Penalty upheld as assessee didn't show reasonable cause for receiving cash deposit in contravention of Sec. 269SS

Summary – The Cochin ITAT in a recent case of Hindalco Employees Co-operative Credit Society Ltd., (the Assessee) held that where reasonable cause for receiving loan or deposit in cash was not established by assessee, levy of penalty under section 271D was to be upheld.

Facts

- The assessee was a co-operative society of the employees of 'H' and the members of the co-operative society were employees of the Company 'H' only.
- During assessment year under consideration, the assessee received fixed deposits in cash in contravention of section 269SS and the Assessing officer finding no reasonable cause of the failure on the part of the assessee as prescribed under section 273B to receive fixed deposits in the form of cash in contravention of section 269SS, levied penalty.
- On appeal, the Commissioner (Appeals) confirmed the penalty under section 271D levied by the Assessing Officer.
- On further appeal, the assessee 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 could not be considered as 'loan' or 'deposit' so as to attract section 269SS or section 269T as the assessee was working on the concept of mutuality and its director or member was not covered by the expression 'any other person' occurring in section 269SS and therefore, penalty under section 271D or section 271E was not leviable. More so, when the Assessing Officer had accepted the genuineness of such deposits and the assessee was under bona fide belief that the provisions of sections 269SS and 269T were not applicable to it.

Held

- According to the assessee, its case is squarely covered by the order of the Tribunal in the case of *Citizen Co-operative Society Ltd.* v. *Addl. CIT* [2010] 41 DTR 305 (Hyd.). However, 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. Whereas, 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.* (*supra*) cannot be applied.
- In view of the above, the Tribunal held that the assessee carried on the business at par with banking activities, the provisions of section 269SS read with section 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.

- It is no doubt true that the heading of Chapter XX-B 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 section 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 section 269SS and, therefore, the provisions of section 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 section 269SS is not to judge the genuineness or otherwise of the credit entries appearing in account books. For this purpose the provisions of section 68 have been incorporated which deal with unexplained credits appearing in assessee's books of account. The provision of section 269SS are in addition to section 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 section 68 itself. On the contrary, section 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.

Applicability of section 269SS where loans and deposit transactions are with members only

- A perusal of section 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 fulfilment 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 there is no

stipulation which restricts its application only to entities 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. Thus, 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 section 269S. There is no stipulation in the body of this section to this effect which provides for the inapplicability of this section on transactions between members. Therefore, in the instant case, loan or deposit was involved in cash in excess of the amount specified in the section, thus, the Commissioner (Appeals) was justified in confirming the penalty.

Application of concept of mutuality - Whether provisions of section 269SS could be applied

- The Supreme Court had an occasion to consider this mutuality concept in the case of *CIT* v. *Kumbakonam Mutual Benefit Fund Ltd.* [1964] 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. Therefore, 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 under section 271D. 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. However, as 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.
- Consequently, the appeal filed by the assessee is dismissed.