

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA NO.1192/2011**

% **Reserved on : 8<sup>th</sup> November, 2011.**  
**Date of Decision : 21<sup>st</sup> November, 2011.**

THE COMMISSIONER OF INCOME TAX DELHI IV .... Appellant  
Through: Mr. Sanjeev Sabharwal, Advocate

**VERSUS**

I.P.INDIA PVT. LTD. ....Respondent  
Through : Mr. S. Krishnan, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE SANJIV KHANNA**  
**HON'BLE MR. JUSTICE R.V. EASWAR**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

**R.V. EASWAR, J.:**

This is an appeal filed by the Revenue under Section 260A of the Income Tax Act (Act, for short) against the order dated 31<sup>st</sup> March, 2011 of the Income Tax Appellate Tribunal (Tribunal, for short) in ITA 226/Del./2011 relating to the assessment year 2005-06. The following

questions of law, stated to be substantial questions of law have been raised in the appeal :

- “2.1 Whether learned ITAT/CIT(A) erred in deleting the penalty of Rs.18,00,000/- imposed by the Assessing officer under Section 271D of the Income Tax Act, 1961?
- 2.2 Whether ITAT was correct in law in holding that the share application money received in cash is not violation of section 269SS attracting penalty under section 271D of the Income Tax Act, 1961?
- 2.3 Whether the decision of the Hon’ble Jharkhand High Court in the case of M/s Bhalotia Engineering Works Pvt. Ltd. reported at 275 ITR 399 is not applicable in the present case?

2. The respondent assessee is a private limited company. While completing the assessment under Section 143(3) of the Act, the Assessing Officer observed that the assessee received share application monies in cash from three private limited companies as follows :

Sl. No.	Name of the person from whom Share Application Money received	Share Application Money received in “Cash” (in Rs.)
1.	M/s Shekhawat Vanijya Vikas Pvt. Ltd.	6,00,000/-
2.	Udaipuria Commodities Pvt. Ltd.	7,00,000/-
3.	Veena Merchants Pvt. Ltd.	5,00,000/-

3. On the ground that the provisions of Section 269SS of the Act are attracted to the receipt of the above monies in cash, the Assessing Officer was of the view that the assessee was liable to be proceeded against for levy of penalty under Section 271D. He referred to the judgment of the High Court of Jharkhand in *M/s Bhalotia Engineering Works Pvt. Ltd. (2005) 275 ITR 399* where it was held that receipt of share application monies in cash, in violation of Section 269SS of the Act should be treated as “deposits” with the consequence that the assessee would be liable for penalty under Section 271D. In this view of the matter, he referred the matter to the Additional Commissioner of Income Tax, Range 11, New Delhi, who was the appropriate authority to levy the penalty. Before the Additional Commissioner of Income Tax, the assessee submitted a written reply dated 1<sup>st</sup> August, 2008 and contended that there was no violation of the provisions of Section 269SS as it had not accepted any loan or deposit in cash. It was claimed that the receipt of share application monies in cash did not amount to acceptance of loan or deposit by the company. These submissions were, however, rejected by the Additional Commissioner of Income Tax, who by a brief order dated 28<sup>th</sup> August, 2008 imposed the penalty of Rs.18,00,000/- under Section 271D.

4. The assessee filed an appeal before the CIT(A) repeating the arguments advanced before the Additional Commissioner of Income Tax. In addition, the assessee relied on the judgment of the Madras High Court in *Commissioner of Income Tax Vs. Rugmini Ram Ragav Spinners (P)*

*Ltd.* (2008) 304 ITR 417 where it was held that the money in cash by a company towards allotment of shares, was neither a loan nor a deposit. The CIT(Appeals) considered the submissions of the assessee in detail and held that there was no violation of Section 269SS since the share application monies received by the assessee company would not amount either to a loan or a deposit within a meaning of Section 269SS. He further noted that the shares have in fact been subsequently allotted to the three companies, who advanced the monies to the assessee. In this view of the matter he cancelled the penalty and allowed the assessee's appeal.

5. The Revenue filed an appeal before the Tribunal. The Tribunal in para 6 of its order noted that there was a cleavage of judicial opinion on the question whether the share application monies could be treated as a deposit or loan within the meaning of Section 269SS as could be seen from the judgments of the Jharkhand and Madras High Court (supra) and in view of the divergence of judicial opinion, the assessee's plea to the effect that receipt of monies in cash against allotment of shares cannot termed as loans or deposits would be sufficient to drop the penalty. In this behalf the Tribunal relied on the judgment of the Supreme Court in *CIT vs. Vegetable Products Ltd* (1973) 88 ITR 192 (SC) in which it was held that if the Court finds that a taxing provision or penalty provision is ambiguous or can give rise to more than one meaning, then it should adopt that meaning which favours the assessee. Relying on this judgment of the Supreme Court, the Tribunal held that since there was more than

one view on the applicability of Section 269SS to monies received as share application monies, the CIT(Appeals) had rightly cancelled the penalty. The appeal filed by the Revenue was thus dismissed.

6. The revenue has raised the questions of law extracted above. The facts are not in dispute. On these facts, the question is whether any substantial question of law arises from the order of the Tribunal cancelling the penalty.

7. Section 269SS prohibits any person from accepting a loan or deposit in cash exceeding Rs.20,000 in the aggregate in a year from a third person. If there is any violation, the person receiving the loan or deposit will be liable to penalty u/S.271D in an amount equal to the amount of the loan or deposit. A loan or deposit is defined in the Explanation below Sec.269SS as a “loan or deposit of money”. The assessee’s contention, accepted both by the CIT(A) and the Tribunal, is that share application monies received by a company, pending allotment of shares, do not amount to loan or deposit.

8. On a careful consideration of the matter, we find that the AO has relied on the judgment of the Jharkhand High Court (supra) and referred the issue of levying penalty to the Additional CIT. He did not examine whether the share application monies can be treated as “loan” or “deposit” within the meaning of Section 269SS. The Additional CIT has merely endorsed the view of the AO in passing the penalty order. The CIT(A) has

found as a fact that the shares were subsequently allotted to the applicant-companies as shown by the form filed before the Registrar of Companies. Neither the AO nor the Additional CIT has taken the trouble to examine this aspect while imposing the penalty. They have merely relied on the judgment of the Jharkhand High Court (supra). The reliance on this judgment appears to us to be misplaced. In ***Baidya Nath Plastic Industries (P) Ltd. and Ors vs K.L. Anand*** (1998) 230 ITR 522, a learned Single Judge of this court pointed out that the distinction between a loan and a deposit is that in the case of the former it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement while in the case of a deposit it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for it. This judgment was approvingly cited by a Division Bench of this court in ***Director of Income Tax (Exemption) vs ACME Educational Society*** (2010) 326 ITR 146 (Del). In this decision, it was held that a loan grants temporary use of money, or temporary accommodation, and that the essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it has been made, on fulfillment of certain conditions. If these tests are applied to the facts of the case before us, it may be seen that the receipt of share application monies from the three private limited companies for allotment of shares in the assessee-company cannot be treated as receipt of loan or deposit. In any case, the Tribunal has rightly noticed the cleavage of judicial opinion on the point and held that in that situation there was

reasonable cause u/S.273B, applying the judgment of the Supreme Court in *Vegetable Products* (supra).

9. We are accordingly of the view that no substantial question of law arises from the order of the Tribunal. We decline to admit the appeal. The same is dismissed with no order as to costs.

**(R.V. EASWAR)**  
**JUDGE**

**(SANJIV KHANNA)**  
**JUDGE**

**NOVEMBER 21, 2011**  
vld