IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'H': NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER, AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 2765/Del /2011
ITA No. 3703/Del /2011
[Assessment Year: 2007-08]

The Income-tax Officer Ward 17(4) New Delhi	Vs.	M/s Vishu Impex Pvt. Ltd D-108, Panchsheel Enclave New Delhi - 17 PAN : AAACV 8190 R

CO No. 17/Del/2015
[A/o ITA No. 2765/Del /2011]
&
CO No. 18/Del/2015
ITA No. 3703/Del /2011
[Assessment Year: 2007-08]

M/s Vishu Impex Pvt. Ltd D-108, Panchsheel Enclave New Delhi PAN : AAACV 8190 R [Appellant]	Vs.	The Income –tax Officer Ward 17(4) New Delhi - 17 [Respondent]

Date of Hearing : 09.10.2015
Date of Pronouncement : 31 .12.2015

Assessee by : Shri Rajkumar Gupta, Adv
Shri Sumit Goyal, CA

Department by : DR

ORDER

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

The above captioned appeals by the Revenue have been filed against the order of the ld. CIT(A)-XIV, New Delhi dated 7.4.2011 and 13.5.2011 passed in Appeal Nos. 267 & 268/2010-11 for A.Y 2007-08 by which penalty

levied by the AO u/ss 271D & 271E of the Income-tax Act, 1961 ['the Act' for short] have been cancelled allowing the appeals of the assessee.

2. The assessee has also filed cross objections challenging the validity of penalty orders alleging that the same are barred by limitation as prescribed u/s 275(1)(c) of the Act.

3. The ld. AR submitted that the cross objections of the assessee being on legal grounds, may kindly be taken up first and the application for condonation of delay and admission of additional ground sought to be taken by the assessee by way of cross objection may kindly be heard first. The ld. DR fairly submitted that she has no objection if the application for condonation of delay and for admission of additional ground being legal is taken up for hearing first. The ld. AR submitted that the cross objections of the assessee being ITA Nos. 17 & 18/Del/2015 are delayed by 1297 and 1244 number of days but as per the notice issued by the ITAT Registry, there was delay of 1266 and 1211 days. Elaborating the reasons for delay, the ld. Counsel has drawn our attention towards the application for condonation of delay and affidavits of the Director of the assessee company and submitted that the earlier appeal was being handled by Shri Satish Agarwal, CA and he never adviced the assessee for filing any cross objection. But on 22.1.2015, when the counsel was changed and Shri R.K. Gupta, CA was appointed as new counsel, then on going through the relevant case records, he adviced

that since the impugned penalty order is barred by limitation, therefore, the company alongwith request for admission of additional ground should have been filed immediately alongwith the petition for condonation of delay in filing the cross objections. The ld. AR further submitted that on his instructions, the assessee immediately proceeded to file the cross objection alongwith other necessary applications and delay in filing the cross objection has been caused on account of no such advice or incorrect advice by the earlier counsel which is a reasonable and bonafide cause for delay in filing the cross objection. The ld. AR further submitted that the issue raised in cross objection is legal issue which goes to the root of the matter and also touches upon the issue of validity of jurisdiction of the AO for levying penalty u/ss 271D and 271E of the Act. The ld. AR also submitted that these facts and cause of delay has also been supported by an affidavit of Shri Ramesh Chandra Arora, the Director of the assessee company, sworn on 12.2.2015. The ld. AR vehemently contended that there is no rebuttal by the Revenue against the affidavit of the Director of the assessee company and the date of service of Form No. 36A is also not known. Therefore, the bonafide delay in filing the cross objection may kindly be condoned and the cross objection of the assessee may kindly be accepted for adjudication. The ld. AR placed reliance on various decisions including the decision of ITAT Mumbai in the case of Perfect Scale Pvt. Ltd 60 SOT 255 [Mumbai Tribunal].

4. The ld. DR strongly opposed the application for condonation of delay in both the appeals and submitted that the delay cannot be condoned on account of change of advice. Therefore, the delay should not be condoned.

5. On a careful consideration of the above submissions of the rival parties, we note that in the case of Perfect Scale Company [supra], the ITAT, Mumbai Bench ah held as under:

> *"After considering the submission and perusing the material on record, I found that the assessee was bonafide in not filing the appeals in time. Copy of the affidavit of the Director of the company is placed on record. It has been explained that the company received the order ITA Nos.3228 to 3234/2013 of CIT(A) dated 1-10-2011 and the appeal should have been filed before the Tribunal within 60 days. It is further explained that the appeal matters of the assessee were looking after by Mr. P.K.Tandon, Chartered Accountant and on his advice the appeals were not filed. However, when the assessee transferred the case to Mr. S.S. Gajja, Chartered Account, who advised that appeals are to be filed before the Tribunal as the order of the CIT(A) is not as per the provisions of law. I noted that due to wrong advice of the Chartered Accountant, appeals could not be filed in time, therefore, I am of the view that there is a reasonable cause in not filing the appeals in the time. The decision in the case of The Phoenix Mills Ltd (supra), on which reliance has been placed, is in favour of the assessee. In this case the ratio of the decision of the Hon'ble Apex Court in the case of Concord of*

India Insurance Co. Ltd. Vs. Smt. Nirmala Devi and others, reported in (1979) 118 ITR 507(SC), has been considered, wherein it has been held that the mistake of the counsel may in certain circumstances be taken into account in condoning the delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. Accordingly, the Hon'ble Apex Court has held that there is a mistake of the counsel and, therefore, the delay in filing the appeal has been condoned. I further noted that similar finding has been expressed by the Hon'ble Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy, reported in AIR 1998 SC 3222. The Tribunal has also considered the decision in the case of Mela Ram and sons Vs. ITA Nos.3228 to 3234/2013 CIT, reported in 29 ITR 607 (SC) and accordingly, the delay in filing appeal was condoned. The facts in the present case are also similar as in this case also due to mistake of Chartered Accountant the assessee could not file the appeals in time. In view of the above facts and circumstances of the case and in view of the various decisions mentioned above, which was considered by the Tribunal in the case of The Phoenix Mills Ltd (supra), I condone the delay in filing the present appeals before the Tribunal for all the years. Also heard on merit of the case".

6. In view of the above, it was held by the Coordinate Bench of the Tribunal that where it was due to wrong advice of the Chartered Accountant that the appeal was not filed on time, then it was to be held that there was reasonable cause in not filing appeals in time and the same was to be

condoned. In the present case also, the assessee company has clearly stated in the application for condonation of delay and affidavit of the Director that earlier the case was handled by Shri Satish Agarwal, Chartered Accountant and he did not advice to raise legal objection and when Shri R.K. Gupta, CA appointed on 22.1.2015 then adviced for filing cross objection. Since the delay was caused in this situation, we are inclined to hold that there was a bonafide reason and cause due to which cross objections could not be filed on time and delay was caused which cannot be attributed as wilful omission or negligence on the part of the assessee. Therefore, respectfully following the dicta of ITAT, Mumbai in the above mentioned case, the application for condonation of delay in filing the appeals are hereby allowed.

Application of the assessee for admission of additional ground in both the cross objections

7. We have heard the arguments of both the sides on the admission of additional ground sought to be raised by the assessee in both the cross objections and also perused the relevant material on record. The ld. AR submitted that the ground in the cross objection is that the impugned orders passed u/s 271D & 271E of the Act are barred by limitation and since this issue is taken up for the first time before the ITAT in the nature of additional ground, therefore, the same may kindly be admitted for adjudication. The ld. AR placed reliance on the proposition laid down by

the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd reported in 229 ITR 383 [Hon'ble Supreme Court] submitting that the issue which is purely legal and which goes to the root of the matter and no new facts are required to be invoked, then the same should be admitted for adjudication being legal objection of the assessee. The ld. AR also placed reliance on the decision of the ITAT Delhi Bench vide order dated 26.9.2014 in the case of DCIT Vs. Silver Line passed in cross objection Nos. 122, 109, 107 & 108/Del/2012.

8. The ld. DR vehemently contended that when the ground was not raised before the ld. CIT(A), then the same cannot be raised before the Tribunal by way of additional ground.

9. On careful consideration of the above submissions, at the very outset, we note that the ITAT 'G' Bench Delhi in the case of DCIT Vs. Silver Line [supra] has elaborately considered the submissions of the assessee as well as of the Revenue on admission of additional ground raised by the assessee which was not raised before the first appellate authority and referring and following the dicta laiddown by the Hon'ble Apex Court, in the case of NTPC [supra] wherein it has been held as under:

> *6.1. Since the additional ground raised by the assessee firm, according to us, being a legal issue which goes to the root of the matter, we were of the view that it was paramount to take up*

this issue for adjudication before addressing the other issues raised by the rival parties in their respective appeals/ cross objections [supra].

6.2. The learned DR, on his part, by extensively quoting the provisions of s. 253(4) of the Act, argued that the assessee had failed to file a Memorandum of cross objection/additional ground against the any part of the CIT (A) within the time specified in sub-section (3) and, therefore, it cannot be acted upon now. He had, further, contended that whether a notice u/s 143(2) of the Act is issued or not was only a question of fact and not a question of law. It was also pointed out by the learned DR that the alleged non-issuance of a Notice u/s 143(2) of the Act was neither raised before the assessing officer or nor before the first appellate authority and, therefore, it was argued, a new case (issue) cannot now be raised before the Tribunal for the first time. In this connection, the learned DR had relied on the findings of the Tribunal in the case of Sandeep & Patel reported in 22 Taxman.com

288. It was the stand of the learned DR that no findings of the CIT (A) on the issue can be impugned. It was, further, argued that, even for argument sake, the issue raised by the assessee firm is purely a question of law; the same cannot be raised/taken up in a Cross Objection.

ITA Nos.1809, 1504, 1505 & 1506 /Del/ 2013 C.O. Nos.122, 109, 107 & 108 /Del/2013 6.3 Further, the learned D.R. has given a short written submission dated 06.08.2014 the content of the same is reproduced below:-

"Note on applicability of Delhi High Court judgment in Alpine Electronics Asia P Ltd. (341 ITR 247 Del) in CO No. 122/D/2013 in ITA 1809/D/2013 filed by Silverline for AY 2008-09 Before discussing as to how the facts of the Delhi High Court judgment in Alpine Electronics Asia Pvt. Ltd. (341 ITR 247 Del) are distinguishable it will be relevant to keep in mind the provisions of section 292BB of the Income Tax Act, 1961 which provide that after 31-04-2008 in a ease where assessee has appeared or co-operated in any inquiry relating to assessment or reassessment, he after the completion of the assessment/reassessment cannot question the notice service of any notice on the following grounds;

(a) that notice has not been served; or

(b) that notice has not been served in time; or

(e) that notice has been served upon him in an improper manner.

1.2 In the case before the High Court (as seen from para 26 of the Order), assessment proceedings had not got completed (only a draft order was proposed) by the time when service of notice u/s 143(2)(ii) was challenged before the High Court by way of Writ Petition. Since, the challenge has been there before the completion of the assessment or reassessment proceedings the High Court in para 28 held that benefit of saving as provided u/s 292BB is not available to Revenue and hence Writ of Certiorari was issued quashing the assessment proceedings.

02. In so far as the facts of the CO filed by assessee Silverline (AY 08-09) are concerned it would be relevant to take note that

Notice u/s 148 was issued on 28-03-2011 and thereafter taking note of the compliance or non compliance made by the assessee, AO finalized the assessment proceedings on 28-12-2011. It may kindly be noted that till the conclusion of assessment proceedings validity or service of notice has not at all been questioned ill any manner.

03. From the above facts it is clear that since the assessee did not challenge at all the service of notice till the conclusion of the assessment proceedings by virtue of provisions of section 292BB the assessee is estopped from challenging the re-assessment proceedings on account of non-service or improper service or non- service in time of notice u/s 143(2) of the Act.

04. From the above, it is clear that reliance placed by the Cc-Object on Delhi High Court judgment on Alpine Electronics Asia Pvt. Ltd. (341 ITR 247 Del) is misplaced and it on the contrary is in favour of Revenue. On this ground itself COs filed by the assessee Silverline ITA Nos.1809, 1504, 1505 & 1506 /Del/ 2013 C.O. Nos.122, 109, 107 & 108 /Del/2013 need to be dismissed with costs."

6.4. On the other hand, the learned AR submitted that during the course of reassessment proceedings, no notice u/s 143(2) of the Act was issued. To strengthen his argument, he had cited the re-assessment order dated 28.12.2011 [Para 3 for the AY 2005-06] and also produced a copy of the order-sheet obtained from the assessing authority [source: P 88 of PB-I]. According to the learned AR, the assessing authority had admitted also in response to a query under RTI Act that no notice u/s 143(2) of

the Act was issued. Rebutting the learned DR's argument that the additional ground raised in Cross Objection cannot be acted upon in lieu of s. 253(4) of the Act, the learned AR had placed strong reliance on the judgment of the Hon'ble Gauhati High Court reported in 234 ITR 663 (Gau). The issue raised in the additional ground being a legal which goes to the rootof the matter, the learned AR contended that there was no difference between a cross objection and an appeal and, therefore, the additional ground raised by the assessee deserves to be admitted as it is within the parameter of law. It was, further, submitted that it was an undisputed fact that in the absence of a notice u/s 143(2) of the Act, whether the assessment prevails or not, is purely a legal issue. In this connection, the learned AR drew strength from the findings of the earlier Bench of this Tribunal in ITA No. 6020/Del/2012 dated 29.5.2014 in the case of B.R.Arora v. ACIT.

6.5 Further, it was submitted by the learned counsel that Section 292BB is applicable only from A.Y. 2008-09 onward in light of dictum laid down by the Hon'ble Special Bench of the Tribunal in case of Kuber Tabacco Products (Pvt.) Ltd. reported in 117 ITD 273 (Delhi) (S.B), which was affirmed by the Hon'ble Delhi H.C. by judgment dated 06.10.2010 in Writ Petition No. 1159 & 1161/2010. It was submitted further that when no notice u/s 143(2) is issued. Section 292BB does not have any application. For above proportion, the learned AR relied on the following case laws:

i) Manish Gupta 259 CTR 57 (All.) H.C.

ii) Parikalpana Estate Development (P) Ltd. 79 DTR 241 (All.)

6.6 In conclusion, it was contended that non-issuance of a notice u/s 143(2) of the Act, the assessment concluded u/s 147 of the Act becomes invalid. For this proposition, the learned AR had placed strong reliance on the following case laws, namely:

(i) B.R.Arora v. ACIT in ITA No.6020/D/2012 dated 29.5.2014 - ITAT, Delhi 'A' Bench;

(ii) Alpine Electronics Asia Pte Ltd v. DGIT & Ors. (2012) 341 ITR 247 (Del);

(iii) ITO v. D.D. Ahuja & Brothers - 158 TTJ (Lucknow) 54;

(iv) Sapthagiri Finance and Investments v. ITO (2013) 90 DTR 289 (Mad);

(v) Rajkumar Chawla 94 ITD 1 (Del) (SB);

(vi) CIT v. K.M.Ravji (Tax Appl No.771/2012, Order dt. 18.7.2011 - Guj HC);

(vii) CIT v. Panorama Builders Pvt. Ltd (Tax Appl.No.435/2011 order dt. 30.8.2012)

6.7. The learned D.R., in reply filed a written submission dated 22.09.2014. The gist of same read as follows:-

"A Note on applicability of decisions/judgments relied by the assessee

1. The assessee has basically placed reliance on the following judgments/decisions:-

(i) Manish Gupta 259 CTR 57 All HC:

(ii) Parikalpana Estate 79 DTR 246) & P&H HC:

(iii) Kuber Tobacco Products P Ltd. Delhi HC 06.10.2010:

2.1 Before dealing with the applicability of the aforesaid judgments which hover around the provisions of section 143(2), 292BB in the context of issuance of the notice and service thereof etc. It is pointed out that all these provisions as contained in the Income Tax Act or the Income Tax Rules talk about the 'service of the notice' alone obviously become upon service issuance is implicit. That is why, the law also as contained u/s 143(2) etc. does not provide for the factum of issuance of the notice to be proved but just talk about the service of the notice. Further, law does not provide that notice intended to be served should necessarily be issued in writing or in a particular form (format). 2.2 Since the emphasis qua notice referred u/s 143(2) or 142(1) etc. is on 'service', section 292BB too talk about 'service' and not on the issuance. That is, to make the provisions of the Income Tax Act, 1961 really workable emphasis is on the service of the notice and not beyond. Reading the word issuance' u/s 292BBwhich law does not talk so would only tantamount to keeping oneself busy in writing the law which is the exclusive domain of the legislature and not of the Courts.

2.3 What fun would it make when the notice so issued is not even served. Kindly appreciate without service the assessee cannot be legally expected to appear in the proceedings for which service of the relevant notice is a must. How an assessee

can participate in the proceedings without there being any ITA Nos.1809, 1504, 1505 & 1506 /Del/ 2013 C.O. Nos.122, 109, 107 & 108 /Del/2013 notice (written or oral). Upon participation in the proceedings one can conclude that there was notice about which assessee had the knowledge. 2.4 Since, the Income Tax Act is silent for obvious reasons which even lay person (as shown above) can appreciate about the crucial aspect of the 'issuance of notice or the form (whether written or oral) in which it is to be served we have to form understanding with the help of other sources like Dictionaries which define the 'Notice' to mean information, knowledge of the existence of a fact or to apprise a person of some proceeding in which his interest are involved. Black's Law Dictionary (5th Edition) provides 'a person has notice of a fact if he knows the fact' and that it can be in many ways like implied, constructive etc. When seen in the context of the present case undisputed service of notice u/s 148 and thereafter participation of the assessee in assessment goes to show that it had the notice of the proceedings. 2.5 It is requested to kindly appreciate that section 292BB, 142(1), 143(2) are part of the machinery provided under the Income Tax Act to ascertain the correctness of the disclosures made in the return of income. That is, section 292BB is just a procedural provision unlike the charging sections which have intimate connection with the taxation of income per se just at the time of its accrual, arisal or receipt (and not mere quantum). Since, these are merely procedural provisions, they will apply to procedures which are initiated on or after the particular date from which it is brought on the statute which in this case was 01.04.2008.

2.6 As mentioned in this particular case the procedure of reassessment started with the service of notice u/s 148 (served on 28.03.2011) by which time amendment on the statute has already become effective. Accordingly, the procedural provisions of section 292BB which provide that there cannot be challenges like that notice has not been served; or that notice has not been served in time; or that notice has been served upon him in an improper manner once it is not agitated in the proceedings, will disable the assessee from impugning the notice u/s 143(2) in any manner that too at a belated stage before the Tribunal because of its participation in the proceedings without challenge as mandated in the laws.

2.7. In short, it is pointed out that law as contained u/s 143(2) etc. does not provide that notice intended to be issued has to be necessarily in writing or in a particular proforma. Participation in the proceedings is undisputedly the best evidence to prove issuance or service of the notice that is why section 292BB taking note of this crucial aspect post participation has disabled the participants from challenging the frivolous grounds of non service of the notice. Service of the written notice issued u/s148 and subsequent participation in the proceedings has to be taken conclusive of service notice which, implicitly include issuance too. In other words, undisputed service of notice u/s 148 and thereafter participation of the assessee in assessment proceedings goes to show that it had the notice of the proceedings.

3. About the date as to from which particular date or assessment year section 292BB (inserted w.e.f. 01.04.2008) would be applicable, it may kindly be ITA Nos.1809, 1504, 1505 & 1506 /Del/ 2013 C.O. Nos.122, 109, 107 & 108 /Del/2013 appreciated that Finance Act is always for the financial year for which budget is being laid before the Parliament. It is why, Finance Act is generally in the context of the income which has been earned on which likely revenue realization can be worked out as such except where it is specifically provided as to form which particular date that will apply. But this has no relation with the procedural provisions which would apply with effect from the date from which it is inserted on the statute book dealing with the procedures taking place on that date or thereafter.

4. Thus, the interpretation that law requires issuance of notice deserves to be rejected.

5.0 In the light of the aforesaid submission alone it would become clear that none of the decisions referred to in para 1 above are applicable. Though in view of the discussion made above it is clear that all the three judgments referred to above do not need further submissions yet for the sake of further clarity qua the inapplicability these are being dealt with in the following paragraph 5.1 to 5.3.

5.1 In so far as Delhi High Court judgment in Kuber Tobacco Products P Ltd. Delhi HC 06.10.2010 is concerned it is humbly submitted that this does not help the cause of the appellant assessee. Before elaborating this aspect further, it will be relevant to note as to what the High Court has held which is as

under: "In our view ITAT rightly held that 292BB is not retrospective as it creates disability by precluding assessee from taking a plea which otherwise could be taken as a matter of right. We hold that 292BB is applicable to AY 08-09 & later years."

Kindly note Law as contained u/s 292BB does not provides that it will apply for assessment year 08-09 and later years. Further, it may kindly appreciated that the issue as to from which assessment year the amendment will become applicable was not under consideration before the High Court. When it is so clearly the observations of the High Court "We hold that section 292BB is applicable to AY 08-09 and later years" are just obiter dictum. Even without these words the judgment of the High Court would have remained the same which further proves that above were just 'by the way remarks' and not the ratio which is a must for applying any High Court judgment. In this context, attention is invited to the Supreme Court judgment in Rekha Mukherjee v. Ashok Kumar Das {(2005) 3 SCC 427, 440-41 (para 29)} where it was held that the Court is bound by the ratio decidendi and not by mere observation. Very clearly thus judgment of the High Court does not help the appellant.

5.2 In so far as the Allahabad High Court judgment in the case of Manish Gupta {259 CTR 57 All HC} is concerned it is submitted that it proceeded on the assumption that law mandates issuance of the notice whereas as a matter of fact (demonstrated above) the law does not lay emphasis on issuance at all. 5.3 Likewise the Punjab and High Court judgment in Parikalpana E-state 79

DTR 246) also proceeds on the assumption that law mandates issuance of the notice whereas (as demonstrated above) law does not lay emphasis on ITA Nos.1809, 1504, 1505 & 1506 /Del/ 2013 C.O. Nos.122, 109, 107 & 108 /Del/2013 issuance and instead lays stress on 'service' of the notice. Thus, this too is not applicable.

5. Submitted for kind consideration."

7. We have carefully considered the rival submissions with regard to the admissibility or otherwise of the additional ground sought to be raised by the assessee. At the out-set, we would like to point out that since the additional ground sought to be raised is legal in nature and goes to the root of the matter and also in view of the judgments of (i) the Hon'ble Supreme Court in the case of National Thermal Power Company Ltd 229 ITR 383 (SC) and (ii) the Hon'ble Delhi High Court in Gedore Tools Pvt. Ltd reported in 238 ITR 268 (Del), we are inclined to admit the same and taken up for consideration.

7.1. Now, the moot question for consideration is: Whether the non-issuance of a notice u/s 143(2) of the Act as alleged by the assessee-firm had vitiated the conclusion of the assessments u/s 147 read with s. 143(3) of the Act? On receipt of information from the DIT (Inv), Jaipur that there were alleged bogus purchases resorted to by the assessee firm, the AO had re-opened the assessments of the assessee for the assessment years under dispute by issuance of notices u/s 148 of the Act. Subsequently, notice u/s 142(1) of the Act along with questionnaire was issued to the assessee. In the reassessment

proceedings, after having considered the asssessee's submissions, the AO had concluded the re-assessments making certain additions. While doing so, however, no notices u/s 143(2) of the Act were issued to the assessee, even though notice u/s 142(1) of the Act was ordered to be issued on 14.11.2011. This was apparent from the perusal of the Order Sheet for the AY 2005-06 [Source: P 88 of PB-I AR]. This fact has been admitted by the Revenue through a RTI query by the assessee firm [Refer: P 165 of PB AR (A.Y.2006-07)]. The above sequence of events categorically proves that notice u/s 143(2) of the Act was neither issued nor served on the assessee."

10. In view of the above, respectfully following the proposition, we hold that since the additional ground sought to be raised is legal in nature and goes to the root of the matter, therefore, the same is admitted for adjudication in both the cross objections. Finally, the applications of the assessee for admission of additional ground are allowed.

Cross Objection of the assessee in both the Appeals

11. Both the parties are agreed that the cross objection of the assessee being legal, should be heard first and therefore, we heard the rival submissions on the cross objections of the assessee and also carefully perused the relevant material placed on record, inter alia, the penalty order, impugned order, paper book filed by the assessee, and paper book of

compilation of cases filed by the assessee as well as the written submissions of the assessee, reply of the ld. DR and rejoinder of the assessee.

12. The ld. AR vehemently pointed out that the first notice u/ss 271D and 271E dated 31.12.2009 was issued by the AO who framed the original assessment orders and second notice dated 26.7.2010 fixing the hearing on 9.8.2010 was issued by the Additional CIT who passed the penalty order. The ld. AR also drew our attention towards para 2 of the penalty orders and submitted that both the penalty orders have been passed on 4.1.2011 i.e. after a lapse of 12 months from the first notice dated 31.12.2009. The ld. AR further submitted that section 275(1)(c) of the Act is applicable for calculating limitation period for passing penalty orders u/s 271D & 271E of the Act. Therefore, the penalty orders are barred by limitation. The ld. AR vehemently contended that limitation of six months should be calculated with regard to the first notice issued by the AO and penalty order was to be passed on or before 30.6.2010 which were actually passed on 4.1.2011. Therefore, under the facts and circumstances of the case, the impugned penalty orders levying penalty u/s 271D & 271E of the Act is barred by limitation and the same may kindly be quashed, allowing the objection of the assessee.

13. Per contra, the ld. DR supported the orders of the AO and submitted that the ld. CIT(A) was not justified in deleting the penalty without appreciating that the transactions between the assessee company and Shri R.C. Arora, Director recorded in the RCA Imprest A/c were of the nature of loan or deposits, as per Explanation (iii) to section 269SS of the Act. The ld. DR further submitted that the assessee company did not incur any expenses through the RCA Imprest A/c during the year under consideration, which was without reasonable cause and in contravention of provisions of section 269SS of the Act. The ld. DR further submitted that the assessee company had not carried out any business during the period under consideration and there was no business exigencies to receive loan or deposit in cash from the Director. The ld. DR was of the view that the cases relied upon by the ld. CIT(A) had no similarities with the facts of the assessee's case. He further vehemently argued that the ld. CIT(A) deleted the penalty without giving an opportunity of being heard to the AO. He concluded his arguments by submitting that the assessee's explanation regarding cash payment of R. 23 lakhs to Shri R.C. Arora through RCA Imprest A/c on 30.6.2006 was incorrect since Shri R.C. Arora was out of India on that day as per documentary evidence filed by the assessee himself. In view of his above arguments, the ld. DR pleaded that the order of the AO may be upheld.

14. The ld. AR also placed rejoined to the above noted contentions of the ld. DR and also placed his reliance on the decision of the ITAT Delhi Bench in the case of Ashwani Kumar Vs. ITO reported at 118 TTJ 483 [Del], the decision of the Hon'ble Jurisdictional High Court in the case of Jitendra Singh Rathore 352 ITR 327 [Raj] and decision of the Hon'ble Bombay High Court in the case of CIT Vs. Chajjer Packaging & Plastics Pvt. Ltd. 206 Taxmann 690 [Bombay] and submitted that in the penalty proceedings, the time limit prescribed u/s 275(1)(c) of the Act has to be completed either with the F.Y. of its germination or six months or the end of the month in which the action for imposition of penalty has been initiated, whichever is later. The ld. AR strenuously contended that the action for imposition of penalty having been initiated by the ITO on 31.12.2009, though incompetent to impose penalty, limitation u/s 275(1)(c) of the Act was expired on 30.6.2010. Hence penalty order passed by the Addl. CIT dated 4.1.2011 are not sustainable being passed beyond prescribed limitation period.

15. On careful consideration of above rival submissions, at the very outset, we note that in the case of CIT Vs Jitender Singh Rathore [supra] the Hon'ble Rajasthan High Court in similar set of facts and circumstances, held as under:

> *"In the present case, the notice for issuance of the penalty proceedings under Section 271D of the Act for the alleged contravention of provisions of Section 269SS was issued to the*

assessee, of course by the AO, on 25.03.2003. Even if the matter had otherwise been in appeal before the CIT(A) against the original assessment order and the appeal was decided on 13.02.2004, the same was hardly of relevance so far the penalty proceedings under Section 271D were concerned. As held by this Court in Hissaria Bros. (supra), completion of appellate proceedings arising out of assessment proceedings has no relevance over sustaining such penalty proceedings. As held clearly by this Court, in such a matter, clause (c) of Section 275 (1) would be applicable. Section 275(1)(c) could be noticed as under:-

"275. Bar of limitation for imposing penalties.

(1) No order imposing a penalty under this Chapter shall be passed-

.....

(c) in any other case, after the expiry of the financial year in which the proceedings, in the course of which action for the 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."

In the present case, the first show cause notice for initiation of proceedings was issued by the AO on 25.03.2003 and was served on the assessee on 27.03.2003. Obviously, the later period also expired on 30.09.2003 when six months expired from the end of the month in which the action for imposing the penalty was

initiated. The order as passed by the Joint Commissioner of Income Tax for the penalty under Section 271D on 28.05.2004 was clearly hit by the bar of limitation and has rightly been set aside in the orders impugned.

In view of the above, our answer to the formulated question of law is that even when the authority competent to impose penalty under Section 271D was the Joint Commissioner, the period of limitation for the purpose of such penalty D.B. INCOME TAX APPEAL NO.90/2007 Commissioner of Income Tax, Udaipur Vs.

Shri Jitendra Singh Rathore.

proceedings was not to be reckoned form the issue of first show cause by the Joint Commissioner; but the period of limitation was to be reckoned from the date of issue of first show cause for initiation of such penalty proceedings. For the purpose of present case, as observed hereinabove, for the proceedings having been initiated on 25.03.2003, the order passed by the Joint Commissioner under Section 271D on 28.05.2004 was hit by the bar of limitation. The CIT(A) and the Tribunal have, thus, not committed any error in setting aside the order of penalty."

16. Further, in the case of Ashwani Kumar Vs. ITO [supra], the ITAT Delhi 'I' Bench decided similar controversy with the following observations and conclusion:

11. As regards limitation, we find that the limitation as prescribed in s. 275(1)(c) alone is made applicable. Sec. 275(1)(c) prescribes as under :

"275(1) No order imposing a penalty under this chapter shall be passed—

(a).....

(b).....

(c) in any other case, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty on or before the 31st day of March, 1989."

As per above provision, it is clear that no order imposing penalty under s.271D shall be passed after certain limitation. The limitation commences from the date the action for imposition of penalty has been initiated. Thus, it will be relevant to find out the date on which the action for imposition of penalty has been initiated. In the assessment order dt. 27th Jan., 2003, the ITO has clearly recorded a finding that 'since the assessee has violated the provisions of s. 269SS of the Act for which a separate show-cause notice has been issued vide notice dt. 10th Jan, 2003, penalty proceedings are being initiated for committing the default for accepting loan in cash i.e. through bearer cheque'. This conclusively proves that the action for imposition of penalty has been initiated on 10th Jan., 2003 as recorded in assessment order dt. 27th Jan, 2003. It is a different fact that the ITO, who has so initiated the penalty is not

competent to levy penalty under s. 271D. However, it cannot be said that the action has not been initiated. Once the penalty proceedings have been initiated, whosoever is the competent authority has to pass an order imposing penalty if he is of the opinion that penalty under s. 271D is attracted. The authority competent to levy penalty is thereafter not initiating the proceedings for imposition of penalty but is only exercising his powers. But, merely because he chooses to exercise his powers after a considerable time he cannot get a fresh limitation if on earlier occasion, the action for imposition of penalty has already been initiated. He can only continue the action earlier taken and in all cases the order imposing penalty shall be passed within the limitation prescribed under s. 275(1)(c). Since the action for imposition of penalty has been initiated on 10th Jan., 2003, as per s. 275(1)(c), the limitation period will expire on 31st July, 2003. Thus, the order passed under s. 271D by Addl. CIT dt. 29th Dec., 2003/15th Jan., 2004 is beyond the limitation and hence, not sustainable in law. Similar view has been adopted by Tribunal, Jodhpur Bench in the case of Hissaria Bros. (supra) and Tribunal Hyderabad Bench in the case of Dillu Cine Enterprises (P) Ltd. (supra). In the case before Hon'ble Bombay High Court in the case of Chhajer Packaging & Plastics (P) Ltd. (supra), the following facts emerged :

"Assessment of taxable income of respondent for the asst. yr. 1996-97 (financial year 1995-96) was carried out by the Departmental authorities and concluded with assessment order dt. 30th March, 1999. The AO [Dy. CIT (Inv.), Circle II, Jalgaon],

during the course of assessment noticed that the assessee had accepted loans/deposits exceeding Rs. 20,000 by modes otherwise than account payee cheques/demand drafts and had thus contravened s. 269SS of the Act. By his letter dt. 30 March, 1999, he referred the matter to Addl. CIT, Range II, Jalgaon for levy of penalty under s. 271D of the Act."

Hon'ble Bombay High Court held as under :

"In the matter at hand, the penalty proceedings arise out of assessment of income of the assessee for financial year 1995-96 (asst. yr. 1996-97). It has come in the order of the CIT(A) that the assessment order was dt. 30th March, 1999. Thus, the assessment proceedings are concluded on 30th March, 1999 i.e. within financial year 1998-99, corresponding assessment year being 19992000. Consequently, penalty could have been imposed latest by 31st March, 1999 since the assessment proceedings out of which penalty proceedings took birth, were completed on 30th March, 1999. So far as second mode of computation of limitation is concerned, the later half of the cl. (c) of s. 275(1) of the Act is not that difficult to be understood. The penalty proceedings in the present matter were initiated by notice dt. 6th April, 1999 and the period of limitation of six months is to be computed from the last date of the month in which the penalty proceedings were initiated. Thus, 30th April, 1999 would be starting point of limitation of six months and consequently, 29th Oct., 1999 would be the last date of period of limitation,

computed in accordance with second half of cl. (c) of s. 275(1) of the Act.

Thus, in the case on hand, by computing limitation in both permissible ways, the period of limitation is either 31st March, 1999 or 29th Oct., 1999. 29th Oct., 1999 being later in time, that was the available outer limit for the Department to impose penalty. The order imposing penalty is passed on 13th March, 2000.

Coming to the opening part of sub-s.(1), it says, 'no order imposing penalty..... shall be passed'. Thus, once the period of limitation prescribed by either of cls. (a) to (c) has expired, the Departmental authorities have no powers to impose penalty. The opening part rules out any possibility of taking initiation of proceedings as 'sufficient compliance' or as keeping the proceedings within limitation. Language is so couched that the penalty proceedings are expected to be concluded before expiry of period of limitation."

In view of our above discussion and in view of the decision of Tribunal referred above as well as that of Hon'ble Bombay High Court, we hold that the order imposing penalty is beyond the limitation period prescribed and hence, penalty under s. 271D is cancelled.

17. In the light of the proposition laid down by the Hon'ble Rajasthan High Court and ITAT, Delhi [supra], when we analyze the facts and circumstances of the case in hand, then undisputedly and admittedly the first notice for initiation of penalty proceedings u/s 271D and 271E of the Act was issued by the AO on 31.12.2009 who framed the original assessment orders and the other notice dated 26.07.2010 was issued by the Additional CIT who passed the penalty order on 4.1.2011. The ld. AR has contended that the period of limitation prescribed u/s 275(1)(c) of the Act has to be calculated from the date of first notice dated 31.12.2009 which was issued by the AO and on the other hand, the ld. DR contended that since the AO was not empowered to initiate the penalty proceedings and to pass penalty orders, therefore, he transferred the case to the competent authority, viz, Additional CIT who issued notice dated 26.7.2010 and the impugned penalty order was passed on 4.1.2011. Therefore, the ld. DR vehemently contended that the penalty orders cannot be held as barred by limitation. To support this contention, the ld. DR ha placed his reliance on the decision of ht Hon'ble Jurisdictional High Court in the case of Sunworld Infrastructure P. Ltd Vs. ITO dated 5.3.2015 in WP(C) No. 1741/2015 and CM No. 3112/15.

18. In the case of Sunworld Infrastructure Pvt. Ltd. Vs. ITO [order dated 5.3.2015 in WP No. 1741/2015 and CM No. 3112/2015] as relied upon by the ld. DR, the Hon'ble Jurisdictional High Court of Delhi held that notice u/s 143(2) of the Act issued on 10.9.2013 was one without jurisdiction and

cannot be regarded as valid notice. In this case, earlier notice was issued by the AO at Bangalore who was without jurisdiction over the assessee and the same was withdrawn when the assessee vide reply dated 17.9.2013 raised the issue of territorial jurisdiction by submitting that it was regularly filing its returns in Delhi and the AO at Bangalore vide letter dated 16.12.2014 transferred the records of the case to Delhi. Their Lordships also observed that if the case itself had been transferred, the same would have to be directed u/s 127 of the Act but no such order of transfer of the case has been made. In the light of the above noted circumstances, their Lordships held that the notice issued by the AO of Bangalore cannot be regarded as a valid notice and the notice issued by the AO of Delhi having jurisdiction over the assessee was, on 24.12.2014 was held as time barred i.e. beyond 30.9.2013 [as per date of 14.9.2012 on which relevant return was filed.

19. In view of the above noted facts of the case of Sunworld [supra], the ld. AR submitted that the analogy advanced by the ld. DR cannot applied to the present case as the present case is not related to section 143(2) of the Act and there is no dispute of territorial jurisdiction and issuing and withdrawing the notice u/s 143(2) of the Act by the AO not having territorial jurisdiction. The ld. AR replied that the limitation prescribed in the second proviso to section 143(2) cannot be equated with sub-section (c) of section 275(1) of the Act as provisions of section 143(2) mandates limitation for service of notice whereas sub-section (c) to section 275(1) of the Act

prescribes limitation for passing of penalty order reckoning from the date of issuance of notice.

20. In view of the above, we decline to accept the contentions of the ld. DR that the limitation for initiation of penalty proceedings has to be calculated from the date of issuance of second notice by the Additional CIT as speaking for the Hon'ble Rajasthan High Court, their Lordships explicitly held that when the first show cause notice for initiation of penalty proceedings was issued by the AO, then obviously six months expired from the end of the month in which the action for imposition of penalty was initiated by the AO and thus the order, as passed by the competent authority i.e. JCIT/ACIT imposing penalty u/s 271D was clearly hit by the bar of limitation and the same deserves to be set aside. At this juncture, it is pertinent to mention that on a specific query from the Bench, the ld. DR could not show us any proposition or dicta of the Hon'ble Apex Court, Hon'ble Jurisdictional High Court, Hon'ble Rajasthan High Court or any other Hon'ble High Court which could lead us to take a different view. Therefore, respectfully following the ratio of the decision of the Hon'ble High Court of Rajasthan in the case of Jitender Singh Rathore [supra] and ITAT Delhi in the case of Ashwani Kumar [supra], we are inclined to hold that the limitation as prescribed u/s 271(1)(c) has to be reckoned from the date of first notice issued by the AO, though not competent to impose penalty on 31.12.2009 and thus penalty order has to be passed on or before 30.6.2010 and penalty

order passed after more than six months on 4.1.2011 u/s 271D and 271E of the Act are clearly hit by the limitation period as prescribed u/s 275(1)(c) of the Act and both the penalty orders cannot be held as sustainable being passed beyond the prescribed limitation by the provisions of the Act and hence we demolish and quash the same. Accordingly, both the cross objection of the assessee are allowed.

21. We have heard the arguments of both the sides on the appeals of the Revenue. Since by the earlier part of this order we have quashed the impugned penalty and first appellate orders, hence both the appeals of the Revenue become infructuous and we dismiss them as having become infructuous.

22. In the result, both the appeals of the Revenue are dismissed and the cross objections of the assessee are allowed.

The decision is pronounced in the open court on 31.12.2015.

Sd/-	**Sd/-**
(L.P. SAHU)	**(C.M. GARG)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 31st December, 2015

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Sl. No.	Description	Date
1.	Date of dictation by the Author	17.12.2015
2.	Draft placed before the Dictating Member	18-12-2015
3.	Draft placed before the Second Member	
4.	Draft approved by the Second Member	
5.	Date of approved order comes to the Sr. PS	
6.	Date of pronouncement of order	
7.	Date of file sent to the Bench Clerk	
8.	Date on which file goes to the Head Clerk	
9.	Date of dispatch of order	