

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai
Before Shri B.R. Baskaran (AM)& Ramlal Negi (JM)

I.T.A. No. 139/Mum/2012
(Assessment Year 2006-07)

M/s. Diastar Jewellery Private Limited Plot No. 58 SEEPZ-SEZ Andheri East MUMBAI-400 096. (Appellant)	Vs.	Add. CIT Range 8(1) 2 nd Floor Aayakar Bhavan M.K. Road Mumbai-40 0020. (Respondent)
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PAN No.AAACD1757C

Assessee by	Ms. Neha paranjpe
Department by	Shri B.S. Bist
Date of Hearing	19.7.2016
Date of Pronouncement	3.8.2016

O R D E R

Per B.R. Baskaran (AM) :-

Both the appeals preferred by the assessee are directed against the orders passed by Ld CIT(A)-16, Mumbai confirming the penalties levied u/s 271D and 271E of the Act for accepting and repaying deposits otherwise than by account payee cheques in violation of the provisions of sec. 269SS and 269T of the Act respectively.

2. The assessing officer, during the course of assessment proceedings, noticed that the assessee has received loan/deposits from its director named Shri K.L.Jain on several occasions by way of cash and also repaid them by way of cash. Since those transactions were in violation of the provisions of sec. 269SS & 269T of the Act, the AO sent the proposal to the Addl. CIT for initiating penalty proceedings u/s 271D and 271E of the Act. Accordingly, the addl. CIT initiated the proceedings and levied penalty under both the sections. It is

pertinent to note that the aggregate amount of loan/deposits received by the assessee by way of cash was Rs.2,52,000/- and a sum of Rs.2,12,000/- was repaid by way of cash. Hence the Addl. CIT levied penalty of Rs.2,52,000/- u/s 271D and Rs.2,12,000/- 271E of the Act. The Ld CIT(A) also confirmed the same.

3. The assessee had submitted that the above said amounts were received as Share Application money from one of its directors and it was repaid, since the shares were not allotted. Accordingly it was contended before the tax authorities that the share application money cannot be equated with loan or deposit. However, the tax authorities noticed that the tax auditor has reported the same loan transaction only. Accordingly the tax authorities did not accept the claim of the assessee that the same represents Share application money.

4. Before us, the assessee raised a legal issue, i.e., according to the assessee, the assessing officer has not recorded satisfaction before initiating penalty proceedings u/s 271D and 271E of the Act and hence the impugned penalty orders are liable to be dismissed on this legal ground. In this regard, the Ld A.R placed his reliance on the decision rendered by the Kolkatta bench of ITAT in the case of Binod Kumar Agarwal Vs. JCIT (ITA No.237 & 238/Kol/2013 dated 04-02-2016). We have carefully perused the order passed by the co-ordinate bench and notice that the Tribunal has taken support of the decision rendered by Hon'ble Supreme Court in the case of CIT Vs. Jai Laxmi Rice Mills (2015)(379 ITR 521). We have carefully gone through the order passed by Hon'ble Supreme Court in the above cited case. We notice that, in the case before Hon'ble Supreme Court, the penalty proceedings were initiated by the assessing officer during the course of assessment proceedings and the said assessment order was passed to the best of his judgement u/s 144 of the Act. The said ex-parte order was set aside by Ld CIT(A) and the AO was directed to frame the

assessment de-nova. However, the AO passed penalty order u/s 271D of the Act on the basis of observations made in the original assessment order. The Hon'ble High Court took the view that the proceedings u/s 271D are not independent proceedings and the penalty order would practically submerge, in view of the order passed by the Commissioner of Income tax (Appeals), vide which the original assessment order was set aside and the case was remanded for de nova assessment. Since the AO did not refer to the violation of provisions of sec.269SS and 269T in the set aside proceedings, the Tribunal deleted the penalty and the Hon'ble High Court did not admit the appeal on the ground that no substantial questions of law arise therein.

5. Hence the limited question that was urged before Hon'ble Supreme Court has been stated as under by Hon'ble Supreme Court:-

"In these appeals, we are concerned with the question as to whether penalty proceeding under section 271D of the Income tax Act (hereinafter referred to as "the Act") **is independent of the assessment proceeding** and this question arises for consideration in respect of assessment years 1991-92 and 1992-93."

It can be noticed that the issue urged before the Hon'ble Supreme Court was not related to recording of satisfaction, but to the issue, viz., whether the penalty proceeding u/s 271D is independent of assessment proceeding. Since the original assessment order, in the course of which the impugned penalty proceeding was initiated, had been set aside, the Hon'ble Supreme court upheld the view of the Hon'ble High Court that the penalty proceeding should not have been continued on the strength of the assessment order so set aside. Hence, all the observations made by Hon'ble Supreme Court were related to the question posed before it. In our considered view, the decision of Hon'ble Supreme Court has to be understood in this context. It is well settled proposition of law that it is not permissible to pick up one word or sentence from the judgement in order

to understand the ratio of the decision. The following observations made by Hon'ble Supreme Court in the case of Sun Engineering works (198 ITR 297) explains this position of law:-

"It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment."

6. In the instant case, the original assessment proceedings has not been set aside and the penalty proceedings have been initiated on the basis of facts noted by the AO in the said proceedings. Accordingly, we are of the view that the assessee cannot take support of the decision rendered by Hon'ble Supreme court in the case of Jai Laxmi Rice Mills (supra). Further, the provisions of sec. 271D and 271E also do not require recording of satisfaction.

7. On merits, the Ld A.R submitted that these amounts were received as Share Application money only and the same was wrongly disclosed as Loan account by the Tax auditor. Referring to the Statement of Facts filed before the Ld CIT(A), the Ld A.R submitted that the assessee had taken these amounts from the director of the assessee company to meet the urgent business requirements.

8. The Ld D.R submitted that the explanations given by the assessee have been proved to be wrong and the Ld A.R is making fresh submissions before the bench. Accordingly he submitted that the fresh submissions should not be admitted.

9. We have heard the parties perused the record. We notice that the assessee could not substantiate its explanations that the amounts were received as Share application money. The details of cash received and repaid also shows that the loan/deposit has been received in smaller amounts on various dates. Generally share application money will not be given in piece meal manner and

hence the nature of transactions also does not support the contention of the assessee that they represent Share Application Money.

10. However, from the Statement of Facts filed before the Ld CIT(A), the assessee has submitted as under:-

"The main man behind the company was Mr. K.L.Jain who was the Director of the Company and the entire Company and day to day administration was run by him. He used to keep some cash with him so that any emergency arises then he used to give this cash to company to run the operations smoothly. The cash loan given was every time for emergency purposes like dispatch of goods, worker falling sick and is required to be treated or such similar grounds. As per the requirement of the Act cash loan in emergency can be given as such the penalty levied is not justified."

However, this explanation appears to have not been addressed by the tax authorities. The various case laws have held that the loan/deposit received by way of cash to meet the urgent business requirements can be considered to be a reasonable cause and in that kind of situation the penalty u/s 271D cannot be levied. However, it is the responsibility of the assessee to prove that there was urgent business requirement on the day when the loan/deposit was received by way of cash. The assessee may prove the same on the basis of books of accounts and other documents. Accordingly, we are of the view that this issue relating to penalty levied u/s 271D of the Act may be set aside to the file of the Addl. CIT for fresh examination.

11. In respect of the loan/deposit repaid in cash, the explanation with regard to urgent business requirements shall not apply. However, since the issue relating to penalty levied u/s 271D has been set aside to the file of Addl, CIT, we are of the view that, in the interest of natural justice, the assessee should be provided with one more opportunity to show the reasonable cause in making payment of loan/deposit by way of cash.

12. In view of the foregoing discussions, we set aside both the orders passed by Ld CIT(A) and restore the issue to the file of the Addl CIT with the direction to examine the same afresh by duly considering the explanations and information that may be furnished by the assessee.

13. In the result, both the appeals of the assessee are treated as allowed for statistical purposes.

Order has been pronounced in the Court on 3.8.2016

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 3/8/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS