

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'C' AHMEDABAD**

**ITA No.1939-1940/Ahd/2009
Assessment Year: 2003-2004**

**GROWTH AVENUES LTD
409, SUPER TEX TOWER
OPP KINNERY CINEMA
RING ROAD, SURAT
PAN NO:AAACG8681Q**

Vs

**JOINT COMMISSIONER OF INCOME TAX
RANGE-1, SURAT, AAYKAR BHAVAN
MAJURA GATE, SURAT**

G D Agarwal, VP (AZ) and Shri D K Tyagi, JM

Dated: May 19, 2011

**Appellant Rep by: Shri J P Shah, SR-AR
Respondent Rep by: Shri Rajesh Ojha, SR-DR**

Assessee's appeal allowed

ORDER

Per: D K Tyagi:

These are two assessee's appeals against the order of Ld. Commissioner of Income-tax(Appeals)-I, Surat of even date i.e. 31-03-2009 for the assessment year 2003-04.

First we take up ITA No.1939/Ahd/2009.

2. The assessee has taken following ground: -

"1. That on facts and circumstances of the case, the learned CIT(A) has erred in conforming penalty of Rs.25,00,000/ u/s.271E of the Act which is absolutely erroneous and bad in law requiring outright annulment."

3. The brief facts of the case as emerged from the order of Ld. CIT(Appeals) are that a search operation u/s.132 was carried out at the residence of Shri Kirtibhai K Shroff (KKS for short), wherein it was found that the assessee had repaid loan of Rs.25 lakh to Shri KKS in cash. The JCIT therefore issued a notice u/s.271E r.w.s.s 269T requiring it to show cause as to why penalty u/s.271E be not levied. The assessee replied that Shri KKS was sub-broker of the assessee-company and had regular dealings with the assessee-company in this regard. As a part of business agreement, Shri KKS had agreed to pay the assessee-company a security deposit for which the assessee-company had executed promissory note in his favour. However, as against

the promissory note given by the assessee-company cheques of only Rs.6 lakh was cleared on 11-07-2003 in the account of the assessee company and the balance amount was pending. This promissory note was executed for the safety point of view by the said Shri KKS against the payments to be made by him during the regular business dealings. The assessee stated that however the actual payment received was only Rs.6 lakh that too through account payee cheque. It was submitted by assessee-company that even during the course of recording of preliminary statement of one of the Directors of the company, Mr. Viren Shah before the Revenue, he had categorically stated that he had received only Rs.6 lakh by account payee cheque against the promissory note and the balance amount was pending. In view of this reason, the assessee contended that there was no violation of provisions of Section 269T. Without prejudice to this argument, the assessee also submitted that if the amount has not been recorded in the regular books of account the Revenue cannot resort to penalty proceedings u/s.271D/271E by alleging the amount as undisclosed. The assessee also placed reliance on the decision of Hon'ble Delhi High Court in the case of *CIT v. Standard Brands Ltd. (2006) 285 ITR 295 (Del)*, wherein it was held that Revenue having taken this stand that the alleged deposit was undisclosed and thereby unaccounted taken resort to penalty proceedings u/s.271D. The assessee also relied on the decision of ITAT Mumbai in the case of *DCIT v. G.S. Entertainment (2007) 109 TTJ 54 (Mum)*, wherein it was held that the penalty levied u/s.271D in respect of amount added as undisclosed income is invalid.

4. This explanation of the assessee was not accepted by Assessing Officer on the ground that during the course of search at the residence of Shri KKS by the promissory notes of Rs.5 lakh each totaling to Rs.25 lakh were found and Shri KKS had stated in his statement recorded u/s.132(4) in reply to Question No.22 that he had given an amount of Rs.25 lakh to M/s Growth Avenues Ltd. on 23-01-2003. It was also stated by him that these five promissory notes were in respect of said amount. In reply to Question No.2 of his statement recorded on 25-01-2005 Shri Samair K Shrof stated that loan of Rs.25 lakh given to Growth Avenues Ltd. had been received back which had given out the unaccounted income, which clearly indicated that the assessee had accepted the loan of Rs.25 lakh and repaid the same in cash. It was also mentioned by the Assessing Officer that in view of reply at Question No.22 of Shri KKS of his statement recorded u/s.132(4) the contention of the assessee that the promissory notes were executed for safety points has no relevance. According to him, Shri KKS has clearly made a statement u/s.132(4) that promissory note found during the course of search in respect of Rs.25 lakh given as loan to the assessee-company. This is further reinforced by the reply to Question No.2 of the statement recorded on 25-01-2005 where Shri Samirbhai K Shroff stated that loan of Rs.25 lakh given to the assessee-company was received back which was given out of unaccounted income. The assessee failed to bring any evidence on the record to show that promissory notes were issued against regular business dealings and not for obtaining loans. The legal position of statement u/s.132(4) is that a person who is in possession of the evidence has to explain the same. The presumption is that these documents/evidences were true and the genuineness is cast on the assessee to disprove the same or prove it otherwise. The Assessing Officer further stated that the decision of Hon'ble Delhi High Court in the case of *Standard Brands Ltd. (supra)* and the decision of ITAT Mumbai Bench in the case of *G.S. Entertainment (supra)* were not applicable in the present case of assessee as they are regarding treating undisclosed income in the hands of the assessee and also initiating proceedings for violation of Section 269SS/271D. In the present case, the amount of Rs.25 lakh has not been taxed as undisclosed income in the hands of Growth Avenues Ltd. and therefore decisions are not applicable on the facts of the

assessee's case. The AO therefore stated that Section 269T envisages that no person shall repay any loan or deposit to any other person otherwise by any account payee cheque of account payee bank draft and if the amount of such loan or deposit is Rs.20,000/- or more than the penalty u/s.271E would be levied equal to the loan or deposit amount. The assessee has repaid the loan of Rs.25 lakh in cash in contravention of the provisions of Section 269T. The AO therefore levied penalty of Rs.25 lakh u/s.271E for violating the provisions of Section 269T.

5. Aggrieved by this order assessee went in appeal before Ld. CIT(A). It was submitted on behalf of assessee that Assessing Officer has levied the penalty merely on the basis of statement of Shri KKS without there being any other evidence. It was further argued that the statement of Shri KKS was not relevant that it was against logic and facts because if cash was repaid promissory notes would be taken back by the borrower and they could not be found in his possession. No borrower would leave the promissory note with the lender once the amount was repaid. It was further argued on behalf of assessee that the statement taken at the back of the assessee cannot be relied upon without providing opportunity of cross-examination. In this regard reliance was placed on the decision of Hon'ble Punjab & Haryana in the case of *CIT v. Arjun Dass Surinder Kumar And Co. (1999) 239 ITR 859 (P & H)*, wherein the Hon'ble High Court held that the statement not confronted to the assessee cannot be relied upon for adverse inferences. The assessee also relied on the decision of ITAT Amritsar Bench in the case of *Raajesh Mehta v. ITO (2006) 100 TTJ 453 (Asr)* in this regard. The presumption u/s 132(4) cannot be resorted to since no evidence was found in the possession of the assessee. It was further argued that promissory notes were not found in the possession of assessee and hence provisions of Section 132(4A) were not applicable to the assessee in this regard. The assessee relied on the decision of ITAT Vishakapatnam in the case of *Smt. Bommana Swarna Rekha v. ACIT (2005) 94 TTJ 885 (Visakha)*, wherein it was held that presumption u/s.132(4A) was available only against the person from whose possession the document was found.

6. The Ld. CIT(A) in order to this submission of the assessee to Assessing Officer for giving cross-examination of Shri KKS and thereafter submitting to his remand report. In the remand report, the Assessing Officer stated that five promissory notes of Rs.5 lakh each was found during the course of search operation at the residence of Shri KKS. These promissory notes were issued by Shri Rakesh Doshi and Shri Viren Shah, who were the Directors of the assessee-company to Shri KKS on 23-01-2003 against receipt of cash. In the statement recorded u/s 132(4) in response to Question NO.22 Shri KKS clearly stated that an amount of Rs.25 lakh in cash was given on 23-01-2003 to Growth Avenues Ltd. and the promissory notes were found in respect of said amount Shri Viren Shah, Director of the assessee-company was also questioned and in his statement recorded on 07-07-2005 stated in reply to Question No.11 that he had received only Rs.6 lakh by cheque and the promissory notes of Rs.25 lakh were issued in good faith. In reply to Question No.22 of his statement dated 25-01-2005 Shri SSK stated that a sum of Rs.25 lakh had been received back. During the remand proceedings, the crossexamination of Shri KKS was carried out by Shri Viren Shah on 24-12-2008 and in this cross-examination Shri KKS repeated his earlier statement that he had given loan of Rs.25 lakh in cash and the same had been received back in cash to Shri Viren Shah and Shri Rakesh Doshi. Shri KKS further stated that promissory notes had remained with him even after repayment of loan in good faith. This copy of this remand report was given to assessee for his comments. The assessee in his counter comments who repeated the same arguments and we have already mentioned and also placed reliance on the same decision which have

also been recorded by us. It was further argued that during the cross-examination the assessee had stated that amount was given to Mr. Viren Shah and Shri Rakesh Doshi and it was returned by them. Shri KKS has made no allegation against the assessee-company and therefore the penalty should not be levied on the assessee-company.

7. After taking into the submissions of assessee, the remand report of the Assessing Officer and counter-comments of the assessee on this remand report Ld. CIT(A) confirmed this penalty by observing as under: -

"2.3.1 I have considered the submission made by the appellant and the observation of the A.O. The facts in this case are very clear. Five promissory notes of Rs. Five lakhs each were found during the course of search operation at the residence of Shri Kirtibhai K Shroff. These promissory notes were issued by Shri Rakesh Doshi and Shri Viren Shah, who are the Directors of the assessee company to Shri Kirtibhai K Shroff on 23.01.2003 against receipt of cash. In the statement recorded u/s.132(4) in response to question No.22, Shri Kirtibhai K. Shroff had clearly stated that an amount of Rs.25,00,000/ in cash was given on 23.01.2003 to Growth Avenues Ltd. and the promissory notes found were in respect of said amount. Shri Viren Shah, Director of the appellant company was also questioned and in his statement recorded on 07.07.2005 stated in reply to question No. 11 that he had received only Rs.6,00,000/p- by cheque and the promissory notes of Rs.25,00,000/- were issued in good faith. Further in reply to question No.22 of statement dated 25.01.2005, Shri Samairbhai K Shroff stated that sum of Rs.255,00,000/p had been received back. Even during the remand proceedings, the cross-examination of Shri Kirtibhai K Shroff was carried out by Shri Viren Shan on 24.12.2008 and in this crossexamination Shri Kirtibhai K Shroff repeated his earlier statement that he had given loan of Rs.25,00,000/- in cash and the same had been received back in cash through Shri Viren Shah and Shri Rakesh Doshi. Shri Kirtibhai K Shroff further stated that the promissory notes have remained with him even after repayment of loan in good faith. The relevant portion of the cross examination is as under: -

'Q.1 Please clarify the statement as given by you in respect of my promissory notes found from your possession during the course of search at your premises?

A.1 I have stated that I have given loan to Mr. Viren Shah and Rakesh Doshi of Rs.25 lakcs for which promissory notes were obtained. I don't remember the exact date since the same have been given around 5 to 6 years back.

Q.2 Whether the promissory notes were in the name of the company Growth Avenues Ltd. or in the individual name?

A.2 It was in the individual name of Viren Shah and Rakesh Doshi.

Q.3 Have the loan given by you is repaid to you or not?

A.3 Yes I have received back the loan.

Q.4 When was the loan repaid to you and how?

A.4 I do not remember the exact dated \e and the said loan was repaid I cash.

Q.5 By whom was the loan repaid to you?

A.5 The loan was repaid by Shri Viren Shah and Rakesh Doshi.

Q.6 Do you have any receipt or any other evidence in respect of loan given or received back?

A.6 No apart from promissory note I have no other evidence.

Q.9 Whether you or your family members or any of your concern have any business relation or business transaction with me personally or my company Growth Avenue Ltd. in connection with which the promissory note was executed?

A.9 The promissory note was executed only on account of loan transaction and not for anything else. As regards business relation I would like to state that I do not have any business transaction with you or your company to the best of my knowledge. As regards business relation of my family members I would like to state that I do not exactly remember any thing as regards business transactions of my family member."

2.3.2 From the above it is clear that the cash transaction of giving loan to the assessee company and the assessee company repaying the same in cash has been established not only by the fact that the promissory notes were issued which are not denied by the appellant company but also by the cross-examination statement recorded by Shri Viren Shah, Director of the appellant company. Mr. Viren Shah could not rebut the statement made by Shri Kirtibhai K Shah who reiterated during the cross-examination what he had stated earlier. Since the fact of receiving and repaying the loan in cash has been established the decision of the Hon'ble Delhi High Court in the case of Standard Brand Ltd. (supra) and the decision of the Hon'ble I.T.A.T., Mumbai in the case of G.S. Entertainment (supra) are not applicable because this is not a case where the A.O has treated the same amount as undisclosed income of the appellant as well as levied penalty for receiving the amount in cash as loan/deposit. In the case of Standard Brand, the facts and decision of the Hon'ble High Court is as under:-

'The assessee received an amount of Rs 3 lakhs in cash from a company which was in violation of section 269SS of the Income tax Act, 1961. According to the assessee, it was a deposit by the Assessing Officer treated the amount as undisclosed income of the assessee and initiated penalty proceedings against the assessee under section 271D. The Commissioner (Appeals) confirmed the penalty. In the quantum issue, the Commissioner (Appeals) held that the addition under section 158BC could not be sustained and that the Assessing Officer could have taken action under section 147. The Tribunal upheld the view taken by the Commissioner (Appeals) in the quantum appeal and held that the receipt was outside the scope of undisclosed income defined under section 158B(b) and dismissed the Departments appeal. On appeal:

Held, dismissing the appeal, that the Revenue having taken the stand that the amount was undisclosed income in the hands of the assessee, it could not resort to proceedings under section 269SS read with section 271D. Since the block assessment could not be sustained, penal action may be permissible (if at all) only after a regular assessment was made. No substantial question of law arose in the appeal.'

2.3.3 From the above decision, it is seen that the A.O in the case of Standard Brand had not only treated the amount as loan received but had also treated the amount as assessee's own undisclosed income. Both the stands are contradictory and, therefore, the penalty was deleted. In fact, the Hon'ble High Court observed that the penal action may be permissible once the regular assessment was made. The provisions of Section 269SS and 269T r.w.s. 271D & 271E were brought on this statute to prevent laundering of unaccounted money. In the present case, it is established that the assessee had taken cash loan of Rs.25,00,000/p and repaid the same thereby violating the provisions of Section 269SS and 269T inviting upon itself the penal provisions of Section 271D & 271E. Therefore, the penalty levied by the Jt. CIT u/s.271E is confirmed and the ground of appeal is dismissed."

8. Further aggrieved by this order of Ld. CIT(A) now assessee is in appeal before us.

9. After hearing both the parties and perusing the record we find that five promissory notes of Rs.5 lakh each were found during the course of search operation at the residence of Shri KKS. These promissory notes were issued by Shri Rakesh Doshi and Viren Shah Shri KKS against receipt of cash. In the statement recorded u/s.132(4) in response to Question No.22 Shri KKS stated that an amount of Rs.25 lakh in cash was given on 23-01-2003 to Growth Avenues Ltd. and the promissory notes were in respect of that amount. However, during the remand proceedings, the cross-examination of Shri KKS was carried out by Shri Viren Shah on 24-12-2008. In this cross-examination, Shri KKS in reply to Question No.1 has categorically stated that he had given loan to Shri Viren Shan and Rakesh Doshi of Rs.25 lakh for which promissory notes were obtained. In reply to Question No2 he mentioned that promissory notes were in the name of individuals and not in the name of Growth Avenues Ltd.. In reply to Question No.5 he has mentioned that the loan was repaid by Shri Viren Shah and Rakesh Doshi. It is clear from this that assessee-company neither took any loan from Shri KKS nor repaid any amount to him in cash. The provisions of Section 271E which read as under: -

"271E If a person repays any [loan or] deposit referred to in section 269T otherwise than in accordance with the provisions of that section, he shall be liable to pay, by way of penalty, a sum equal to the amount of the [loan or] deposit so repaid."

It is clear that penalty u/s.271E can be levied against the person who has repaid any loan or deposit referred to in Section 269T otherwise than in accordance with the provisions of that Section. Since in this case there is no such violation on the part of assessee-company the penalty cannot be levied against it. If at all there is any violation of the provisions of Section 269T, it was on the part of Shri Rakesh Doshi and Viren Shah as is clear from the cross-examination of Shri KKS. In view of this, the penalty imposed by Assessing Officer u/s.271E/269T and sustained by Ld. CIT(A) is hereby deleted.

Now coming to ITA No.1940/Ahd/2009.

10. The assessee has taken the following ground: -

"1. That on facts and circumstances of the case, the Learned CIT(A) has erred in confirming penalty of Rs.25,00,000/- u/s.271D of the Act which is absolutely erroneous and bad in law requiring outright annulment."

11. The brief facts of the case as emerged from the order of Ld. CIT(A) are that a search operation was carried out at the residence of Shri KKS u/s. 132, wherein it was found that the assessee had accepted a loan of Rs.25 lakh from Shri KKS in cash. The JCIT issued a notice u/s.271D r.w.s. 269SS requiring it to show cause as to why penalty u/s.271D be not levied. The assessee replied that Shri KKS was sub-broker of the assessee-company and had regular dealings with the assessee-company in this regard. As a part of business agreement, Shri KKS had agreed to pay the assessee-company a security deposit for which the company had executed promissory note in his favour. However, as against the promissory note given by the assessee-company cheques of only Rs.6 lakhs were cleared on 11-07-2003 in the account of the assessee-company and the balance amount was pending. This promissory note was executed for the safety point of view by the said broker against the payments to be made by him during the regular business dealings. It was submitted by assessee-company that the actual payment received was only Rs.6 lakh that too through account payee cheque and even during the course of recording of preliminary statement of one of the Directors of the assessee-company, Mr. Viren Shah before the Revenue had categorically stated that he had received only Rs.6 lakh by account payee cheque against the promissory note and the balance amount was pending. In view of this reason, the assessee contended that there was no violation of provisions of Section 269SS. Without prejudice to this argument, the assessee also submitted that if the amount has not been recorded in the regular books of account, the Revenue cannot resort to penalty proceedings u/s.271D/271E by alleging the amount as undisclosed. The assessee relied on the decision of the Hon'ble Delhi High Court in the case of Standard Brands Ltd. (supra), wherein it was held that the Revenue having taken this stand that the alleged deposit was undisclosed and thereby unaccounted taken resort to penalty proceedings u/s.271D. Again assessee also relied on the decision of ITAT Mumbai in the case of G.S. Entertainment (supra), wherein it was held that the penalty levied u/s.271D in respect of amount added as undisclosed income is invalid.

12. This explanation of the assessee was not accepted by Assessing Officer on the ground that during the course of search at the residence of Shri KKS by the promissory notes of Rs.5 lakh each totaling to Rs.25 lakh were found and Shri KKS had stated in his statement recorded u/s 132(4) in reply to Question No.22 that he had given an amount of Rs.25 lakh to M/s Growth Avenues Ltd. on 23-01-2003. It was also stated by him that these five promissory notes were in respect of said amount. In reply to Question No.2 of his statement recorded on 25-01-2005, Shri Samir K Shroff stated that loan of Rs.25 lakh given to M/s. Growth Avenues Ltd had been received back which had given out the unaccounted income, which clearly indicated that assessee had accepted the loan of Rs.25 lakh and repaid the same in cash. It was also mentioned by the Assessing Officer that in view of reply at Question No.22 of Shri KKS of his statement recorded u/s 132(4) the contention of the assessee that the promissory notes were executed for safety points has no relevancy. According to him, Shri KKS has clearly made a statement u/s.132(4) that promissory note found during the course of search in respect of Rs.25 lakh given as loan to the assessee-company. This is further reinforced by the reply to Question No.2 of the statement recorded on 25-01-2005 where Shri Samirbhai K Shroff stated that loan of Rs.25 lakh given to the assessee company was received back which was given out of unaccounted income. The assessee failed to bring any evidence on the record to show that promissory notes were issued against regular business dealings and not for obtaining loans. The legal position of the statement u/s.132(4) is that a person who is in possession of the evidence has to explain the same. The presumption is that these documents/evidences were true and the genuineness is

cast on the assessee to disprove the same or prove it otherwise. The AO further stated that the decision of Hon'ble Delhi High Court in the case of Standard Brands Ltd. (supra) and the decision of ITAT Mumbai Bench in the case of G.S. Entertainment (supra) were not applicable in the present case of assessee as they are regarding treating undisclosed income in the hands of the assessee and also initiating proceedings for violation of Section 269SS/271D. In the present case, the amount of Rs.25 lakh has not been taxed as undisclosed income in the hands of Growth Avenues Ltd. and therefore decisions are not applicable on the facts of the assessee's case. The AO therefore stated that Section 269T envisages that no person shall take or accept any loan deposit from any other person otherwise by any account payee cheque or account payee bank draft and if the amount of such loan or deposit of Rs.20,000/- or more then penalty u/s.271D would be levied equal to the loan or deposit amount. The assessee has accepted loan of Rs.25 lakh in cash in contravention of provision of Section 269SS. The AO therefore levied the penalty of Rs.25 lakh u/s.271D for violating the provision u/s.269SS.

13. Aggrieved by this order assessee went in appeal before first appellate authority. It was submitted on behalf of assessee that Assessing Officer has levied the penalty merely on the basis of statement of Shri KKS without there being any other evidence. It was further argued that the statement of Shri KKS was not relevant that it was against logic and facts because if cash was repaid promissory notes would be taken back by the borrower and they could not be found in his possession. No borrower would leave the promissory note with the lender once the amount was repaid. It was further argued on behalf of assessee that the statement taken at the back of the assessee cannot be relied upon without providing opportunity of cross-examination. In this regard reliance was placed on the decision of Honble Punjab & Haryana High Court in the case of Arjun Dass Surinder Kumar And Co. (supra), wherein the Hon'ble High Court held that the statement not confronted to the assessee cannot be relied upon for adverse inferences. The assessee also relied on the decision of ITAT Amritsar Bench in the case of Rajesh Mehta (supra). The presumption u/s.132(4) cannot be resorted to since no evidence was found in the possession of the assessee. It was further argued that promissory notes were not found in the possession of assessee and hence provisions of Section 132(4A) were not applicable to the assessee in this regard. The assessee relied on the decision of ITAT Vishakaptnam in the case of Smt. Bommana Swarna Rekha (supra), wherein it was held that presumption u/s.132(4A) was available only against the person from whose possession the document was found.

14. The Ld. CIT(A) in order to this submission of the assessee to Assessing Officer for giving cross-examination of Shri KKS and thereafter submitting to his remand report. In the remand report, the Assessing Officer stated that five promissory notes of Rs.5 lakh each was found during the course of search operation at the residence of Shri KKS. These promissory notes were issued by Shri Rakesh Doshi and Shri Viren Shah, who were the Directors of the assessee-company to Shri KKS on 23-01-2003 against receipt of cash. In the statement recorded u/s 132(4) in response to Question NO.22 Shri KKS clearly stated that an amount of Rs.25 lakh in cash was given on 23-01-2003 to Growth Avenues Ltd. and the promissory notes were found in respect of said amount Shri Viren Shah, Director of the assessee-company was also questioned and in his statement recorded on 07-07-2005 stated in reply to Question No.11 that he had received only Rs.6 lakh by cheque and the promissory notes of Rs.25 lakh were issued in good faith. In reply to Question No.22 of his statement dated 25-01-2005 Shri SSK stated that a sum of Rs.25 lakh had been received back. During the remand proceedings, the cross-examination of Shri KKS

was carried out by Shri Viren Shah on 24-12-2008 and in this cross-examination Shri KKS repeated his earlier statement that he had given loan of Rs.25 lakh in cash and the same had been received back in cash to Shri Viren Shah and Shri Rakesh Doshi. Shri KKS further stated that promissory notes had remained with him even after repayment of loan in good faith. This copy of this remand report was given to assessee for his comments. The assessee in his counter comments who repeated the same arguments and we have already mentioned and also placed reliance on the same decision which have also been recorded by us. It was further argued that during the cross-examination the assessee had stated that amount was given to Mr.Viren Shah and Shri Rakesh Doshi and it was returned by them. Shri KKS has made no allegation against the assessee-company and therefore the penalty should not be levied on the assessee-company.

15. After taking into the submissions of assessee, the remand report of the Assessing Officer and counter-comments of the assessee on this remand report Ld. CIT(A) confirmed this penalty by observing as under: -

"2.3.1 I have considered the submission made by the appellant and the observation of the A.O. The facts in this case are very clear. Five promissory notes of Rs .Five lakhs each were found during the course of search operation at the residence of Shri Kirtibhai K Shroff. These promissory notes were issued by Shri Rakesh Doshi and Shri Viren Shah, who are the Directors of the assessee company to Shri Kirtibhai K Shroff on 23.01.2003 against receipt of cash. In the statement recorded u/s.132(4) in response to question No.22, Shri Kirtibhai K. Shroff had clearly stated that an amount of Rs.25,00,000/ in cash was given on 23.01.2003 to Growth Avenues Ltd. and the promissory notes found were in respect of said amount. Shri Viren Shah, Director of the appellant company was also questioned and in his statement recorded on 07.07.2005 stated in reply to question No. 11 that he had received only Rs.6,00,000/p- by cheque and the promissory notes of Rs.25,00,000/- were issued in good faith. Further in reply to question No.22 of statement dated 25.01.2005, Shri Samairbhai K Shroff stated that sum of Rs.255,00,000/p had been received back. Even during the remand proceedings, the cross-examination of Shri Kirtibhai K Shroff was carried out by Shri Viren Shan on 24.12.2008 and in this cross examination Shri Kirtibhai K Shroff repeated his earlier statement that he had given loan of Rs.25,00,000/ in cash and the same had been received back in cash through Shri Viren Shah and Shri Rakesh Doshi. Shri Kirtibhai K Shroff further stated that the promissory notes have remained with him even after repayment of loan in good faith. The relevant portion of the cross examination is as under: -

'Q.1 Please clarify the statement as given by you in respect of my promissory notes found from your possession during the course of search at your premises?

A.1 I have stated that I have given loan to Mr. Viren Shah and Rakesh Doshi of Rs.25 lakcs for which promissory notes were obtained. I don't remember the exact date since the same have been given around 5 to 6 years back.

Q.2 Whether the promissory notes were in the name of the company Growth Avenues Ltd. or in the individual name?

A.2 It was in the individual name of Viren Shah and Rakesh Doshi.

Q.3 Have the loan given by you is repaid to you or not?

A.3 Yes I have received back the loan.

Q.4 When was the loan repaid to you and how?

A.4 I do not remember the exact dated \e and the said loan was repaid I cash.

Q.5 By whom was the loan repaid to you?

A.5 The loan was repaid by Shri Viren Shah and Rakesh Doshi.

Q.6 Do you have any receipt or any other evidence in respect of loan given or received back?

A.6 No apart from promissory note I have no other evidence.

Q.9 Whether you or your family members or any of your concern have any business relation or business transaction with me personally or my company Growth Avenue Ltd. in connection with which the promissory note was executed?

A.9 The promissory note was executed only on account of loan transaction and not for anything else. As regards business relation I would like to state that I do not have any business transaction with you or your company to the best of my knowledge. As regards business relation of my family members I would like to state that I do not exactly remember any thing as regards business transactions of my family member."

2.3.2 From the above it is clear that the cash transaction of giving loan to the assessee company and the assessee company repaying the same in cash has been established not only by the fact that the promissory notes were issued which are not denied by the appellant company but also by the cross-examination statement recorded by Shri Viren Shah, Director of the appellant company. Mr. Viren Shah could not rebut the statement made by Shri Kirtibhai K Shah who reiterated during the cross-examination what he had stated earlier. Since the fact of receiving and repaying the loan in cash has been established the decision of the Hon'ble Delhi High Court in the case of Standard Brand Ltd. (supra) and the decision of the Hon'ble I.T.A.T., Mumbai in the case of G.S. Entertainment (supra) are not applicable because this is not a case where the A.O has treated the same amount as undisclosed income of the appellant as well as levied penalty for receiving the amount in cash as loan/deposit. In the case of Standard Brand, the facts and decision of the Hon'ble High Court is as under:-

'The assessee received an amount of Rs 3 lakhs in cash from a company which was in violation of section 269SS of the Incometax Act, 1961. According to the assessee, it was a deposit by the Assessing Officer treated the amount as undisclosed income of the assessee and initiated penalty proceedings against the assessee under section 271D. The Commissioner (Appeals) confirmed the penalty. In the quantum issue, the Commissioner (Appeals) held that the addition under section 158BC could not be sustained and that the Assessing Officer could have taken action under section 147. The Tribunal upheld the view taken by the Commissioner (Appeals) in the quantum appeal and held that the receipt was outside the scope of undisclosed income defined under section 158B(b) and dismissed the Departments appeal. On appeal:

Held, dismissing the appeal, that the Revenue having taken the stand that the amount was undisclosed income in the hands of the assessee, it could not resort to proceedings under section 269SS read with section 271D. Since the block assessment could not be sustained, penal action may be permissible (if at all) only after a regular assessment was made. No substantial question of law arose in the appeal.'

2.3.3 From the above decision, it is seen that the A.O in the case of Standard Brand had not only treated the amount as loan received but had also treated the amount as assessee's own undisclosed income. Both the stands are contradictory and, therefore, the penalty was deleted. In fact, the Hon'ble High Court observed that the penal action may be permissible once the regular assessment was made. The provisions of Section 269SS and 269T r.w.s. 271D & 271E were brought on this statute to prevent laundering of unaccounted money. In the present case, it is established that the assessee had taken cash loan of Rs.25,00,000/p and repaid the same thereby violating the provisions of Section 269SS and 269T inviting upon itself the penal provisions of Section 271D & 271E. Therefore, the penalty levied by the Jt. CIT u/s.271E is confirmed and the ground of appeal is dismissed."

16. Further aggrieved by this order of Ld. CIT(A) now assessee is in appeal before us.

17. After hearing both the parties and perusing the record we find that five promissory notes of Rs.5 lakh each were found during the course of search operation at the residence of Shri KKS. These promissory notes were issued by Shri Rakesh Doshi and Viren Shah Shri KKS against receipt of cash. In the statement recorded u/s.132(4) in response to Question No.22 Shri KKS stated that an amount of Rs.25 lakh in cash was given on 23-01-2003 to Growth Avenues Ltd. and the promissory notes were in respect of that amount. However, during the remand proceedings, the cross-examination of Shri KKS was carried out by Shri Viren Shah on 24-12-2008. In this cross-examination, Shri KKS in reply to Question No.1 has categorically stated that he had given loan to Shri Viren Shan and Rakesh Doshi of Rs.25 lakh for which promissory notes were obtained. In reply to Question No2 he mentioned that promissory notes were in the name of individuals and not in the name of Growth Avenues Ltd. In reply to Question No.5 he has mentioned that the loan was repaid by Shri Viren Shah and Rakesh Doshi. It is clear from this that assessee company neither took any loan from Shri KKS nor repaid any amount to him in cash. The provisions of Section 271D read as under: -

"271D If a person takes or accepts any loan or deposit in contravention of the provisions of section 269SS, he shall be liable to pay, by way of penalty, a sum equal to the amount of the loan or deposit so taken or accepted."

It is clear that penalty u/s 271D can be levied against a person who takes or accepts any loan or deposit in contravention of the provisions of Section 269SS. Sine in this case there is no such violation on the part of assessee company the penalty cannot be levied against it. If at all there is any violation of the provisions of Section 269SS, it was on the part of Shri Rakesh Doshi and Viren Shah as is clear from the cross-examination of Shri KKS. In view of this, the penalty imposed by Assessing Officer u/s.271D/269SS and sustained by Ld. CIT(A) is hereby deleted.

18. In the result, both appeal of assessee are allowed.

(Order pronounced in Open Court on 19.5.2011)