

Prabha Vs. Hali Chit Fund Co. (P.)

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-19-1994

Reported in : (1994)49ITD566(Delhi)

Judge : A Kalyanasundharam, M Bakshi

Appellant : Prabha

Respondent : Hali Chit Fund Co. (P.)

Judgement :

1. The assessee chit fund company has filed this appeal aggrieved by the confirmation of penalty imposed under Section 271D of the Income-tax Act, 1961 for Rs. 23,71,000, for infringement of the provisions contained in Section 269SS of the Act, by accepting loan or deposit in cash.

2. Shri K. Sampath the learned counsel for the appellant company, submitted that, the company which carries on the business of chit fund, had a total capital of Rs. 10,200. He drew our attention to the Balance Sheet of the company as on 31-3-1990 and submitted that, the amount received towards subscription to various chits aggregated to Rs. 45.60 lakhs and the exact amount had been granted as loans to the subscribers. The amount that was due to prized subscribers was Rs. 6.50 lakhs and the subscription in arrears was to the tune of Rs. 7.22 lakhs. He also submitted that, the cash and the bank balance was a paltry figure of Rs. 37,382 and there were hardly any asset worth the mention.

3. Shri Sampath submitted that, the figures in the Balance Sheet gave an indication that, on almost all times whenever the subscribers were due on the prized chits, the company was always short of requisite liquid funds. The two directors of the company Shri Narinder Pal Chug and Shri Subash Chand Chug, in the interest of the company, ie., to keep it afloat and to sustain it, and to show that, the directors are genuinely interested in meeting the liabilities under the chits, brought in cash to tide over the temporary needs. The two directors felt that, it would be better to increase the paid up share capital of the company, which would ensure sufficient working capital for the company and had brought cash into the company, which they had withdrawn from their partnership firms. Subsequently, they had decided against the increase in the capital and the company, had repaid them the cash brought in.

4. Shri Sampath submitted that, since, the cash being brought into the company and it being repaid to the directors was repeated every month, the department had treated the exercise as in the nature of loan or deposit. Shri Sampath contended that, the term 'loan or deposit' had not been defined very clearly in Section 269SS, but, in normal connotation or as is understood by the common man, it means those amounts, that carry interest as part of the package, i.e., the person giving a loan or keeping his money in deposit with the company, expected a reasonable rate of interest, which is usually calculated depending upon the period for which, the money is retained by the company. He contended that, every company that is governed by the Indian Companies Act, 1956, have to necessarily conform to the provisions contained therein and it could accept deposit or a loan within the framework of the Companies Acceptance of Deposit Rules, 1975 and according to Section 58A of the Companies Act. He contended that, the Companies Act clearly prohibits companies from taking loans or deposits for a period less than a year and have also prescribed the rate of interest payable thereupon.

He submitted that, it is not that every receipt of money would be in the nature of loan or deposit and it is absolutely essential to appreciate the facts in their proper perspective. He contended that, temporary accommodation as in the instant case, could never be roped within the term 'loan or deposit' because, it has no similar characteristics. The moneys were received towards share application and it was

returned because, the company had decided against the increase in the share capital, perhaps on the appreciation of the fact that, it would be more prudent to emphasize on the speedy recovery of the subscription due. It was rather unfortunate for the company, that, it had to approach its directors too often in the year to tide over the company from its financial crisis, by placing a proposal of issuing further shares of the company.

He contended that, the definition of the term 'deposit' is contained in Section 269T of the Act, which governs the mode of repayment of the deposits and since, the two sections, viz., Section 269SS and Section 269T are part materia identical and also govern the deposits, the definition of the term 'deposit' in Section 269T, could be borrowed for enlisting the intentions of the legislature. He pleaded that, the definition that reads "any 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 deposit of any nature", is clearly indicative that, Sections 269SS and 269T are intended to cover only those class of receipts of money that are repayable after a notice or after a fixed period. He contended that, the Supreme Court in *Banarsi Debiv. ITO* [1964] 53 ITR 100, at page 106 had observed to the effect that, a particular word or term if gives a doubtful meaning, that has received a judicial interpretation, either by subsequent statute interpreting the same word or the phrase in a similar context, then, it would be only proper that, the word or the term is construed in the manner it has been so interpreted. He contended that, since, the term 'loan or deposit' has not been defined in Section 269SS, and it is only in Section 269T that, the word 'deposit' has been given some meaning, it should be adopted as the meaning of the term 'loan or deposit'.

He also made reference to the Supreme Court decision in *Mehta Parikh & Co. v. CIT*[1956] 30 ITR 181, with specific reference to the observations contained at page 187. He contended that, the directors had filed affidavits confirming their intention of having provided cash for further issue of shares, but, subsequently when the decision was taken not to increase the share capital of the company, the money was repaid, had not been controverted or found to be wrong. He contended that, on every occasion of introduction of the cash, it had always coincided with the date of draw and the amounts were just sufficient to meet the immediate

requirements of the company. He contended that, the cash book and the ledger entries clearly show or indicate that, the moneys were received towards share application. He pleaded that, it was on such similar uncontroverted facts that, the Supreme Court in Mehta Parikh & Co.'s case (supra), had observed that, on accepted or uncontroverted facts, it is no longer open to the department to challenge the correctness of the books or other submissions.

Shri Sampath submitted that, the penalty imposable under Section 269SS is rather very heavy, because, it is always equal to the amount of the loan or deposit received otherwise than by cheques. The vires of the section was challenged before the Madras High Court in a writ in Kumari A.B. Shanthi v. Assistant Director of Inspection [1992] 197 ITR 330 and the Madras High Court considering the stringent nature of the section, had held it to be ultra vires. He contended that, the Supreme Court [1993] 204 ITR (St.) 1 had granted an interim stay on the above order of the Madras High Court and had directed that, though the criminal proceedings may go on, any substantive sentence may not be given effect to until further orders from the Supreme Court.

Shri Sampath pleaded that, broad objective of Section 269SS is to contain the influx of unaccounted money being passed on in the shape of loans or deposits. He pointed out that, there are times that, every business needs temporary accommodation from its sister concerns or may provide temporarily funds to sister concerns, and these are outside the scope of Section 269SS, for which proposition, he placed reliance on the Tribunal decision in Muthoot M. George Bankers v. Asstt. CIT [1993] 46 ITD 10 (Coch.). Shri Sampath contended that, the copy of the share application money account as extracted from the ledger of the company clearly show that, almost each month there had been receipts of cash and each month there had been repayments too and the time gap between receipt of money and repayment had never been more than thirty days, which only shows that, the temporary accommodation by the directors, was with a view to augment the cash needs of the company, by proposing get more shares of the company, but, later withdrawing from that idea.

He contended that, since this problem of cash shortage continued, the directors in fact had closed down the operation subsequently. He concluded his submission by stating that, by rejecting the genuine submissions of the directors and the facts as are on the record, a real fact cannot be transformed into an unreal one and therefore, the penalty should be quashed.

5. Shri S.C. Gupta, the learned senior departmental representative submitted that, merely because, the directors had clothed the transactions of cash loans as share application money, the true fact should not be lost sight of, which is loans being provided on a temporary basis in total violation of the provisions of Section 269SS of the Income-tax Act. He contended that, the term 'deposit' as defined in Section 269T is with reference to repayment of those moneys that are received as such. He vehemently contended that, if the legislature desired to adopt the same meaning in Section 269SS, they would have stated so and in its absence, the meaning from another section could not be borrowed. He pleaded that, the affidavits and the entries in the books of accounts are nothing more than self-serving statements and therefore, they have no evidentiary value in the eye of law.

6. The rival submissions on the issue have been given our very careful consideration. Since, we are concerned with the intentions of the legislature in the framing of the Sections 269SS & 271D, we would begin with reproducing the two sections reasons given in the Finance Bill, 1984, through which, the said sections were introduced into the statute.

No person shall, after the 30th day of June, 1984, take or accept from any other person (hereinafter in this section referred to as the depositor) any loan or deposit otherwise than by an account payee cheque or account payee draft if (a) the account of such loan or deposit or the aggregate amount of such loan or 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 had 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, (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 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 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 deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.

(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 same meaning assigned to it in Part V of the Banking Regulation Act, 1949 (10 of 1949); 8. The Notes on Clauses forming part of the Finance Bill, 1984 explained the intention behind the provision, is reproduced for the sake of facility: Clause 28 seeks to insert a new Section 269SS in the Income-tax Act, relating to the mode of taking or accepting loans and deposits.

The proposed provision seeks to provide that after 30th June, 1984, no person shall accept any loan or deposit from any other person of ten thousand rupees or more except by account payee cheque or account payee draft. This requirement will also apply in cases where on the date of taking or accepting a loan or deposit from a person, any earlier loan or deposit taken or accepted from the same person and remaining unpaid on that date is ten thousand rupees or more.

The proposed requirement will also apply, if the aggregate amount of such earlier loan or deposit and the amount of loan or deposit proposed to be taken or accepted from the person is ten thousand rupees or more. The proposed requirement will however not apply to any loan or deposit taken or accepted from or any loan or deposit taken from or accepted by Government and banking

company, post office savings bank or any cooperative bank; any corporation established by a Central, State or Provincial Act; or any Government company as defined in Section 617 of the Companies Act, 1956. The provisions of the new section will also not apply to any loan or deposit taken from, or accepted by any institution, association or body or class of institutions, associations or bodies, which the Central Government may, for reasons recorded in writing, notify in this behalf in the Official Gazette. For the purposes of this provision, the expression 'banking company' will have the meaning assigned to it in Clause (a) of the Explanation to Section 40A(8) of the Income-tax Act. The expression 'co-operative bank' will have the meaning assigned to it in part V of the Banking Regulation Act, 1949 and the expression 'loan or deposit' will mean any loan or deposit of money.

The proposed provision will take effect from 1st April, 1984, but, as stated earlier the requirement laid down under the proposed section will apply only in relation to loans and deposits taken or accepted after 30th June, 1984.

(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 imposed under Sub-section (1) shall be imposed by the Deputy Commissioner.

10. The reading of the Section 269SS indicates that, the provisions are restricted to loan or deposit taken or accepted and excludes from its purview all other transactions that cannot be characterised as loans or deposits. The use of the two terms 'loan or deposit' and in combination of the terms 'taken or accepted', is indicative of the intention of the legislature that, it intends to cover both loans and deposits. Loan is usually termed as money that has been borrowed by the assessee for a certain period at a fixed rate of interest, i.e., it is money received at the instance of the assessee. Deposit normally includes any amount that is invited by an assessee for keeping in deposit with it, for a certain period, at a fixed rate of interest. The section covers both kinds of receipt of money and since, it does not use the term 'certain period', it gives an impression that, any loan or deposit whether received temporarily or for a specific period may also be covered. The

only restriction it places is on the mode of receipt of money as loan or deposit, that is, shall not be in the shape of cash. Section 269T further restricts the repayment of deposit by cash.

11. In the instant case, the assessee has passed resolution to the effect that, it intended to increase its paid up share capital. The two directors had brought by means of cash, which has been classified as share application money, for additional shares which they had desired to take of the company. The dates on which the cash was so brought in, coincided with the dates of draw and it is accepted by the appellant company that, the customers or subscribers had to be shown the physical existence of money which was why it was brought in by cash, so as to exhibit the genuineness of the company to keep up its promise to pay the prize winners. The claim made by the company is that, though the ultimate purpose of bringing in cash was to meet the liability of the company on the various dates of draw, its source was the proposal to issue further shares of the company that made the two directors to contribute from their partnership firms. It is not disputed by the department that, the source of cash brought in by the directors is explained to the satisfaction of the Assessing Officer, i.e., it is from a firm in which the two directors of the company are partners.

We may observe that, under the Indian Companies Act, 1956, as is applicable to Private Limited Companies, there is no restriction in issuing of further shares, of course subject to the ceiling of its authorised capital. The company of course has to follow the prescribed mandatory requirements of offering the additional shares to the existing shareholders, if they do not accept them, then only offer them to others. Perhaps, a solitary resolution to issue further shares may be sufficient and it may decide against the issue of additional shares, in which case, the share application money, has to be necessarily refunded.

12. It may not be out of place to mention that, the Supreme Court in CIT v. Bazpur Co-operative Sugar Factory Ltd. [1988] 172 ITR 3211, had held that, the essence of a deposit is that, there must be a liability to return it to the party by whom or on whose behalf it is made on fulfilment of certain conditions. The claim made by the appellant is also that, since, the amount received by way of cash was towards

share application, there was no liability to return it to the applicants and therefore, it cannot be categorised as a loan or a deposit. Under normal circumstances, the claim of the appellant would be a reasonable proposition, but, in the present circumstances, when repeatedly, the moneys were received and were repaid to the two directors, the claim advanced by the appellant cannot be upheld. There is no doubt that, normally amount received towards share application would not be returned, unless the amount received is in excess of the amount of share capital that is proposed to be allotted. There is also no denial that, a company after initially proposing to issue further shares, may drop the proposal. But, when this act of receiving money for further issue of shares and later dropping that idea on more than one occasion, is indicative of the intention of the company that, it was so brought in to tide over the tight financial situation and once the situation became favourable, it was withdrawn, is in the nature of a loan or temporary accommodation only and therefore, despite it being clothed as share application money, its true or real nature, i.e., as loan props out.

13. The case of Muthoot M. George Bankers (supra) as decided by the Tribunal was with reference to the assessment year 1989-90, of a firm and in relation to temporary accommodation from two sister concerns, which was not termed as deposit, because, the amendment to Section 269T covering deposit of any nature was effective from 1-4-1989, it was concluded that, the temporary accommodation from and to the sister concerns was inapplicable. In the present case before us, the situation is not similar and therefore, the cited Tribunal decision is inapplicable.

14. The decision of MehtaParikh & Co. (supra) relied upon by the appellant company for the proposition that, the affidavits and the entries as made in the account books not having been controverted, the department could not challenge its nature, in our opinion is a far-fetched proposition. This is because, the very transaction of receipt and payment of money, from and to the directors are the issue that is under examination and since, the affidavits do not inspire confidence, as the fact of repeated receipt of money and its consequent repayment, narrate a different story.

15. The reliance on the Supreme Court decision on BanarsiDebi's case 1.

38 Taxman 195.(supra), for the definition of the term 'deposit' as given in Section 269T should be adopted to cover even loans, in our view is unacceptable because, the term loan is combined with the word taken and the term deposit is combined with word accepted and this distinction has been clearly so brought out in the section, with which no ambiguity is attached. The reading of the Explanation to Section 269T, where the term 'deposit' has been defined, also bring out the fallacy in the argument advanced by the appellant. The term 'deposit' has been defined as "means any 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 deposit of any nature'. Loan unlike a deposit is always sought for by the borrower, it is repayable as agreed to with the lender and does not require any notice to be given by the borrower for repayment, and in fact it is the lender who could raise the notice on the borrower, for failure on its part to meet the demand of the lender. The only other factor that is akin to a deposit is that, the loan may also be repayable after a period, but, since, the legislature have specifically defined the term 'deposit' to mean any money repayable after a period, the present circumstance, may not warrant such an interpretation. To adopt such an interpretation, in our view, it would require interchanging nature for the term 'loan or deposit', which is not possible because, it is followed by the words, 'taken or accepted', indicating that, it covers both loan taken and deposit accepted otherwise than by account payee cheques or account payee drafts.

16. We are fully conscious of the fact that, the penalty imposed under Section 271D is quite harsh, for it is equal to the amount of loan or deposit, taken or accepted, but, since, we are required to interpret the section so as to draw its true intention and to ensure that, such an interpretation does not negate the section, we find ourselves compelled to hold the present transaction of receipt of money in cash as in the nature of a loan, and it is clearly in contravention to the provisions contained in Section 269SS of the Act. We are therefore of the view that, the plain reading of the section along with the Notes on Clauses is unambiguous in the intention of roping in all loans or deposits that are received otherwise than by account payee cheques or account payee drafts, and penalty has been rightly imposed.

17. The dates of draw are fixed up well in advance, and the extent of liability is also known and therefore, it cannot even be argued that, there was an emergency which could not be overcome except by bringing in cash. The provisions of this section, does not recognise exceptional circumstances, as in the Rule 6DDJ which provides for exceptional circumstances for payment in cash. Another factor is that, even before the amount that was brought in was repaid, fresh amounts have been brought in, and all of the repayments have been by means of cheques only. When the company has a bank account and the firm is also enjoying banking facilities, and both the concerns are located in the same city, transfer of funds from one to the other should not have posed any difficulty and therefore, the claim that, the directors wanted to exhibit their genuine intention to honour the draw, does not carry much weight and in fact, only goes to point out that, the transactions are in the nature of accommodation of the needs of funds by the company, which is the other name for loan or deposit.

18. The Supreme Court has stayed the operation of the decision of the Madras High Court in Kumari A.B. Shanthi's case (supra) and have directed that, 'though the criminal proceedings may go on, any substantive sentence may not be given effect to until further orders from the Supreme Court'. Penalty proceedings under the Income-tax Act are therefore permitted by the Supreme Court to be proceeded with. We therefore confirm the penalty so imposed.

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