Ltd., 343 ITR 0353, which speaks about share application money received in cash did not amount to either loan or deposit, within the meaning of section 269SS. The said Judgement is placed from page no. 104 to 107 in the paper Book submitted before the Commissioner of Income Tax (Appeals)*

*In the case of the appellant, whatever amount received under the head share application, is like a current account from where share application money is refunded, when it could not be allotted. In the Assessment Order, no additions have been madeon account of share application money, which clearly means that source of share capital were found to be genuine*

*Another case cited by the Respondent is CIT vs. Rugmini Ram Ragav Spinners (P) Limited, (2008) 304 ITR 417 (Mad.) contained in page no 14 of the CIT (A) order. In the instant case, the assessee had received cash over a period of time as advance towards allotment of shares from 16 persons without stipulating any time frame towards return/refund of money without interest, in case of non-allotment of shares either fully or partly. It was held by the Madras High Court that the money retained by the company was neither deposit nor loan, it was only share capital advance. The advances of share application money or repayments of such advances had not flowed from any undisclosed income of the assessee or the concerned persons. The assessee had not paid any interest at all on any of the advances repaid after some time. The advances were only against allotment of shares and not by way of loans or advances.*

*Transaction with the Sister concern shall not come within the ambit of section 271D/E*

*As submitted in para 1 of this submission, RKDCPL is only infusing fund in shape of either share capital or unsecured loan. Up to A.Y. 2013-14, The RKDCPL, the holding company has invested Rs. 9,44,36,000/- and R. K. Das has invested Rs. 67,00,000/- Both the R. K. Das, who is the Chairman-cum-Managing Director of appellant company and Managing Director of RKDCPL have 89,31% of total share. In Both the company the Managing Director is common. The cheque signing lies with MD of both companies. The entire finance and Management of both the companies are under the control of R. K. Das. Under this situation cash transaction which is genuine shall not covered u/s 271D/E, since the fund is being changed from one hand to other and vise- versa. The above issue is narrated in more detail in the case of Muthoo M. George Brothers vs Asst. CIT (1993) 46 ITD 0010, contained from page no. 153 to 156 of the Paper Book, submitted before CIT (A).*

*It is not in dispute that the assessee has accepted moneys in cash from its sister concerns or repaid the same in cash. Many of them are partnership firms and one of them is a limited company. It is also not in dispute that the managing partner of the assessee firm is also the Managing partner of sister concern. It is also not in dispute that the managing partner of the assessee firm is also the Managing director of the limited company, nor is it in dispute that the transactions of alleged deposits are alleged loans or the repayments thereof are among the sister concern inter se. It is also on record that the accounts of these concerns are managed from K where the senior partners are residing. Nor is it in dispute that the assessee and the sister concerns with which it had dealing are all assessed to income-tax in the circumstances, can it be said that the taking of moneys from one firm by another firm or repayment thereof constituted deposits or loans so as to attract the provisions of ss. 269SS and 269T? To make a deposit or loan there must be at least two parties- The giver and the receiver both in physical existence and in legal existence. It is also pertinent to note that is only w.e.f. 1 April 1989 and not before that the meaning of "deposit" is enlarged so as to include "deposit of any nature in the case of a person other than a company. Against this background, the transactions between the sister concerns and the assessee are to be examined. There are transfer of funds from and to the sister concerns. There is no evidence to show that money was loaded or kept deposited for a fixed period or repayable on demand. Further, the sister concerns and the assessee are owned by the same family group of people with a common managing partner with centralized accounts under the same roof. Transfer of funds has taken place in a whimsical manner. Therefore, it is rather difficult to say that the transaction are in the nature of deposits or loans with certain conditions attached to them, either as regards the period of such deposit or loans or with regard to their repayment. From the copies of the accounts furnished all that can be gathered is that funds have*

*been transferred from and to the sister concerns as and when required and since the managing partner is common to all the sister concerns, the decision to transfer the funds from one concern to another concern or to repay the funds could be said to have been largely influenced by the same individual. In other words, the decision to give and the decision to take rested with either the same group of people or with the same individual. In such circumstances of the case, it is held that the transactions inter se between the sister concerns and the assessee cannot partake of the nature of either "deposit" or "loan".*

*Hence, the case of appellant is squarely covered try the above decision. Even in case of transaction between sister concerns carries no interest, no terms and conditions of repayment and no other conditions*

*The appellant has not properly understood that the Ld. Commissioner of Income Tax (Appeals), in accepting the unsecured loan as share capital. As per the record of the Respondent, both in RKDCPL and Respondent's account, all the transactions are recorded under the head share application. The Learned CIT (A) has not accepted the same as unsecured loan. He only mentioned that the share application transaction between RKDCPL and the company of the respondent are genuine and also has reasonable cause for such type of transactions*

*Ground No.2: Whether the Ld. CIT (A) was correct in holding that since no addition of unaccounted Income has been made, question of levying penalty for violation of section 269T does notaries, when the addition on account of cash loan has been duly made and confirmed in the hands of the sister concern of the assessee.*

*Compliance*

*As submitted in our above compliance, in Ground No.1, all the share transaction are recorded in the holding and the subsidiary company accounts and these are genuine transaction. The CIT (Appeals) has never concluded that since no addition of unaccounted income has been made question of levying penalty for violation of 269SS and 269T do not arise.*

*Ground no.3-Whether the Ld. CIT (A) was correct in overlooking the ratio of the judgment in Grihalakshmi Vision vs. Additional Commissioner of Income Tax, Range-1, Kozhikode (2015) and Commissioner of Income Tax - 1, Kanpur vs Sunil Sagar Co. (2017).*

*Compliance*
*The Appellant questioned that whether the Grihalkshmi Vision vs Additional Commissioner of Income-tax, Range 1, Kozhikode (2015), relates to limitation u/s 275, for initiation of proceeding by AO vs CIT. The Ld. CIT (A), has not adjudicated this issue in his*

> *order, although the Respondent raised the issue in the Ground of Appeal. In this context, the order cited has no relevance. The other case cited by the Appellant i. e. CIT -1, Kanpur, vs Sunil Sagar Co. (2017), could not be located even after lots of effort. The Appellant may be directed to produce the decision of the above case before the Honourable Bench.*

14. He further submitted that no addition was made in the case of assessee towards these amounts of loans taken/repaid in the assessment completed; therefore, the amounts were not treated as unexplained in the hands of the assessee company. Once no doubts have been raised with regard to the genuineness of the receipts/ transaction, there should not be any question of violation of provisions of section 269SS / 269T so also of levy of penalty u/s.271D & 271E of the Act. Ld. AR also drawn our attention to the fact that ld. CIT(A) has not decided the issue of validity of initiation of penalty proceedings challenged by it on account of limitations and further stated that no satisfaction was recorded in assessment order before making reference to the JCIT for initiation of penalty proceedings u/s. 271D and 271E of the Act for violation of provisions of section 269SS and 269T of the Act. He, thus, prayed for the confirmation of the order of the ld. CIT(A) in deleting the penalty for all the years under consideration.

15. We have considered the rival submissions and perused the material available on record. In this case, all the assessment years under appeal before us, there were certain documents found during the course of search indicating certain transactions in cash between the assessee and the holding company M/s RKD Constructions Pvt. Ltd. for which it was explained that the same were cried out under a current account between the parties and whatever balance is left at the end of the year is converted

into the share capital account. It was explained that the cash was taken by the appellant due to urgent needs and were returned back, thus it was under exceptional circumstances and thus having reasonable cause for these cash transaction. Our attention is also drawn to the balance sheet for 31.03.2013 where the closing balance of Rs.2,95,00,000/- as on 31.03.2013 was converted into share capital and shares were allotted to the holding company by the assessee. It is also a matter of fact that in all the three years no addition has been made by holding the said loans as unexplained in the hands of the assessee company. Since these are the transactions carried out between the holding company and subsidiary companies under business exigency, therefore, the ld. CIT(A) by holding that there was reasonable cause as defined u/s.271B of the Act and deleted the penalty. The observations of the ld. CIT(A) while deleting the penalty levied for A.Y.2009-2010 are as under :-

> *5.3 All the above contentions & the enclosed documents reveal the following:*
>
> *i) The sister concerns & the assessee are owned by the same family group with a common MD with centralized accounts under the same roof. Shri R. K. Das, CMD of the assessee Company & M/s. RKDCPL (Shri Das is the MD of this company) altogether owns 89.39% of total share of assessee. In fact, entire finance & management of both companies are under the control of Shri Das & he is the sole cheque signing authority. The decision to give & take funds was taken by the same individual i.e. Shri Das.*
>
> *ii) The transaction between the holding & the subsidiary company is running like a current account & at the end of the year whatever balance is left, it is transferred to share application account. Consequently, the same is converted to share of the holding company.*
>
> *iii) Though Shri R. K., Das's statement in the course of search reflected that seized documents of loose sheets containing repayment of loan to the assessee company was not recorded in books of accounts, the AO has observed that in the books of*

*account of both the assessee & RKDCPL, these transactions are duly recorded as share application. In the same assessment order of the assessee, no addition has been made on account of share application money which indicates that source of share capital was found to be genuine by the AO.*

*The transactions in question were genuine and bona fide and undertaken during the regular course of its business. Moreover the transactions have taken place between the appellant and sister concerns. In the case of CIT Vs. Sunil Kumar Goyal (21 DTR 43), it was held by Hon'ble Punjab & Haryana High Court that no prejudice was caused to the Revenue in the instant action of the assessee inasmuch as the assessee did not attempt by the impugned act to avoid any tax liability. Furthermore, there was no dispute about the fact that the instant cash transactions of the assessee were with the sister concern, and that, these transactions were between the family, and due to business exigency. A family transaction, between two independent assessees, based on an act of casualness, especially in a case where the disclosure thereof was contained in the compilation of accounts, and which had no tax effect, established "reasonable cause" under section 273B of the Act. Since the assessee had satisfactorily established "reasonable cause" under section 273B of the Act, he must be deemed to have established sufficient cause for not invoking the penal provisions (section 271D and 271E of the Act) against him. In the case of Rajendra Suryavanshi Vs. ACIT (56 DTR. AT 386), admittedly, the assessee was an individual and the amounts in question had been received by his proprietary concern M/s Parth Enterprises from another entity namely, Shri Rajendra Suryavanshi (HUF), which was the HUF of the assessee. The aspect as to whether a transaction of funds of a sister concern used by another sister concern would amount to a loan or deposit within the meaning of section 26955 of the Act was a subject-matter of several decisions. On perusal of several decisions in this regard, it was held by Honourable Pune ITAT that it was not in dispute that the assessee and the other concerns lending the amounts in question were owned by members of the same family. In other words, the giving and taking of cash was between members of the same family and was in keeping with the necessity of firms for business of the assessee. In these circumstances and having regard to the forgoing discussion, it was quite evident that the assessee was of the strong belief that the provisions of section 269SS were not attracted to the transactions involving utilization of cash of sister concerns by it and although such belief turned out to be a mistaken belief in the final analysis, it was based on the possible views arising from the interpretation of the relevant provisions in the light of legislative intention behind enacting the same and in that sense, there was a misconception of law which the authorities below failed to appreciate in the right perspective. It was further held that there was also no material on record to establish that the transactions had been aimed at camouflaging any unaccounted money and there was also no rebuttal to the assertion of the assessee that such*

*transactions had been accepted under section 143(3) of the Act after scrutiny and, therefore, it was held by the Tribunal that penalty under section 271D of the Act was not sustainable. In the case of Muslim Urban Co-operative Credit Society Ltd. Vs. JCIT (278 ITR AT. 246), the assessee, a credit co-operative society, had repaid deposits to the tune of Rs.74,08,545/- in cash to various persons during the previous year relevant to the assessment year 1998-99. The Joint Commissioner issued a notice under section 274 read with section 271E of the Income-tax Act to the assessee. The assessee's submission was that it catered to the needs of agriculturalists and small businessmen having no taxable income and repaid the deposits to members only and therefore the provisions of section 269T could not be invoked. However, the Joint Commissioner levied a penalty of Rs.74,08,545/- under section 271E. The Commissioner (Appeals) confirmed the penalty imposed by the Joint Commissioner under section 271E. On appeal, the Honourable Pune Tribunal held that the provisions of section 271E conferred a discretion on the competent authority to levy or not to levy penalty. Such discretion was required to be exercised with wisdom and in a fair and just manner. The assessee had taken the plea that there was a reasonable cause as provided under section 273B. The repayments were genuine transactions and there was no mens rea on the part of the assessee at the time when the repayments were made. It was held that the Revenue had not impeached the transactions as non-genuine and no transaction was noticed outside the books of account. The repayments of the deposits were made to the members of the society and the assessee society entertained a bona fide belief that no contravention of any provisions of the Income-tax Act was being made while making the repayments of loans/deposits in cash. Thus, it was held by the Tribunal that no penalty under section 269T read with section 271E could be imposed and the penalty was cancelled. In the case of OMEC Engineers Vs. CIT (294 ITR 599), the assessee was a firm carrying on contract business. The assessee received Rs.20,000/- or more in cash from 11 persons between. February 14, 1993, and November 10, 1993, amounting to Rs.5 lakhs. The return filed by the assessee was, however, accepted under section 143(3) of the Income-tax Act. After the assessment was made, penalty proceeding under section 271D of the said Act was initiated by the Assessing Authority for receiving and accepting those deposits in violation of the provisions of section 269SS of the Act. In compliance with the notice issued by the Assessing Authority, the assessee submitted its explanation stating, inter alia, that the assessee firm was in urgent need of money for payment to the labourers and sufficient cash was not available, therefore, it received deposits from different persons in cash. The assessee further stated that its return was finally accepted under section 143(3) of the Act and no loss of revenue was found. The Deputy Commissioner of Income-tax imposed penalty and this was upheld by the Tribunal. On a reference, the Honourable Jharkhand High Court held that there was no finding of the Assessing Authority, the appellate authority or the Tribunal that the transaction made by the*

*assessee in breach of the provisions of section 269SS was not a genuine transaction. On the contrary, the return filed by the assessee was accepted after scrutiny under section 143(3) of the Act. Further, there was no finding of the appellate authority that the transaction in breach of the aforesaid provisions made by the assessee was mala fide and with the sole object to conceal money. Consequently, penalty imposed under section 271D merely on technical mistake committed by the assessee, which had not resulted in any loss of revenue, was held to be harsh and not sustainable in law and appeal was decided in favour of the assessee. In the case of CIT Vs. Manoj Lalwani (260 ITR 590), it was held by Honourable Rajasthan High Court that when section 271D of the Income-tax Act, is read with section 273B of the Act of 1961 which begins with the non obstante clause "notwithstanding anything contained in the provisions of section 271D", it is clear that in spite of the provisions of section 271D, the enactment following, namely, "no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure", will have its full operation. Section 273B permits the Assessing Authority not to impose a penalty provided under section 271D of a sum equal to the amount of loan or deposit taken or accepted in spite of the breach of the provisions of section 269SS wherein the person has to accept a loan or deposit or the aggregate amount of such loan or deposit by way of account payee cheque or account payee bank draft, if the assessee or the person proves before the Assessing Authority that there was reasonable cause for not accepting the amount of loan or deposit by way of account payee cheque or account payee bank draft. Under section 273B, a judicial discretion is left with the Assessing Authority not to levy a penalty under section 271D if the authority is satisfied that there was a reasonable cause for not complying with the provisions of section 269SS. It was further held that, in the present case, the Tribunal had found that the assessee was an exporter and was in urgent need of the money for complying with the time bound supplies and therefore, he took a loan of Rs. 2,50,000 from his brother-in-law namely Mukesh Kumar Manwani. Out of the loan so taken, an amount of Rs. 2,45,000 was immediately deposited in the bank, which indicated that the amount of loan, in fact, was received by him from Mukesh Kumar Manwani. It was only to meet the emergent need of time bound supplies that the loan was taken as he did not have sufficient time and funds and that there was no intention to violate the provisions of section 26955. Accordingly it was held that the Tribunal had acted in accordance with law in waiving the penalty imposed on the assessee by the Revenue Authorities. The observations of Honourable Hyderabad Tribunal in the case of Dillu Cine Enterprises (P) Ltd. Vs. Addl. CIT (80 ITD 484) are very pertinent for the issue under consideration which are reproduced as under:*

*"We find force in the argument of the learned counsel for the assessee that the object of the provisions being unearthing of*

*unaccounted money, is not applicable to any transaction which is done in an open manner, which is genuine and in which no unaccounted money is involved. Mere technical breach of the provisions, while the transactions are held to be genuine, do not attract the provisions of section 269SS. It is not the case of the Revenue that the amounts involved were unaccounted transactions. It is an undisputed fact that the transactions are genuine. The Chapter XX-B and s. 269SS begins with the heading 'Requirement as to mode of acceptance, payment or repayment in certain cases to counteract evasion of tax The term "certain" used therein, when read along with the legislative intent of curbing tax evasion, clearly means that all loans are not attracted. This section attracts only "certain" loans that are brought in by the taxpayer to explain away his unexplained cash or unaccounted deposit. This section is definitely not intended to penalize genuine transactions where no tax evasion is involved. It is well-settled that the headings prefixed to sections or set of sections in some modern statutes are regarded as preambles" to these sections. This view was approved by Farewel L.J. in Fletcher vs. Birkenhead Corporation (1907) 1 KB 205".*

*The Mumbai Bench of the Tribunal in the case of Karnataka Ginning & Pressing Factory Vs. Jt. CIT (77 ITD 478) at page 486 observed as under:*

*"10. It may not be possible for an assessee to predict with precision the exact requirements of money for discharging its obligations connected to the business, statutory or otherwise. It may not also be possible for it to anticipate the exact dates on which it may be required to discharge such obligations. There can be some difference between what was anticipated and what was actually required. Perhaps in the two instances (Sl. Nos. 2 & 5 in Annexure';A'; to the penalty order) to which our attention was drawn by the ld. Sr. DR, the assessee was a little extra cautious and took money from VE much ahead of the actual dates on which the amounts were required to be paid. These are all part of the business and one cannot really fault the assessee if he had exercised a little extra caution, especially in the matter of discharging the statutory payments. It has not been suggested on behalf of the department before us nor by the income-tax authorities that the assessee had sufficient monies of its own from which it would have easily made the excise duty payments and there was no need for taking monies from the sister concern. In other words, the fact that the monies were taken for the purpose of making the excise duty payments is not in dispute at all. It has not also been suggested nor can it possibly be, that the discharge of excise duty payments is not incidental to the assessee's business, but was something unconnected with the business or personal in nature. The provisions of section 269SS were introduced by the Finance Act, 1984. Circular No. 387 dated 6-7-1984 (146 ITR St. Page 162) explains the rationale behind the introduction of the provision. The Board has referred to the practice of tax payers getting confirmatory*

*letters from persons in support of the explanation that the cash found during the search belongs to certain other persons, from whom the assessee had borrowed the monies. This practice was creating difficulties for the income-tax authorities and to counter this, section 269SS was introduced which debarred persons from taking or accepting after 30-6-1984 from any other person any loan or deposit otherwise than by an account payee cheque or account payee draft, provided the amount exceeded Rs. 10,000 (now increased to Rs. 20,000). While interpreting the provisions of section 269SS, we have to bear in mind the object for which it was introduced. If the assessee is able to lead evidence to show that not only was there reasonable cause for taking the money in cash, but the amounts did not also represent unaccounted monies either of the assessee or of the persons from whom they were taken, normally that should be sufficient to hold that the penalty is not justified. As regards the genuineness of the borrowing in the present case, there does not appear to be any doubt. The income-tax authorities have raised no doubt about the genuineness as is clear from the fact that no addition of the amounts received from VE has been made by Invoking section 68 of the Act. Apparently the Assessing Officer was satisfied with the assessee's explanation regarding the nature and source of the amount. Thus, the transactions between the assessee and VE did not fall within the mischief sought to be remedied by the section. As already pointed out by us, the assessee was also prevented by reasonable cause from taking the monies through account payee cheque or draft. The CIT(A), who has enhanced the penalty has also not said a word against the genuineness of the transactions between the assessee and VE He has harped upon the fact that the excise duty payments could have been effected by cheques after taking the monies from VE through cheques of drafts since there was no urgency about the matter. But we have already pointed out that it is not a condition for the existence of reasonable cause that there should be some sort of urgency about the matter. We have in this connection already referred to the fact that it is not always possible to predict the exact time in which the assessee may be called upon to meet the statutory payments. Therefore, we are unable to share the view of the CIT(A) that unless there is an urgency or emergent need to effect payments in cash, the assessee would not be justified in taking the monies in cash from VE. The expression 'reasonable cause' has to be considered pragmatically and keeping in view the vicissitudes and the exigencies of the business, where it is not always possible to get things done or to anticipate the course of events with infallible precision. We are therefore satisfied that there was reasonable cause for the assessee to act in contravention of the provisions of section 269SS by taking monies from VE in cash.*

*12. The Assessing Officer had held that whatever amounts were not utilized by the assessee for payment of excise duty should be considered as falling under section 269SS and to that extent the assessee would be liable for penalty. We have already seen that it is not always possible for an assessee to predict accurately his*

*requirements of monies for the purpose of effecting payments related to the business. A certain amount of unpredictability will always be there and it is quite possible that in its anxiety to cover the impending payments, the assessee was over-cautious and took more monies from VE than was actually required. This has resulted in an excess of Rs. 9,85,000. Merely because the assessee had not utilized these amounts for making the excise duty payments, it cannot be stated that the assessee is liable for penalty in respect of this amount. This amount had also been taken for the purpose of effecting advance excise duty payments. It is not the case of the income-tax authorities that these amounts were not taken for such purpose. The mere fact that in the ultimate analysis it transpired that the assessee had taken more monies than were actually required for making the excise duty payments does not, in our view, authorize a different treatment to be accorded to the excess amount than what has been accorded to the amounts which were actually utilized for making excise duty payments. For the aforesaid reasons, we cancel the penalty and allow the appeal. The penalty, if any, already collected is directed to be refunded".*

*The Honourable Madras High Court in the cases of CIT Vs. Kundrathur Finance & Chit Co. (283 ITR 329) and CIT Vs. Ratna Agencies (284 ITR 609) has held that if the Appellate Tribunal was satisfied that the transactions were genuine and bona fide, penalty could not be imposed under section 271D of the Act, particularly when the amounts were found reflected in the books of account of respective parties/creditors and hence, there was no evasion of tax. Further the Honourable Madras High Court in the case of CIT Vs. Kundrathur Finance & Chit Co. (supra) following the decision of Apex Court in Asstt. Director of Inspection (Investigation) Vs. Kum. A.B. Shanthi (255 ITR 258) held that if there was genuine and bona fide transaction and the taxpayer could not get a loan or deposit by account-payee cheque or demand draft for some bona fide reason, the authority vested with the power to impose penalty had a discretion not to levy penalty. In the case of Smt. Rupali R. Desai Vs. Addl. CIT (88 ITD 76), the Hon'ble Mumbai Tribunal held that the section 269SS was introduced to prevent abuse of laws and to discourage tax avoidance and tax evasion. In particular, it was meant to circumvent the device by which the taxpayers often explained away unaccounted cash or unaccounted deposits found in the course of searches carried out by the Department. In the instant case, there was no doubt about the genuineness of the loan and the Assessing Officer had fully accepted these loans in the assessment made for the year under consideration. The compelling circumstances in which the assessee was constrained to violate the provisions of section 269SS, which could not be termed as intentional, had not in any way defeated or tended to defeat the objective of incorporation of section 26 SS in the statute book, i.e., prevention of tax evasion, as there was no element of tax evasion in the instant case. Thus, in this case, it was only a technical violation of the provisions of section 269SS. The assessee had sufficiently explained the circumstances under which it was constrained to go*

*in for cash loans. Those explanations constituted reasonable cause as construed in section 273B. In this background, the Honourable Mumbai Tribunal held that the contention of the assessee that violation of the provisions of sections 269SS and 269T was an innocent mistake on its part on account of ignorance of the relevant provisions of law and it constituted a reasonable cause within the meaning of section 273B, could not be just brushed aside. Originally a plea as to the ignorance of law cannot support the breach of a statutory provision. But the fact of such an innocent mistake due to ignorance of the relevant provisions of law, coupled with the fact that the transactions in question were genuine and bona fide transactions and were undertaken during the regular course of its business, would constitute a reasonable cause. CBDT's Circular Nos. 387 and 345 also clarified that section 26955 was introduced with a view to countering the various devices adopted by the tax evaders for explaining their unaccounted cash found during the course of search or for introducing their unaccounted income in the form of loans and deposits and it was introduced for countering major economic evil of proliferation of black money etc. In the cited case, such facts did not appear as it was nobody's case that the assessee was a tax evader or it gave cooked up explanation for cash found during the course of search. Considering the above decisions & facts of the present case, 1 am of the opinion that levy of penalty U/s 271D was unwarranted. When the loans received from the sister concerns have not been doubted by the AO, then provisions of section 271D are not applicable as held by Mumbai ITAT in the case of Dr. Deepak Muchala Vs. ITO (58 TTJ 524). In view of the above, it is not proper to infer that utilization of money from one firm by another firm or repayment thereof constitutes deposit or loan so as to attract the provisions of Section 269SS/269T Accordingly, it is held that the transactions between sister concerns & the assessee can't partake of the nature of either deposit or loan. The decision of the Hon'ble Supreme Court in CIT vs. Raipur Cooperative Sugar Factory Ltd. (172 ITR 321) (SC), Hon'ble Punjab & Haryana High Court in the case of CIT vs. Eqbal Inn & Hotels Ltd., Hon'ble Madras High Court in the case of CIT vs. I. P. India Pvt. Ltd. (343 ITR 0353), CIT vs. Rugmini Ram Ragav Spinners Pvt. Ltd. (304 ITR 0417) broadly point out that such transactions between the sister concerns are not covered by the provision of Section 269SS or 269T.*

*In view of this, the penalty u/s.271E is deleted.*

16. The Hon’ble Punjab & Haryana High Court in the case of CIT Vs. M/s Eqbal Inn & Hotels Limited, passed in ITA No.256 of 2014, dated 21.09.2015, has come up with the similar issue of levy of penalty u/s.271D of the Act in violation of provisions of Section 269SS of the Act,

wherein the Hon'ble High Court while confirming the order of the Tribunal in deleting the penalty so levied u/s.271D of the Act has made the following observations :-

> *7 In order to impose penalty under section 271D of the Act, the revenue has to establish that what was received by the assessee, was a loan deposit within the meaning of section 269SS of the Act. Under Rule 2(b) or (ix) of the Rules, deposit does not include any amount received from a director, relative of director or member of a private limited company. The assessee company in the present case was constructing a hotel and loan had not been sanctioned by the financial institutions and banks. The assessee company received money from its directors for construction of hotel which had been transferred at the end of the every year to share application account ie. current account which cannot be called loan or deposit. The Assessing officer held that the assessee had taken the loan in cash in the garb of share application money in violation of section 269SS of the Act for various years under section 148/143(3) of the Act. It seems that notice under section 148 was issued because assessee had not filed any return of income for assessment year 2003-04 and later years. The assessments were completed later on. This becomes clear from the assessment orders filed at pages 61 to 68 of the paper book. No additions have been made on account of share application money which clearly means that sources of the share capital were found to be genuine. It was pleaded by learned counsel for the assessee that even Chartered Accountant who has conducted the audit never pointed out any objection for receipt of share application money in cash. The same was done to meet the requirement of funds for construction of the hotel and assessee was under the bonafide belief that no violation have taken place, therefore, the case becomes totally covered by the decision of the Hon'ble Punjab and Haryana High Court in the case of Speedways Rubber Pvt. Limited (supra). In that case it is clearly held that if transaction was bonafide and default was of technical nature then the penalty should not be justified. In the case before us, there is no default because the share application money or deposit in the current account cannot be included in the definition of deposit but in any case even if it is assumed otherwise then the defect is only of technical nature and there was a bonafide belief on the part of the assessee that this is not in contravention of provisions of the Act, therefore, it is of technical nature and does not call for levy of penalty. In any case, a reasonable cause was also explained that assessee company was constructing a hotel. Learned counsel for the appellant-revenue was unable to point out any illegality or perversity in the findings recorded by the Tribunal.*
>
> *8 We proceed to examine the judgments relied upon by the learned counsel for the respondent-assessee. In CIT vs. Rugmini Ram*

*Ragav Spinners P. Limited, (2008) 304 ITR 417 (Mad.), the assessee had received cash over a period of time as advance towards allotment of shares from 16 persons without stipulating any time frame towards return/refund of money without interest, in case of non allotment of shares either fully or partly. It was held by the Madras High Court that the money retained by the company was neither deposit nor loan, it was only share capital advance. The advances of share application money or repayments of such advances had not flowed from any undisclosed income of the assessee or the concerned persons. The assessee had not paid any interest at ail on any of the advances repaid after some time. The advances were only against allotment of shares and not by way of loans or advances/The The relevant findings recorded by the Madras High Court read thus:-*

*"Heard the counsel. The assessee had received cash over a period of time, as advance towards allotment of shares from 16 persons without stipulating any time frame towards return refund of money without interest, in case of non-allotment of shares either fully or partly. In this case, the money retained by outside the accounts. The provision of Section 26955 and 2591 therefore have application only in a limited way in respect of deposits or loans. When it is neither deposit nor loan, the provisions of Sections 269SS and 2691 have no application at all. Even if there is repayment by cash it could not be said to attract the levy of penalty automatically, under Section 271E of the Act. The advances of share application money or repayments of such advances have not flowed from any undisclosed income of the assessee or the concerned persons. It is also seen from the records that assessee had not paid any interest at all on any of the advances repaid after quite some time. If the intention was to receive them as loans or deposits. then certainly the lenders would not have made the advances gratuitously. It is also a factual finding given by the authorities below that the assessee was not called upon to explain the default under Section 269SS on receipt of the advances in earlier years, which would show that the assessee's case was not governed by the said provisions. Penalty under Section 271E is not automatic, and a bona fide belief to the effect that the receipt of advances against allotment of shares would not be termed as loans or deposits, would be sufficient to drop the penalty leviable, unless and until the material on record positively shows that money received is only a deposit or loan. There is no dispute that the impugned advances were only against allotment of shares and not by way of loans or deposits."*

*contended that there was no violation of the provisions of section 26955 of the Act as it had not accepted any loan or deposit in cash. The receipt of share application monies in cash did not amount to acceptance of loan or deposit by the company. The Assessing Officer referred the matter to the Additional Commissioner who imposed penalty. The CTT(A) deleted the penalty. The Tribunal upheld the said view. The Delhi High Court held that receipt of*

*share application monies from the three private limited companies for allotment of shares in the assessee could not be treated as receipt of loan or deposit. The relevant findings recorded by the Delhi High Court read thus:-*

*"7. Section 269SS prohibits any person from accepting a loan or deposit in cash exceeding Rs.20,000 in the aggregate in a year from a third person. If there is any violation, the person receiving the loan or deposit will be liable to penalty u/S.271D in an amount equal to the amount of the loan or deposit. A loan or deposit is defined in the Explanation below Sec.269SS as a "loan or deposit of money". The assessee's contention, accepted both by the CIT(A) and the Tribunal, is that share application monies received by a company, pending allotment of shares, do not amount to loan or deposit.*

*8. On a careful consideration of the matter, we find that the AO has relied on the judgment of the Jharkhand High Court (supra) and referred the issue of levying penalty to the Additional CIT the trouble to examine this aspect while imposing the penalty. They have merely relied on the judgment of the Jharkhand High Court (supra). The reliance on this judgment appears to us to be misplaced. In Baidya Nath Plastic Industries (P) Ltd. and Ors vs K.L. Anand (1998) 230 ITR 522, a learned Single Judge of this court pointed out that the distinction between a loan and a deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement while in the case of a deposit it is generally the duty of the depositor to go to the banker or to the deposited, as the case may be, and make a demand for it. This judgment was approvingly cited by a Division Bench of this court in Director of Income Tax (Exemption) vs ACME Educational Society (2010) 326 ITR 146 (Del). In this decision, it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it has been made, on fulfillment of certain conditions. If these tests are applied to the facts of the case before us, it may be seen that the receipt of share application monies from the three private limited companies for allotment of shares in the assessee- company cannot be treated as receipt of loan or deposit. In any case, the Tribunal has rightly noticed the cleavage of judicial opinion on the point and held that in that situation there was reasonable cause u/s 273B, applying the judgment of the Supreme Court in Vegetable Products (supra)" assessee had satisfactorily established reasonable cause under section 273B of the Act. he must be deemed to have established sufficient cause for not invoking the penalty provisions of Sections 271D and 271E of the Act against him. The deletion of penalty by the Tribunal was held to be valid This Court recorded thus:-*

*"Having given our thoughtful consideration to the submissions advanced by the learned counsel for the rival parties, we are of the*

*view that the finding that there was reasonable cause shown by the respondent assessee, is a finding of fact. This emerges from the decision rendered by this Court in Saini Medical Store's case (2005) 277 ITR 420, wherein, this Court has inter-alia held as under:-*

*"As pointed out earlier, there is no doubt about the genuineness of the transactions which have been fully accepted in the assessment made for the year under consideration. Even if, there is any ignorance, which resulted in the infraction of law, the default is technical and venial which did not prejudice the interests of the Revenue as no tax avoidance or tax evasion was involved. To my mind, bona fide belief coupled with the genuineness of the transactions would constitute reasonable cause under section 273B for not invoking the provisions of section 271E of the Act. The impugned order of penalty is cancelled.*

*The findings of the Commissioner of Income tax question of law. Accordingly, the appeal is dismissed"*

*The Income Tax Appellate Tribunal was right in recording its conclusion that a "reasonable cause" had been shown by the respondent assessee. The Income Tax Appellate Tribunal relied on the fact that the respondent-assessee had produced his cash books, depicting loans taken by him unilaterally before the Revenue Another fact taken into consideration was that no prejudice was caused to the Revenue, in the instant action of the respondent-assessee inasmuch as, the respondent assessee did not attempt by the impugned set to avoid any tax liability. Furthermore, there is no dispute about the fact, that the instant cash transactions of the respondent-assessee were with the sister concern, and that, these transactions were between the family, and due to business exigency. A family transaction, between two independent assessees, based on an act of casualness, specially in a case where the disclosure thereof is contained in the compilation of accounts, and which has no tax effect, in our view establishes "reasonable cause" under Section 273B of the Act. Since the respondent-assessee, had satisfactorily established "reasonable cause" under Section 273B of the Act, he must be deemed to have established sufficient cause for not invoking the penal provisions (Sections 271D and 271E of the Act) against him."*

*11. However, contrary view was taken by the Jharkhand High Court in Bholotia Engineering Works Pvt. Limited vs. Commissioner of Income, [2005] 275 ITR 399 (Jharkhand) and held to be vilating provisions of section 26985 of the Act. It was observed as under-*

*9. If we take recourse to the explanation in Section 269T of the Act, deposit means a deposit of money which is repayable after notice or repavable after a period. Money paid to a company in support of an application for shares is a deposit of money in the company which is repayable by the company after the period for allotment of shares comes to an end, or a decision is taken regarding the*

*allotment of shares. Thereafter, the amount is repayable to the person who paid the money, even without a demand in that behalf. In case of refusal of shares the amount has to be returned in specie. In that context, it appears to us that there cannot be much difficulty in holding that the amount paid in support of an application for shares must be considered to be a deposit till the allotment of shares or refund of the money on rejection of the application*

*10. What will happen if shares are ultimately allotted to the applicant? What is the nature of the amount in the hands of the company until the shares are allotted? The amount cannot be a loan. But at the same time, there is an obligation on the company to return the money to the applicant or for allotting the shares applied for. Until either of these happens, the amount cannot be considered to be a loan in the hands of the company. But it appears to us that it will partake the character of a deposit in the hands of the company attracting the prohibition contained in Section 269SS of the Act.*
*made to a company as share application money, should be as provided in Section 26955 of the Act.*

*12. Therefore, even if share application money cannot be considered as a loan within the meaning of Section 2605S of the Act, we are of the view that it partakes the character of a deposit. since it is repayable in specie on refusal to allot shares and is repayable if recalled by the applicant, before allotment of shares and the conclusion of the contract."*

*Respectfully, we are unable to subscribe to the view taken by the Jharkhand High Court in Bhalotia Engineering Works Pvt. Limited's case (supra). Accordingly, it is held that the amount received by the assessee towards share application money would not fall under loan or deposit under section 2695S of the Act. Consequently, the penalty under Section 271D of the Act was not leviable. The Tribunal was right in deleting the penalty. Consequently, finding no merit in the appeals, the same are hereby dismissed.*

17. The Hon'ble Delhi High Court in the case of CIT Vs. I.P.India (P) Ltd., passed in IT Appeal No.1192 of 2011, dated 21.11.2011, while confirming the deletion of penalty has also considered the judgment of the Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works (P) Ltd. [1998] 230 ITR 522 (Del) as relied upon by the revenue and deleted the penalty by observing as under :-

*7. Sec. 269SS prohibits a loan or deposit in cash exceeding Rs.20,000 in the aggregate any person from accepting con. If there is any violation equal to the receiving the loan or deposit be will be*

*liable to penalty under s. 271D in an amount equal to the amount of the loan or deposit. A loan or deposit is defined in the Explanation below s. 269SS as a "loan or deposit of money". The assessee's contention, accepted both by the CIT(A) and the Tribunal, is that share application monies received by a company, pending allotment of shares. do not amount to loan or deposit.*

*8. On a careful consideration of the matter, we find that the AG has relied on the judgment of the Jharkhand High Court (supra) and referred the issue of levying penalty to the Addl. CIT. HE did not examine whether the share application monies can be treated as "loan" or "deposit within the meaning of s. 269SS. The Addl. CIT has merely endorsed the view of the AO I passing the penalty order. The CIT(A) has found as a fact that the shares were subsequently allotted to the applicant-companies as shown by the form filed before the RoC. Neither the AD nor the Addl. CIT has taken the trouble to examine this aspect while imposing the penalty. They have merely relied on the judgment of the Jharkhand High Court (supra). The reliance on this Judgment appears to us to be misplaced. In Baidya Nath Plastic Industries (P) Ltd. & Ors. vs. K.L. Anand, ITO (1998) 146 CTR (Del) 421 (1998) 230 ITR 522 (Del), a learned single Judge of this Court pointed out that the distinction between a loan and a deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement while in the case of a deposit it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for 1. This judgment was approvingly cited by a Division Bench of this Court in Director of IT (Exemption) vs. ACME Educational Society (2010) 43 DTR (Del) 250 (2010) 326 ITR 146 (Del). In this decision, it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it has been made, on fulfilment of certain conditions. If these tests are applied to the facts of the case before us, it may be seen that the receipt of share application monies from the three private limited companies for allotment of shares in the assessee-company cannot be treated as receipt of loan or deposit. In any case, the Tribunal has rightly noticed the cleavage of judicial opinion on the point and held that in that situation there was reasonable cause under s. 273B, applying the judgment of the Supreme Court in Vegetable Products Ltd. (supra).*

*9. We are accordingly of the view that no substantial question of law arises from the order of the Tribunal. We decline to admit the appeal. The same is dismissed with no order as to costs.*

18. Similarly, the Hon'ble High Court of Punjab & Haryana in the case of CIT Vs. Speedways Rubber (P) Ltd., passed in IT Appeal No.361 of

2009, dated 22nd October, 2009/(2010) 326 ITR 31, after considering the judgment of the Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works (P) Ltd.(supra), has observed as under :-

> *4. We have heard learned counsal for the appellant.*
>
> *5. The only point which has been pressed is that the amount should have been held to be loan or deposit, as held in Bhalotia Engineering Works (P) Ltd. (Jharkhand).*
>
> *6. We do not find any merit in the contention raised. The finding to the effestiry levy of transaction was bona fide and the default was of technical nature which did not justify levy of penalty is not shown to be, in any manner, perverse or unreasonable.*
>
> *7. No substantial question of law arises.*
>
> *8. The appeal is dismissed.*

19. The Hon'ble Madras High Court in the case of CIT Vs. M/s Pride Remedies Private Ltd., passed in Tax Case(Appeal) Nos.982 and 983 of 2014 & M.P.No.1 of 2014, dated 3rd December, 2014, by holding that money received was towards the allotment of shares and not deposit and deleted the penalty levied u/s.271D of the Act. The relevant observations of the Hon'ble High Court are as under :-

> *5. Heard learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.*
>
> *6. In the decision reported in 304 ITR 417 (CIT V. Rugmini Ram Raghav Spinners Private Limited), this Court had an occasion to consider the similar issue, wherein this Court held as follows:*
>
> > *".....if the assessee proves that there is a reasonable cause, he is not subject to levy of penalty. The case of the asses-see is that, the amount received by the assessee is only for the purpose of allotment of shares and it is not a deposit or loan. In this case, the reasonable cause is that the assessee was under the bona fide belief that the money received is only for the purpose of allotment of shares. Also, there is no material or evidence or any compelling reason produced by the Revenue to prove that the money received is a deposit or loan. The first appellate authority as well as the Tribunal have come to a correct conclusion after*

> *accepting the explanation offered by the assessee. It is a question of fact and the order of the Tribunal is not a perverse one. The concurrent finding given by both the authorities below is based on valid materials and evidence. In the case of CIT v. P. Mohanakala [2007] 291 ITR 278, the Supreme Court held that whenever there is a concurrent finding by the authorities below, no interference 5 should be called for by the High Court. Under these circumstances, we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference."*
>
> *7. In the present case, the assessee was under the bona fide impression that the money received was only towards allotment of shares and it is not a loan or deposit. Hence, following the decision of this Court cited supra, we find no question of law much less any substantial question of law arises for consideration in this appeal. Accordingly, the order of the Tribunal stands confirmed and both the Tax Case (Appeals) stand dismissed. No costs. Consequently, M.P.No.1 of 2014 is also dismissed.*

20. The Hon'ble Madras High Court in the case of CIT Vs. Lakshmi Trust Co., reported in (2008) 303 ITR 99, while deleting the penalty u/s.271D & 271E of the Act after appreciating that there was bona fide belief and reasonable cause for accepting/repayment of amount in cash has confirmed the order of the Tribunal in deleting the penalty by observing as under :-

> *7. We have given our careful consideration to the submissions made on either side.*
>
> *8. This Court in CIT vs. Kundrathur Finance and Chit Co. (supra), following the decision of the apex Court in Asstt. Director of Inspection (Inv.) vs. Kum. A. B. Shanthi (2002) 174 CTR (SC) 513: (2002) 255 ITR 258 (SC), held that if there was genuine and bona fide transaction and the taxpayer could not get a loan or deposit by account payee cheque or demand draft for some bona fide reason, the authority vested with the power to impose penalty has a discretion not to levy penalty.*
>
> *9. In the instant case, the CIT(A) and the Tribunal found on the facts that the transactions were genuine and the identity of the lenders was also satisfied. The Tribunal also upheld the order of the CIT(A) that there was no intention on the part of the assessee to evade the tax.*
>
> *10. Once the said finding as to the genuineness of the transactions is arrived at by the Tribunal on the facts, following the decision of*

*this Court in CIT vs. Ratna Agencies (supra), wherein it was held that the finding recorded by the Tribunal in this regard is a finding of fact and no question of law much less a substantial question of law would arise, we do not have any hesitation to hold that it may not be proper for this Court to interfere with such a finding of fact.*

*11. For all these reasons, answering the questions of law referred to us against the Revenue, the appeal stands dismissed. No costs.*

21. On the issue of bonafide and reasonable cause as per Section 273B of the Act, the Hon'ble High Court of Punjab & Haryana in the case of PCIT Vs. M/s Tehal Singh Khara & Sons, passed in ITA No.248 of 2017, dated 17.07.2017, has concurred the findings of ITAT in deleting the penalty levied u/s.271D & 271E of the Act by making following observations in paras 4 to 6 :-

***3.*** *We have heard learned counsel for the appellant-revenue.*

***4.*** *It has been recorded by the CIT(A) that in order to verify the bona fides of the impugned transactions in which cash deposits were received and repaid aggregating in excess of Rs. 20,000, a remand was sent to the jurisdictional Joint CIT who opined that persons who had deposited cash with the assessee and subsequently got it returned in cash were identifiable agriculturists who were produced before the authorities. They also presented and filed copies of jamabandis to indicate their holding of land on which agricultural operations were conducted. Copies of account of deposits with the assessee were also adduced to show that they indeed deposited money with the assessee firm and subsequently received back the same. From the regularity of the transaction in case of each of the depositors, it was apparent that receipt and repayment were in the nature of inter se transactions. After examining the matter, it was concluded by the CIT(A) that the remand proceedings found the creditors to be genuine agriculturists and their cash transactions also to be genuine, in as much as there was confirmation of the money having been deposited and returned. It was categorically recorded that the impugned transactions could not be said to have been aimed at attempting to evade tax thereby causing loss to the Revenue. Thus, the imposition of penalty under ss. 271D and 271E of the Act was not held to be justified. The relevant findings recorded by the CIT(A) in this regard read thus:*

*"In the appellant's case, the business exigencies of making cash payment to farmers for the purposes of both-honouring commitment as also to help them cannot be denied. The remand proceedings found the creditors to be genuine agriculturists and their cash transactions also to be genuine, in as much as there was a*

*confirmation of the money having been deposited and returned. The said impugned transactions also cannot be said to have been aimed at or attempting to evade tax, thereby causing loss to revenue. In such circumstances, it can reasonably be held that the breach of the statutory provisions contained in s. 269SS & 269T of the Act flowed by a bona fide belief, which is ex-facie a venial breach. It may also be appreciated that the Hon'ble Supreme Court, while hearing the constitutionality of the provisions of s. 269SS, observed that the undue hardship emanating from the said provision, perceived to be expropriatory in nature, is very much mitigated by the inclusion of s. 273B [ Asstt. Director of Inspection (Investigation) vs. Kum. A.B. Shanthi (2002) 174 CTR (SC) 513 : (2002) 255 ITR 258 (SC) ]. Following the judicial precedents, including that of the jurisdictional High Court of Punjab & Haryana, it is held that the imposition of penalty under ss. 271D & 271E of the Act, in the circumstances, was not justified. The AO is, therefore, directed to delete both the aforesaid penalties. It is ordered accordingly."*

***5.*** *On appeal by the Revenue before the Tribunal, the findings recorded by the CIT(A) were upheld. It was recorded by the Tribunal that there was reasonable cause for entering into the above said transactions. The creditors from whom the cash was received and repaid were held to be genuine and confirmation to that act was obtained from the said persons and the transactions were not made for attempting to evade tax. The relevant findings recorded by the Tribunal in this regard read thus :*

*"While going through the material placed on record, we find that in the second round of appellate proceedings before learned CIT(A), the learned CIT(A) remanded the issue back to the office of AO. The AO in his remand report submitted that the persons from whom cash was received and was subsequently repaid were identifiable agriculturists. It was also submitted in the remand report that the said persons had filed a copy of jamabandi to indicate that agricultural operations were being conducted on their land. The learned CIT(A) in view of these facts deleted the penalties by holding as under :*

*6. The penal provisions of s. 271D and 271E for contravention of the provisions contained in ss. 269SS & 269T respectively are hemmed in by the provisions of s. 273B of the Act which prescribes imposition of penalty in cases where contravention of the statutory provisions have been occasioned because of 'reasonable cause'. 'Reasonable cause' neither finds any definition, for, as held by the Hon'ble Delhi High Court in the case of Azadi Bachao Andolan vs. Union of India (2001) 167 CTR (Del) 154 : (2001) 252 ITR 471 (Del) , attempting to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space. Ordinarily, reasonable cause would mean an honest belief founded upon reasonable grounds of the existence of a state of circumstances which (assuming them to be true), would reasonably lead any ordinary, prudent and cautious person (placed*

*in the position of the person concerned) to come to the conclusion that the same was the right thing to do. The cause has to be considered and only if it is found to be frivolous, without substance or foundation, as held by the Hon'ble Delhi High Court in the case of the Wood Ward Governors of India (Pvt) Ltd. (2001) 118 Taxman 433 , 745 penalty can be imposed. In the context of penalty provisions, words "reasonable cause" would definitely mean a cause which is beyond the control of the appellant.*

*7. We find that the learned CIT(A) has made a finding of fact that creditors from whom cash was received and cash was repaid were genuine and he has also made a finding of fact that a confirmation to that act was obtained from these persons and the transactions were not made for attempting to evade tax, therefore, he held that there was a reasonable cause for entering into such transactions. The learned CIT(A) has passed an exhaustive and elaborate speaking order, and we do not find any infirmity in the order of learned CIT(A), therefore, the appeals filed by revenue are dismissed."*

***6.** The findings of fact recorded by the CIT(A) as affimed by the Tribunal have not been shown to be illegal or perverse or based on misreading of evidence on record by the learned counsel for the appellant-revenue so as to warrant interference by this Court.*

***7.** Adverting to the judgments relied upon by the learned counsel for the Revenue, it may be noticed that in Auto Piston Mfg. Co. (P) Ltd. vs. CIT (2013) 355 ITR 414 (P&H) , the question was whether the Tribunal was justified in confirming the penalty under s. 271D of the Act. In view of the facts and circumstances of that case, the explanation tendered by the assessee was not found to be reasonable and, therefore, the imposition of penalty was held to be valid. Such is not the position in the present case. Herein there was reasonable cause for entering into the transactions in question. Thus, the appellant cannot derive any advantage from the said decision. Similar was the position in Charan Dass Ashok Kumar vs. CIT (2014) 365 ITR 367 (P&H) . Each case has to be decided on its own facts. However, in the present case, the position being different, the appellant cannot derive any advantage from this decision as well.*

***8.** In view of the above, no substantial question of law arises. Consequently, the appeal stands dismissed.*

22. After going through the orders of various Hon'ble High Courts as referred to above and also considering the fact that there were reasonable cause with the assessee in accepting/repayment of the loans in cash, in our opinion, it is only a technical violation of Section 269SS & 269T of the

Act. It is also a matter of fact that no addition has been made in the hands of the assessee with regard to the loans amounts taken in cash and the AO has fully accepted these amounts as genuine loan taken by the assessee. It is also an admitted fact that these transactions were carried out between the sister concerns i.e. the assessee and its holding company, who ultimately get the shares of the amount outstanding at the end of the relevant year and, therefore, this amount cannot be held as loan/deposits for the purpose of levy of penalty u/s.271D & 271E of the Act.

23. The judgment of Hon'ble Kerala High Court in the case of Grihalaxmi Vision (supra) as relied upon by the revenue wherein it is held that transaction in cash between partners and firm are loan transactions however, in that case no material was placed before the Hon'ble Court to show the true nature of transaction. Whereas in the instant case, as has been observed by ld. CIT(A), assessee has been able to prove that there was reasonable cause in taking/repaying the amount in cash. Thus, the fact of the case of Grihalaxmi are totally distinguishable. Likewise the judgement of Hon'ble Supreme Court in the case of Bazpur Co-operative Sugar Factory (supra) as relied upon by the revenue also have different facts and, thus, are not applicable in the instant case. Rather the ration held by the Hon'ble Apex court of reasonable cause goes in favour of the assessee.

24. The reliance placed by the ld.CIT-DR/Sr. DR on the decision of Hon'ble Jharkhand High Court in the case of Bhalotia Engineering Works

(P) Ltd. (supra), has also been considered by various other Hon'ble High Courts and after considering the said judgments, it was the opinion of the Hon'ble High Courts that share application money cannot be considered as loan or deposits for the purpose of provisions of Section 269SS & 269T of the Act, so also for levy of penalty u/s.271D/271E of the Act. The Hon'ble Supreme Court in the case of M/s Vegetable Products Ltd., reported in 88 ITR 192 (SC) also held that when there two views are available on an issue, the view favourable to the assessee is to be followed. One more glaring fact which remained unanswered by ld. CIT(A) was that in all the three years, no satisfaction was recorded in the assessment orders regarding violation of provisions of section 269SS and 269T. After completion of assessment proceedings, the AO vide letter dt. 8.9.2015 (available in the paper book pages 13-14) has proposed to initiate the proceedings u/s. 271D and 271E and information was forwarded to JCIT for onward action. It is settled position of law, irrespective of the nature of assessment proceedings and failure/contraventions that the penalty proceedings could not be initiated unless a *prima facie* satisfaction is recorded by the Assessing Officer which should be reflected in the assessment order. This proposition finds Support from the order of Hon'ble Supreme Court in the case of CIT vs. Jai Laxmi Rice Mills(2015) 379 ITR 521 (SC) wherein it is held as under.

> *Section 271E of the Income-tax Act, 1961 - Penalty - For failure to comply with section 269T (Recording of satisfaction) - Assessment years 1991-92 and 1992-93 - Assessee was engaged in large scale purchase and sale of wheat - For relevant years, Assessing Officer passed assessment order determining certain taxable income - While framing assessment, Assessing Officer also opined that*

> *assessee had contravened provisions of section 269SS and, thus, penalty proceedings were initiated under section 271E - Commissioner (Appeals) set aside said assessment order with a direction to frame assessment de novo - After remand, Assessing Officer passed fresh assessment order but in said assessment order, no satisfaction regarding initiation of penalty proceedings under section 271E was recorded - Tribunal as well as High Court held that when original assessment order itself was set aside, satisfaction recorded therein for purpose of initiation of penalty proceeding under section 271E would also not survive - Accordingly, impugned penalty order was set aside - Whether since impugned penalty order was passed under section 271E without recording any satisfaction, same was rightly set aside by authorities below - Held, yes [In favour of assessee]*

25. This decision of Hon'ble Supreme Court in the case of CIT Vs Jai Laxmi Rice Mill (Supra) has been followed by Hon'ble Telangana High Court in the case of Srinivasa Reddy Reddeppagari Vs. JCIT reported in 12 TM 1446 (Telangana) wherein the Hon'ble Court has observed as under:

> *24. Reverting back to the facts of the present case, we find that petitioner had submitted reply to the show cause notice on 02.06.2022. In his reply, petitioner mentioned that no satisfaction was recorded by the assessing officer in the assessment order as to infraction of Section 269SS of the Act. Therefore, no penalty could be levied under Section 271D of the Act without recorded satisfaction. In this connection, reference was made to the decision of the Supreme Court in Jai Laxmi Rice Mills Ambala City (1 supra) wherein it was clarified that provisions of Section 271E are in parimateria with the provisions of Section 271D of the Act. However, this aspect of the matter was not considered by respondent No.1 while passing the impugned order. Respondent No.1 relying upon the Kerala High Court decision in Grihalaxmi Vision (2 supra) noted that competent authority to levy penalty is the Joint Commissioner. He has also referred to an earlier decision of the Supreme Court in CIT V. Mac Data Ltd.(2013) 352 ITR 1 wherein it was observed that assessing officer has to satisfy himself as to whether penalty proceedings should be initiated or not. Assessing officer is not required to record his satisfaction in a particular manner or reduce it into writing. Therefore, respondent No.1 imposed the penalty under Section 271D of the Act.*
>
> *25. We are afraid respondent No.1 had completely overlooked the decision of the Supreme Court in Jai Laxmi Rice Mills Ambala City (1 supra). In the said decision as extracted above, Supreme Court had concurred with the view taken by the High Court holding that*

> *satisfaction must be recorded in the original assessment order for the purpose of initiation of penalty proceedings under Section 271E of the Act. We have already discussed above that provisions of Section 271E and 271D of the Act are in parimateria. When there is a decision of the Supreme Court, it is the bounden duty of an adjudicating authority, be it an income tax authority or any other civil authority or for that matter any court in the country, to comply with the decision of the Supreme Court.*

26. As per above cited judgments, the AO has to record his satisfaction in the assessment order in respect to the violation of the provision of Section 269SS and 269T of the Act before initiating penalty proceedings u/s. 271D and 271E respectively. In the instant case, the assessment order for all the three years were passed on 31.3.2015 and the reference was made by the Assessing Officer to the JCIT vide letter dt. 8.9.2015. In the assessment order, the AO has initiated penalty proceedings u/s. 271(1)/(c) of the Act after recording satisfaction however, neither any satisfaction was recorded in respect to the violation of the provision of Section 269SS and 269T of the Act nor any proposal for initiation of penalty proceedings u/s. 271D and 271 E was made in the course of assessment proceedings itself. Thus, by considering the decision of Hon'ble Supreme Court in the case of CIT vs. Jai Laxmi Rice Mills (supra), and the judgment of Hon'ble Telangana High Court in the case of Srinivasa Reddy Reddeppagari (supra), we are of the considered view that ld. CIT(A) should have allowed the appeal of the assessee on this score also. Since this issue is still alive, the Tribunal is duty bound to answer the same as this issue has not been answered by the ld. CIT (A). Therefore, we hold that penalty levied u/s. 271D and 271E by the JCIT

are without recording satisfaction by the AO of violation of provision of Section 269SS and 269T in the assessment order itself.

27. Thus, considering these facts and by respectfully following the judgments of the Hon'ble Supreme Court and of various High Courts, cited supra, we are of the considered view that the ld.CIT(A) has rightly deleted the penalty levied u/s.271D & 271E of the Act for the assessment years under consideration as levied by the lower authorities. Accordingly, we uphold the order of the ld. CIT(A) in deleting the penalty so levied u/s.271D/271E of the Act.

28. There is also an issue of limitation which in so far as the communication to the JCIT on 8th September, 2015 and the orders levying penalties u/s.271D/271E of the Act in different assessment years have been passed on 31st January, 2019, therefore, these orders are also barred by limitation. However, as we have quashed the penalty orders on account of the issue of initiation without proper satisfaction by the Assessing Officer in the assessment order, we are not going into the issue of limitation in depth.

29. In the result, all the three appeals of the Revenue are dismissed.

Order pronounced in the open court on 18/09/2024.

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| **Sd/-** | **Sd/-** |
| **(GEORGE MATHAN)** | **(MANISH AGARWAL)** |
| **न्यायिक सदस्य / JUDICIAL MEMBER** | लेखा सदस्य / **ACCOUNTANT MEMBER** |

**कटक** Cuttack; दिनांक Dated 18/09/2024
*Prakash Kumar Mishra, Sr.P.S.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-
   DCIT Central Circle-2, Bhubaneswar
2. प्रत्यर्थी / The Respondent-
   M/s Hotel Sukhamaya Pvt. Ltd.,
   A-1/9, A-1(A) & A-14, IRC Village,
   Nayapalli, Bhubaneswar-751014
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

**आदेशानुसार**/ BY ORDER,

सत्यापित प्रति //True Copy//

(**Assistant Registrar**)
**आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack**