

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and CHANDRA POOJARI, AM

I.T.A. No. 812/ Coch/2013
Assessment Year : 2007-08

M/s. Hindalco Employees Co-operative Credit Society Ltd., No. 3304, Alupuram, Kalamassery-683 104. [PAN: AABFT 5959Q]	Vs.	The Addl. Commissioner of Income-tax, Range-4, Kochi
(Assessee -Appellant)		(Revenue-Respondent)

Assessee by	Shri R. Krishna Iyer, CA
Revenue by	Smt. Latha V. Kumar, Jr. DR

Date of hearing	14/07/2014
Date of pronouncement	25/07/2014

ORDER

Per CHANDRA POOJARI, Accountant Member:

This appeal filed by the assessee is directed against the order dated 18-10-2013 passed by the Ld. CIT(A)-II, Kochi for the assessment year 2007-08.

2. The only grievance in this appeal is with regard to penalty levied u/s. 271D of the I.T. Act to the tune of Rs. 74,56,185/-.

3. The brief facts of the case are that in the assessment year under consideration, the assessee received fixed deposits in cash in contravention of section 269SS of the I.T. Act, 1961 for which the Assessing officer called for

explanation vide show cause letter dated 07-06-2010 for which assessee submitted reply vide letter dated 24-06-2010. However, the Assessing officer was not convinced with the reply and accordingly, the Assessing officer finding no reasonable cause of the failure on the part of the assessee as prescribed u/s. 273B of the I.T. Act so as to receive fixed deposits in the form of cash in contravention of section 269SS, he levied penalty to the tune of Rs.74,56,185/-. On appeal, the CIT(A) confirmed the penalty u/s. 271D levied by the Assessing Officer. Against this, the assessee is in appeal before us.

4. The Ld. AR submitted that the assessee is a co-operative society of the Employees of Hindalco Industries Ltd. The members of the Co-operative Society are only employees of the Co. The amounts are accepted from the members and lent only to the members of the society who are in need of funds, on mutual consideration, the principle of mutuality is applicable.

5. According to the Ld. AR, the income of the society is from interest received on loans given to members and also from the fixed capital made by the society, which are basically exempt as per section 80P(2)(d). The interest received from the members is also not to be included in the gross total income of the assessee as per section 80P(1). The Ld. AR submitted that the assessee had received fixed deposits in cash and the Addl. Commissioner issued show cause

notice u/s. 271D directing to show cause as to why appropriate penalty u/s. 271D should not be levied on the assessee.

6. The Ld. AR submitted that the assessee filed a detailed reply on 24-06-2010 and stated therein that persons who have given fixed deposits by cash are employees of M/s. Hindalco Industries Ltd. The society was formed with the intention of encouraging thrift and savings as between members. However, the Assessing officer observed that explanations cited cannot be accepted as reasonable cause u/s. 273B of the Income Tax Act for the following reasons:

1. The assessee has not proved the business expediency and banking facility available for not taking loans or deposits by way of account payee cheque or DDs.
2. Provisions of sec. 269SS is a strict liability in the nature of adoption of procedure and it is immaterial whether the persons employees or not, it is also immaterial whether the receipt is only by mode of cash. And not by account payee cheque/bank DD.
3. The assessee has accepted that repayments have been done through cheque/DD and subsequent receipts have also been received by way of cheque DD.
4. Being financial liability the transaction between members who are also employees of M/s. Hindalco Industries Ltd. will not determine reasonable cause for failure.
5. There is no reasonable cause for failure u/s. 273B and as such, provisions u/s. 269SS is clearly attracted for imposition of penalty u/s. 271D.
6. The amount of Fixed deposit taken by cash/otherwise than by account payee cheque/DD are substantial to the tune of Rs.74,56,185/- during the year 2006-07 from various persons. The assessee is unable to prove the reasonable cause for failure u/s. 273B.

7. The Ld. CIT(A) vide order dated 18-10-2013 dismissed the appeal with the observations that "all the grounds relate to only one point that section 269SS is not applicable in the case of the assessee and hence imposition of penalty is not justified". The Ld. CIT(A) observed that the AO while making this addition held that the various explanations cite by the assessee do not constitute reasonable cause u/s. 273B of the Income Tax Act and observed as following:

- (i) The assessee has not proved the business expediency and banking facility available for not taking loan/deposit amount in account payee cheque/DD from various parties.
- (ii) Provision of section 269SS is a strict liability is in the nature of adoption of procedure and it is immaterial whether the parties are employees or not.
- (iii) The assessee explained the repayments have been made through account payee cheque/DD and receipts in subsequent years have also been receive in cheque/DD.
- (iv) Transaction between members who are also employees of M/s. Hindalco Industries Ltd. will not determine reasonable cause or failure.
- (v) There is not reasonable cause of failure u/s. 273B, provisions of section 269SS has been violated.

The assessee filed appeal against the said order.

8. The Ld AR submitted that the in the grounds of appeal the assessee has brought to the notice of the CIT(A) the object of introduction of section 269SS. Introduction of the said provision was only to avoid unaccounted cash being

explained by tax payers as representing loan taken. Prevention of unaccounted cash being explained as loans was the main object of insertion of section 269SS of the Income Tax Act. This fact has been stated in Circular 387 dated 6.7.1984. With a view to counter in this device the Finance Act has inserted a new section 269SS in the Income Tax Act debarring persons from taking or accepting any loan or deposit otherwise than by account payee cheque or bank draft. This fact has been considered by various decisions of different benches of the Hon'ble High Courts.

9. The Ld. AR relied on the judgment of the Supreme Court in the case of Assistant Director of Inspection (Investigation) vs. Kum. A.B. Shanthi and Chamundi Granites Pvt. Ltd. vs. DCIT and Another reported in 255 ITR 258 wherein it was stated that the main object of introducing section 269 was to curb furnishing of false explanation/false entries in the accounts by a tax payer. As such, imposition of penalty without considering the objects stated while introducing the section according to Circular No. 387 dated 6.7.84 of the CBDT is grossly incorrect and only to be set aside. Hence section 269SS is not applicable and it has been held that wherever the depositor has been identified the levy of penalty is not warranted.

10. The Ld. AR submitted that section 269SS has to be read with section 274 wherein it has been held that wherever reasonable cause exists for acceptance

of cash, penalty is not to be imposed. The repayment of deposits is made only by way of account payee cheque which further confirms the fact that the receipts by way of cash is only for the purpose of practical convenience.

11. The Ld. AR submitted that the Addl. Commissioner observed that "there is no reasonable cause for accepting deposits by way of cash since there is no business expediency or lack of banking facility". Further, since in the subsequent years the amounts have been received by way of account payee cheques or drafts in the current year also there is no reasonable cause for accepting deposits by way of cash.

12. The Ld. AR relied on the judgment of the Madras High Court in the case of K.R.M.V. Ponnuswamy Nadar Sons (FIRM) and Others vs. Union of India and Others, 196 ITR 431 (Mad.) wherein it was held that sufficient safeguards that the assessee can show reasonable cause before imposing punishment for violation u/s. 269SS.

13. The Ld. AR also relied on the judgment of the Punjab & Haryana High Court in the case of CIT vs. Saini Medical Store, 276 ITR 79(P&H) wherein it was held that having accepted that violation of the provisions of s 269SS was under a bona fide belief of the assessee and the same was not with any intention to avoid or evade the tax while deleting penalty u/s. 271D. Findings recorded by

the CIT(A) and the Tribunal that the assessee had shown reasonable cause for the failure to comply with the provisions of s. 269SS is a finding of fact based on appreciation of material on record and it does not give rise to substantial question of law and the CIT(A) having accepted that violation of the provisions of s. 269SS was under a bona fide belief of the assessee and the same was not with any intention to avoid or evade the tax while deleting penalty u/s. 271D and the findings of CIT(A) having been confirmed in appeal by the Tribunal, no substantial question of law arises.

14. The Ld. AR relied on the judgment of the Rajasthan High Court in the case of CIT vs. Maheshwari Nirman Udyog, 302 ITR 201 wherein it was stated that the transaction in question is a genuine transaction. Section 269Ss has to be read with section 273B, authority is to consider whether there was a reasonable cause.

15. The Ld. AR further relied on the judgment of the Rajasthan High Court in the case of CIT vs. Lokhpat Film Exchange (Cinema), 304 ITR 172 wherein it was stated that the assessee's firm acting under a bona fide belief that transactions with partners did not attract provisions of section 269SS and 269T, such a bona fide belief constituted reasonable cause and the Tribunal was justified in deleting penalty u/s. 271D and 271E

16. The Ld. AR relied on the judgment of the Gujarat High Court in the case of CIT vs. Natvarlal Purshottamdas Parekh, 303 ITR 5 wherein it was stated that penalty u/s. 271D and 271E - contravention of ss. 269Ss and 269T – Reasonable cause – Tribunal, on appreciation of evidence, having found that there was no contravention of ss. 269Ss and 269T and even if there was one, there was reasonable cause for the same, no interference was called for with the order of Tribunal deleting penalty under ss. 271D and 271E – Whether evidence is correctly appreciated or not cannot give rise to a question of law unless and until such findings are challenged as being contrary to the evidence on record or recorded after omitting to consider relevant evidence and taking into consideration irrelevant evidence.

17. The Ld. AR relied on the judgment of the High Court of Punjab and Haryana in the case of CIT vs. Sunil Kumar Goel, 315 ITR 163 wherein it was held that penalty under ss. 271D and 271E – contravention of ss. 269SS and 269T – Reasonable cause – A family transaction between two independent assesseees, based on an act of casualness, specially in a case where the disclosure thereof is contained in the compilation of accounts, and which has no tax effect, establishes “reasonable cause” under s. 273B for not invoking the penal provisions of ss. 271D and 271E.

18. The Ld. AR relied on the decision of the High Court of Rajasthan in the case of CIT vs. Manoj Lalwani, 260 ITR 590 (Jaipur Bench) wherein it was held that penalty under s. 271D – Contravention of s. 269SS – Reasonable cause – Tribunal found that the assessee exporter took the cash loan because he was in urgent need of money for making the time bound supplies – accepting it as a reasonable cause, Tribunal acted in accordance with law in deleting the penalty.

19. The Ld. AR relied on the judgment of the Delhi High Court in the case of CIT vs. Parma Nand, 266 ITR 255 wherein it was held that penalty u/s. 271D was not leviable was based on relevant factors.

20. The Ld. AR further relied on the judgment of the Rajasthan High Court in the case of CIT vs. Maheshwari Nirman Udyog, 302 ITR 201 wherein it was stated that penalty u/s. 271D – finding given by the appellate authority as well as by the Tribunal that the transaction in question is a genuine transaction and penalty u/s. 271D is not exigible, same cannot be disturbed by the Court.

21. The Ld. AR also relied on the judgment of the Gauhati High Court in the case of CIT vs. Bhagwati Prasad Bajoria (HUF) 263 ITR 487 wherein it was held that where the findings is that loan transaction was genuine and that there was no immediate necessary for money, deletion of penalty was held justified. Penalty u/s. 271D – element of mens rea is not borne out from the nature and

the manner in which the transaction was carried out. In the facts and circumstances of the case the Tribunal was justified and correct in law in upholding the judgment of the CIT(A) in deleting the penalty imposed on the assessee u/s. 271D though for the different reasons.

22. The Ld. AR relied on the judgment of the Madras High Court in the case of CIT vs. Ratna Agencies, 284 ITR 609 wherein it was held that there is no reason to interfere with the findings of the Tribunal that there was reasonable cause for the as not strictly complying with the provisions of s. 269SS - Therefore, penalty under ss. 271D and 271E could not be imposed.

23. The Ld. AR relied on the judgment of the Madras High Court in the case of CIT vs. Balaji Traders, 303 ITR 312 wherein it was held that penalty u/s. 271D – the genuineness of creditors and transactions were never doubted by the Department and there was no revenue loss to the exchequer; the assessee has shown reasonable cause.

24. The Ld AR relied on the judgment of the Delhi High Court in the case of Director of Income Tax (Exemption) vs. All India Deaf and Dumb Society, 283 ITR 113 wherein it was held that the substantial question of law – penalty u/s. 271D and 271E – No malafide intention on the part of the assessee and there was no intent of violating the law – ingredients of ss. 271D and 271E not strictly

satisfied – finding of Tribunal not perverse and no substantial question of law arises.

24.1 The Ld. AR also submitted that the deposit holders are employees of M/s. Hindalco Industries Ltd. who are identifiable and there is evidence for payment of their wages/salary.

25. The Ld. AR submitted that the assessee is a co-operative society of the employees of M/s. Hindalco Industries Ltd. and the Members of the Co-operative Society are employees of the Company only. It was submitted that the amounts are accepted from members only and lent to other members of the society who are in need of the funds. The Principle of Mutuality is applicable on the income of the society and as such, no income tax is payable. It is submitted that the deposits received from the members are basically the amount saved out of salary income by the employees (members). As and when salary is received in cash, the members come to the Credit Society which is in premises of the Company itself and deposit the money. The company has also issued confirmation certificate dt. 30-04-2013 wherein it has been certified that during the financial year 2007 the Company was making wage payment to the employees on a monthly basis, majority in cash. This also confirms that the amounts received by the employees are from the Company and out of salary the said amount is remitted by the employees in the Society.

26. The Ld. AR submitted that the assessee also brought to the notice of the authorities below that the object of sec. 269SS was to ensure that a taxpayer is not allowed to give false explanation for his unaccounted money. The very purpose of introduction of sec. 269SS and corresponding section 269 T is to bring into light unaccounted cash or deposits held by an assessee and avoid it being explained as loans or deposits from others. In this case, there is no unaccountable income or cash or false information. Moreover, in all the cases repayments are made only by way of account payee cheque.

27. The Ld. AR explained that the object of introduction of sec. 269SS has been explained in Circular No. 387 dated 06.07.1984. "However, in the course of search carried out by the Income Tax Department it is often explained by tax payers as representing loans taken from or deposits made by various persons. Unaccounted income is also brought in the books of accounts in the form of such loans and deposits and tax payers are also able to get confirmatory letters from such persons in support of their explanation. With a view to countering this device which enables tax payers to explain away unaccounted cash or unaccounted deposits the Finance Act has inserted a new section 269Ss in the Income Tax Act debarring persons from taking or accepting any loan or deposit otherwise than by account payee cheque or bank draft." Therefore, it is very clear that the very purpose of introduction of section 269SS is only to avoid

unaccounted income of a person being brought into the books of accounts in the form of loans and deposits and subsequently these loans and deposits being explained as representing loans taken from various persons.

28. The Ld. AR submitted that in the case of the assessee there is no question of any unaccounted income. Employees have received the salary in cash and deposited the same in the co-operative society, which is situated in the same premises. The Ld. AR therefore submitted that each and every deposit made has been identified as belong to a certain employee and repayment has been made by way of account payee cheques only. The circumstances under which deposits have been made in cash in 2007 has been explained by the Company. The Company has also certified that the deposits have been made out of salary payment made in cash. Therefore, it was submitted that the genuineness of the transactions is not in dispute, there is no case that the amounts have not been received by the society nor repayment have not been made by the assessee. The various Courts have held that whenever the transactions are genuine, penalty u/s. 271D and 271E need not be imposed.

29. The Ld. AR also brought to the notice the decisions of the Hon'ble Supreme Court in the case of CIT vs. Bankipur Club Ltd., 226 ITR 97 and in the case of Chelmsford Club vs. CIT, 243 ITR 89 wherein it has been held that there must be a complete identity between the contributors and participators. It is

therefore very clear that the income of the assessee is not taxable under the Income Tax Act.

30. The Ld. AR also drew attention to the Circular No. 387 dated 6.7.1984 and also the decision of the Hon'ble Supreme Court in the case of Assistant Director of Inspection (Investigation) vs. Kum. A.B. Shanthi and Chamundi Granites Pvt. Ltd. vs. DCIT and Another reported in 255 ITR 258 wherein it was held that the object of sec 269SS was to ensure that a taxpayer is not allowed to give false explanation for unaccounted money. The very purpose of introduction of sec. 269Ss and the corresponding sec. 269T is to bring into light unaccounted cash or deposits held by an assessee and avoid it being explained as loans or deposits from others. In the case of the assessee there is no unaccountable income or cash or false information, in a cases repayments are made only by way of account payee cheque. He also drew attention to the decision of the ITAT, Hyderabad Bench in the case of Citizen Co-operative Society Ltd. vs. Addl. CIT, 41 DTR 305.

31. The Ld. AR submitted that money received by assessee co-operative society from its members/directors and their relatives by way of deposits and the sums repaid to them as part of its banking activities cannot be considered as 'loan' or 'deposit' so as to attract section 269SS or section 269T as the assessee is working on the concept o mutuality and its director or member is not covered

by the expression 'any other person' occurring in section 269SS and therefore, penalty u/s. 271D or section 271E is not leviable. More so, when the Assessing officer has accepted the genuineness of such deposits and the assessee was under bonafide belief that the provisions of section 269Ss and 269T are not applicable to it.

32. The Ld. AR referred to the following case law:

1. Addl. CIT vs. Secunderabad Club, 150 ITR 401 (AP)
2. Assistant Director of Inspection (Investigation) vs. Ku. A.B. Shanthi and Chamundi Granites Pvt. Ltd. vs. DCIT and Another, CIT255 ITR 258(SC)
3. Chamundi Granites P. Ltd. vs. DCIT, 239 ITR 694(Kar)
Chandra Cement Ltd. vs. DCIT, 68 TTJ (JP) 35
4. 96 ITR 261 (AP)
5. CIT vs. Nataraj Finance Corporation, 169 ITR 732 (AP)
6. Farrukhabad Investment (I) Ltd. vs. JCIT, 85 ITD 230 (Del)(Agra).
7. Industrial Enterprises vs. DCIT, 73 ITD 252(Hyd)
8. K.P. Varghese vs. I.T.O., 131 ITR 597 (SC)
9. Kerala State Industrial Development Corpn. Ltd. vs. CIT,
259 ITR 51(SC)
10. Orissa State Warehousing Corporation & Rajasthan State Warehousing Corporation vs. CIT, 237 ITR 589 (SC)
11. Padmasundara Rao (Decd.) & Ors. vs. State of Tamil Nadu & Ors.
255 ITR 147(SC)
12. Shrepak Enterprises vs. DCIT, 64 ITD 300 (Ahd)
13. Jalgaon District Central Co-operative Bank Ltd. & Another,
265 ITR 423(Bom)

14. Circular No. 387 dt. 6.9.1984 referred to.

33. The Ld. AR submitted that in that decision, it was held that Director or Members of Society is not covered by the expression "any other person" occurring in section 269SS and the transactions in question cannot be considered as loan or deposit so as to attract section 269SS or section 269T.

34. According to the Ld. AR the expression 'reasonable cause' has to be considered pragmatically and as transactions are openly done to meet the exigencies of business, it can be said to constitute 'reasonable cause'. The bona fide business transaction cannot be considered for levying the penalty u/s. 271D or 271E. More so, the assessee has been carrying on the banking business and is having bona fide belief that provision of section 269SS/269T is not applicable to the assessee's case and same coupled with genuineness of the transaction constituted a reasonable cause and in such case the default on the part of the assessee is merely of a technical or venial nature and no penalty be levied. Therefore, it was submitted that the ratio of the above judgment is directly applicable in the assessee's case.

35. The Ld. AR submitted that there was no question of any unaccounted income, each and every deposit amount had been identified as belonging to certain employees.

36. The Ld. AR submitted that the assessee is only a Co-operative Society of the employees of Hindalco Industries Ltd. The membership is limited only to the employees of the Company. The receipts of deposits are only from members and loans are extended only to members. The assessee is a mutual concern, the principles of Mutuality are applicable and provisions of section 269SS would not apply since the transactions are between members only.

37. The Ld. AR submitted that the assessee had explained the circumstances under which the deposits are received in cash. The Ld. AR relied on the ratio of various judgments of High Court and Supreme Court to convince that the amount is not unaccounted money. The Courts, according to the Ld. AR, have in various cases cancelled the levy of penalty, particularly when the transaction is a genuine transaction and in this case the genuineness has not been disputed.

38. According to the Ld. AR, penalty u/s. 271D and 271E – Contravention of section 269Ss and 269T – Co-operative Society accepting deposits from members and advancing loans to members. Object of section 269SS or 269T is to ensure that a taxpayer is not allowed to give false explanation for his unaccounted money or make some false entries. If the transactions are not impeached as non-genuine or bogus, penalty under section 271D/271E is not leviable. Further, if the assessee had a bona fide belief that the transactions do

not attract the provisions of section 269SS and 269 given the nature of transactions and circumstances, penalty need not be levied. Thus, bona fide belief coupled with genuineness of the transactions constitute reasonable cause for not invoking the provisions of section 271D and 271E.

39. The Ld. AR submitted that the deposits were accepted and repaid by the assessee as part of its banking services. The said deposits were not in the nature of any loan or deposit taken for the purpose of funding a project. These deposits have been accepted as genuine and veracity of the creditors has not been doubted by the Revenue. Breach of provisions of section 269Ss and 269T occurred on account of bona fide belief of the assessee that the provisions of said sections are not applicable to it. Cash payments and receipts were made because of business exigencies. The Ld. AR submitted that it was not established that there is deliberate and intentional violation of the provisions by the assessee in order to hide any income or to evade any payment of tax. As such, there existed reasonable cause for accepting and paying deposits in cash.

40 According to the Ld. AR default on the part of the assessee is merely of a technical or venial nature. Therefore, penalties u/s. 271D and 271E were not leviable.

41. The Ld. AR submitted that the settled position of law is that the provisions dealing with penalty must be strictly construed. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest or acted in conscious disregard of his obligation. Penalty will also not be imposed merely because it is lawful to do. Rather penalty should be imposed for failure to perform a statutory obligation which is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. One of the cardinal principles of the English Criminal Law is expressed in the maxim '*actus non-facit reum, nisi mens sit rea*', that is a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shown that he had a guilty mind. A penalty imposed for a tax delinquency is a civil obligation, remedial coercive in its nature and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal law. Thus the Ld. AR relied on the judgment of the Supreme Court in the case of Hindustan Steel Ltd. vs. State of Orissa, 83 ITR 26.

42. If the assessee is having bona fide belief that it would not attract the penalty provisions, given the nature of transactions and circumstances, the penalty need not be levied. In other words, bona fide coupled with genuineness of the transactions constitute reasonable cause for not invoking provisions of section 271D and 271E.

43. The bona fide transaction cannot be considered for levying penalty u/s. 271D or section 271E. More so, the assessee has been carrying on the banking business and it having bona fide belief that provisions of section 269SS/269T are not applicable to the assessee's case and same coupled with genuineness of the transaction constituted a reasonable cause and in such case the default on the part of the assessee is merely of a technical or venial nature and no penalty be levied.

44. The Ld. AR submitted that section 269SS was inserted by the Finance Act, 1984, w.e.f. 1st April 1984, which lays down the mode of taking and accepting certain loans and deposits. Section 269Ss reads as under:

"269SS –Mode of taking or accepting certain loans and deposits – No person shall after the 30th day of June, 1984 take or accept from any other person, any loan or deposit otherwise than by an account payee cheque or account payee draft if

(a) The amount of such loan or deposit or the aggregate amount of such loan and deposit or

(b) On the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid.

(c) The amount or the aggregate amount referred to in cl. (a) together with the amount of the aggregate amount referred to in cl.(b) is Twenty thousand rupees or more;

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by:

(a) Government.

(b) Any banking company, post office savings bank or co-operative bank;

(c) Any corporation established by a central, State or Provincial Act;

(d) Any government company as defined in section 617 of the Companies Act, 1956.

(e) Such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing notify in this behalf in the Official Gazette;

Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.

Explanation : For the purpose of this Section –

(i) 'banking company' means a company to which the Banking Regulation Act, 1949 910 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act.

(ii) 'Co-operative Bank' shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949).

(iii) 'Loan or deposit' means loan or deposit of money'.

From the above reading it is manifestly clear that after the insertion of the aforesaid, no person should take or accept from any other person any loan or deposit, otherwise than by an account payee cheque or account payee draft if the amount is Rs. 20,000 or more.

It was also observed that the term 'any person' in section 269SS appears to mean persons who are not very intimately or closely connected with the assessee".

45. Further, the Ld. AR submitted that the learned Commissioner of Income-tax(Appeals) had not considered the ratios in various judgments cited by the assessee or given any reasoning why the said judgments were not applicable in the assessee's case and had merely confirmed the penalty order of the learned Addl. Commissioner.

45.1 The Ld. AR. therefore, prayed that the Hon'ble Tribunal may be pleased to set aside the orders of the learned authorities and cancel the levy of penalty.

46. The Ld DR relied on the order of the CIT(A).

47. We have heard both the parties and perused the record. The Ld. AR placed much reliance on the order of the ITAT, Hyderabad 'B' Bench in the case of Citizen Co-operative Society Ltd. vs. Additional Commissioner of Income Tax reported in (2010) 41 DTR (Hyd. Trib.) 305. According to the Ld. AR, the assessee's case is squarely covered by the above order of the Tribunal.

However, we are not in agreement with the Ld. AR on this point. In that case, the Tribunal gave a categorical finding that the assessee is in banking business. Being so, it was natural to accept deposits in the form of cash. The Ld. AR may not have noticed the categorical finding of the Tribunal in the case of Citizen Co-operative Society Ltd. vs. Additional Commissioner of Income Tax, cited supra in para 17 of the order. For the sake of clarity, we reproduce below para 17.

"17. In the present case, assessee is subject to rules laid down by cooperative society Act and the assessee has been carrying out banking operation which are under audit of various authorities and therefore the assessee could not be put at par with the other cases of other concerns since the assessee have no control in respect of the amounts received from the customers in the form of deposits. The customer usually go to the bank to make deposits with an intention of earning interest and the assessee is to maintain the same and the depositor operate those accounts and the deposits repayable on expiry of specific period. There is no dispute in these assessment years that the assessee has been carrying on the banking transactions which may be with or without approval of the Reserve Bank of India. If the carrying on the operations of the banking activities is not at all approved by the Reserve Bank of India or the assessee is having no requisite licence from the authorities, the concerned authorities could have stopped the same or taken action against the assessee. Once the assessee is permitted to carry on the banking activities, then the assessee is bound by the relevant provisions of the Banking Regulations Act. The bank, for all its banking activities is strictly governed by the Banking Regulation Act 1949. 'Banking' is described as accepting, for the purpose of lending or investment of money, due from the public repayable on demand or otherwise and withdrawal by cheque, draft order or otherwise. The deposits held by the assessee are its stock in trade. The deposits and loans are just like buying and selling of goods/products. The amounts in account maintained by the assessee bank were not in the control of the assessee. In the sense that the bank may be required to pay at any point of time. In case of banks, like present assessee, the customer identity required to be taken with proper introduction, photographs and address etc. This is so because, any person from general public can come and open a deposit account with the bank. The acceptance of deposit by this assessee cannot be equated with other kind of assessee. In other cases, normally, deposits are accepted from the people

connected with are known to the depositors. It is in accordance with the terms of Sec.131 of the Negotiable Instruments Act. The customer introduction had to be taken to avoid any kind of fraud. The assessee like present is not obliged to question the source of deposit made by its customers. Also, the customer can keep the deposit for a period which is according to their convenience. The amount has to be repaid by the assessee to its customer immediately on demand. These features distinguish the case of the assessee from other ordinary assessees. Therefore, the provisions of sec.271D/271E to be viewed in the back ground of these aspects. Further, the assessee is subject to periodical inspections and audits by various statutory authorities and in case of any default assessee is liable for having penalty besides cancellation of its licence. This is not the case with other assessees. Further, the assessee has to maintain confidentiality in respect of the information collected by it from its customers, such information is not to be divulged to outsiders. There is no such obligation with other assessee. In spite of this, the assessee has furnished the information as available with it. Now if the address of the customers of the assessee found to be incomplete, this cannot form the basis for levying the penalty. There is no finding by the lower authorities that the assessee violated any guidelines issued by the Regulatory authorities. Usually, the bank was not required to go for detailed verification of addresses, whereabouts of its customers. There is no absolute obligation to assessee to make enquiries about the proposed customer so as to examine the genuineness/sources of the deposits. Bank usually rely in the introduction of any old customer and that if the bank bona fide acted on the reference of a customer, it can avail of the protection under section 131 of the Negotiable Instrument Act. Further, the bank is accepting the deposits and there is no involving of any risk to the bank, even the rule of proper introduction did not operate strictly. It is to be noted that the assessee while doing the business in ordinary course, if it puts various conditions, the expected business may not be able to achieve. Therefore, it cannot be said that assessee did commit any infringement or it is incorrect to say that there was any deliberate attempt on the part of the assessee to accommodate tax dodgers. The deposits accepted and repaid by the assessee were part of its Banking activities and the depositors were its Members. The deposits received by the assessee, which was carrying on the banking business, were not in the nature of taking of any loan or deposits for the purpose of funding its project as a source of investment, that rather, it was in the business of accepting deposits that in view of the nature of such business, the scrutiny of the deposits could not be the same as in the case of assessee making entries of deposits on account of loan etc. The authority vested with the power to impose penalty as a discretionary power not to levy the penalty. It is all very well to paint justice blind, but she does better without a bandage round the eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth and the less dust there is about the better. We made

attempt to examine the truth. We found that there is no addition on account of these impugned deposits in the return of income it means that deposits are genuine. Veracity of creditor not doubted by the Revenue. Assessing officer did accept the deposit as genuine. The breach of provisions of Sections 269SS /269T from a bona fide belief. Ex facie it is a venial breach. The law takes no notice of trivialities. Cash payments and receipts made because of business exigencies. The mere violation of a statutory obligation is not liable for any penalty more so, undisputedly the penal action is quasi criminal nature. The income of the assessee is exempt u/s 80P of the Act and more so, there is no establishment of deliberate and intentional violation of the provisions by the assessee, that too, in order to hide any income or to evade any payment of tax. Usually penalty will not be imposed unless the party concerned has acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation and that penalty will also not be imposed merely because it is lawful to do so. The imposition of penalty for failure to perform statutory obligation is only a discretionary power of the authority exercising judicial functions on consideration of all the relevant circumstances. If the assessee acted on genuine belief that penal provisions have no application to deposits and it applied only to other kind of assessee, then penalty could not be levied. As such, in present case, there exists reasonable cause in accepting the deposits in cash and paying by cash. Assessee may therefore be exonerated from the levy of penalty." .

However, in the present case, it is an admitted fact that the assessee is a society earning income from interest received on loan given to the members and also from the fixed deposits. Being so, it is an admitted fact that when the assessee has not received money as part of banking activity, the judgment of the Tribunal relied upon by the assessee in the case of Citizen Co-operative Society Ltd. cited *supra* cannot be applied.

48. In view of the above, the Tribunal held that the assessee carried on the business at par with banking activities, the provisions of sec. 269SS r.w.s. 271D

cannot be applied. Each case takes colour from its facts. A slightest change in the facts makes a decision different. It is neither desirable nor permissible to pick out a word or sentence from the judgment of the Tribunal, divorced from the context of the question under consideration and treat it to be the complete "law" declared by the Tribunal. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Tribunal. The decision of the Tribunal takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to later case, the Tribunal must carefully try to ascertain true principle laid down by the decision of the Tribunal and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Tribunal, to support their reasoning.

49. Now we would deal with the contention raised by the learned counsel as regards the marginal note of Chapter XX-B which reads as under:

"Requirement as to mode of acceptance, payment or repayment in certain cases to counteract evasion of tax."

It states that the provisions contained in this Chapter are to counteract evasion of tax. The case was made by the learned counsel that since the transactions recorded by the assessee were genuine and the income returned was the assessed income and in the absence of any finding contrary to the genuineness of the transaction by the Assessing officer it was not open to the Assessing

officer to impose penalty u/s. 271D for violation of s. 2569SS. It is no doubt true that the heading of this chapter provides that the sections in this chapter are to counteract the evasion of tax. At the same time, it is equally true that nowhere in the body of s. 269SS or other sections falling in this chapter has it been provided that if the transactions are found to be genuine then the provisions of these sections would not apply. The marginal note only indicates the intention of the legislature and cannot override the clear language incorporated in the sections. It is well-settled that while interpreting the provisions of section the marginal note is not decisive and cannot run contrary to substantive provisions contained therein. Only in case of doubt, the heading can be considered as aid for construction. In the light of this legal position, it is noted that there is no ambiguity in the language of s. 269SS and, therefore, we have no hesitation in holding that the provisions of s. 269SS are not only to counteract the evasion of tax but also to regulate certain transactions of money in a specified form. If the contention of the assessee that no penalty is exigible because genuineness of transaction was not doubted, is accepted, it would lead to anomalous results. It is important to bear in mind that s. 269SS is not to judge the genuineness or otherwise of the credit entries appearing in account books. For this purpose the provisions of s. 68 have been incorporated which deal with unexplained credits appearing in assessee's books of accounts. The provision of s. 269SS are in addition to s.68 and not substitute of it. Both sections have their own separate field to operate in. When a transaction of taking loan or deposit from a person is

held to be ingenuine, obviously the issue would close at the applicability of s.68 itself. On the contrary, s. 269SS does not deal with the genuineness or otherwise of the loans and deposits accepted by the assessee but it only requires the regulation of loans and deposits in a specific manner exceeding a specified limit. As such, we hold that this contention of the learned counsel is bereft of any force and we cannot restrict ourselves to the marginal note of the Chapter XX-B itself.

50. Another contention was also raised by the learned counsel that s.269SS is not applicable where the loans and deposit transactions are with members only. A perusal of s.269SS reveals that it bars any "person" from taking or accepting loan from any other "person" otherwise than by account payee cheque or account payee bank draft on fulfillment of certain conditions. The reference in this section is to a 'person'. Section 2(31) defines "person" to include individual, HUF, company, firm, etc. It thus points out that no person can take or accept loans or deposits subject to the provisions of this section from any other person otherwise than by an account payee cheque or account payee bank draft. In the body of the section we have not seen any stipulation which restrict its application only to entitites outside the ground and family of the assessee. The assessee is a separate person and when it takes or accepts loan or deposits from its members, such other distinct person also comes into picture. One person is giving loan and the assessee-company, another person, is accepting loan. It,

therefore, boils down that two persons are involved in the transaction of accepting loan. To contend that the assessee and its members are one and the same person, is wholly in contravention of the provisions of the Act. Clearly, the members or the directors or their relatives are different persons. In our considered opinion, it is not legally correct to contend that the assessee and its members are one and the same person and the transactions with the members are outside the scope of s. 269S. We have not come across any stipulation in the body of this section to this effect which provides for the inapplicability of this section on transactions between members. We, therefore, hold that in the present case, loan or deposit was involved in cash in excess of the amount specified in the section, we are of the considered opinion that the CIT(A) was justified in confirming the penalty. We confirm the action of CIT(A) on that count also.

51. On the other hand, the assessee made an alternative plea that the assessee is lending money only to its members. Being so, applying the concept of mutuality, provision of section. 269SS cannot be applied. However, we find that this argument of the assessee is also devoid of merits. The Hon'ble Supreme Court had an occasion to consider this mutuality concept in the case of CIT vs. Kumbakonam Mutual Benefit Fund Ltd., 53 ITR 241 (SC) wherein it was held that if the profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. A shareholder in the assessee-company is

entitled to participate in the profits without contributing to the funds of the company by taking loans. He is entitled to receive dividend as long as he held shares. He did not have to fulfil any other condition. His position is in no way different from a shareholder in a banking company, limited by shares. Indeed, the position of the assessee is no different from an ordinary bank except that it lends money and receives dividend from its shareholders which does not by itself make its income any the less income from business.

52. In our opinion, the assessee shall show the reasonable cause for receiving the amount by way of cash and what is the reason for not receiving the deposit by way of account payee cheque or bank draft. If there is a reasonable cause for accepting the deposits in the form of cash, then only the assessee could be exonerated from the levy of penalty 271D of the Act. The assessee was unable to explain any reasonable cause for accepting the deposits in the form of cash. In the absence of any proof to show that there existed a reasonable cause for receiving the amount in cash, it is not possible to come to the conclusion that the assessee is not liable for payment of penalty. The burden is on the assessee to prove that there was reasonable cause for receiving the deposits by way of cash from the various persons. In the absence of any proof, the lower authorities were justified in rejecting the contention of the assessee. The assessee has relied on innumerable decisions to show that penalty not be

levied in the assessee's case. As we have discussed in the earlier para, those decisions are delivered on their own facts and those decisions have no application to the case of the assessee. Thus, all the grounds raised by the assessee in this appeal are dismissed.

53. In the result, the appeal filed by the assessee is dismissed.

Pronounced accordingly on 25-07-2014.

sd/-
(N.R.S.GANESAN)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 25th July, 2014

GJ

Copy to:

1. M/s. Hindalco Employees Co-operative Credit Society Ltd., No. 3304, Alupuram, Kalamassery-683 104.
2. The Addl. Commissioner of Income-tax, Range-4, Kochi.
3. The Commissioner of Income-tax(Appeals)-II, Kochi.
4. The Commissioner of Income-tax, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., COCHIN