

ITA/68/2012
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX, CENTRAL-III, KOLKATA
VERSUS
M/S. VAMSHI CHEMICALS LTD.

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
AND
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 6TH May, 2024.

Appearance:
Mr. Om Narayan Rai, Adv.
Mr. Prithu Dudheria, Adv.
... for the appellant.

1. Heard Sri Om Narayan Rai,, learned senior standing counsel assisted by Sri Prithu Dueheria, learned advocate for the appellant. None appears for the respondent.
2. This appeal was admitted by this Court by order dated 25.6.2012 on the following **substantial question of law:**

“Whether the Learned Tribunal below committed substantial error of law in holding that the amount received on account of share application money and repayment of the same did not violate the provisions of Sections 269SS and 269T of the Act respectively attacking penalty under Sections 271D and 271E respectively of the Act ?”

3. This appeal arises out the impugned order of the Income Tax Appellate Tribunal, “E” Bench, Kolkata dated 12.01.2012 in ITA No.1940/Kol/2009 (A.Y.2004-05), No.1941/Kol/2009 (A.Y.2005-06), No.1942/Kol/2009 (A.Y.2006-07), No.1943/Kol/2009 (A.Y.2007-08), No.1952/Kol/2009 (A.Y.2004-05), No.1953/Kol/2009 (A.Y.2005-06), No.1954/Kol/2009 (A.Y.2006-07) and No.1955/Kol/2009 (A.Y.2007-08). All the above-noted eight appeals were filed by the assessee involving identical question regarding levy of penalty under Sections 271D or Section 271E of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act, 1961’), which have been decided by the impugned common order of the ITAT.
4. Briefly stated facts of the present case are that during the assessment years in question, the respondent/assessee company received **share application money** for preference shares amounting to Rs.20,000/- or more from persons otherwise than by an account payee cheque or by account payee bank draft. The assessing officer issued a show cause notice for penalty under Section 271D/271E on the ground that the assessee has violated the provisions of Section 269SS. The Additional Commissioner imposed penalty under Section 271D for assessment years 2005-06, 2006-07 and 2007-08 and also imposed penalty under Section 271E of the Act, 1961 for the assessment years 2004-05, 2005-06, 2006-07 and 2007-08. Aggrieved with the order of the CIT(A), the assessee filed eight appeals before Income Tax Appellate Tribunal, E Bench, Kolkata

which has been allowed by the impugned order. Aggrieved with the impugned order of the ITAT, the revenue has filed the present appeal.

Discussion & Findings :

5. Before we proceed to examine the merits of the case, it would be appropriate to reproduce the relevant provisions of the Act, namely, Sections 269SS, 269T, 271D and 271E of the Act, 1961:

“269SS. No person shall, after the 30th 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 loan and deposit; or
- (b) on the date of taking or accepting such loan or deposit, any loan or accepted earlier by taken such person from the deposit 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

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 savings bank or co-operative bank;
- (c) any corporation established by a Central, State or Provincial Act;
- d) any Government company²⁵ 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 are both has deposit is taken or accepted agricultural income and neither of them has any income chargeable to tax under this Act.]

Explanation.- For the purposes of this section,-

- [(i) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949), applies and includes any bank or banking institution referred to in section 51 of that Act:]*
- (ii) "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949):*
- (iii) "loan or deposit means loan or deposit of money.]*

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 that nothing contained in this section shall apply to repayment of any loan or deposit taken or accepted from-

- (i) Government;
- (ii) any banking company, post office savings bank or co-operative bank;
- (iii) any corporation established by a Central, State or Provincial Act;
- (iv) any Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
- (v) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, by reasons to be recorded in writing, notify in this behalf in the Official Gazette.]

Explanation. For the purposes of this section,-

- (i) "banking company" shall have the meaning assigned to it in clause (of the Explanation to section 269SS;
- (ii) "co-operative bank" shall have the meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949);
- (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)**

271D. [(1) 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.]

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

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.]”

6. The object of Section 269SS has been well explained by the Hon’ble Supreme Court in the case of **Assistant Director of Inspection**

Investigation Vs. A. B. Shanthi (2002) 6 SCC 259 (paragraphs 8 and 10),
as under :

“8. *The contention of the appellant’s counsel has no force. **The object of introducing Section 269SS is to ensure that a taxpayer is not allowed to give false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false explanation for the same.** During search and seizures, unaccounted money is unearthed and the taxpayer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so called lender also to manipulate his records later to suit the plea of the tax payer. **The main object of Section 269SS was to curb this menace.** As regards the tax legislations, it is a policy matter, and it is for Parliament to decide in which manner the legislation should be made. Of course, it should stand the test of constitutional validity.*

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10. *The above dictum applies in full force as regards the present case. **The object sought to be achieved was to eradicate the evil practice of making of false entries in the account books and later giving explanation for the same.** To a great extent, the problem could be solved by the impugned provision.”*

7. Section 269SS prohibits any person to take or accept from any other person any loan or deposit otherwise than by an account payee cheque or

by account payee bank draft, if the amount or 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. If a person violates Section 269SS then he is liable to penalty under Section 271D of the Act.

8. Section 269T provides that 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 by account payee bank draft drawn in the name of the person who has made the loan or deposit** together with interest, if it exceeds rupees twenty thousand. Explanation-(iii) to Section 269T defines the words “loan or deposit” to mean 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, include loan or deposit of any nature.
9. The main controversy involved in the present appeal is as to **whether** share application money received by the respondent/assessee and its repayment in excess of Rs.20,000/- otherwise than by way of an account payee cheque or by account payee bank draft would fall within the phrase **“loan or deposit”**.
10. In the **Concise Oxford English Dictionary (South Asia Edition), (12th Edition)** the word **“loan”** has been defined as “a thing that is borrowed, especially a sum of money that is expected to be paid back with interest.”

As per **New International Webster's Comprehensive Dictionary (Delux Encyclopaedic Edition)** "loan" means "something lent, especially a sum of money lent at interest". According to the **Concise Oxford English Dictionary, (South Asia Edition)**, "deposit" means "1.a sum of money placed in a bank or other account; 2.a sum payable as a first instalment or as a pledge, a returnable sum paid to cover possible loss or damage." In the aforesaid **Webster's Comprehensive Dictionary**, the meaning of the word "deposit" is '1. To give in trust or for safekeeping, 2. To give as part payment or as security,"

11. In *Commissioner of Income Tax Vs. Bazpur Cooperative Sugar Factory Ltd.*, (1988) 3 SCC 553 (para 15) the Hon'ble Supreme Court has held that the essence of 'deposit' is that there must be a liability to return it to the party by whom and on whose behalf it is made on the fulfilment of certain conditions. In *Keshavlal Kemchand and Sons Pvt. Ltd. Vs. Union of India* (2015) 4 SCC 770 (para 29) the Hon'ble Supreme Court has held that the expression 'loan' is the act of advancing money by one person to another under an agreement by which the recipient of money agrees to repay the amount on agreed terms.
12. We find that the words loan or deposit has been defined in Explanation-(iii) to Section 269T which is not an expansive definition. It provides that "loan or deposit" mean any loan or deposit of money which is repayable after notice or repayable after a period and, in case of a person other than

a company including loan or deposit of any nature. Share application money is neither repayable after notice nor repayable after a period. It is for participation in the capital of the company. Therefore, neither as per the definition of the words “loan or deposit” as given in the Explanation-(iii) to Section 269T of the Act, 1961 nor in ordinary sense, share application money can be said to be a loan or deposit. Once share application money is neither loan nor deposit, then neither Section 269SS nor 269T shall attract. Consequently, no penalty either under Section 271D or under Section 271E could be imposed.

13. **In case of loan** it is ordinarily the duty of the debtor to seek the creditor and to repay the money according to the agreement. In other words, a loan grants temporary use of money or temporary accommodation on certain conditions. Thus loan is an act of advancing money by one person to another under an agreement by which the recipient of money agrees to repay the amount on agreed terms. **In case of a deposit**, it is generally the duty of the depositor to go to the banker or to the depositee, as the case may be, and make a demand for it. The **essence of a deposit** is that there must be a liability to return it to the party by whom or on whose behalf deposit has been accepted on fulfilment of certain conditions. **Share application money is for participation in capital of a company which is neither a loan nor a deposit.** Once the share application money is neither a loan nor deposit, the provisions of Section 269SS or

269T shall not attract. Consequently, no penalty under Section 271D or 271E of the Act, 1961, as the case may be, could be imposed. The ITAT has referred to several judgments of different High Courts and took a view that share application money or its repayment is neither a loan nor a deposit and as such, provisions of Section 269SS or 269T are not attracted and consequently no penalty could be imposed under Sections 271D or 271E. Looking into the object and purpose of Section 269SS and 269T of the Act, 1961 read with the Explanation defining the words “loan and deposit”, the share application money can neither be said to be loan nor a deposit, and accordingly, the provisions of Section 269SS or Section 269T or the consequential penalty provisions under Sections 271D or Section 271E shall have no application on facts and circumstances of the present case. Thus, we do not find any illegality in the impugned order of the Tribunal.

14. For all the reasons afore-stated, we do not find any merit in this appeal. Consequently, the appeal (ITA/68/2012) is dismissed and substantial question of law is answered in negative i.e., in favour of the assessee and against the revenue.

(SURYA PRAKASH KESARWANI, J.)

I agree.

(RAJARSHI BHARADWAJ, J.)