

Penalty proceedings couldn't be initiated if assessment proceedings weren't pending before AO

Summary – The Chandigarh ITAT in a recent case of Baldev Singh, (the Assessee) held that In order to exercise power of levy of penalty under section 271D primary condition is that proceedings in respect of assessee for relevant assessment year should be pending before Assessing Officer to come to conclusion that given set of facts and circumstances merit initiation of penalty proceedings

Facts

- A survey under section 133A was conducted at the business premises of the assessee on 10-12-2007. During the course of survey, certain documents were impounded which revealed that the assessee had received loan of Rs. 2 lakhs in cash from 'B' The Assessing Officer took a view that assessee had violated the provisions of sections 269SS and 269T.
- A show-cause notice was issued to the assessee by the Assessing Officer for imposing penalty under sections 271-D and 271-E.
- The plea of the assessee that it had surrendered a sum of Rs. 30.00 lakhs pursuant to the survey and the amount was covered in the said surrender, was rejected by the Assessing Officer as the surrender was for assessment year 2007-08 and the loan was taken and repaid in financial year 2004-05.
- The Commissioner (Appeals) upheld the orders of Assessing Officer in levying penalty under sections 271-D and 271-E.
- On second appeal:

Held

- Penalty under section 271D is leviable, where the assessee has violated the provisions of section 269SS, which provides that no person shall accept loan or deposit exceeding Rs. 20,000 otherwise than by crossed cheque or demand draft. Penalty under section 271D is leviable equal to the amount of such cash loan accepted.
- Further, penalty under section 271E is leviable for violation of provisions of section 269T, which *inter alia* provide that no loan or deposit shall be repaid, except by way of crossed cheque or demand draft, where such loan or deposit exceeds Rs. 20,000. Penalty under section 271E is leviable equivalent to the amount of cash loan or deposit repaid.
- The issue arising in the instant appeal is whether where no proceedings were initiated or pending in respect of the captioned assessment year *i.e.* assessment year 2005-06, penalty proceedings under section 271D or 271E could be initiated, while completing the assessment proceedings relating to assessment year 2007-08. Admittedly the documents evidencing the loan transaction were found during the course of survey proceedings on the business premises of the assessee on 10-1-2007. The assessee had offered additional income of Rs. 30 lakhs, which was included in his return of income.

During the course of assessment proceedings relating to assessment year 2007-08, the assessee was confronted with the documents relating to financial year 2004-05 and asked to show cause as to why penalty proceedings under sections 271D & 271E should not be initiated. No proceedings were initiated or were pending in relation to assessment year 2005-06, except for the show-cause notice given to assessee during the assessment proceeding relating to assessment year 2007-08, for the alleged violation of provisions of sections 269SS and 269T.

- Both the assessment and penalty proceedings are distinct and separate, but the penalty imposable in given set of facts has relevance to the proceedings carried on while completing the assessment in the case of the assessee for the relevant assessment year. Where the information was received by the Assessing Officer pursuant to the survey at the premises of the assessee and admittedly the said information was acted upon by the Assessing Officer by confronting the same to the assessee, the knowledge of the Assessing Officer in such circumstances could not be doubted. The Assessing Officer acted upon the said information by issuing show-cause notice to the assessee during the assessment proceedings relating to assessment year 2007-08, though the information related to assessment year 2005-06. No proceedings by way of reassessment or otherwise were taken up for assessment year 2005-06 in the present case. The penalty proceedings for violation of provisions of sections 269SS and 269T were initiated *vide* assessment order passed under section 143(3) relating to assessment year 2007-08, though the transaction in question was relating to assessment year 2005-06.
- Chapter-XXI of the Act deals with penalty imposable/leviable. Penalty under various sections are imposable by the revenue authorities, where they are satisfied that particular default defined under the respective section/s has been committed by the assessee. The language of section is clear that the penalty can be imposed only if there is violation of one or more of the circumstances mentioned in the section. The levy of penalty for failure to perform statutory obligation prescribed under the Act is a matter of discretion of the authorities to be exercised judicially and on consideration of relevant circumstances and the law laid down by the Apex Court on the issue of levy of penalty. Imposition of penalty in the given set of circumstances is not mandatory but discretionary and in order to exercise its power of levy of penalty under the respective section/s, primary condition is that the proceedings in respect of assessee for the relevant assessment year should be pending before the Assessing Officer to come to the conclusion that the given set of facts and circumstances merit the initiation of penalty proceedings in the case.
- In the facts of the present case, no proceedings were initiated for the financial year 2004-05 *i.e.* assessment year 2005-06, which is the year to which the aforesaid transaction of accepting and payment of the cash loan relates. The show-cause notice was issued to the assessee by the Assessing Officer, however, in the proceedings relating to assessment year 2007-08 and even penalty proceedings were initiated under sections 271D and 271E while completing assessment order relating to assessment year 2007-08. There is no merit in the said initiation of penalty

proceedings under sections 271D and 271E relating to assessment year 2005-06, while completing assessment proceedings relating to assessment year 2007-08.

- In view of above, the penalty levied under sections 271D and 271E is deleted. In the result, assessee's appeal is allowed.