

(2012) 02 DEL CK 0068
In the Delhi High Court
Case No : ITA No. 313 of 2006

The Commissioner of Income Tax

APPELLANT

Vs

M/s Samora Hotels P. Ltd.

RESPONDENT

Date of Decision : 23-02-2012

Acts Referred:

Banking Regulation Act, 1949 — Section 51
Companies (Acceptance of Deposits) Rules, 1975 — Rule 2(4)
Companies Act, 1956 — Section 617
Income Tax Act, 1961 — Section 260(A), 269(SS), 271, 271(A), 271(B)

Citation : (2012) 3 AD 198 : (2012) 187 DLT 706 : (2012) 211 TAXMAN 189

Hon'ble Judges : V.K. Jain, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Kiran Babu, for the Appellant; Anoop Sharma, for the Respondent

Judgement

Badar Durrez Ahmed, J

1. The substantial question of law which we have to answer in this appeal is:-

Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in concluding that no penalty was leviable on the assessee under the provisions of section 271D of the Income Tax Act, 1961?

2. This appeal arises out of the order dated 29.07.2005 passed by the Income Tax Appellate Tribunal, Delhi Bench "E", New Delhi (hereinafter referred to as "the Tribunal") in ITA No.1066/Del/2005 relating to the assessment year 2001-02.

3. In the course of assessment proceedings for the relevant assessment year (2001-02), the Assessing Officer noticed that a sum of Rs. 66.50 lakhs was shown to have been received by the assessee from three persons (Mr. Rajinder Diwan, Mr Puneet Diwan & Mrs Urmil Diwan - promoter directors) by way of unsecured loans. What is significant is that, out of the said amount of Rs. 66.50 lakhs, a sum of Rs. 23.25 lakhs was received by the assessee from the said three

persons (Mr. Rajinder Diwan - Rs. 5,00,000/-, Mr Puneet Diwan - Rs. 9,95,000/- & Mrs Urmil Diwan - Rs. 8,30,000/-) in cash / bearer cheques in excess of the limit of Rs. 20,000/-laid down in section 269SS of the Income Tax Act, 1961 (hereinafter referred to as "the said Act"). Inasmuch as the Assessing Officer felt that loans to the extent of Rs. 23.25 lakhs had been received and accepted by the assessee company in a manner prohibited by section 269SS of the said Act, he initiated penalty proceedings u/s 271D of the said Act.

4. In the penalty proceedings, it was submitted on behalf of the assessee company that a hotel was being set up by it at Shimla and for the purpose of construction of the said hotel, funds were contributed by its directors / shareholders in the form of loans, as and when required. It was also submitted that the said amount was actually contributed by them towards share capital and the same being in the nature of share capital money the provisions of Section 269SS were not applicable. The Assessing Officer, however found that the authorised share capital of the assessee company as on 31.03.2001 was only Rs. 5 lakhs which was raised to Rs. 25 lakhs only on 31.3.2003. He also noted that the amounts standing in the name of the three creditors were shown by the assessee company in its balance sheet as unsecured loans and even in the confirmation letters filed by the said creditors, the said amounts were stated to have been paid to the assessee company as loans without any mention of share application money. The Assessing Officer did not, therefore, accept the explanation of the assessee that the amount in question received from the three creditors was on account of share application money. The Assessing Officer also held that the assessee had failed to prove that the said amount had been accepted by it in cash or bearer cheques in exceptional circumstances of urgent requirement of funds or business exigencies. The assessee's plea that there was a reasonable cause which prevented it from complying with the requirements of Section 269SS was also found to be unacceptable by the Assessing Officer. He, therefore, proceeded to impose penalty of Rs. 23.25 lakhs u/s 271D.

5. Being aggrieved by the penalty order, the assessee company preferred an appeal before the Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT(A)"]. Before the CIT(A), it was submitted that the amounts received from the directors/ shareholders were strictly not in the nature of loans and the source of the said amounts having allegedly been explained in the hands of the concerned creditors, imposition of penalty u/s 271D was not justified keeping in view the legislative intent behind enacting the said provisions. It was reiterated that the said amounts were contributed by the director / shareholders as their share application money and the same having allegedly been finally adjusted against the shares allotted to the said creditors, the amounts in questions could not be treated as loans in the strict sense so as to attract the provisions of Section 269SS. It was also submitted that there was a reasonable cause for having taken the said amounts from its directors/ shareholders in cash / bearer cheques and it was therefore not a fit case for imposition of penalty u/s 271D. The submissions made on behalf of the assessee company, however, did not find

favour with the CIT (A) and he confirmed the penalty imposed by the Assessing Officer u/s 271D. The CIT (A), inter alia, held that no evidence had been produced to show that the said sum had been received as share application money. According to the CIT (A), the story of share application money was an after-thought, once the assessee realized that the unsecured loans taken in cash / bearer cheques clearly violated section 269SS of the said Act.

6. Thereafter, the assessee preferred the appeal before the Tribunal which culminated in the order dated 29.07.2005 which is impugned before us by the revenue.

7. Before the Tribunal, the assessee raised the plea that the amounts in question were actually contributed by the concerned directors/ shareholders of the assessee company towards share application money and that such amounts having been finally adjusted against the share capital subsequently in the year 2003, the provisions of section 269SS were not attracted. But, this plea was rejected by the Tribunal inasmuch as it was of the view that, as the authorized share capital of the assessee company during the year in question was only Rs. 5 lakhs (it was raised to Rs. 25 lakhs only in 2003), the assessee company was not authorized in the year in question to accept share application money to the extent of Rs. 23.25 lakhs in excess of its authorized capital. The Tribunal also noted that in the balance sheet of the relevant year, the amounts in question were shown as unsecured loans. Even the confirmation letters filed by the concerned three creditors showed the said amounts as loans and did not refer to application for shares. Thus, the Tribunal found as a fact that the amounts in question had not been received as share application money but as unsecured loans. This finding is final and has not been challenged before us by the assessee as it has not preferred any appeal or cross-objection.

8. However, the Tribunal accepted the other plea of the assessee that the loans were "genuine" loans and that the assessee was under a bona fide belief that the provisions of section 269SS did not apply to the case of genuine loans and, therefore, there was reasonable cause for the assessee for not complying with the provisions of section 269SS while accepting the amounts in question. The Tribunal also held that the bona fide belief of the assessee company was also based on the interpretation of the words "any other person" appearing in section 269SS. The Tribunal noted that the Hyderabad Bench of ITAT in Dillu Cine Enterprises (P) Ltd v. ACIT: 80 ITD 484 had taken the view that the words "any other person" did not include a director of the very company which accepted the loan or deposit. Though the Tribunal also noted that a contrary view had been taken by other benches of the ITAT, it was of the view that the Hyderabad Bench decision was sufficient to lead the assessee company to believe that its shareholders/ directors were not covered within the expression "any other person" and consequently the acceptance of the amounts in question were not in violation of section 269SS of the said Act.

9. The Tribunal concluded as under:-

10. As such, considering all the facts of the case and keeping in view the legal position emanating from the aforesaid judicial pronouncement we are of the view that the assessee company had entertained bona fide belief that the loans accepted by it from its shareholders/ directors were not covered by the provisions of section 269SS and this bona fide belief coupled with the fact that the said loans were genuine and were also accepted in the regular course of business constituted a reasonable cause for its failure to accept the loans in question from its directors shareholders by account payee cheque/ drafts in compliance with the requirement of section 269SS. In that view of the matter, we find no justification in the impugned order of learned CIT(A) confirming the penalty imposed by the Assessing Officer u/s 271D and reversing the same, we cancel the penalty so imposed.

(emphasis supplied)

10. It is in this backdrop that the question posed has arisen in this appeal u/s 260A of the said Act. The learned counsel for the revenue contended that there was a clear violation of the provisions of section 269SS inasmuch as loans had been accepted in excess of the sum of rupees twenty thousand in cash/ bearer cheques whereas the said provision strictly required the same to be through account payee cheques or account payee bank drafts. It was contended that the Tribunal misdirected itself in law in construing the action on the part of the assessee company to be bona fide and/or to be excusable under the "reasonable cause" provision in section 273B of the said Act. The learned counsel for the assessee supported the view taken by the Tribunal in the impugned order. He submitted that the amounts could not be regarded as loans or deposits as they were receipts from directors/ shareholders. In support, the decision of the Madras High Court in the case of The Commissioner of Income Tax Vs. Idhayam Publications Limited, was cited. It was also submitted by the learned counsel for the assessee that, in any event, the "loans" were genuine and the assessee had demonstrated a "reasonable cause" for its failure to comply with section 269SS of the said Act.

11. First of all, let us have a look at sections 269SS, 271D and 273B:

269SS. Mode of taking or accepting certain loans and deposits.--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 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 cooperative 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 that 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."

271D. Penalty for failure to comply with the provisions of section 269SS.--(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."

273B. Penalty not to be imposed in certain cases.--Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271A, section 271B, section 271BB, section 271C, section 271D, section 271E, section 271F, clause (c) or clause (d) of subsection (1) or sub-section (2) of section 272A, sub-section

(1) of section 272AA or sub-section (1) of section 272BB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, 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.

12. Section 269SS prohibits "a person" from taking or accepting from "any other person" any "loan or deposit" otherwise than by an account payee cheque or account payee bank draft if, inter alia, the amount of such loan or deposit or the aggregate amount of such loan and deposit is twenty thousand rupees or more. The assessee company being a juristic person would be covered by the said provision. There is no dispute with this. However, it was contended that the expression "any other person" would not refer to a director or shareholder of the company in question. Such a view is not warranted from a plain reading of the section. There is no indication that the corporate veil is to be pierced so as to bring about an identity between the company as a juristic person and its directors or members. Therefore, in our view, the expression "any other person" does not exclude the directors or members of the assessee company which has received or accepted the loans or deposits.

13. The view taken by the Tribunal that the assessee company had entertained a bona fide belief that the loans accepted by it from its directors/ shareholders were not covered by the provisions of section 269SS, we are afraid, is not borne out by the record. When the assessee company was asked to furnish its answer in the penalty proceedings, the assessee company did not take the plea that the receipts in question were loans but, because they were from directors/ shareholders, the loans were not covered u/s 269SS. On the contrary, the specific plea of the assessee company was that the amounts in question represented share application money and were not loans or deposits at all! When the clear stand of the assessee was that the amounts in question were not loans or deposits how can it said that the assessee company had entertained a bona fide belief that the loans accepted by it from its directors/ shareholders were not covered by the provisions of section 269SS? It is another matter that the story of share application money was itself an after thought and was rightly rejected by all the authorities below. At the same time, there was no belief what to speak of "bona fide belief" that the loans taken from directors/ shareholders were not within the ambit of section 269SS.

14. This is the appropriate point to refer to the Madras High Court

decision in Idhayam Publications (supra), a decision relied upon by the learned counsel for the assessee. In that decision, the Madras High Court observed as under:-

Companies (Acceptance of Deposits) Rules, 1975, under rule 2(b)(ix), deposit does not include any amount received from a director or a shareholder of a private limited company. Therefore the transaction between the appellant and

the director cum shareholder is not a loan or deposit and it is only a current account in nature and no interest is being charged for the above transaction.

15. In the case at hand, as already pointed out above, the stand of the assessee was entirely different. It had contended that the amounts in question represented share application money. In any event, Rule 2(b)(ix) of the Companies (Acceptance of Deposits) Rules, 1975 would have no application in the present case. This is because the said rule carries a proviso which stipulates a condition precedent which has not been satisfied in the present case. To make things clear, the proviso is set out herein below -

Provided that the director or member, as the case may be, from whom the 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;

16. There is no evidence that the three persons from whom the amounts were received had furnished such declarations. Clearly, then, the assessee cannot take refuge under the said rule. We may also make it clear that we have neither expressed our agreement or disagreement with the Madras High Court view and leave that issue open. What we say is that even taking the Madras High Court view to be correct, it does not come to the rescue of the assessee herein because there is no factual foundation of the condition precedent stipulated in the said proviso having been fulfilled.

17. The learned counsel for the assessee had also placed reliance on a recent decision of a Division Bench of this court in the case of CIT, Delhi-IV v. I.P. India (P) Ltd: (2012) 204 Taxman 368. But, that decision would also be of no help to the assessee inasmuch as in that case, the receipts by the assessee company were in the form of share application monies. The Division Bench held that such receipts cannot be treated as receipts of loans or deposits. However, in the present case, the receipts are not in the nature of share application money. Therefore, the decision in I.P. India (P) Ltd (supra) is clearly distinguishable and would not be of any help to the assessee in the case at hand.

18. Let us now consider section 271D. The meaning is clear. 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. Once it is established that there is a violation of section 269SS, the penalty is mandatory and so is the amount of penalty.

19. In such an eventuality where section 271D is attracted, it is only section 273B of the said Act which can save a person from penalty. Section 273B provides that, notwithstanding anything contained in the provisions of section 271D, no penalty shall be imposable on the assessee for any failure referred to in section 271D if he proves that there was "reasonable cause" for the said failure.

20. The Supreme Court in *Asst. Director of Inspection (Investigation) v. Kum. A.B. Shanthi*: 255 ITR 258 SC, while upholding the constitutional validity of sections 269SS and 271D, held as under:

The new section 271D provides only for fine equal to the amount of loan or deposit taken or accepted. It is important to note that another provision, namely section 273B was also incorporated which provides that notwithstanding anything contained in the provisions of section 271D, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provision if he proves that there was reasonable cause for such failure and if the assessee proves that there was reasonable cause for failure to take a loan otherwise than by account-payee cheque or account-payee demand draft, then the penalty may not be levied. Therefore, undue hardship is very much mitigated by the inclusion of section 273B in the Act. If there was a genuine and bona fide transaction and if for any reason the taxpayer could not get a loan or deposit by account-payee cheque or demand draft for some bona fide reasons, the authority vested with the power to impose penalty has got discretionary power. In that view of the matter, we do not think that section 269SS or 271D or the earlier section 276DD is unconstitutional on the ground that it was draconian or expropriator in nature.

(emphasis supplied)

21. The above extract gives us a key to the understanding of section 273B of the said Act. The Supreme Court observed that (1) if there was a genuine and bona fide transaction and (2) if for any reason the taxpayer could not get a loan or deposit by account-payee cheque or demand draft for some bona fide reasons, the authority vested with the power to impose penalty has got discretionary power. The existence of a genuine or bona fide transaction is not sufficient to attract the relief u/s 273B of the said Act. It must also be established that for some bona fide reasons the assessee could not get a loan or deposit by an account payee cheque or account payee bank draft. In the present case, the Tribunal has not returned any finding as to the second aspect. Without a clear finding on both the aspects referred to in the said Supreme Court decision, the Tribunal, in law, could not have concluded that the assessee had "reasonable cause" for its failure to accept the said amounts in compliance with section 269SS of the said Act. There is nothing on record to show that there were bona fide reasons for not accepting the said amounts through account payee cheques or account payee bank drafts. And, unless that is established, the shelter of section 273B is not available.

22. Consequently, we answer the question in the negative and in favour of the revenue. The impugned order cancelling the penalty is set aside. The appeal is allowed. There shall be no order as to costs.