



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

Dated this the 18th day of August, 2015

Present

THE HON'BLE MR JUSTICE VINEET SARAN

&

THE HON'BLE MR JUSTICE B MANOHAR

Income Tax Appeal 382 / 2009

Between

- 1 Commissioner of Income Tax
55/1, Shilpashree
Vidyaranya Complex
Vishveshwaranagar
Mysore 570 008
 - 2 Addl. Commissioner of Income Tax
Central Range 2, # 59
HMT Bhavan, 6th Floor
Bellary Road, Ganganagar
Bangalore 32
- Appellants

(By Sri K V Aravind, Adv.)

And

M/s Canara Housing Development Company
10/1, Lakshminarayana Complex
Palace Road, Bangalore

Respondent

(By Sri S Parthasarathi, Adv.)

Appeal is filed under S.260 A of the Income Tax Act, 1961 praying to set aside the orders passed by the Income Tax Appellate Tribunal, Bangalore in ITA 1425/Eang/2008 on 13.2.2009 and confirm the order of the Appellate Commissioner confirming the order passed by the Addl. Commr. Of Income Tax, Central Range 2, Bangalore.

Appeal coming on for hearing this day, **Vineet Saran J**, delivered the following:

JUDGMENT

The Revenue is in appeal against the order of the Tribunal whereby the penalty, which was imposed under section 271 E of the Income Tax Act (Act for short) by the Additional Commissioner of Income Tax, and confirmed by the Commissioner of Income Tax (Appeals), has been set aside by the Tribunal.

The brief facts relevant for the purpose of this case are that for the assessment year 2005-06, respondent assessee had repaid certain advances/loans to M/s Annapoorneshwari Investments (for short 'AI') and M/s Adarsh Enterprises (for short 'AE') in cash which was to the tune of Rs.14.6 crores and 0.12 crores respectively which, according to the appellant - Revenue, was in violation of the provisions of section 269 T of the Act.

Notice dated 20.6.2008 was thus issued to the respondent assessee to explain why penalty under section 271 E of the Act should not be imposed for such violation of the provisions of section 269 T of the Act. The payments of Rs.14.6 crores made in cash by the assessee to AI were made on several occasions between 28.10.2004 to 22.3.2005, and payment of Rs.0.12 crores (12 lakhs) to AE was made in cash by the assessee on 16.12.2004.

In response to the said notice, assessee submitted its reply on 8.3.2008, stating that since one of the partners of the assessee and AI firms was common, being Sri A Ramakrishna, and both the firms were carrying on the business in real estate, these were inter-firm transactions which were to be treated only as current account transactions, and could not be described as loan or deposits within the meaning of section 269 T of the Act. It was also stated that even if the transactions were held to be loan transactions, there was no intention to commit any violation of the provisions of the Act. It was further explained in the reply, that the amounts drawn from the

firm by one of the partners was nothing but investments in a group concern, by way of drawing from the firm, to meet the expenses of emergency situation.

The Assessing Officer – Additional Commissioner of Income Tax, by his order dated 2.6.2008, held that merely because one partner of the assessee firm was also a partner in the other firm – AI, the same could not be treated as an internal transaction in the nature of current account transaction, specially when the assessee firm had taken an advance from AI and AE firms to the tune of over Rs.50 crores, as was shown in the account books and thus, it was held that payment in cash made by the assessee firm was in violation of the provisions of section 269 T of the Act, and imposed a penalty of an equal amount of Rs.14.72 crores which was the amount that had been repaid by the assessee in cash. Challenging the said order, assessee filed an appeal before the Commissioner of Income Tax (Appeals) which has been dismissed by a detailed, reasoned order dated 10.11.2008 with the following conclusion:

“In view of the above, I conclude that

- (i) *the appellant in one hand and AI and AE **are not even group concerns what to speak of sister concerns and each are independent from the other.***
- (ii) *The common links i.e., Sri A Ramakrishna and Sri Satish Pai are not the determining person channelising the course of repayment through cash.*
- (iii) *The **transactions entered into between appellant and AI and appellant and AE was in the nature of loan as reflected in the accounts of the appellant filed with the department.***
- (iv) *The transactions are not even in the nature of current account since **the appellant and AI/AE are independent unrelated entities.** Transaction between them are not whimsical. Even if for arguments sake, it is accepted as current account not admitting the same, current account transactions are even treated as loan and therefore deviation of provisions of S.269 T has to be visited by penalty u/s 271 E of IT Act. It may be mentioned that **in banking parlance ‘current account’ is treated as loan and the account holder is treated as a borrower** which is opened only by obtaining some collateral security of stock/FDs. It is unlike saving bank of fixed deposits where the bank acts as a Borrower.*
- (v) *The transactions between the appellant and AI/AE are covered within the definition of loan or deposit enshrined in Expln.(iii) to Sec.269 T.*

- (vi) *The fact that the transacting parties do not treat the transactions as loan or deposit is immaterial because **law points treat these transactions as loan or deposit** and therefore repayment thereof in cash violating the provisions of section 269 T has to be necessarily visited by the penalty under section 271E of the IT Act.*

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- (vii) *The argument that Sri A Ramarkrishna common partner drew money from the appellant firm to pay to AI so as to take these transactions from the ambit of definition of loan and deposit is of no help because records do not justify or corroborate the same. **The audit report clearly shows AI as lenders of money to the appellant firm. No such claim has been made by the appellant in case of Sri Satish Pai of AE.***

(emphasis supplied)

Challenging the order of the appellate Commissioner, assessee filed a further appeal before the Tribunal, where certain additional evidence by way of documents had been filed, which were:

- (i) Agreement to sell dated 5.10.2004 between AI and Sahara India Commercial Corporation Ltd., and others;

- (ii)** Agreement of sale dated 31.3.2005 between M/s Gauri Ganesh Real Estate, AI and MAHE;
- (iii)** Memorandum of Agreement between AI and the assessee dated 5.10.2004; and
- (iv)** Copies of cash book extracts in the case of the assessee firm on nine dates.

Both the agreements dated 5.10.2004 [at no.(i) and (iii)] were unregistered documents, whereas the agreement dated 31.3.2005 was a registered document. Such additional evidence was filed under Rules 10 and 29 of the Income Tax (Appellate Tribunal) Rules, 1963 (for short Rules of 1963) by way of an affidavit dated 11.1.2009 of a partner of the assessee firm. After accepting the additional evidence and holding that the amount earlier advanced by AI and AE to the assessee (which totaled to Rs.50.36 crores) was neither in the nature of loan or deposit, the Tribunal further held that the said refund of money was a cash transaction between the sister concerns, which was not affected by section 269 T of the Act and hence, the provisions of section 271 E would not be

attracted. Aggrieved by the said order of the Tribunal, this appeal has been filed, which has been admitted on the following substantial questions of law:

(i) Whether the Tribunal was correct in accepting the additional evidence placed before it by the assessee when the same was not produced before the Assessing Officer and the Appellate Commissioner, when the assessee has not assigned any reasons for not producing the same before the Assessing Officer.

(ii) Whether the Tribunal was correct in holding that the repayment made by the assessee in favour of Annapoorneshwari Investment and Adarsh Enterprises is in the nature of current account transaction and hence the same is not in violation of section 269 T of the Act, when all the three firms are independent identities and the assessee cannot maintain a current account with it for Annapoorneshwari Investments and Adarsh Enterprises and consequently recorded a perverse finding.

We have heard Sri K V Aravind, learned counsel for the appellants, as well as Sri S Parthasarathi, learned counsel for respondent at length and have perused the record.

Question No.(i)

In the background of the facts as narrated above, we shall first proceed to decide the first question which relates to acceptance of additional evidence adduced by the assessee before the Tribunal. Rule 10 of the Rules of 1963 relates to filing of affidavits, and the relevant Rule 29, relates to production of additional evidence before the Tribunal, which is reproduced below:

R 29: Production of additional evidence before the Tribunal

*The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but **if the Tribunal requires any document to be produced** or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income tax authorities have decided the*

*case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, **for reasons to be recorded, may allow such document to be produced** or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.*

It is under the said provision that additional evidence had been adduced by the respondent. The said Rule 29 provides for the Tribunal requiring any document to be produced, or witness to be examined, or affidavit etc., or, if the income tax authorities have decided the case without affording sufficient opportunity to the assessee to adduce evidence, the Tribunal may, for sufficient reasons to be recorded, allow additional evidence to be filed. In the present case, it was the assessee which had filed an application by way of an affidavit for adducing additional evidence in support of its case, in the form of agreements, both registered and unregistered, and also cash book extracts.

The first agreement filed as additional evidence before the Tribunal by the assessee, is an agreement to sell dated 5.10.2004, entered into between AI on the one part and certain other partnership firms like Sahara India Commercial Corporation Ltd and four others, of the second part, by which AI had entered into an agreement to purchase a large area of land. Such agreement to sell is, admittedly, an unregistered document. The third agreement (which is again dated 5.10.2014) is also an unregistered agreement of sale between AI and the respondent assessee - Canara Housing Development Company, by which Sahara India Commercial Corporation and four others, had entered into an agreement to sell land in favour of Manipal Academy of Higher Education (MAHE), through an agreement entered into with AI and Sri Ramakrishna as a partner of the assessee M/s Canara Housing Development Company and it provides that *“it is agreed the business of the first party (AI) shall be carried on under the managerial control and supervision of the second party (Canara) firm and to effectuate such management and supervisory control of the business. The business premises*

of the first party was also transferred to the premises of the second party and all the activities hence forth carried on in the same premises until all the obligations of M/s MAHE are fully discharged.” The main provision in the said agreement was that Sri Ramakrishna was to act on behalf of AI for carrying on the contract with the respondent – assessee M/s Canara Housing Development Company. The second agreement, which is a registered agreement of sale, is dated 31.3.2005 between M/s Gauri Ganesh Real Estate and M/s AI with MAHE shown as the purchaser. The same is a registered agreement.

What has been explained in the affidavit seeking to adduce additional evidence, is to substantiate that M/s AI is a group or sister concern of the assessee. It has been submitted by Sri Parthasarathi, learned counsel for the respondent, that since it was for the first time that the appellate Commissioner had recorded a finding that the appellant on the one hand, and AI and AE on the other hand, are not group concerns, what to speak of sister

concerns, and are independent of one another, that filing of these agreements was necessitated.

Sri Aravind, learned counsel for the appellant, has submitted that there was no adequate reason for accepting the additional evidence at the stage of second appeal before the Tribunal, as the documents which have been filed by respondent-assessee before the Tribunal were all there with the assessee at the time of filing its reply to the notice dated 23.6.2008. It is submitted that in its reply to the show cause notice itself the assessee had contended that the transactions were between inter-firms, with one of the partners being common in the firm, and as such, if the agreements (especially unregistered ones dated 5.10.2004) had existed at that time, then to substantiate the stand taken in the reply, the agreements ought to have been filed along with the reply or before the Assessing Officer, and the same having been filed at a much later stage, ought not to have been accepted. It has been contended that filing of unregistered documents at such a late stage is always doubtful. as they can be prepared at a later stage for the

purpose of the case. On the other hand, Sri Parthasarathi, learned counsel for the respondent, stated that since the question of the assessee being a sister concern or group concern of AI and AE, was denied for the first time by the appellate Commissioner, there was no occasion for the assessee to have filed the document at an earlier stage.

Having heard learned counsel for the parties and on perusal of the record, what we find is that at the very initial stage, while submitting its reply dated 8.3.2008, assessee had taken a stand that the assessee firm was internally connected with the firms – AI and AE, as one partner was common in the firms, and as such, it was contended in the reply that the transactions were merely inter-firm transactions and could be treated as current account transactions. The Assessing Officer – Addl. Commissioner of Income Tax has also, vide his order dated 2.6.2008, recorded a finding that *‘the Act has not given any exemption to the transactions between **group concerns**’*. He further recorded a finding that *‘the transactions between **group***

concerns cannot violate the provisions of section 269 T of the Act for making repayment of loan or deposits in cash above the prescribed limit'. From the aforesaid findings, it is clear that the question of the firms being group concerns or not was always there before the Assessing Officer. The appellate Commissioner had also considered this aspect and arrived at a finding that the firms were not group concerns or sister concerns.

From the above, it is clear that the question as to whether the firms in question were group concerns or not was always under consideration, right from the stage of the assessee submitting its reply to the notice, and it was for the assessee to have filed necessary documents at the initial stage itself, when it took the stand that the firms were group concerns or sister concerns. Filing of the additional evidence at a late stage, even when the said documents are said to be available with the assessee at the initial stage itself, makes the authenticity of the documents doubtful. The main agreements dated 5.10.2004 are both unregistered documents. There could be substance in the

submission of the learned counsel for the Revenue, that the said documents could have been prepared at a later date for the purposes of this case. Merits of the said documents shall be considered while dealing with the second substantial question of law. At present, we have to only consider whether the filing of additional documents, which were available with the assessee at the initial stage, would be justified or not, when they have been filed at the stage of second appeal before the Tribunal.

In the facts and circumstances of the case and for the reasons given hereinabove, we are of the view that the Tribunal was not justified in accepting the additional evidence filed by the assessee at the second appellate stage, and we are also of the view that the reasons assigned by the assessee for not having produced the same earlier before the Assessing Officer, is not worthy of acceptance. As such, we answer the first substantial question of law in favour of the Revenue and against the assessee.

Question No. (ii)

For deciding the second substantial question of law, which is as to whether repayments made by the assessee to AI and AE firms are in the nature of current account transactions and hence, the question of violation of section 269 T of the Act was not there, we will have to examine the nature of transactions which had taken place between the assessee and the AI/AE, and also the relationship between the assessee and the two firms – AI and AE.

We shall first treat the three firms to be group concerns or sister firms, and then proceed to decide the matter. We shall also, for the present, accept the documents which had been filed by the assessee as additional evidence before the Tribunal. Admittedly, there is not one transaction between the assessee and AI but a series of transactions i.e., half a dozen transactions between 28.10.2004 and 23.2.2005. Not once but on several occasions, cash repayment of Rs.2 crores each had been made by the assessee to AI and on one occasion, cash repayment of Rs.60 lakhs was made. The explanation

given by the assessee was that the two firms were sister concerns with a common partner namely, Sri Rama Krishna, and because of urgency in the matter, payments had to be made in cash. The authorities below (Assessing Officer and appellate Commissioner) have considered this matter, and arrived at a finding that there was no dearth of banking facility in the city of Bangalore, so as to necessitate payment to be made by the assessee in cash, and that too not on one occasion, but on several occasions. It could be understood if there was an urgency of payment to be made in cash on one stray emergent occasion because of which, in stead of paying by cheque or bank draft as required under section 269 T of the Act, payment was made in cash. There cannot be extreme urgency in repayment of such heavy sum of money in cash on half a dozen occasions, each one amounting to a couple of crores of rupees. The assessee firm has, admittedly, taken an advance from AI (which may be by way of loan, deposit or otherwise), to the tune of over Rs.50.36 crores, which had to be returned by the assessee.

Learned counsel for the respondent assessee has submitted that advances deposited with the assessee cannot be treated as a loan or deposit, and as such, the same is not covered under the provisions of section 269 T of the Act. It is contended that prior to 1.6.2002, it was only 'deposit' which was covered by the said section 269 T, and by an amendment which came into effect from 1.6.2002, 'loan' was also included. Then, by an amendment which has come into effect from 1.6.2015, 'specified advance' received by the assessee has also been included. However, it is contended that for the assessment year in question, it is only 'loan' and 'deposit' which was in the purview of section 269 T and not 'specified advance'. The submission thus is, since in the notice dated 26.2.2008 itself it had been stated that the repayment had been made of the advances which were deposited by AI with the assessee firm, such repayment would not attract the provisions of section 269 T of the Act. It is also contended that all the transactions were duly recorded in the account books and hence, same were bonafide transactions on which TDS had been deducted and as

such, payment by the assessee in cash could, at best, be an irregularity and not illegality, and that the case of the assessee would be covered under the provisions of section 273 B of the Act.

By amendment of 2015, what has been included is 'specified advance'. Advance, in the present case, is of a sum of over Rs.50.36 crores parked by AI with the assessee. The parking of such huge amount can only be by way of a loan or deposit. Advances of such nature with a different company, which is an independent entity, cannot be anything but a loan or deposit made by such firm. Merely because one partner is common, would not justify the parking of such huge funds by one firm in another firm, except by way of a loan or deposit. Much reliance has been placed on the memorandum of agreement dated 5.10.2004 between AI and the assessee – Canara Housing Development Company, which is with regard to some earlier dealing of AI with different firms/companies namely, Sahara India Commercial Corporation Ltd., Gauri Ganesh Real estate, etc., as well as another agreement between

three parties i.e., Gauri Ganesh Real Estate, AI and MAHE. It is not so that assessee is a party in both the agreements. For carrying forward the aforesaid two agreements between different parties, the memorandum of agreement dated 5.10.2004 is said to have been entered into between AI and the assessee. Notably this agreement is not a registered agreement and thus, not much reliance can be placed on the said agreement, as the authenticity of the same would always be in doubt. Even otherwise, the said agreement only authorizes the assessee to carry on the work on behalf of AI i.e., to supervise the work to be carried out by AI for MAHE. This agreement, in our view, would not authorize repayment of any amount, which was kept in deposit by way of loan, deposit or advance by AI with the assessee firm, in cash towards certain expenses of AI, for work with regard to a contract between AI and MAHE. The account books of the assessee showed an opening advance received from AI to the extent of over Rs.50.36 crores and the closing balance shows an outstanding advance of Rs.31.75 crores. From this it appears that over Rs.18 crores has been paid back by the assessee to AI during the

assessment year 2005-06, out of which Rs.14.60 crores had been paid in cash. As we have already noticed above, it is not one stray payment of some amount in cash having been made by the assessee but, it is a series of payments made in cash spread over nearly five months.

It is true that penalty for non compliance of section 269 T of the Act as provided under section 271 E of the Act, is not automatic as section 273 B provides that no penalty shall be imposable on the person or the assessee for any violation referred to under section 269 T of the Act, if he proves that there was reasonable cause for such failure. It has been submitted, that considering the urgency in the matter requiring immediate payment, according to the assessee, there was reasonable cause for paying in cash the amount of Rs.14.60 cores during the assessment year in question.

In support of his submission, learned counsel for the appellant has relied on the decision of Punjab & Haryana High Court in the case of **Commissioner of Income Tax**

Vs Sunil Kumar Goel – (2009) 315 ITR 163. In the said case, transactions entered into were between members of the family, and due to business exigencies. It was, thus, held in the said case that a family transaction between two independent assesseees, based on act of casualness, especially in case where a disclosure thereof was contained in the compilation of accounts and which had no tax effect, establishes 'reasonable cause' under section 273 B of the Act. The present is not a case of family transaction. Even if it is accepted that the transaction was between two group concerns, there cannot be casualness between group concerns or sister concerns, especially when they are separate legal entities. Except for there being one common partner between the firms, there is no other relationship between the two firms.

In another case of the Karnataka High Court relied on by the learned counsel for the assessee, rendered in ITA 453/2003 between ***H S Ananthasubraya Vs Dy. Commissioner of Income Tax***, decided on 9.3.2004, the payments were made in cash to the tune of Rs.20,000/- to

Rs.50,000/- towards repayment of loan by the assessee therein who was an individual. Such payment was towards refund of loan taken from friends and relatives, and considering that the transactions were genuine and bonafide, for which confirmation letters had also been furnished, the benefit of section 273 B of the Act was granted to the assessee. In the other case relied on by the learned counsel for the assessee, being **Commissioner of Income Tax Vs Deccan Designs (India) Pvt Ltd – (2012) 347 ITR 580**, the case was of repayment of loan for payment of wages, etc., which was on behalf of a sister concern to save the company from its closure. The transactions, made in cash, were found to be undertaken out of business exigencies.

The facts in the present case are different from the facts of the cases relied upon by the learned counsel for the assessee. As we have noticed earlier, transactions in cash, in the present case, are all of heavy amounts, several of them being for an amount of Rs.2 crores each and one being of Rs.60 lakhs. It could have been understood if

there was extreme urgency of repayment of certain amounts in cash on one occasion but, that extreme urgency cannot be repeated on several occasions for the same amount of Rs.2 crores paid over five months. The agreement dated 5.10.2004 is entered into between the assessee and AI with regard to the contract or agreement between AI and certain third parties who had to carry on some contract work for MAHE. All this would be an indirect way to support the stand taken by the assessee, that payment was made by the assessee in cash on behalf of AI and not even to the firm – AI, which had loaned, deposited or paid an advance to the assessee firm.

Normally this court should take a liberal view in matters where there is only some violation of provisions of the Act, especially when the transactions are reflected in the books of account of the assessee. However, the courts have also to consider that the provisions of law are substantially complied. One odd non compliance made by the assessee should normally not attract penal provisions but, that is in a case where because of some extreme

urgency, the violation had been committed for genuine and valid reason. In the present case, the same reason has been given by the assessee for making payment in cash, not on one occasion, but more than half a dozen occasions. The same cannot be said to be reasonable cause shown by the assessee for repeatedly violating the provisions of section 269 T of the Act. If the benefit of section 273 B of the Act is given in cases as the present one, the very purpose of enacting section 269 T of the Act would be frustrated or lost. The assessee who deals in crores of rupees, is expected to not only know the provisions of law, but also comply with the same. Section 269 T requires the assessee to repay the loan or deposit by an account payee cheque or account payee bank draft, if the amount of such repayment is of Rs.20,000/- or more. In the present case, the amount paid by the assessee to AI is in cash, amounting to several crores, and on several occasions.

Similar is the position in the case of payment of Rs.12 lakhs in cash by the assessee to AE, where again it

is claimed that there was a common partner between the assessee firm and the firm – AE. The common partner between the assessee and AE is one Sri Satish Pai, but no such plea had been raised by the assessee before the Assessing Officer, as has been categorically held by the appellate Commissioner in his order. The Tribunal has, in paragraph 14, justified the same by observing that Satish Pai is a partner in the assessee firm, as also a partner in AE. It is not understood as to on what basis the same has been observed by the Tribunal, because the appellate Commissioner has specifically stated that no such plea had ever been taken by the assessee with regard to such common partner being there between the assessee firm and the firm –AE. On perusal of the replies given to the notices and other documents, the assessee has only stated that Sri Rama Krishna is a common partner between the assessee firm and the firm AI, but nothing has been said about the assessee and AE firms having a common partner. On being asked, Sri Parthasarathi, learned counsel for the respondent – assessee could not place any document from the entire record to show that such information was ever

given to any of the authorities below. As such, the observation made by the Tribunal in paragraph 14 of its order with regard to Sri Satish Pai being a partner in the assessee firm as well as the firm AE, is not borne out from the record.

In view of the aforesaid discussion, we are of the view that even if the additional documents are accepted on record, answer to the second substantial question of law, would still be in favour of the Revenue and against the assessee.

Accordingly, the two substantial questions of law are answered in favour of the Revenue and against the assessee. Appeal filed by the Revenue is accordingly, allowed and the order of the Assessing Officer is confirmed.

Sd/-
Judge

Sd/-
Judge

An