(2003) 07 GAU CK 0037

Gauhati High Court

Case No: IT Appeal No. 7 of 2001

Commissioner of Income Tax		APPELLANT
	Vs	
Bhagwati Prasad Bajoria (HUF)		RESPONDENT

Date of Decision: July 17, 2003

Acts Referred:

- Income Tax Act, 1961 - Section 269SS, 271D, 273B

Citation: (2003) 183 CTR 484

Hon'ble Judges: P.P. Naolekar, C.J; T. Va(sic)phei, J

Bench: Division Bench

Advocate: K.P. Pathak and U. Bhuyan, for the Appellant; N. Choudhury, S.C. Koyal and S.P. Sarma, for the Respondent

Final Decision: Dismissed

Judgement

P.P. Naolekar, C.J.
The appeal is admitted on the following questions of law :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in upholding the order of the CIT(A) deleting the penalty of Rs. 4,50,000 imposed on the respondent u/s 271D of the Act ?

Whether, on the facts and in the circumstances of the case, the CIT(A) as well as the Tribunal did not err in law in deleting the penalty of Rs. 4,50,000 imposed on the respondent u/s 271D of the IT Act, 1961 ?"

2. The brief and necessary facts of the case are that during a search and seizure operation of the premises of one Umadutta Jhunjunwalla of Shillong large number of promissory notes were found and seized from his residence. Among them three promissory notes were found to have been executed by the assessee Bhagwati Prasad Bajoria, the present respondent. These promissory notes were of the date 15th May, 1995, for Rs. 1,50,000 26th Dec., 1996, for Rs. 2,00,000 and 8th Jan., 1996

for Rs. 1,00,000. The promissory notes were executed by the assessee in favour of Jhunjunwalla for the amount which has been mentioned in the promissory notes to have been taken by him as loan. As the amount has not been paid to the assessee by account payee cheque or account payee bank draft, the penalty proceedings were taken up against the assessee for imposition of penalty u/s 271D of the Act. The AO has found that there was contravention of the provision of Section 269SS of the Act and, therefore, the assessee is liable to pay the penalty. The AO came to the conclusion that the explanation submitted by the assessee is not genuine as he could have taken the loan, if there was a pressing need, from nationalized banks and would not have approached the private money-lender for advancement of the loan amount and imposed penalty of Rs. 4,50,000, being the sum equal to the cash loan taken by the assessee, for failure to comply with the provision of Section 269SS of the IT Act.

3. Aggrieved by the said order the assessee preferred an appeal before the CIT(A), Guwahati. The appellate authority was of the view that as the provision of Section 269SS itself has been declared ultra vires in the decision rendered by the Madras High Court in the case of Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, no penalty proceedings could have been taken for imposition of penalty u/s 271D of the IT Act. The appellate authority has also said that the loan appears to have been taken without following the prescribed mode as provided u/s 269SS of the Act because the assessee was not aware of the rigors of law of requirement of payment of penalty u/s 271D of the Act if the method of taking loan as provided u/s 269SS is not followed. Consequent thereof the appellate authority set aside the order of imposition of penalty against an assessee. Aggrieved by the said order the Revenue preferred an appeal before the Tribunal, Guwahati. The Tribunal accepted the order passed by the appellate authority and dismissed the appeal preferred by the Revenue. While dismissing the appeal in para 5 of the judgment the Tribunal has said that considering the facts of the case that the purpose for which Section 269SS has been introduced, namely, to punish the tax evaders but at the same time not to punish the genuine transaction, and also taking into consideration the fact of the case that the transaction was genuine, there is no need to impose minimum penalty merely because the law required to do so. On this finding the Tribunal has accepted the order passed by the CIT(A).

4. The Revenue being aggrieved by the said order has preferred the present appeal. It is contended by the learned senior counsel for the appellant that in two decisions rendered in K.R.M.V. Ponnuswamy Nadar Sons (Firm) and Others Vs. Union of India and Others, and SUKHDEV RATHI Vs. UNION OF INDIA AND ANOTHER, the constitutional validity of Section 269SS of the Act has been upheld by the Division Benches of the Madras High Court and the Gujarat High Court and thus, the learned Members of the Tribunal as well as the CIT(A) have erred in relying upon the decision rendered in Kumari A.B. Shanthi (Alias) Vennira Adai Ntimala v. Asstt.

Director of Inspection, Investigation (supra). The learned senior counsel also urged that neither the CIT(A) nor the Tribunal has given any reason for exercising the discretion in favour of the assessee for not imposing the penalty and, therefore, a case is made out for remand of the case to the appellate authority for reconsideration of the matter and decision thereon.

5. Section 273B of the IT Act provides that notwithstanding anything contained in the provisions of Section 271D, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the provisions of Section 269SS of the IT Act, if there is a reasonable cause for such failure and if the assessee proves that there was a reasonable cause for failure to take a loan otherwise than by account payee cheque or account payee bank draft and in such circumstances the penalty shall not be levied. In view of this provision it is apparent that there is a discretion left with the authority concerned whether to levy the penalty or not in the given circumstances if the assessee comes and proves a reasonable cause for not accepting the loan by account payee cheque or account payee bank draft. In the matter of Assistant Director of Inspection Investigation Vs. Kum. A.B. Shanthi, the apex Court has reversed the judgment of the Madras High Court in Kumari A.B. Shanthi (alias) Vennira Adai Nirmala Vs. Assistant Director of Inspection, Investigation, wherein the Madras High Court quashed the provision of Section 269SS of the IT Act as ultra vires to the Constitution, That being the case the reasoning given by the CIT(A) and the Tribunal as regards validity of Section 269SS of the Act for not imposing penalty on the assessee could not stand.

6. The apex Court in the matter of Asstt. Director of Inspection (Investigation) v. Kum. A.B. Shanthi (supra) has explained the object of introducing Section 269SS and said :

"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 taxpayer would usually give the explanation that he had borrowed or received deposits from his relatives or friends that 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. As regards the tax legislations, it is a policy matter, and it is for the Parliament to decide in which manner the legislation should be made. Of course, it should stand the test of constitutional validity. The object sought to be achieved was to eradicate the evil practice of making false entries in the account books and later giving explanation for the same."

7. Keeping in view the object of introducing Section 269SS the legislature has given discretion to the assessing authority u/s 273B of the IT Act to levy the penalty as provided u/s 271D of the Act or not. u/s 273B if the Court finds that there was a reasonable and sufficient cause for not imposing the penalty on the assessee in the

given facts and circumstances of the case the penalty shall not be levied.

The facts which emerged in the case are that as the result of advancement of the loan by Umadutta Jhunjunwalla on three different dates the assessee has executed the promissory notes in favour of Umadutta Jhunjunwalla. The transaction of loan has found place in the books of account of the assessee as well as the lender of the loan. None of the authorities have reached to the conclusion that the transaction of the loan was not genuine and it was a sham transaction to cover up the unaccounted money. It appears to us that the assessee felt need of the money and thus he approached the money-lender for advancement of the money, the transaction is reflected in the promissory notes executed by the assessee in favour of the lender. When there is an immediate need of money the person cannot get such money from the nationalized bank to satisfy the immediate requirement. To satisfy the immediate requirement of money the person normally approaches the money-lender or his friend or relative who could lend money to him to satisfy his immediate requirement. In those circumstances it cannot be said that the assessee has entered into a transaction to avoid the payment of tax or to defraud the Revenue. The element of mens rea is not bone out from the nature and the manner in which the transaction was carried out. In these circumstances we do not find any justification or reasonable cause to remand the matter for adjudication afresh by the CIT(A) for consideration of reasonableness within the meaning of Section 273B of the Act. In the facts and circumstances of the case we hold that the Tribunal was justified and correct in law in upholding the judgment of the CIT(A) in deleting the penalty of Rs. 4,50,000 imposed on the assessee u/s 271D of the IT Act, though for the different reasons.

8. The appeal stands dismissed.