

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI PCHALY

FRIDAY,THE 7TH DAY OF AUGUST 2015/16TH SRAVANA, 1937

ITA.No. 83 of 2014

AGAINST THE ORDER IN ITA 103/2011 of I.T.A.TRIBUNAL, COCHIN BENCH, DATED 10-01-2014

APPELLANT/APPELLANT:

GRIHALAKSHMI VISION
KTC BUILDING, YMCA ROAD, KOZHIKODE-673 001.

BY ADVS.SRI.P.BALAKRISHNAN (E)
SRI.MOHAN PULIKKAL
SRI.P.P.NARAYANAN
SRI.R.ANAS MUHAMMED SHAMNAD

RESPONDENT/RESPONDENT:

THE ADDITIONAL COMMISSIONER OF INCOME TAX
RANGE I, KOZHIKODE-673 001.

R. BY SR. ADV. SRI.PKR MENON, SC, FOR INCOME TAX
R BY SRI.B.RAMACHANDRAN, ADDL.CGSC

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 07-08-2015,
ALONG WITH ITA 86/2014, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES:

ANNEUXRE A: TRUE COPY OF THE ASSESSMENT ORDER DATED 6.11.2007 PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE (1), KOZHIKODE.

ANNEXURE B: TRUE COPY OF THE SHOW CAUSE NOTICE DATED 28.3.2008 ISSUED BY THE RESPONDENT.

ANNEXURE C: TRUE COPY OF THE REPLY DATED 15.4.2008 SUBMITTED BY THE APPELLANT TO THE RESPONDENT.

ANNEXURE D: TRUE COPY OF THE ORDER DATED 29.7.2008 ISSUED BY THE RESPONDENT.

ANNEXURE E: TRUE COPY OF THE ORDER DATED 22.11.2010 PASSED BY THE COMMISSIONER OF INCOME TAX (APPEALS), KOZHIKODE.

ANNEXURE F: TRUE COPY OF THE ORDER DATED 20.9.2013 IN M.A.NOS.89 & 90/COCH/2013 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH.

ANNEXURE G: TRUE COPY OF THE ORDER DATED 10.1.2014 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH.

// TRUE COPY //

P.A. TO JUDGE

ANTONY DOMINIC & SHAJI P.CHALY, JJ.

'CR'

ITA No.83 & 86 of 2014

Dated this the 7th day of August, 2015

JUDGMENT

Antony Dominic, J.

These appeals are filed by the assessee impugning the orders passed by the Tribunal in ITA Nos.103/11 and 104/11 whereby the orders passed under Sections 271D and 271E of the Income Tax Act (hereinafter referred to as 'Act') confirmed by the Commissioner of Income Tax (Appeals) were upheld.

2. We heard the counsel for the appellant and the Standing Counsel for the Revenue.

3. Briefly stated, the facts of the case are that for the assessment year 2005-2006, the assessee had filed returns declaring loss. The returns were accepted and finally, on 6.11.2007, assessment order was passed. In the assessment order, it was found that by accepting deposits and making repayments in violation of the provisions contained in Section 269SS and 269T of the Income Tax Act, penalty provisions of Section 271D and 271E are initiated. Accordingly, the matter was referred to the Joint

Commissioner of Income Tax and who issued notice dated 28.3.2008. To the notice, replies were given and finally order under Section 271D and 271E were passed on 29.7.2008. In the order passed under Section 271D, penalty of Rs.10,83,000/- which is equal to the cash loans taken by the assessee in contravention of 261SS of the Income Tax Act was levied. Similarly, in the order passed under Section 271E, penalty of Rs.2,97,000/- which is equal to the amount of cash loans repaid by the assessee in contravention of 269T of the Act was levied. These orders were confirmed by the Commissioner of Income Tax (Appeals). Further appeals filed before the Tribunal as ITA Nos.103 and 104 of 2011 were also dismissed by the common order. It is in this background, these appeals are filed by the assessee.

4. The questions of law framed are mainly whether the Tribunal was correct in holding that the orders imposing penalty under Section 271D and E were passed within the period of limitation prescribed under Section 275(1)(c) and whether the Tribunal was correct in confirming the findings without examining the circumstances providing reasonable cause as contemplated under Section 273B of the Act.

Another question of law which is framed is whether the authorities below erred in not considering the issue whether the cash receipts, being bonafide transactions between the assessee and its sister concerns/partners, can be considered as loans or deposits attracting the provisions of Sections 269SS and 269T of the Act.

5. These contentions were reiterated before us by the learned counsel for the assessee and were contradicted by the learned Senior Counsel appearing for the Revenue.

6. Section 269SS of the Act, occurring in Chapter XXB, provide for *mode of taking or accepting certain loans and deposits*. Insofar as it is relevant, the Section provides that no person shall, after 30th day of June 1984, take or accept from any other person any loan or deposit otherwise than by an account payee cheque or account payee bank draft if the aggregate amount of such loan or deposit is Rs.20,000/- or more. Section 269T of the Act, also occurring in Chapter XXB of the Act, provides for *the mode of repayment of certain loans or deposits*. As per this provision, no firm or other person shall repay any loan or deposit made with it otherwise than by an account payee cheque or account

payee bank draft drawn in the name of the person who has made the deposit if the amount of loan or deposit together with the interest, if any, payable thereon is Rs.20,000/- or more.

7. Section 271D and 271E of the Act provides for *penalty for failure to comply with the provisions of Section 269SS and 269T*. As per these provisions, contravention of provisions of Section 269SS and 269T renders the person concerned liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted and a sum equal to the amount of the loan or deposit so repaid. Sub section (2) of both these provisions provide that any penalty imposable under sub section (1) shall be imposed by the Joint Commissioner. By virtue of these provisions, though contravention of Section 269SS and T automatically invites penalty under Section 271D and E, Section 273B provides that notwithstanding anything contained in the above provisions, 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. This Section also provides that no penalty shall be levied under Section 271D or

271E after the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later. (vide Section 275(1)(c) of the Act).

8. Insofar as these cases are concerned, the assessment order was passed on 6.11.2007 and the assessment order concluded by stating thus:

“Since the assessee has violated the provisions of section 269SS and 269T of the IT Act by accepting and repaying loans exceeding Rs.20,000/- aggregating and otherwise at any point of time, as given above, penalty provisions of Section 271D and 271E of the IT Act are attracted. Accordingly initiated penalty proceedings under Section 271D and 271E.”

It was relying on the last sentence in the assessment order that “Accordingly initiated penalty proceedings under Section 271D and 271E”, the counsel for the assessee is contending that the Assessing Officer having initiated the proceedings vide his order dated 6.4.2007, the order passed by the Joint Commissioner on 29.7.2008 levying penalty is beyond the time permitted in Section 275(1)(c). It was to

substantiate this contention that the learned counsel placed reliance of the Supreme Court judgment in D.M.Manasvi v. Commissioner of Income Tax, Gujarat II [1972] 86 ITR 557 and Commissioner of Income Tax v. Jitendra Singh Rathore [2013] 352 ITR 327 (Raj).

9. As we have already seen, although Section 271D and E of the Income Tax Act provides for levy of penalty for contravention of Sections 269SS and 269T. As per sub section (2) to both these sections any penalty imposable under sub section (1) of these provisions shall be imposed by the Joint Commissioner. It was, therefore, that the matter was referred to the Joint Commissioner who passed orders on 29.7.2008 levying penalty.

10. Question to be considered is whether proceedings for levy of penalty, are initiated with the passing of the order of assessment by the Assessing Officer or whether such proceedings have commenced with the issuance of the notice issued by the Joint Commissioner. From statutory provision, it is clear that the competent authority to levy penalty being the Joint Commissioner. Therefore, only the Joint Commissioner can initiate proceedings for levy of penalty. Such

initiation of proceedings could not have been done by the Assessing Officer. The statement in the assessment order that the proceedings under Section 271D and E are initiated is inconsequential. On the other hand, if the assessment order is taken as the initiation of penalty proceedings, such initiation is by an authority who is incompetent and the proceedings thereafter would be proceedings without jurisdiction. If that be so, the initiation of the penalty proceedings is only with the issuance of the notice issued by the Joint Commissioner to the assessee to which he has filed his reply.

11. The only case of the assessee is that if the period of limitation prescribed in Section 271(1)(c) is reckoned from the date of the assessment order dated 6.11.2007, the penalty order passed by the Joint Commissioner on 29.7.2008 is beyond the time permitted in the above section. As we have already held, the initiation of the penalty proceedings is not by the Assessing Officer but by the Joint Commissioner and if that be so, the order levying penalty passed by the Joint Commissioner is within the time prescribed in Section 275(1)(c).

12. Insofar as the judgment of the Apex Court in *D.M.Manasvi v. Commissioner of Income Tax, Gujarat II [1972] 86 ITR 557* is concerned, that was a case where penalty was levied under Section 271(1)(c) and as is evident from the provision itself, the proceedings under that Section are to be initiated on the basis of the satisfaction of the officers mentioned therein including the Assessing Officer. Unlike the provisions of Section 271(1)(c), under the provisions of Section 271D and E, the exclusive authority is conferred on the Joint Commissioner. Therefore, the principles laid down in the judgment of the Apex Court cannot be called in aid to impugn the concurrent findings of the lower authorities. Therefore, the first contention raised by the learned counsel for the assessee deserves to be rejected and we do so.

13. The second contention raised by the assessee is regarding the existence of reasonable cause. As we have already stated, Section 273B provides that notwithstanding anything contained in the provisions of Section 271D and E, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred in the provisions, if he proves that there was reasonable cause for the failure. Insofar as

this case is concerned, reading of the reply given by the assessee shows that the amount in cash was taken from the partners of the firm to meet certain urgent business expenditure. It is also stated that the amount in cash was taken from M/S Grihalakshmi Music and M/S Kerala Transport Company for meeting various business expenditure at the location where serial was being shot. The explanation offered was considered by the Assessing Officer and he examined the question whether this was a reasonable cause as provided under Section 273B. Answering this question, the Assessing Officer has stated thus:

"The said replies do not give 'reasonable cause' of failure to repay 'otherwise' than by the account payee cheque or, account payee bank draft. The assessee does not state any 'objective satisfaction' regarding cash repayment of Rs.2,97,000/-. The assessee also does not say anything about availability of banking facility and maintenance of bank accounts by both parties (the person who has paid loan/deposit and the person who has received such loan/deposit) or, Nothing has been stated about banking transaction facilities/knowledge of both the assessee firm and its partners/sister concerns. But why the partners/sister concerns of the firm were paid cash loans whereas banking facilities are available for both the firm and the partners/sister concerns. I found no reasonable circumstances compelling the assessee firm to repay cash loans to its partners/sister concerns without proving the receipts and payments both

were made beyond normal banking hours or beyond the availability of banking facilities. The said provision of section 269T is procedural regarding why the assessee must not repay any loan exceeding Rs.20,000/- (aggregate) 'otherwise' than by an account payee cheque or an account payee bank draft. It not only prohibits cash loan repayment but also prohibits any amount received 'otherwise' than by account payee cheque or an account payee bank draft. The assessee must prove to take the benefit of section 273B why the cash loan or 'otherwise' has been repaid and whether there has been any 'reasonable cause' for the said failure. The said section 269T does not say anything about how the loan or deposit amount is being utilized, or sourced or by whom paid or received or flexibility of cash/'otherwise' loan/deposit (other than account payee cheque or account payee bank draft). It is only referring why the cash loan or 'otherwise' must not be repaid other than by an account payee cheque or account payee bank draft. So, I am not inclined to give the benefit of provision of Section 273B of the Income Tax Act, 1961, since the assessee firm has not proved any 'reasonable cause' for the said failure."

14. It is this finding which has been confirmed by the Commissioner of Income Tax (Appeals) and by the Tribunal, having appreciated the reasoning of the lower authorities we do not find any perversity in the findings. Apart from that, this concurrent findings of the lower authorities are finding of facts which does not give rise to any

question of law to be considered by this Court in an appeal under Section 260A of the Act.

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.

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.

**ANTONY DOMINIC
JUDGE**

**SHAJI P. CHALY
JUDGE**

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