

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No. 256 of 2014
Date of decision: 21.9.2015**

The Commissioner of income Tax, Patiala

.....Appellant

M/s Eqbal Inn & Hotels Limited

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Zora Singh Klar, Advocate for the appellant-revenue.

Ms.Radhika Suri, Sr. Advocate with Ms. Rinku Dahiya,
Advocate for the respondent-assessee.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.256, 266, 279 and 321 of 2014 as learned counsel for the parties are agreed that the issue involved in all these appeals is identical. However, the facts are being extracted from ITA No.256 of 2014.

2. ITA No.256 of 2014 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 30.1.2014, Annexure A.3 passed by the Income Tax Appellate Tribunal Chandigarh Bench 'B', Chandigarh (in short, "the Tribunal) in ITA No.878/Chd/2013 for the assessment year 2006-07, claiming following

substantial questions of law:-

“i) In the facts and circumstances of the case, whether the ITAT was right in law in not sustaining the action of the JCIT/CIT(A) in imposing/upholding the penalties under section 271D of the Income Tax Act, 1961 on the ground that the amount was received in the current account, even though the section itself does not provide any exception that the loan or deposit received in the current account of the assessee would be exempt from the provisions of Section 269SS of the Act?

ii) In the facts and circumstances of the case, whether the ITAT was right in holding that receipt of share application money in cash would be exempt from the provisions of section 269SS?

iii) In the facts and circumstances of the case, whether the ITAT was right in treating the amounts received in cash over a period of 6 years, without allotment of shares, as share application money?

iv) In the facts and circumstances of the case, whether the ITAT was right in holding that there was reasonable cause for receipt of cash by the assessee company from the directors, even though cash was received regularly and on consecutive dates and of large sums and both the payers and the receiver had bank accounts in the same city?

3. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The assessee accepted share application money in cash from its directors namely Shri Kamalpreet Singh, Prop. M/s Saran Enterprises, Patiala, Shri Balwinder Singh Prop. M/s M.P.Traders, Patiala and Smt. Pritam Kaur Prop. M/s Jaimai Sons Enterprises, Patiala amounting to ₹ 4,15,440/-, ₹ 1,07,49,200/-, ₹ 29,33,000/- and ₹ 66,50,000/- for the assessment years 2003-04, 2005-06 to 2007-08 respectively in cash aggregating to ₹ 2,07,47,640/- in violation of

the provisions of section 269SS of the Act. The Joint commissioner of Income Tax, Patiala Range, Patiala vide consolidated order dated 28.9.2011, Annexure A.1 imposed penalty under section 271D of the Act amounting to ₹ 4,15,440/- for the assessment year 2003-04, ₹ 1,07,49,200/- for the assessment year 2005-06, ₹ 29,33,000/- for the assessment year 2006-07 and ₹ 66,50,000/- for the assessment year 2007-08 respectively. Aggrieved by the order, the assessee filed appeals before the Commissioner of Income Tax (Appeals) CIT(A)]. Vide consolidated order dated 27.8.2013, Annexure A.2, the CIT(A) dismissed the appeals. Still not satisfied, the assessee filed appeal before the Tribunal. Vide order dated 30.1.2014, Annexure A.3, the Tribunal partly allowed the appeal, deleting the penalty under section 271D of the Act in all the four years. It was held that when the money had been received in a current account, it cannot be covered under the definition of loan or deposit and consequently penal provisions under section 271D of the Act would not be attracted and that the money contributed by the various directors and their relatives was to be treated as share capital. Hence the instant appeal by the revenue.

4. We have heard learned counsel for the parties.

5. The issue herein is whether the amount paid towards share application money by various applicants to the assessee would be embraced under the term 'loan or deposit' within the meaning of section 269SS of the Act.

6. It would be expedient to refer to the relevant statutory provisions. Rule 2(b) (vii) and (ix) of the Companies (Acceptance of deposits) Rules, 1975 (in short, "the Rules") reads thus:-

“**Rule 2(b)**: deposit means any deposit of money with, and includes any amount borrowed by, a company, but does not include-

(i) to (vi) xx xxx xxxx xx xx xx xx

(vii) any amount received by way of subscriptions to any shares, stock, bonds or debentures such bonds or debentures as are covered by sub clause (x) pending the allotment of the said shares, stock, bonds or debentures and any amount received by way of calls in advance on shares, in accordance with the articles of Association of the company so long as such amount is not repayable to the members under the articles of Association of the company;

(viii) xxxxx xx xx xx x x

(ix) any amount received by a private company from a person who, at the time of the receipt of the amount, was a director, relative of director or member:

Provided that the director or member, as the case may be, from whom money is received, furnishes to the company at the time of giving the money, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting from others;

Explanation – For the removal of doubts, it is hereby declared that any deposit received or renewed by a company before the commencement of the Companies (Acceptance of Deposits) Amendment Rules, 1978 shall continue to be governed by the rules applicable at the time of such deposit or renewal as the case may be.”

Section 269SS of the Act

“**269SS.** No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this section referred to as the depositor), any loan or deposit otherwise than by an account payee cheque or account payee bank draft *-or use of electronic clearing system through a bank account* if,—

(a) the amount of such loan or deposit or the aggregate

amount of such loan and deposit ; or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid ; or

(c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more :

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by,—

(a) Government ;

(b) any banking company, post office savings bank or co-operative bank ;

(c) any corporation established by a Central, State or Provincial Act ;

(d) any Government company-as defined in section 617 of the Companies Act, 1956 (1 of 1956) ;

(e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette :

Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.]

Explanation.—For the purposes of this section,—

(i) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in section 51 of that Act ;]

(ii) "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949) ;

(iii) "loan or deposit" means loan or deposit of money."

Section 271D of the Act

"271D. (1) If a person takes or accepts any loan or deposit in contravention of the provisions of [section 269SS](#), he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner."

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 or deposit within the meaning of section 269SS of the Act. Under Rule 2(b) (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 i.e. 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 Sections 269SS of the Act and was liable to penalty under Section 271D of the Act. The CIT(A) while concurring with the findings recorded by the Assessing Officer dismissed the appeal filed by the assessee. The Tribunal deleted the penalty while observing thus:

"25. We may also note that assessment orders have been passed

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 for which bank loans were not sanctioned and therefore, directors had to contribute the money towards construction of the hotel. The payment was generally required for labour payments and other cash items, therefore, it is a reasonable case for accepting the cash from directors and relatives and even on this basis also penalty is not leviable.”

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 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. 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 the company was neither deposit nor loan, but it is only share capital advance. Penalty under [Section 271E](#) is not automatic and to be levied only in the absence of a reasonable cause. No doubt a reasonable cause has to be established by the assessee. The rationale behind the provisions of [Section 269SS](#) and [269T](#) is to prevent tax evasion, i.e., the laundering of concealed income by parties in the guise of cash loans or deposits in or

outside the accounts. The provision of [Section 269SS](#) and [269T](#) 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 [269T](#) 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.”

9. In *CIT vs. I.P.India P. Limited*, (2012) 343 ITR 353 (Del.), the assessee a private company received share application monies in cash from three private limited companies. The Assessing Officer was of the view that the assessee was liable to be proceeded against for levy of penalty under section 271D of the Act on the ground that the provisions of section 269SS of the Act were attracted to the receipt of monies in cash. The assessee

contended that there was no violation of the provisions of section 269SS 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 CIT(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. He did not examine whether the share application monies can be treated as "loan" or "deposit" within the meaning of [Section 269SS](#). The Additional CIT has merely endorsed the view of the AO in 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 Registrar of Companies. Neither the AO nor the Additional 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. 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 depositor, 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).”

10. Similarly, in *CIT vs. Sunil Kmar Goel*, (2009) 315 ITR 163 (P&H), a family transaction between two independent assesseees, based on an act of casualness, specially 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 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 (Appeals) have been confirmed in appeal by the Tribunal.

Therefore, the findings recorded by the Commissioner of Income-tax (Appeals) and the Tribunal that the assessee had shown reasonable cause for the failure to comply with the provisions of [section 269T](#) of the Act is a finding of fact based on appreciation of material on record. It does not give rise to any question of law, much less substantial

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 act 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 assesseees, 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. Limted vs. Commissioner of Income Tax***, (2005) 275 ITR 399, to the effect that even if share application money cannot be considered to be a loan within the meaning of section 269SS of the Act, 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. Hence the acceptance of share application money in cash amounting to ₹ 20,000/- or more was

held to be violating the provisions of section 269SS 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 repayable 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.

11. The question has to be considered in the context of purpose sought to be achieved by the insertion of [Section 269SS](#) in the Act. Obviously, it was done with a view to prevent transactions in black money and to ensure that payments of Rs. 20,000/- and above, are traceable to transactions through a Bank. If the mischief that is sought to be averted is kept in mind. it will be appropriate to hold that any payment of Rs. 20,000/- or above,

made to a company as share application money, should be as provided in [Section 269SS](#) of the Act.

12. Therefore, even if share application money cannot be considered as a loan within the meaning of [Section 269SS](#) 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.”

12. 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 269SS 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.

(Ajay Kumar Mittal)
Judge

September 21, 2015
'gs'

(Ramendra Jain)
Judge