IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**INCOME TAX APPEAL NO.5746 OF 2010**

The Commissioner of Income Tax,

Central IV, 6th Floor, 660 Aayakar Bhavan,

M K Road, Mumbai – 400 020 ..Appellant.

Versus

M/s.Triumph International Finance (I) Limited,

Oxford Centre, 10, Shroff Lane,

Colaba Causeway, Mumbai – 400 023 ..Respondent.

Mr.Suresh Kumar, Advocate for the appellant.
Mr.Percy J Pardiwala, Senior Advocate with Mr.Atul K Jasani for the respondent.

**CORAM : J.P. Devadhar & A.R. Joshi, JJ.**

**Judgment Reserved on : 29th March 2012.**

**Judgment Pronounced on : 12th June 2012.**

**ORAL JUDGMENT :** (Per J.P. Devadhar, J.)

1. This appeal was admitted on 13th September 2010 on the following substantial question of law :-

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that transactions effected through journal entries in the books of the assessee would not amount to repayment of any loan or deposit otherwise than by account payee cheque or account payee bank draft within the meaning of Section 269T to attract levy of penalty under Section 271E of the Income Tax Act, 1961 ?"

2. The assessment year involved herein is AY 2003-2004.

3. The respondent – assessee, a Public Limited Company, is a member of the National Stock Exchange and is also a Category I Merchant Banker, registered with the Securities and Exchange Board of India (SEBI). The assessee is engaged in the business of shares, stock broking, investment and trading in shares and securities.

4. In the assessment year in question, the assessee had filed its return of income declaring loss of Rs.17,27,21,815/-. The assessment was completed on 5th November 2003 under Section 143(3) of the Income Tax Act, 1961 ('Act' for short) determining loss at Rs.9,84,92,500/-.

5. Prior to 1st April 2002, the assessee had accepted a sum of Rs.4,29,04,722/- as and by way of loan / inter-corporate deposit from the Investment Trust of India which was repayable during the assessment year 2003-2004. During the previous year relevant to the assessment year in question, the assessee on 3rd October 2002 had transferred 1,99,300 shares of

Rashal Agrotech Limited held by it to the Investment Trust of India for an aggregate consideration of Rs.4,28,99,325/-. Thus, in the assessment year in question, the assessee was liable to repay the loan / inter-corporate deposit amounting to Rs.4,29,04,722/- to the Investment Trust of India and receive Rs.4,28,99,325/- from Investment Trust of India towards sale price of the shares of Rashal Agrotech Limited sold by the assessee to the Investment Trust of India. Instead of repaying the loan / inter-corporate deposit to the Investment Trust of India and receiving the sale price of the shares from the Investment Trust of India, both the parties agreed that the amount payable / receivable be set-off in the respective books of account by making journal entries and pay the balance by account payee cheque. Accordingly, after setting off of the mutual claim through journal entries, the balance amount of Rs.5,397/- due and payable by the assessee to the Investment Trust of India was paid by a crossed cheque dated 19th February 2003 drawn on the Citibank.

6. In view of the objections raised in the Audit Report regarding repayment of loan / inter-corporate deposit otherwise than by an account payee cheque or draft, the assessing officer issued a show-cause notice calling upon the assessee to show cause as to why action should not be taken against the assessee for violating the provisions of Section 269T of the Act. The assessee opposed the show-cause notice by filing a detailed reply. However,

by an order dated 21st March 2006 passed under Section 271E of the Act, the assessing officer on the basis of the report of the Joint Parliamentary Committee of Lok Sabha and Rajya Sabha on the Stock Market Scam imposed penalty amounting to Rs.4,28,99,325/- on the ground that the assessee had repaid the loan / inter-corporate deposit to the extent of Rs.4,28,99,325/- in contravention of the provisions of Section 269T of the Act.

7. On appeal filed by the assessee, the Commissioner of Income Tax (Appeals) by his order dated 21st December 2006 confirmed the penalty levied upon the assessee. On further appeal filed by the assessee, the Tribunal by the impugned order dated 29th January 2008 allowed the appeal by following its decision in the case of V N Parekh Securities Private Limited and Ketan V Parekh and held that the payment through journal entries do not fall within the ambit of Section 269SS or 269T of the Act and consequently no penalty can be levied either under Section 271D or Section 271E of the Act. Challenging the aforesaid order, the Revenue has filed the present appeal.

8. Mr.Suresh Kumar, learned counsel appearing for the Revenue submitted that the assessee belongs to the Ketan Parekh Group, which is involved in the securities scam. He submitted that the Ketan Parekh Group

was found to be indulging in large scale manipulation of prices of select scripts through fraudulent use of bank and other public funds and had flouted all the norms of risk management by making transactions through a large number of entities so as to hide the nexus between the sources of funds and their ultimate use with the sole motive of evading tax. He submitted that since the language of Section 269T of the Act is clear and unambiguous, the Tribunal ought to have held that repayment of the loan / inter-corporate deposit otherwise than by account payee cheque or demand draft was in violation of the provisions of Section 269T of the Act and, hence, the penalty imposed under Section 271E of the Act was justified.

9. Mr.Pardiwala, learned Senior Advocate appearing on behalf of the respondent – assessee, on the other hand submitted that Section 269T of the Act has been enacted to curb the menace of giving false explanation of the unaccounted money found during the course of search and seizure. He submitted that the bona fide transaction of repayment of loan or deposit by way of adjustment through book entries carried out in the ordinary course of business would not come within the mischief of the provisions of Section 269T of the Act. Referring to the legislative history as also the circulars issued by the Central Board of Direct Taxes from time-to-time, Mr.Pardiwala submitted that Sections 269SS and 269T were not meant to hit the genuine transactions and the legislative intent is to mitigate any unintended hardships

caused by the provisions to genuine transactions. He submitted that in the present case genuineness of the transactions entered into by the assessee with the Investment Trust of India is not in doubt. No additions on account of the impugned transactions have been made in the regular assessment made under Section 143(3) of the Act. He submitted that Section 269T postulates that if a loan or deposit is repaid by an outflow of funds, same has to be by an account payee cheque or demand draft. He submitted that discharge of the debt in the nature of loan or deposit in a manner otherwise than by an outflow of funds would not be hit by the provisions of Section 269T.

10. Mr.Pardiwala further submitted that in the present case Rs.4,29,04,722/- was due and payable by the assessee to the Investment Trust of India and the assessee was liable to receive a sum of Rs.4,28,99,325/- from the Investment Trust of India. Instead of repaying the amount by account payee cheque / demand draft and receiving back the amount by way of demand draft / cheque, the parties as and by way of commercial prudence have settled the account by netting off the accounts and paid the balance by account payee cheque. Relying on a decision of the Apex Court in the case of ***J B Boda and Company P Limited V/s. Central Board of Direct Taxes*** reported in ***(1997) 223 ITR 271 (S.C.)***, counsel for the assessee submitted that the two-way traffic of forwarding bank draft and

receiving back more or less same amount by way of bank draft was unnecessary and, therefore, in the facts of the present case, no fault could be found with the repayment of loan through journal entries.

11. Mr.Pardiwala submitted that Section 269T, if plainly read, supports the contention of the Revenue that each and every loan or deposit has to be repaid only by an account payee cheque or draft. However, such literal interpretation, if accepted, would lead to absurdity because, by such interpretation not only mala fide transactions but even the genuine transactions would be affected. Relying on the judgments of the Apex Court in the case of ***ADIT (Inv.) V/s. Kum.A B Shanti*** reported in ***(2002) 255 ITR 258 (S.C.)*** and ***Commissioner of Income Tax V/s. J H Gotla*** reported in ***156 ITR 323***, counsel for the assessee submitted that if a strict and literal construction of a statute leads to an absurd result, that is, a result not intended to be sub-served by the object of the legislation ascertained from the scheme of the legislation and if another construction is possible apart from the strict and literal construction, then, that construction should be preferred to strict literal construction.

12. Referring to the provisions contained in the Code of Civil Procedure and books on accountancy, counsel for the assessee submitted that set off of the claim / counter-claim otherwise than by account-payee cheque

or bank draft are legally permissible in commercial transactions as also in the accounting practice. Therefore, it must be held that genuine transactions like the transaction in the present case involving repayment of loan through journal entries do not violate Section 269T of the Act. In any event, it is contended that having regard to the commercial dealings between the parties it must be held that there was reasonable cause for repaying the loan through journal entries and in view of Section 273B of the Act penalty was not imposable under Section 271E of the Act. In support of the above contention, reliance was placed on the decision of the Delhi high Court in the case of ***Commissioner of Income Tax V/s. Noida Toll Bridge Company Limited*** reported in ***262 ITR 260 (Del.)***, decision of the Gujarat High Court in the case of ***Commissioner of Income Tax V/s. Shree Ambica Flour Mills Corporation*** reported in ***(2008) 6 DTR 169 (Guj.)*** and a decision of this Court in the case of ***Commissioner of Income Tax V/s. Motta Constructions P. Limited*** reported in ***(2011) 338 ITR 66 (Bom.)***.

13. We have carefully considered the rival submissions.

14. The basic question to be considered in this appeal is, whether repayment of loan of Rs.4,28,99,325/- by making journal entries in the books of account maintained by the assessee is in contravention of Section 269T of the Act, and, if so, for failure to comply with the provisions of Section 269T,

the assessee is liable for penalty under Section 271E of the Act.

15. Section 269T, Section 271E and Section 273B of the Act, to the extent relevant for the present case relating to AY 2003-2004 read thus :-

> "**Mode of repayment of certain loans or deposits**.
>
> 269T.- No branch of a banking company or a co-operative bank and no other company or co-operative society and no firm or other person shall repay any loan or deposit made with it otherwise than by an account payee cheque or account payee bank draft drawn in the name of the person who has made the loan or deposit if -
>
> (a) the amount of the loan or deposit together with the interest, if any, payable thereon, or
>
> (b) the aggregate amount of the loans or deposits held by such person with the branch of the banking company or co-operative bank or, as the case may be, the other company or co-operative society or the firm, or other person either in his own name or jointly with any other person on the date of such repayment together with the interest, if any, payable on such loans or deposits,
>
> is twenty thousand rupees or more :
>
> **Provided** that where the repayment is by a branch of a banking company or co-operative bank, such repayment may also be made by crediting the amount of such loan or deposit to the savings bank account or the current account (if any) with such branch of the person to whom such loan or deposit has to be repaid :
>
> **Provided further** …….
>
> *Explanation.* - For the purposes of this section, -
>
> (i) …….

(ii) …….

(iii) "loan or deposit" means any loan or deposit of money which is repayable after notice or repayable after a period and, in the case of a person other than a company, includes loan or deposit of any nature."

*********

"**Penalty for failure to comply with the provisions of Section 269T**

271E.- (1) 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.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner."

**********

"**Penalty not to be imposed in certain cases**.

273B.- Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271D, section 271E, section 271F, section 271G, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable clause for the said failure."

16. Chapter XXB containing Sections 269SS to Section 269TT were introduced by the Income Tax (Second Amendment) Act 1981 with effect from 11th July 1981 with a view to counter the evasion of tax. The object of

the provisions contained in Chapter XXB of the Act as explained by the CBDT in its circular No.345 dated 28th June 1982 is that the proliferation of black money poses a serious threat to the national economy and to counter that major economic evil, Chapter XXB has been introduced.

17. Section 269T in Chapter XXB of the Act, as introduced originally in the year 1981 provides that none of the entities specified therein (which includes a Company like the assessee) shall repay any deposit made with it otherwise than by an account payee cheque / bank draft drawn in the name of the person who had made the deposit, if the amount of the deposit together with the interest, if any, payable thereon, exceeds the amount specified therein. The obligation to repay the deposit by account payee cheque / bank draft for the entities specified in Section 269T would have to be construed as mandatory in view of the negative language used in the Section. Section 269T provides that none of the entities specified therein shall repay deposit otherwise than by the modes set out therein. In other words, the Section provides that irrespective of the fact that there are several modes for repaying the deposit, the entities specified in Section 269T shall repay the deposit only by the modes set out therein. The mandatory requirement of Section 269T is further fortified by Section 276E inserted along with Section 269T on 11th July 1981 which provides that if a person referred to in Section 269T of the Act repays any deposit in contravention of

Section 269T then such person shall be punishable with imprisonment for a period upto two years and also liable to fine equal to the amount of deposit. Thus, the negative language used in Section 269T as also the penal consequences provided in Section 276E for non-compliance of the procedure prescribed under Section 269T leave no manner of doubt that repayment of deposit in the manner prescribed under Section 269T is mandatory.

18. With effect from 1st April 1989, Section 276E dealing with the consequences on failure to comply with Section 269T has been omitted and Section 271E has been inserted which provides penalty for failure to comply with Section 269T of the Act. Section 269T has been substituted by Finance Act 2002 with effect from 1st June 2002 wherein the provision relating to repayment of deposit exceeding the prescribed limit by account payee cheque / draft has been extended to repayment of loans as well. Thus, with effect from 1st June 2002, it is mandatory under Section 269T of the Act for the persons specified therein to repay any loan / deposit together with interest, if any, exceeding the limits prescribed therein, by account payee cheque / bank draft and failure to do so is made liable for penalty under Section 271E of the Act.

19. In the present case, it is not in dispute that the assessee has repaid loan / deposit by debiting the account through journal entries. The

question is, whether such repayment of loan / deposit is in contravention of the modes of repayment set out in Section 269T ? The argument advanced by the counsel for the assessee that the bonafide transaction of repayment of loan / deposit by way of adjustment through book entries carried out in the ordinary course of business would not come within the mischief of Section 269T cannot be accepted, because, the section does not make any distinction between the bonafide and non-bonafide transactions and requires the entities specified therein not to make repayment of any loan / deposit together with the interest, if any otherwise than by an account payee cheque / bank draft if the amount of loan / deposit with interest if any exceeds the limits prescribed therein. Similarly, the argument that only in cases where any loan or deposit is repaid by an outflow of funds, Section 269T provides for repayment by an account payee cheque / draft cannot be accepted because Section 269T neither refers to the repayment of loan / deposit by outflow of funds nor refers any of other permissible modes of repayment of loan / deposit, but merely puts an embargo on repayment of loan / deposit except by the modes specified therein. Therefore, in the present case, where loan / deposit has been repaid by debiting the account through journal entries, it must be held that the assessee has contravened the provisions of Section 269T of the Act.

20. Strong reliance was placed by the counsel for the assessee on the decision of the Apex Court in the case of *J B Boda & Company P. Limited*

(supra). In that case, J B Boda & Company P Limited carrying on business as reinsurance brokers were during the course of business required to remit the entire reinsurance premium payable to the foreign reinsurers in foreign currency and then receive commission in foreign currency from the said foreign insurers. Instead of remitting the entire amount to the foreign reinsurers and then receiving commission from the said foreign insurers, J B Boda & Company with the approval of the Reserve Bank of India retained the foreign currency to the extent of the commission and remitted the balance amount to the foreign reinsurers. As deduction under Section 80-O of the Act in respect of the amount retained as commission was denied by the income tax authorities as also the High Court, the Company approached the Apex Court and the Apex Court held that to insist on a formal remittance to the foreign reinsurers first and thereafter to receive the commission from the foreign reinsurer would be an empty formality and a meaningless ritual on the facts of that case. Accordingly, the Apex Court held that the Company was entitled to 80-O deduction in respect of the commission retained by the Company. In our opinion, the aforesaid decision of the Apex Court has no relevance to the facts of the present case, because, Section 80-O and Section 269T operate in completely different fields. The object of Section 80-O is to encourage Indian Companies to develop technical knowhow and make it available to foreign companies and foreign enterprises so as to augment the

foreign exchange earnings, where as, the object of Section 269T in Chapter XXB of the Act is to counteract evasion of tax. For Section 80-O, receiving income in convertible foreign exchange is the basic requirement, where as, for Section 269T, compliance of the conditions set out therein is the basic requirement. Section 80-O does not prescribe any particular mode for receiving the convertible foreign exchange, where as, Section 269T bars repayment of loan or deposit by any mode other than the mode stipulated under that Section and for contravention of Section 269T penalty is imposable under Section 271E of the Act. In these circumstances, the decision of the Apex Court rendered in the context of Section 80-O cannot be applied while interpreting the provisions of Section 269T of the Act.

21. It is relevant to note that with a view to mitigate the hardship that may be caused to the genuine business transactions on account of the bar imposed under Section 269T and the penalty imposable under Section 271E, the legislature, by the Taxation Laws (Amendment & Miscellaneous Provisions) Act 1986 has introduced Section 273B with effect from 10th September 1986. Section 273B interalia provides that notwithstanding anything contained in Section 271E, no penalty shall be imposed on the person or the assessee as the case may be for any failure referred to in the said Section, if such person or assessee proves that there was reasonable cause for such failure. Thus, reading Section 269T, 271E and 273B together

it becomes clear that :

a) Under Section 269T it is mandatory for the persons specified therein to repay loan / deposit only by account payee cheque / draft if the amount of loan / deposit together with interest, if any, exceeds the limits prescribed therein;

b) Non-compliance of the provisions of Section 269T renders the person liable for penalty under Section 271E; and

c) Section 273B provides that no penalty under Section 271E shall be imposed if reasonable cause is shown by the concerned person for failure to comply with the provisions of Section 269T of the Act.

22. The argument advanced on behalf of the assessee that if Section 269T is construed literally, it would lead to absurdity cannot be accepted, because, repayment of loan / deposit by account payee cheque / bank draft is the most common mode of repaying the loan / deposit and making such common method as mandatory does not lead to any absurdity. No doubt, that in some cases genuine business constraints may necessitate repayment of loan / deposit by a mode other than the mode prescribed under Section 269T. To cater to the needs of such exigencies, the legislature has enacted Section 273B which provides that no penalty under Section 271E shall be imposed for contravention of Section 269T if reasonable cause for such contravention is shown.

23. The expression 'reasonable cause' used in Section 273B is not defined under the Act. Unlike the expression 'sufficient cause' used in Section 249(3), 253(5) and 260A(2A) of the Act, the legislature has used the expression 'reasonable cause' in Section 273B of the Act. A cause which is reasonable may not be a sufficient cause. Thus, the expression 'reasonable cause' would have wider connotation than the expression 'sufficient cause'. Therefore, the expression 'reasonable cause' in Section 273B for non-imposition of penalty under Section 271E would have to be construed liberally depending upon the facts of each case.

24. In the present case, the cause shown by the assessee for repayment of the loan / deposit otherwise than by account-payee cheque / bank draft was on account of the fact that the assessee was liable to receive amount towards the sale price of the shares sold by the assessee to the person from whom loan / deposit was received by the assessee. It would have been an empty formality to repay the loan / deposit amount by account-payee cheque / draft and receive back almost the same amount towards the sale price of the shares. Neither the genuineness of the receipt of loan / deposit nor the transaction of repayment of loan by way of adjustment through book entries carried out in the ordinary course of business has been doubted in the regular assessment. There is nothing on record to suggest that the amounts

advanced by Investment Trust of India to the assessee represented the unaccounted money of the Investment Trust of India or the assessee. The fact that the assessee company belongs to the Ketan Parekh Group which is involved in the securities scam cannot be a ground for sustaining penalty imposed under Section 271E of the Act if reasonable cause is shown by the assessee for failing to comply with the provisions of Section 269T. It is not in dispute that settling the claims by making journal entries in the respective books is also one of the recognized modes of repaying loan / deposit. Therefore, in the facts of the present case, in our opinion, though the assessee has violated the provisions of Section 269T, the assessee has shown reasonable cause and, therefore, the decision of the Tribunal to delete the penalty imposed under Section 271E of the Act deserves acceptance.

25. In the result, we hold that the Tribunal was not justified in holding that repayment of loan / deposit through journal entries did not violate the provisions of Section 269T of the Act. However, in the absence of any finding recorded in the assessment order or in the penalty order to the effect that the repayment of loan / deposit was not a bonafide transaction and was made with a view to evade tax, we hold that the cause shown by the assessee was a reasonable cause and, therefore, in view of Section 273B of the Act, no penalty under Section 271E could be imposed for contravening the provisions of Section 269T of the Act.

26. The appeal is disposed of in the above terms with no order as to costs.

(A.R. Joshi, J.) (J.P. Devadhar, J.)