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Reserved

Income Tax Appeal No.174 of 2015

Commissioner of Income Tax-II, Agra ..... Appellant

Vs.

Smt. Dimpal Yadav, Etawah ..... Respondent

With

Income Tax Appeal No.71 of 2013

Commissioner of Income Tax-II, Agra ..... Appellant

Vs.

Akhilesh Kumar Yadav, Etawah ..... Respondent

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Hon'ble Tarun Agarwala, J.
Hon'ble Surya Prakash Kesarwani, J.

(Per: Tarun Agarwala, J.)

(Delivered on 21st August, 2015)

The dispute in the two appeals is the same and are being decided together. For facility, the facts of Income Tax Appeal No.174 of 2015 is being taken into consideration.

The present dispute relates to the assessment year

2006-07. The assessee claims to be deriving income from companies for her services as a Director, income from house property and income from business of purchase and sale of foodgrains. The return was processed under Section 143(1) of the Income Tax Act, 1961 *(hereinafter referred to as the Act)* but subsequently, the case was selected for scrutiny and, accordingly, notice under Section 143(2) of the Act was issued. The Assessing Officer passed an assessment order under Section 143(3) of the Act on a total income of Rs.11,52,470/-. While considering the matter, the Assessing Officer noticed that the assessee had acquired lease hold rights over a nazul land along with her husband vide assignment-cum-sale deed dated 31st January, 2005. The said nazul land was subsequently, converted into free hold in favour of the assessee and her husband vide deed executed on 24th June, 2005 on a total cost of Rs.44,67,208/-. The Assessing Officer noticed that 50% of the amount i.e. Rs.22,33,604/- was taken in cash as an unsecured loan from Samajwadi Party for the purpose of converting lease hold land into free hold land. The cash amount taken from Samajwadi Party was deposited in the joint account of the assessee along with her husband. The amount was subsequently, paid back to the Samajwadi Party on 24th August, 2005.

Subsequent to the assessment order, the assessee received a notice under Section 274 of the Act to show cause as to why an order of penalty should not be passed under Section 271D of the Act for violating the

provisions of Section 269SS of the Act. In response to the notice, the assessee filed her reply stating that since she did not had the requisite funds at that point of time and the funds were urgently required for conversion of the property, a loan was taken from the Samajwadi Party, which was deposited in her account and, subsequently, the loan was paid back to the Samajwadi Party. It was contended that the transaction of loan was found to be genuine in assessment proceedings and, therefore, the assessee could not be subjected to penalty. It was further urged that the assessee was not aware of the provisions of Section 269SS of the Act.

The Additional Commissioner of Income Tax, after considering the matter, held that the assessee's case did not fall under the exceptional clause under Section 269SS of the Act nor provided any evidence to prove the urgency of taking a loan in cash and thereby avoiding the transaction through banking channel nor there was any condition of limitation, which compelled the assessee to accept the amount in cash. The authority held that the assessee had violated the provisions of Section 269SS of the Act and, therefore, imposed a penalty amounting to Rs.22,33,604/-. The assessee, being aggrieved, filed an appeal, which was allowed and the order of penalty was set aside. The department, being aggrieved by the appellate order, filed an appeal before the Tribunal, which was dismissed. Consequently, the present appeal has been filed by the department under Section 260A of the Act.

In this background, we have heard Sri Ashok Kumar, the learned counsel for the appellant and Sri Vijay Bahadur Singh, the learned Senior Counsel assisted by Sri Udai Pratap Singh and Sri Shivam Yadav, the learned counsel for the assessee.

The short question that arises for consideration is, whether any penalty could be imposed under Section 271D of the Act?

The learned counsel for the department contended that the unsecured loan, which was more than Rs.20,000/- taken by the assessee from a political party should have been taken by a cheque or a demand draft through banking channels, which had not been done. The taking of the loan in cash, which was more than Rs.20,000/- was in gross violation of Section 269SS of the Act and, consequently, by operation of law, the penalty was rightly imposed, which had wrongly been deleted by the appellate authorities. The learned counsel contended that there was no urgency for the assessee to receive the entire amount in cash nor any dire need was shown for taking such huge amount in cash. In support of his submission, the learned counsel has placed reliance upon a decision of the Punjab and Haryana High Court, ***Charan Dass Ashok Kumar Vs. Commissioner of Income Tax, 365 ITR 367*** and ***Auto Piston MFG. Co. P. Ltd. Vs. Commissioner of Income Tax, 355 ITR 414*** as well as the decision of the Madras High Court ***P. Baskar Vs. Commissioner of Income Tax, 340 ITR 560.***

On the other hand, Sri Vijay Bahadur Singh, the learned Senior Counsel contended that the transaction of loan found place in the books of accounts of the assessee as well as by the lender, namely, the Samajwadi Party and that the assessing authority while completing the assessment order had found that the transaction of loan was genuine. The learned counsel submitted that in the absence of any finding that the transaction of loan was not genuine or it was a sham transaction to cover unaccounted money, no penalty could be imposed. In support of his submission, the learned Senior Counsel relied upon a decision of Gauhati High Court in ***Commissioner of Income Tax Vs. Bhagwati Prasad Bajoria (HUF), 263 ITR 487***, ***Chamundi Granites Pvt. Ltd. Vs. Deputy Commissioner of Income Tax, 255 ITR 258*** and ***M. Janardhana Rao Vs. Joint Commissioner of Income Tax, 2005 (2) SCC 324.***

In order to appreciate the submission of the learned counsel for the parties, it would be appropriate to refer to a few provisions which will have a bearing to the issue involved in the present case, namely, Sections 269SS, 271D and Section 273B of the Act. For facility, the said provisions are extracted hereunder:

> ***"269SS****. No person shall take or accept from any other person (herein referred to as the depositor), any loan or deposit or any specified sum, otherwise than by 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 specified sum or the aggregate amount of such loan, deposit and specified sum; or

(b) on the date of taking or accepting such loan or deposit or specified sum, any loan or deposit or specified sum 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 or specified sum taken or accepted from, or any loan or deposit or specified sum taken or accepted by, –*

(a) the 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 clause (45) of section 2 of the Companies Act, 2013 (18 of 2013);

(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 or specified sum, where the person from whom the loan or deposit or specified sum is taken or accepted and the person by whom the loan or deposit or specified sum 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 provisions of 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 same meaning as 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;

(iv) "specified sum" means any sum of money receivable, whether as advance or otherwise, in relation to transfer of an immovable property whether or not the transfer takes place.

271D.*(1) If a person takes or accepts any loan or deposit or specified sum 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 or specified sum so taken or accepted.*

(2) Any penalty imposable under sub-

section (1) shall be imposed by the Joint Commissioner.

273B. *Notwithstanding anything contained in the provisions of clause (b) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FAB, section 271FB, section 271G, section 271GA, section 271H, section 271-I, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA, or section 272B or sub-section (1) or sub-section (1A) of section 272BB or clause (b) of sub-section (1) of section 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."*

The object of introducing Section 269SS of the Act was to ensure that a tax payer was not allowed to give false explanation for his unaccounted money or if the tax payer made some false entries, he would not escape by giving false explanation for the same. It was found that during the search and seizure, unaccounted money was found and the tax payer usually gave an explanation that he had borrowed or received deposits from his relatives or friends and, consequently, it became easy for the so called lender to manipulate his record to suit the plea of the tax payer. In order to curb this menace, Section

269SS of the Act was introduced to do away with the menace of making false entries in the account books and later give an explanation for the same. Section 269SS of the Act consequently, required that no person shall take or accept any loan or deposit, if it exceeds more than Rs.20,000/- in cash.

Section 271D of the Act provided that a person who takes or accepts any loan or deposit in contravention of the provision of Section 269SS of the Act, he would be liable to pay by way of penalty a sum equal to the amount of the loan or deposit so taken or accepted.

Section 271D of the Act caused undue hardship to the tax payers where they took a loan or deposit in cash exceeding Rs.20,000/- even where there was a genuine or bonafide transaction. The legislature accordingly, introduced Section 273B of the Act, which provided that if there was a genuine and bonafide transaction and the tax payer could not get a loan or deposit by an account payee cheque or demand transaction for some bonafide reason, the authority vested with the power to impose penalty had a discretion not to levy the penalty.

In ***Chamundi Granites (supra)*** the Supreme Court considered the provision of Section 271D and 273B of the Act and held:-

> *"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 is 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 ***Bhagwati Prasad Bajoria's (supra)*** the Gauhati High Court held:

"..... The transaction of loan has found place in the books of account of the assessee as well as the lender of the loan. None of the authorities have reached the conclusion that the transaction of the loan was not genuine and it was a sham transaction to cover up the unaccounted money. It appears to us that the assessee felt need of money and thus he approached the money-lender for advancement of the money, the transaction is reflected in the promissory notes executed by the assessee in favour of the lender. When there is an immediate need of money the person cannot get such money from the nationalised bank to satisfy the immediate requirement....."

In the instant case, we find that the Tribunal has given a categorical finding that the assessee had established a reasonable cause for failure to comply with the provision of Section 269SS of the Act. The Tribunal further found that the loan given by the Samajwadi Party was a genuine loan, which was reflected in the books of accounts on account of the Samajwadi Party as well as in the books of account of the assessee and that the cash given by the party was deposited in the bank of the assessee and, thereafter, used for the purpose of converting the nazul land into free hold. The Tribunal found that the genuineness of the transaction was also not disputed by the Assessing Officer.

In the light of the aforesaid, we find that even though the assessee had taken a loan in cash, nonetheless, the loan transaction was a genuine transaction and was routed through the bank account of the assessee which clearly shows the bonafides of the assessee. The cash given by the lender was not unaccounted money but was duly reflected in their books of account. The Assessing Officer also accepted the explanation and found the transaction to be genuine. The contention of the learned counsel for the appellant that since there was no urgency, the assessee could have taken the loan through cheque and should have processed the matter through regular banking channels is immaterial, inasmuch as the genuineness of the transaction has not been disputed by the Assessing Officer. Further, we find that the cash was deposited in

the bank account of the assessee and the money was thereafter, routed through the banking channel for payment to the government for converting the land into free hold property.

In the light of the aforesaid, we are of the view that reasonable cause had been shown by the assessee and the provisions of Section 273B of the Act was applicable. The appellate authorities were justified in holding that no penalty could be imposed since a reasonable cause was shown by the assessee

In view of the aforesaid, we are of the opinion that no substantial question of law arises for consideration. Both the appeals fail and are dismissed.

Date:21.8.2015
Bhaskar

(Surya Prakash Kesarwani, J.) **(Tarun Agarwala, J.)**