

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**TAX APPEAL NO. 554 of 2007**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE KS JHAVERI Sd/-**

**and**

**HONOURABLE MR.JUSTICE G.R.UDHWANI Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

DR RAJARAM L AKHANI....Appellant(s)

Versus

ITO, GANDHIDHAM....Opponent(s)

Appearance:

MR SN DIVATIA, ADVOCATE for the Appellant(s) No. 1

MR PRANAV G DESAI, ADVOCATE for the Opponent(s) No. 1

**CORAM: HONOURABLE MR.JUSTICE KS JHAVERI**  
and  
**HONOURABLE MR.JUSTICE G.R.UDHWANI**

**Date : 22/06/2016**

**ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE KS JHAVERI)**

1. By way of this Appeal, the Appellant has challenged the order and judgment dated 16.11.2006 of the Income Tax Appellate Tribunal, Rajkot (SMC) Bench, Rajkot in ITA No.393/RJT/2006 for the Assessment Year : 2003 - 2004 whereby the Tribunal reversed the order and judgment of the CIT (Appeals).

2. While admitting the matter on 28.11.2007, the following substantial question of law was framed by the Court for consideration :-

"Whether on the facts and in the circumstances of the case, Income Tax Appellate Tribunal was right in law in confirming the penalty u/s. 271D of the Income Tax Act, 1961 even though the transaction of accepting Rs.2 lacs from appellant's son was non-commercial and personal in nature, apart from otherwise found to be genuine?"

3. The facts of the case are that the appellant an individual has income from

medical practice and agriculture. The appellant had filed his return of income for Assessment Year : 2003 - 2004 on 31.03.2004. During the course of assessment proceedings, the Assessing Officer noticed that the appellant had accepted a sum of Rs.2,00,000/= from his son; the appellant's son had issued a cheque in the name of the appellant, but the son had encashed the same and the cash so received by the appellant was deposited by the appellant in his own account and a draft was taken out in favour of the motor car dealer. The appellant received delivery of the vehicle on 25.11.2005. The respondent made a reference to the Additional CIT, Gandhidham Range for initiating penalty proceedings u/s. 271D on the ground that the aforesaid sum was taken in cash instead of a/c. Payee cheque from the appellant's son. In this manner, it was alleged that the appellant had acted in contravention to the provisions of section 269SS of the Act. The appellant later clarified that the amount so

received from his son was neither a loan nor a deposit within the meaning of section 269SS of the Act and it was received in cash in view of urgent necessity. The Additional CIT imposed a penalty of Rs.2,00,000/= on the ground that the appellant being a learned person and well aware of the provisions could not have ignored the law or could have taken the assistance of an income tax counsel.

Being aggrieved and dissatisfied with the above order, an appeal was preferred before the CIT(A) at Rajkot which deleted the penalty holding that the transaction was between a father and son, to meet the urgent requirement of depositing the margin money in the bank account for buying a vehicle for personal use and thus, it was neither a loan nor deposit nor had anything to do with evasion of tax. Against this order, the respondent came in an appeal before the Appellate Tribunal wherein the penalty was confirmed. Being

aggrieved by this order, the above Appeal is preferred.

4. Learned Advocate for the appellant has taken this Court to the facts of the case and has referred to Paragraph 6 of the judgment and order of the CIT (Appeals) which reads as under :-

"I have carefully considered the submission made by the appellant alongwith the case record and the material brought to my notice. I have also considered the various judicial authorities the appellant has sought support from. The undisputed facts which has emerged from the records are that the appellant received the sum of Rs.2,00,000/= from his son Dr. Mahesh Akhani who is also assessed to tax. The amount was paid by a bank cheque bearing No.52276 issued on ICICI Bank of Bhuj. This transaction has been considered and accepted by a Department as the genuine transaction. However, the Department Circular No.387 dated 6<sup>th</sup> July 1984 clarifies that the provision was brought in to cover those situations where unaccounted cash found in the course of search or was explained by the tax payers as representing loans taken or deposits made to various persons.

This particular section was brought in with a view to counter such tactics of the assessee in question. The clarification given in the Department Circular No.387 is of a binding nature on the Departmental authorities. There is no dispute in this case that it is not a case when any search and seizure had taken place and it is also not a case of explaining deposits or loan taken through cash in past. It is also evident from the record that the father appellant received the amount from his son for meeting with his urgent requirement of depositing the margin money in bank account for buying a vehicle for his personal use. Penalty under section 271D is leviable only if the amount received by an assessee was by way of loan or deposit. If the amount received does not amount to a loan or deposit, then no penalty would be leviable. It is perused from the appellant's reply in response to the show cause notice that it was claimed by him that the amount received was neither loan nor deposit to attract the penalty. It is accepted fact that the son of the appellant gave the amount to his father to deposit the same in his bank account so that vehicle for personal use could be purchased by father. There is no material or record to suggest that there were any terms between the parties as to the payment of interest or the time

of repayment. There is nothing to suggest that it was obligatory upon the father appellant to repay the amount to his son. In absence of such material it cannot be said that the amount received by the appellant was 'loan' or 'deposit' so as to attract provisions of Section 269SS or 271D clarify consideration of the submission made by the AR clearly reveals that he has taken plea that there was no violation of section 269SS of the Act. It was also pleaded that there was a reasonable cause in accepting the money which was for buying a personal vehicle and thereby it was not commercial transaction but was a domestic transaction. Genuineness of the transaction was not disputed. The transaction also had nothing to do with the evasion of tax. It was also submitted that it was his bona fide belief that for non commercial transaction, father could accept the money from his tax payer son through a bearer bank cheque. It has also been pleaded that there was no mens rea on the part of the appellant. Default if any was of a technical or a venial breach of the provisions of law and therefore no penalty could be imposed under section 271D of the Act. Considering the facts and the submission made by the appellant, I am of the firm view that penalty under section 271D was leviable. In view of above, penalty order under section 271D levying penalty of

Rs.2,00,000/= is hereby cancelled.  
This ground of appeal is therefore allowed."

Learned Advocate for the appellant has also relied on the following two decisions in support of his contentions :-

- **Commissioner of Income Tax v. Bombay Conductors & Electricals Ltd.** reported in 2008 3 DTR (Guj) 200 and
- **Commissioner of Income Tax v. Balaji Traders** reported in 2008 303 ITR 312 (Mad)

In the case of **Commissioner of Income Tax v. Bombay Conductors & Electricals Ltd.** (supra), paragraphs 6, 7, 8 and 9 reads as follows :-

"6. The object of introduction of s. 269SS of the Act has been stated by the Apex court in the aforesaid case of Asstt. Director of Inspector v. Kum A.B. Shanthi (supra) in the following terms :

"The object of introducing s. 269SS is to ensure that a taxpayer

is not allowed to give false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false explanation for the same. During search and seizures, unaccounted money is unearthed and the taxpayer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so-called lender also to manipulate his records later to suit the plea of the taxpayer. The main object of s. 269SS was to curb this menace.

At the same time, while introducing s. 269SS, s. 273B was also incorporated in the statute which provides that no penalty shall be impossible on a person or an assessee, as the case may be, for any failure referred to in the said provision if the assessee proves that there was **reasonable cause** for such failure. In other words penalty is not automatic under s. 271D of the Act on mere violation of provisions of s. 269SS of the Act.

7. The Tribunal has found that there is no evidence on record to show that infraction of the provisions was with knowledge or in defiance of the provisions. It has further been held that there is nothing on record to indicate that the assessee had

indulged in any tax planning or any tax evasion. To the contrary, the Tribunal has recorded that by making the book entries the assessee has made the adjustment bona fide without having the knowledge that such book entries may render the assessee liable to penalty under s. 271D of the Act on account of violation of provisions of s. 269SS of the Act. That there was a **reasonable cause** and hence, no penalty was leviable.

8. In light of the findings of the facts recorded by the Tribunal after appreciating evidence on record and applying the ratio of the apex Court decisions it is not possible to find any legal infirmity in the impugned order of the Tribunal. Not only there is a **reasonable cause**, as found by the Tribunal, but in light of the finding of the Tribunal that the breach, if any, is merely a technical or venial breach no penalty is leviable as laid down by the apex Court merely because it is lawful to do so without exercising discretion before imposing the penalty.

9. In the result, the question referred is answered in the affirmative i.e. in favour the assessee and against the Revenue."

In the case of **Commissioner of Income Tax v. Balaji Traders** (supra),

paragraphs 7 and 8 reads as follows :-

"7. In the instant case, the CIT(A) and the Tribunal found that (i) there was business exigency forcing the assessee to take cash loans for the purpose of honouring the commitment, viz. issuance of cheque on a particular date; (ii) the creditors were genuine persons and the transactions were never doubted by the authorities below; and (iii) there was no revenue loss to the State exchequer, and satisfied that the assessee has shown **reasonable cause** for the above transactions.

8. The authorities have also noticed that all the transactions were brought into the account of the assessee and there were corresponding entries in the book of account of respective parties / creditors which satisfied the test of business exigency."

5. On the other hand, learned Advocate for the respondent has contended that the view taken by the Tribunal is just and proper and the above transaction was in clear breach of Section 269SS of the Act.

6. We have heard learned Counsel for

the respective parties and perused the records of the case. We are of the view that a proper explanation has been rendered by the appellant for the above cited transaction. Besides, the ratio laid down in the decision of **Commissioner of Income Tax v. Bombay Conductors & Electricals Ltd.** (supra) would apply to the facts of the case. Hence, the issue raised in this appeal is answered in favour of the assessee and against the Department. The Appeal is allowed to the aforesaid extent.

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Sd/-  
(K.S. JHAVERI, J.)

THE HIGH COURT  
OF GUJARAT

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Sd/-  
(G.R.UDHWANI, J.)

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