

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : H : NEW DELHI

BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER  
AND  
SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

ITA No.5772/Del/2010  
Assessment Year : 2005-06

DCIT,  
Central Circle-6,  
New Delhi.

Vs. Sahara India Commercial Corpn.  
Ltd.,  
1, Kapoorthala Complex,  
Aliganj,  
Lucknow.

PAN : AADCS6118F

(Appellant)

(Respondent)

Assessee by : Shri Ajay Vohra, Advocate  
Revenue by : Smt. Reena S. Puri, CIT, DR

ORDER

PER A.D. JAIN, JUDICIAL MEMBER

This is an appeal filed by the department for Assessment Year 2005-06 against the order dated 30.09.2010 passed by the CIT (A)-I, New Delhi. The only effective ground taken by the department is that the Ld. CIT (A) has erred in deleting the penalty of ₹ 35,56,79,900/- imposed u/s 271-D of the IT Act.

2. The issues in this case are two: as to whether the OFCDs of the assessee company are loans attracting the provisions of Section 269-SS and, consequently, those of Section 271-D of the Act and as to whether the assessee was prevented by reasonable cause within the meaning of Section 273B of the Act for not complying with the statutory provisions of Section 269-SS, thereby attracting the penalty levied u/s 271-D of the Act.

3. We first take up the controversy as to whether or not the debentures are loans covered u/s 269-SS of the Act.

4. The facts, as per the relevant documents available on record are that the assessee, i.e., M/s Sahara India Commercial Corporation Ltd. filed its return of income for Assessment Year 2005-06 on 31.10.2008 declaring loss of ₹ 164,76,44,352/-. The assessment was completed u/s 143 (3) at a loss of ₹ 138,58,88,630/- on 18.07.2008. The assessment was completed after carrying out Special Audit u/s 142 (2A). The Assessing Officer, after examination of the return of income and the Special Audit Report, has given a finding that the assessee company accepted deposits in contravention of Section 269SS during the F.Y. 2004-05 relevant to the A.Y. under consideration. It was noticed by the Assessing Officer that deposits under the nomenclature "Optionally Fully Convertible Debentures" (OFCDs) were arranged on a significant scale for the assessee company by M/s Sahara India, a firm.

5. During the financial year 2004-05, the assessee company has shown ₹5171.40 crores under the head as "Optionally Fully Convertible Debentures" (OFCDs). The same is shown as 'Unsecured Loans' in the Balance Sheet (Schedule-3 of Balance Sheet). From the Tax Audit Report filed along with the return, the Assessing Officer observed from Annexure-XIII (which is regarding applicability of Section 269SS of Income Tax Act, 1961), that the Auditors of the assessee considered the amount under OFCD as securities and not as loans/deposits and have given the following note:-

'The Company has also received subscription through private placement in respect of Optionally Fully Convertible Debentures. As per the expert opinion of the Solicitor and Advocate obtained by the company, subscription received on issue of OFCD which is in the nature of Securities and not in the nature of loan or deposit within the meaning of Section 269SS of the Income Tax

Act. Relying on the same the subscription received under OFCD has not been considered to be falling within the purview of Section 269SS of the Income Tax Act although in the Tax Audit Report issued by us for financial year 2002-03 the same were considered by us for the purpose of Section 269SS of the Income Tax Act in absence of legal opinion to this effect.'

6. During the assessment proceedings, the assessee company was requested by the Assessing Officer to provide details of OFCDs. From the details submitted by the assessee, it was observed by the Assessing Officer that money was received in violation of provisions of Section 269SS of the Income Tax Act. The Assessing Officer also found that the comments of the Auditor did not clearly show that entire details of OFCD were examined by him. The Auditor in this regard merely stated that subscriptions received and repayments made in respect of OFCDs were not considered to be falling within the purview of Sections 269SS and 269T of the IT Act, 1961. The basis for arriving at this conclusion was some legal opinion of the solicitor and advocate, treating OFCDs as "Securities." It was, however, noticed by the Assessing Officer that the same auditors considered OFCDs as loans/deposits for F.Y. 2002-03. Further, the Assessee has on its own classified the OFCDs as Unsecured Loans in its balance sheet in this year, as in the earlier year. The Assessing Officer further observed that although the OFCDs were convertible at the option of the depositors, no such details of conversion were available from the Tax Audit Report. In view of above facts, the Assessing Officer held that the amount received and paid under OFCDs were loans/deposits and fell within the purview of Section 269SS of the Act. For the reasons discussed above, the amount of deposits accepted, which comes to ₹ 35,56,79,900/- and amounts redeemed, which comes to ₹ 28,35,52,822/- were treated by the Assessing Officer to be in the nature of 'Loans and deposits' covered under Sections 269SS and 269T of Income Tax Act, 1961.

7. In the penalty proceedings, a show cause notice dated 13.03.2009 for levy of penalty u/s 271D of the Act was issued. In response, the assessee filed written submissions dated 06.04.2009 and 19.06.2009, wherein, inter alia, the assessee made the following submissions, as summarized by the Assessing Officer at page 23 of the penalty order, to contend that the OFCDs are not loans or deposits, as contemplated u/s 269SS of the IT Act and so, no penalty u/s 271D of the Act can be levied:-

- i. The Assessing Officer directed the Special Auditor to report all particulars regarding all the deposits including OFCDs of ₹ 20,000/- or above accepted by the company. Thus, the Special Auditor was directed to give comments on OFCDs and not in respect of loans or deposit as contemplated u/s 269SS of IT Act. Therefore, the very basis of the notice u/s 271D is ill founded and not tenable in law.
- ii. The Special Auditor in their report have made observations on the differences between “loan and deposit” and subscription receive under OFCDs which is in the nature of “security”.
- iii. The IT Act recognizes the difference between the terms “loan & deposit” and “security” which is evident from the fact that the TDS provisions for securities is in Section 193 whereas those for other than securities is in 194A (2).
- iv. Similar distinctions are clear u/s 56(2) of the IT Act, 1961 and also section 2(28B) of the IT Act, 1961 which defines the “interest on securities” to mean:-
  - a. interest on any security of the Central Government or a State Government;
  - b. interest on debentures or other securities for money issued by or on behalf of a local authority or a company or a corporation established by a Central State or Provincial Act.

- v. Thus, under the Income Tax Act, interest on debentures has to be treated as interest on securities meaning thereby that the “Debentures” are recognized as “securities” and not as “Loans & Deposits.”
- vi. The subscription received towards allotment of OFCDs is not in the nature of acceptance of money as “loan or deposit”. The opinion of M/s Jhunjhunwala & Co. Solicitors and Advocates supports the above contention.
- vii. Just because the subscription received under OFCDs is shown in the balance sheet under the head “loan & advances”, it cannot be taken as “loan & deposit.”

8. The Assessing Officer, however, rejected the assessee’s contention by observing as follows:-

“2.8.1 The first issue that needs to be decided is whether the subscriptions received under the OFCDs fall in the purview of section 269SS of the I. T. Act.

Sec. 269SS states as under:-

"No person shall, after the 30<sup>th</sup> day of June, 1984, take or accept from any other person(hereafter in this section referred to as the depositor), any loan or deposit otherwise than by an account payee cheque or account payee bank draft if,

- a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or
- b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid' or
- c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b) is twenty thousand rupees or more:

Provided that the provisions of this section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by,-

- (a) Government;
- (b) any banking company, post office saving bank or co-operative bank;
- (c) any corporation established by a Central, State or Provincial Act;
- (d) any Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
- (e) such other institution, association or body or class of institutions associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the official Gazette:

[Provided further that the provisions of this section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposits taken or accepted are both having agriculture income and neither of them has any income chargeable to tax under this Act.]"

2.8.2 Thus, the section is applicable to loans & deposits taken by the assessee. The question is therefore whether OFCDs are loans or deposits? The assessee has quoted various provisions of the I. T. Act, 1961 and the Companies Act, 1956 to claim that the subscription under OFCDs are in the nature of debentures which are securities and therefore do not fall in the class of loans or deposits.

2.8.3 However, it is not possible to accept the claim of the assessee that the subscriptions collected under OFCDs scheme being debentures have the character of securities and not "loans and deposits". The word "security" as per common usage in the financial world refers to instruments through which Public deposits are mobilized either by the State or entities authorized under law such as Body Corporates. The major distinction that a security has vis-a-vis an ordinary deposit is that a security is marketable and transferable. Therefore, a security is a deposit with certain additional attributes. Therefore, the use of the word "security" in no way deprives the basic character of a "deposit" in any transaction. Further, the debentures are specialized instruments where a debenture holder has the option to convert his deposit into equity shares at a future date. Thus, the essential character of a debenture is that of a deposit until the debenture holder exercises his option. In any case, at the time of acceptance of a debenture, the assessee is in fact, accepting a deposit and therefore, has to comply with the provisions of section 269SS.

2.8.4 The assessee has referred to section 2(12) of the Companies Act which defines debenture as a stock, bond or any other security whether constituting a charge on the assets of the Company or not. From this definition, a conclusion has been drawn that debenture is a security of a Company. The assessee has further relied on the Companies (Acceptance of Deposits) Rules, 1975 wherein clause 2(b) defines deposits and excludes from its purview debentures which are secured by mortgage of any immovable property of the Company or with an option to convert them into shares in the Company. The assessee has claimed on the basis of the definition contained in these rules that the debentures issued by a Company which are convertible into shares are not deposits within the meaning of these rules. Similarly, section 2(b) of the Securities Act has been referred wherein the definition of securities includes debentures but not deposits.

2.8.5 The various enactments relied on by the assessee have given certain definitions to securities, debentures and deposits which are specific to those Acts and given within the context of the objects of such enactments. Such definitions can not be imported into the fiscal domain to restrict the sweep of taxation statutes. Thus when the Companies Act states that debentures convertible into equity are not deposits, the objective is to differentiate between two different instruments of fund mobilization with different characteristics such as the risk they carry to the Company, to the depositor as also other legal obligations. The fact that the definition of Security in the Securities Act does not include deposits also does not help the assessee's case.

2.8.6 The assessee has claimed that OFCDs issued by the Company are debentures convertible into equity at the option of the debenture holder as borne out by the Red Herring Prospectus. But the fact remains that these debentures were in the nature of a deposit at the time of the subscription. They would retain their character as a deposit until the option is exercised by the depositor to convert the same into equity shares. In case of redemption, the debenture holder gets back his principal with interest. In case of conversion into equity share, the debenture holder gets the interest up to the date of such conversion. Therefore, the essential character of the debenture is that of a deposit. A reference to the Red Herring Prospectus issued by the Company shows that the depositor is allowed to exercise the option of equity conversion only after completion of 91<sup>st</sup> month and before the 92<sup>nd</sup> month. Considering the long time period the depositor keeps his money with the Company before he is allowed the option of equity conversion, the OFCDs in the instant case, appear more to be in the nature of deposits rather than debentures.

2.8.7 The assessee has further claimed that since securities and debentures are listed together in section 2(28B) of the Income Tax Act 1961 which defines "interest on securities" goes to prove that debentures are not deposits. Further, the Act specifies the head under which such income by way of interest on securities would be taxable but no such definition is given for interest on loans and advances which goes to show that securities are different from loans and deposits. The assessee has also pointed out that the TDS provisions for interest on securities is section 193 and for all other interest is section 194 A(2) clearly showing that the securities are not deposits. The assessee has put forth all these arguments to prove that debentures are securities and not deposits. The arguments of the assessee are only half-truths as all that the Act has done is to carve out a separate provision for securities as a class. The fact remains that the term "deposits" has a very wide amplitude in its meaning and debentures, securities etc. are subsets within it. All that the Act has done is to stipulate certain specific provisions for these subsets and that by no means, renders debentures as a class apart from the deposits. Debentures are inherently deposits and have to be regarded as such.

2.8.8 I have also gone through the observations of the Special Auditor on this issue and the elaborate reasoning given by the Solicitors & Advocates M/s. Jhunjhunwala & Co to conclude that debentures are not deposits and hence section 269 SS would not be applicable. They have concluded that debentures are securities and hence not deposits based on the Companies Act and the Securities Act. But as discussed above, these are specious arguments as such restrictive interpretations given in different statutes have a specific purpose in the context of those statutes and they can not be imported in to the Income Tax Act 1961. Such an exercise would have the effect of reading into the taxing statute a restrictive meaning which is not intended by the legislature in the first place.

2.8.9 Therefore, I would without any hesitation reject the contention of the assessee that the subscriptions collected under the OFCD scheme are not deposits. I hold that the transactions in which the assessee collected the amounts as OFCDs come within the ambit of section 269SS and since the legal provisions have been contravened, the penalty proceedings u/s 271D are clearly applicable in the facts of the case."

9. Holding that the assessee company had violated the provisions of Section 269SS of the Act, the Assessing Officer imposed a penalty of ₹ 35,56,79,900/- on the assessee.



10. While deleting the penalty on this issue, the Ld. CIT (A), by virtue of the impugned order, observed as follows:-

“ I have carefully considered the arguments of the appellant. The word loan or deposit is nowhere defined under the Income Tax Act. The definition of the word loan as given in the Blacks Law Dictionary is - "Lending". Delivery by one party to and receipt by another party sum of money upon agreement, express or implied to repay it with or without interest.

The above definition of the loan does not cover the money received for subscription of debenture. Similarly the word 'Deposit' has been defined "the commit to custody, or to lay down, to place, to put, to let fall (as sediment). The lodge for safe-keeping or as a pledge to entrust to the care of another. It also includes money placed with a person as an earnest or security for the performance of some contract. Thus, the word 'Deposit' also does not have a semblance to the subscription received for issue of debentures. The word 'Debenture' has been defined as a long term unsecured debt instrument, issued pursuant to an indenture.

Thus, on reading of the above definition, it is clear that all the three different words have separate meanings. Similarly the definition of debenture under the Companies Act and that of a loan or deposit are different. The Companies Deposit Rules provide in clause 2(b) that deposit means any deposit of money and includes any money borrowed by a company but does not include money received by company in certain cases. Clause X of the exception contained in rule 2(b) rules of the deposit excludes any amount raised by issue of bonds or debentures secured to mortgage by any immovable property of the company or with an option to convert them into shares in the company meaning thereby that the monies raised on issue of 'bonds' or 'debentures' are not in the nature of receipt of a deposit.

Section 2(b) of the securities Act defines the word 'security' and the word 'loan' or 'deposit' are not included in the definition of a security.

Similarly under the Income Tax Act, section 2(28B) of the Income Tax Act defines "Interest on Securities" to mean-

- (ii) interest on any security of the Central Government or a State Government;
- (iii) interest on debentures or other securities for money issued by or on behalf of a local authority or a company

or a corporation established by a Central State or Provincial Act, but does not include interest on loan or deposit.

Thus, the intent of the legislature is absolutely clear that interest on security is different from interest on loan or deposit. In the same parlance the securities are different from "Loans" and "Deposits" and debentures is in the nature of a "Security" and is not in the nature of any loan or deposit as envisaged by the provisions of section 269SS of the Income Tax Act. This difference is further strengthened from the fact that TDS provisions are also separate for interest on securities (section 193) and other than interest on securities (Section 194A). Different treatment and different rates have been prescribed in both these sections for deduction of tax at source on the interest.

It is also well settled law that interpretation of taxing statutes- same expression in different enactments must be given same meaning.

C.IT. Vs. Bhaskar Metter 202 ITR 612 (Col.)  
Shankar Const. Co. Vs. CIT 189 ITR 463 (Kar)

In view of the aforesaid I am of the opinion that debenture issued by a company is a "Security" and not a "Loan" or "Deposit" and, therefore, the subscription received for issue of debenture cannot be equated with receipt of "Loan" or "Deposit" within the meaning of section 269SS of the Income Tax Act. This view is also supported by the decision of the Hon'ble Supreme Court cited herein above wherein the Hon'ble Supreme Court has held that the interest on investments (Securities and bonds and debentures) was not in the nature of interest on "Loan" or "Advance" to which the provisions of Interest Tax Act were applicable. Therefore, the monies which are received by the appellant company by way of subscription money for allotment of debenture cannot be equated with respect of any deposit within the meaning of section 269SS of the Income Tax Act and the provisions of section 269SS will not be attracted to the subscription received for issue of debenture and, therefore, the penalty levied under section 271D is cancelled."

11. Before us, on this issue, the Ld. DR has contended that it has been conclusively held by the Hon'ble Delhi High Court in the case of 'CIT vs. Jet Life India', 16 Taxman.com 403 (Del) (copy is placed on record) that debentures are loans and that following the legislative amendment w.e.f. 01.06.2002, loans are covered under Sections

269SS and 269T and, therefore, there is no merit in the contention of the assessee that the debentures issued by it were not loans and so, the provisions of Sections 269SS and 269T of the Act were not applicable.

12. The Id. counsel for the assessee, on the other hand, has sought to place reliance on the order dated 31.08.2012 passed by the Hon'ble Supreme Court of India in Civil Appeal No.9813 of 2011, in 'Sahara India Real Estate Corporation Ltd. and Others vs. Securities & Exchange Board of India and Anr.', along with Civil Appeal No.9833 of 2011 (copy placed on record). It has been contended that in the said case, the Hon'ble Supreme Court has conclusively laid down that debentures are Securities. Apropos 'Jet Life' (supra), it has been contended that the said judgement was delivered prior to the amendment in law.

13. In the rejoinder, the Ld. DR has contended that the decision (supra) of the Hon'ble Supreme Court is with regard to the SEBI Regulations, rendered in the context of the Companies Act; and that since this decision is not with reference to the IT Act, the same is not applicable.

14. We have heard the parties and have perused the material on record. Undisputedly, the terms 'loan' and 'deposit' have nowhere been defined in the IT Act. Therefore, recourse has to be taken to the definition of these terms in cognate Acts. For the purposes of the Income Tax Act, as such, in various decisions, reference has been made, inter alia, to the Companies Act, 1956, the Companies (Acceptance of Deposit) Rules, 1975, the SEBI Act, the Securities & Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000, the Securities Contracts (Regulation) Act, 1956, etc.

In 'Sahara India Real Estate Corpn. Ltd. & Others' (supra), inter alia, the assessee had contended that OFCDs issued by it were convertible bonds falling within the scope of Section 28(1)(b) of the SCR Act and that they were not 'securities'; and that at any rate, the provisions of the SEBI Act and Section 67 of the SCR Act were not applicable to such OFCDs, which had been found to be 'hybrid' (in para 106 of the judgement). It was observed by the Hon'ble Supreme Court (in para 112) that the OFCDs issued had the characteristics of shares and debentures and fell within the definition of Section 2 (h) of the SCR Act, such OFCDs continuing to remain debentures till they were converted; that in other words, the OFCDs issued by the assessee were debentures in *presenti* and became shares in *futuro*; that even if the OFCDs were hybrid securities as defined in Section 2(19A) of the Companies Act, they shall remain within the purview of the definition of 'securities' in Section 2 (h) of the SCR Act; that the assessee had treated the OFCDs only as debentures in the IMRHP, application forms and also in their balance sheets; that the term 'securities' defined in the Companies Act has the same meaning as that in the SCR Act, which would also cover the species of 'hybrid' u/s 2(19A) of the Act; that since the definition of 'securities' u/s 2 (45AA) of the Companies Act includes 'hybrid', SEBI has jurisdiction over hybrids like OFCDs issued by the assessee, since the expression 'securities' has been specifically dealt with under Section 55A of the Companies Act; and that the assessee had contended that SEBI had no jurisdiction over the hybrids and that 'hybrids' would be treated as 'securities' within the meaning of the Companies Act, but cannot be treated as 'securities' within the meaning of the SEBI Act. Dwelling upon the issue as to whether 'hybrids' can also be included in the definition of the term 'securities' for the purposes of the SEBI Act, the Hon'ble Supreme Court observed (paras 87 and 88) as follows:-

"87. An attempt shall now be made to determine whether "hybrids" can also be included in the definition of the term "securities" for the purposes of the SEBI Act. For the aforesaid analysis reference may first be made to section 2(19A) of the Companies Act which is being extracted hereunder:

"2(19A) "hybrid" means any security which has the character of more than one type of security, including their derivatives;"

The term "hybrid" is not defined under the SEBI Act, and consequently it may be appropriate to accept the same, as it has been defined in the Companies Act, specially with reference to an issue arising in respect of a public company. Of course, it would not have been apt to rely on section 2(19A) of the Companies Act, if the term "hybrid" had also been defined in the SEBI Act or had even been defined in the SC(R) Act on the Depositories Act, 1996, because section 2(2) of the SEBI Act postulates, that words and expressions used but not defined under the SEBI Act, but defined in the SC(R) Act or in the Depositories Act, 1996 would be attributed the meaning given to them in the said Acts. But the term "hybrid" has also not been defined in either of the aforesaid enactments. The term "hybrid" as defined in the Companies Act means "any security" having "the character of more than one type of security" and "includes their derivatives". For the purposes of the SEBI Act, the term "securities" is accepted as it is defined in section 2(h) of the SC(R) Act. Section 2(h) of the SC(R) Act does not define the term "securities" exhaustively, because clauses (i) to (iia) thereof, only demonstrate what may be treated as included in the definition of the term "securities". And, clause (i) of section 2(h) of the SC(R) Act, includes within the definition of the term "securities" inter alia, "bonds", "debentures" and "other marketable securities of a like nature". For the present controversy it is sufficient to notice, that the appellant-companies through their respective RHPs had invited subscription to, Optionally Fully Convertible "Debentures" (OFCDs). On receipt of subscription amounts from investors, the appellant-companies had issued different kinds of "bonds" (described as Abode Bonds, Nirman Bonds and Real Estate Bonds, by SIRECL; and Multiple Bonds, Income Bonds and Housing Bonds, by SHICL). Since the term "hybrid" has been expressed as "...means any security..." there can be no doubt that a "hybrid" is per-se a security. Moreover, the term "security" in its definition includes "...other marketable securities of a like nature...". Therefore, even if for one or the other reason, the OFCDs issued by the appellant-companies may not strictly fall within the terms "debentures" or "bonds" (referred to in the definition of the term "securities") they would nonetheless fall within the ambit of the expression

“securities of a like nature”. For this, the reasons are as follows. The definition of the term “hybrid” also explains that a “hybrid” has the character of more than one kind of “security” or their “derivatives”. The term “securities” also includes “derivatives”. Therefore, even if the definition of the term “hybrid” is construed strictly, it would fall in the realm of “securities of a like nature”. And if, “securities of a like nature” are “marketable”, they would clearly fall within the expanse of the term “securities” defined in section 2(h) of the SC(R) Act (and therefore also, section 2(1)(i) of the SEBI Act). The OFCDs/bonds issued by appellant-companies were also clearly marketable, because the RHPs issued by the two companies provided, that the subscribers would be at liberty to transfer the OFCDs/bonds, to any other person. Although, the transfer of OFCDs/bonds was to be subject to the terms and conditions prescribed, and the approval of the appellant-companies. In the absence of any prescribed terms and conditions barring transfer, the OFCDs/bonds were clearly transferable, and therefore, “marketable”. The term “marketable” simply means, that which is capable of being sold. Allowing the liberty to subscribers to transfer the OFCDs/bonds made them “marketable”. There is therefore, no room for any doubt, that the term “hybrid”, as defined in the Companies Act, would squarely fall within the term “securities” as defined under section 2(1) (i) of the SEBI Act (i.e., Section 2(h) of the SC(R) Act).

88. In view of the above it is clear, that “hybrids” are included within the term “securities” not only for the purposes of Companies Act, but also, under the SEBI Act. SEBI therefore, would have jurisdiction even over “hybrids”, even under the provisions of the SEBI Act.”

15. Thus, it has been held that ‘hybrids’, i.e., hybrid securities, i.e., OFCDs are ‘securities’ under the Companies Act as well as under the SEBI Act.

16. Now, undisputedly, the OFCDs of the assessee before us are no different from those of ‘Sahara India Real Estate Corpn. Ltd. & Others’ (supra), i.e., the assessee before the Hon’ble Supreme Court in the aforesaid case, and once such OFCDs are securities, they are neither ‘loans’, nor ‘deposits’. Further, it is seen that as per Explanation 2 to Section 2 (42A) of the Income Tax Act, the expression ‘security’ shall have the meaning assigned to it in Section 2 (h) of the Securities

Contracts (Regulation) Act, 1956. Section 2 (h) (i) of the Securities Contracts (Regulation) Act, 1956 defines 'securities' to include, inter alia, debentures or other marketable securities of a like nature in or of any incorporated company or other body corporate.

17. Hence, in keeping with the decision of the Hon'ble Supreme Court in 'Sahara India Real Estate Corpn. Ltd. & Others' (supra), the OFCDs of the assessee before us are neither 'loans', nor 'deposits'.

18. In 'Jet Life' (supra), true, the Hon'ble Delhi High Court has held debentures to be covered by the term 'loan'. However, that decision is dated 13.12.2011 and the Hon'ble High Court obviously did not have the benefit of the Supreme Court decision in 'Sahara India Real Estate Corpn. Ltd. & Others' (supra), which is a judgement dated 31.08.2012, and was not available when the High Court passed its order. Moreover, the law laid down by the Hon'ble Supreme Court is, it goes without saying, the law as it always stood.

19. Apropos the objection taken by the department that the decision of the Hon'ble Supreme Court is not with regard to the IT Act, but it relates to the Companies Act and the SEBI Act, there is no dispute to this fact. But, as discussed herein before, since the Income-tax Act does not define the terms 'loan' and 'deposit', recourse has to be taken to cognate Acts and for the purposes of 'debentures' and 'securities', the Companies Act is of the same family, kind, or nature, or is a related or allied Act, so far as concerns the Income-tax Act. The same remains the position qua the SEBI Act and the Securities Contracts (Regulation) Act, 1956, to the extent required. Then, it is pertinent to note that even 'Jet Life' (supra) makes reference to the Companies Act, 1956 and the Companies (Acceptance of Deposit) Rules, 1975.

20. The Ld. CIT (A), while also holding the above view, though without the benefit of the Hon'ble Supreme Court decision in 'Sahara India Real Estate Corpn. Ltd. & Others' (supra), observed as follows:-

“ I have carefully considered the arguments of the appellant. The word loan or deposit is nowhere defined under the I. T. Act. The definition of the word loan as given in the Blacks Law Dictionary is “Lending”. Delivery by one party to and receipt by another party sum of money upon agreement, express or implied to repay it with or without interest.

The above definition of the loan does not cover the money received for subscription of debentures. Similarly the word 'Deposit' has been defined “the commit to custody, or to lay down, to place, to put, to let fall (as sediment). The lodge for safe-keeping or as a pledge to entrust to the care of another. It also includes money placed with a person as an earnest or security for the performance of some contract. Thus, the word “Deposit' also does not have a semblance to the subscription received for issue of debentures. The word 'Debenture' has been defined as a long term unsecured debt instrument, issued pursuant to an indenture.

Thus, on reading of the above definition, it is clear that all the three different words have separate meanings. Similarly, the definition of debenture under the Companies Act and that of a loan or deposit are different. The Companies Deposit Rules provide in clause 2(b) that deposit means any deposit of money and includes any money borrowed by a company but does not include money received by company in certain cases. Clause X of the exception contained in Rule 2(b) rules of the deposit excludes any amount raised by issue of bonds or debentures secured to mortgage by any immovable property of the company or with an option to convert them into shares in the company meaning thereby that the monies raised on issue of 'bonds' or 'debentures' are not in the nature of receipt of a deposit.

Section 2(b) of the securities Act defines the word 'security' and the word 'loan' or 'deposit' are not included in the definition of a security.

Similarly under the I. T. Act, Section 2(28B) of the I. T. Act defines “Interest on Securities” to mean-

- (i) interest on any security of the Central Government or a State Government;



- (ii) interest on debentures or other securities for money issued by or on behalf of a local authority or a company or a corporation established by a Central State or Provincial Act, but does not include interest on loan or deposit.

Thus, the intent of the legislature is absolutely clear that interest on security is different from interest on loan or deposit. In the same parlance the securities are different from "Loans" and "Deposits" and debentures is in the nature of a "Security" and is not in the nature of any loan or deposit as envisaged by the provisions of section 269SS of the I. T. Act.

It is also well settled law that interpretation of taxing statutes –same expression in different enactments must be given same meaning.

CIT Vs Bhaskar Meter 202 ITR 612 (Col.)  
Shankar Const. Co. Vs CIT 189 ITR 463 (Kar)

In view of the aforesaid I am of the opinion that debenture issued by a company is a "Security" and not a "Loan" or "Deposit" and, therefore, the subscription received for issue of debenture cannot be equated with receipt of "Loan" or "Deposit" within the meaning of section 269SS of the I. T. Act. This view is also supported by the decision of the Hon'ble Supreme Court cited herein above wherein the Hon'ble Supreme Court has held that the interest on investments (Securities and bonds and debentures) was not in the nature of interest on "Loan" or "Advance" to which the provisions of Interest Tax Act where applicable. Therefore, the monies which are received by the appellant company by way of subscription money for allotment of debenture cannot be equated with respect of any deposit within the meaning of Section 269SS of the I. T. Act and the provisions of section 269SS will not be attracted to the subscription received for issue of debenture and, therefore, the penalty levied u/s 271D is cancelled."

21. It was in this manner that the Ld. CIT (A) cancelled the penalty levied on the assessee u/s 271D of the Act, observing the provisions of Section 269SS of the Act to be not attracted. Obviously, when the OFCDs of the assessee do not fall under and cannot be equated with receipt of 'loan' or 'deposit' under the provisions of Section 269SS of the IT Act, evidently, no violation of the said Section can be said to have been committed by the assessee. Hence, penalty u/s 271D of the

IT Act is entirely not attracted. As such, the order of the Ld. CIT (A) does not contain any error or infirmity in this regard. The same is upheld.

22. For the above reasons, respectfully following the Hon'ble Supreme Court decision in 'Sahara Real Estate Corpn. Ltd. & Others' (supra), we hold that the OFCDs of the assessee, Sahara India Commercial Corporation Ltd. are neither 'loans', nor 'deposits'.

23. Now, when the issue as to whether or not the OFCDs of the assessee are 'loans' covered u/s 269SS of the IT Act has been decided in favour of the assessee as above, the question of the assessee having been prevented by reasonable cause within the meaning of Section 273B of the IT Act for not complying with the provisions of Section 269SS of the Act, no longer survives. For the preceding discussion, the grievance sought to be raised by the department by way of its Ground No.2, is rejected. Accordingly, the action of the Ld. CIT (A) in deleting the penalty imposed on the assessee under Section 271D of the IT Act is confirmed.

24. Ground Nos.1 and 2 are general.

25. In the result, the appeal filed by the department is dismissed.

The order pronounced in the open court on 26.08.2013.

Sd/-

[T.S. KAPOOR]  
ACCOUNTANT MEMBER

Sd/-

[A.D. JAIN]  
JUDICIAL MEMBER

Dated, 26.08.2013.

dk

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order,

Deputy Registrar,  
ITAT, Delhi Benches