

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
INCOME TAX REFERENCE No. 103 of 1996

For Approval and Signature:

HONOURABLE MR. JUSTICE D.A. MEHTA Sd/-

HONOURABLE MR. JUSTICE Z.K. SAIYED Sd/-

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1 Whether Reporters of Local Papers may
be allowed to see the judgment ? NO

2 To be referred to the Reporter or not
? NO

3 Whether their Lordships wish to see
the fair copy of the judgment ? NO

Whether this case involves a
substantial question of law as to the
4 interpretation of the constitution of
India, 1950 or any order made
thereunder ? NO

5 Whether it is to be circulated to the
civil judge ? NO

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COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

M/S. BOMBAY CONDUCTORS AND ELECTRICALS LTD., - Respondent(s)

Appearance :

MR BB NAIK for Applicant(s) : 1,

MR MANISH J SHAH for Respondent(s) : 1,

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CORAM : HONOURABLE MR. JUSTICE D.A. MEHTA
and
HONOURABLE MR. JUSTICE Z.K. SAIYED

Date : 11/02/2008

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'C' has referred the following question for the opinion of this Court u/s. 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

“Whether, the Appellate Tribunal is right in law and on the facts in cancelling penalty of Rs. 23 lacs levied u/s.271-D of the Act for violation of the provisions of section 269SS when the assessee transferred the purchase price as Sharafi?”

2 The Assessment Year is 1991. The assessee, a limited company, is a subsidiary of another limited company M/s. Lallubhai Amichand and Company Limited (the creditor company). The assessee purchased goods from time to time from the creditor company as per following details :

“Date Amount

26-5-1989	Rs.5,65,858	
27-5-1989	Rs.3,59,050	Rs.9,24,908
7-6-1989	Rs.4,65,613	
8-6-1989	Rs.4,62,946	
8-6-1989	Rs.4,79,606	Rs.14,08,165
		Rs.23,33,037".

As the assessee was not in a position to make payment of the outstanding purchase price immediately the parties arrived at an understanding whereunder the outstanding purchase price was to be treated as a loan on Sarafi Account after making part payment of the outstanding dues. As per the terms agreed upon, on 31.05.1989 a sum of Rs.24,908/- was paid by Account Payee Cheque out of total of Rs.9,24,908/- and the balance of Rs.9 lacs was simultaneously transferred to 'Lallubhai Amichand Sarafi Account'. The balance outstanding liability in the goods account was adjusted by way of journal entries. Similarly out of total outstanding dues of Rs.14,08,165/- a sum of Rs.8,165/- was paid by Account Payee Cheque and balance amount of Rs. 14 lacs was identically treated as a loan outstanding in the Sarafi Account with requisite journal entries in support thereof.

3. During course of assessment proceedings the Assessing Officer treated the outstanding amounts of Rs.9 lacs and Rs.14 lacs respectively as acceptance of deposit in violation of provisions of Section 269SS of the Act and referred the matter for levy of penalty to the Dy.C.I.T. After issuing show cause notice and considering the written explanation tendered by the assessee and after hearing the assessee the Dy. C.I.T. came to the conclusion that the conversion of the outstanding balance from goods purchase Account to Sarafi Account by transfer entries was a deposit in violation of provisions of Section 269SS of the Act. Accordingly penalty of Rs.23 lacs was levied u/s. 271D of the Act by treating the amount as loan or deposit taken or accepted. The assessee carried the matter in Appeal before the Commissioner (Appeals) who vide order dated 15.02.1994 confirmed the levy of penalty. The assessee carried the matter in Second Appeal before the Tribunal who has allowed the Appeal vide impugned order dated 30.11.1995.

4. Mr. B.B.Naik, learned Standing Counsel for applicant-Revenue has assailed the impugned order of Tribunal on the ground that the reasons assigned by the Tribunal are dehors the provisions of the Act. That for the purpose of imposing penalty the only thing which was material was the provision of Section 269SS of the Act which provides that no person shall after the specified date take or accept from any other person any loan or deposit otherwise than by an Account Payee Cheque or Bank Draft subject to the stipulated limit. That admittedly a sum of Rs.23 lacs which was to be paid as purchase price by the assessee had undergone change in character and was now an outstanding loan so far as the assessee was concerned. Thus in effect by mere transfer entry, it could be stated that, the outstanding purchase price had been paid up by the assessee and then received as a loan from the creditor company. According to Mr. Naik, Explanation to Section 269SS of the Act merely stated that " 'loan or deposit' means loan or deposit of moneys", and therefore it could not be stated that by such transfer entries no money was involved in the

transaction. That money in form of outstanding purchase price was due from assessee and now money in form of loan was accepted by the assessee and due to the creditor company by virtue of journal entries. Hence, penalty was rightly levied. It was therefore urged that the Reference be answered in favour of the Revenue.

5. Mr. M.J.Shah, learned Advocate appearing on behalf of the respondent-assessee apart from heavily relying on the impugned order of Tribunal pointed out that the order of the Tribunal was passed after taking into consideration the object of bringing provisions of section 299SS on the statute as well as after considering existence of reasonable cause as provided in section 273B of the Act. It was further submitted that the Tribunal had found that even if there was any breach the same was only a venial or technical breach which does not warrant penalty as laid down by the Apex Court. That there was difference between the terms 'loan' and 'deposit'. The authorities below had treated both the terms as synonymous and therefore also no penalty was

leviable in absence of any firm conclusion as to the nature of transaction. In support of the propositions reliance has been placed on the following decisions :

- [1] *Asstt. Director of Inspection Vs. Kum A.B. Shanthi (2002)255 ITR 258 SC.*
- [2] *Hindustan Steel Ltd. Vs. State of Orissa, (1972) 83 ITR 26 SC.*
- [3] *CIT Vs. Saini Medical Store (2005) 277 ITR 420 (P&H).*
- [4] *CIT Vs. Bhagwati Prasad Bajoria (HUF) (2003) 263 ITR 487.*
- [5] *Baidya Nath Plastic Industries (P.) Ltd. Vs. K.L.Anand, I.T.O.(1998) 230 ITR 522 (Del.).*

6. The object of introduction of section 269SS of the Act has been stated by the Apex Court in the aforesaid case of *Asstt. Director of Inspection Vs. Kum A.B. Shanthi* in the following terms :

“The object of introducing section 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 tax payer 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 section 269SS was to curb this menace."

At the same time while introducing section 269SS, section 273B was also incorporated in the statute which provides that no penalty shall be imposable 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 u/s. 271D of the Act on mere violation of provisions of section 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 tax evasion. To the contrary, the Tribunal has recorded that by making the book entries the assessee has made the adjustment bonafide without having the knowledge that such book entries may render the assessee liable to penalty u/s. 271D of the Act on account of violation of provisions of section 269SS of the Act. That there was a reasonable cause and hence no penalty was leviable.

8. In light of the findings of 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 of the assessee and against the revenue.

10. The Reference stands disposed of accordingly with no order as to costs.

Sd/-
(D.A.Mehta, J.)

Sd/-
(Z.K. Saiyed, J.)

M.M.BHATT

