

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

TUESDAY, THE 13TH DAY OF MARCH 2018 / 22ND PHALGUNA, 1939

I.T.A.No.199 of 2013

AGAINST THE ORDER IN ITA.No.720/COCH/2010 DATED 31-01-2013
OF INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH, COCHIN.
[ASSESSMENT YEAR 2005-06]

APPELLANT(S)/RESPONDENTS:

THE COMMISSIONER OF INCOME TAX,
TRICHUR.

BY SENIOR COUNSEL FOR GOI (TAXES) SRI.P.K.R.MENON &
STANDING COUNSEL FOR GOI (TAXES) SRI.JOSE JOSEPH.

RESPONDENT(S)/RESPONDENTS/APPELLANTS:

M/S AL- AMEEN EDUCATIONAL TRUST,
KULAPULLY P.O., SHORNUR - 2.

BY ADVS. SRI.T.M.SREEDHARAN (SENIOR ADVOCATE)
SRI.V.P.NARAYANAN
SMT.BOBY M.SEKHAR
SMT.DIVYA RAVINDRAN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 13-03-2018,
ALONG WITH I.T.A.NO.203 OF 2013, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:-

I.T.A.No.199 of 2013

APPENDIX

APPELLANT(S)' ANNEXURES:-

ANNEXURE A: TRUE COPY OF THE ASSESSMENT ORDER U/S.143(3) DT.27.06.2007.

ANNEXURE B: TRUE COPY OF THE PENALTY ORDER U/S.271D DT.31.03.2008.

ANNEXURE C: TRUE COPY OF THE ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS) DATED 26.10.2010.

ANNEXURE D: TRUE COPY OF THE ORDER OF THE ACCOUNTANT MEMBER.

ANNEXURE E: TRUE COPY OF THE ORDER OF THE JUDICIAL MEMBER.

ANNEXURE F: TRUE COPY OF THE REFERENCE ORDER BY THE ACCOUNTANT MEMBER.

ANNEXURE G: TRUE COPY OF THE REFERENCE ORDER BY THE JUDICIAL MEMBER.

ANNEXURE H: TRUE COPY OF THE ORDER OF THE THIRD MEMBER.

ANNEXURE I: CERTIFIED COPY OF THE ORDER OF THE INCOME TAX APPELLATE TRIBUNAL DATED 31.1.2013 BASED ON THE ORDER OF THE \ THIRD MEMBER, WITH A COPY.

ANNEXURE J: TRUE COPY OF THE JUDGMENT OF THE HIGH COURT OF DELHI IN THE CASE OF CIT Vs. M/S.SAMORA HOTELS PVT. LTD.

ANNEXURE K: TRUE COPY OF THE JUDGMENT OF THE HON'BLE HIGH COURT IN THE CASE OF CIT Vs. P.K.SHAMSUDDIN.

RESPONDENT(S)' ANNEXURES:- **NIL.**

vku/-

[true copy]

“C.R.”

K. Vinod Chandran & Ashok Menon, JJ.

I.T.A.Nos.199 of 2013 & 203 of 2013

Dated, this the 13th day of March, 2018

JUDGMENT

Vinod Chandran. J:

The Revenue is in appeal against the common order of the Tribunal for the assessment years 2005-06 and 2006-07. The issue relates to acceptance of loans and deposits other than by way of Cheque or Draft, in violation of Section 269SS of the Income Tax Act, 1961 [for brevity “the Act”] and the resultant penalty levied under Section 271D, totaling the amounts so accepted. The Bench of two members of the Tribunal wrote split verdicts. The Administrative Member (for brevity “AM”) affirmed the orders of the Additional Commissioner, as affirmed by the first appellate authority; remanding to the extent of further verification of the loan of Rs.49,00,000/- received from the daughter of the President of the Trust. The Judicial Member [for brevity “JM”], however, did not agree with the AM and wrote a separate order finding the explanation offered by the assessee

to be satisfactory to enable the assessee to be absolved of the penalty under Section 273B; by reason of which the matter was placed before a third member. The third member, the Vice-President of the Tribunal concurred with the JM's order.

2. The questions of law arising from the above order, as framed by another Division Bench of this Court while admitting the appeals, are as follows:

Whether on the facts and circumstances of the case:

- i. The Tribunal is right in law in interfering with the order of penalty levied under Section 271D of the Income Tax Act;
- ii. Is the approach and conclusion of the Tribunal in accordance with law;
- iii. Did the Tribunal appreciate the import of Section 271D in its correct perspective?
- iv. Is not the order of the Tribunal against Section 271D of the I.T.Act?
- v. Did the assessee discharge the burden of proof?"

3. The learned Senior Counsel Sri.P.K.R.Menon appearing for the Revenue took us through Section 269SS and Section 271D as also the provisions for penalty under Sections 271C, 271CA and 271E to point out that all these are civil liability, which would not require *mens rea* to be found, for imposition of

penalty. The learned Senior Counsel would refer to the intention behind the introduction of Section 269SS, which is to plug inflow of black money into the economy and also to surmount the various measures adopted by individuals to launder unaccounted income. According to the learned Senior Counsel, the Tribunal erred insofar as finding that there was reasonable cause pleaded by the assessee; when the only contention raised by the assessee was ignorance of law. There could be no such contention raised as a reasonable cause and the assessee is an educational Trust running professional colleges, who has sufficient wherewithal to get legal opinion on these aspects.

4. The learned Senior Counsel appearing for the assessee Sri.T.M.Sreedharan would, at the outset, submit that there is no question of law arising from the order of the Tribunal. It is argued that the advances were raised from the staff members, since the construction of the buildings were going on. The genuineness of the transaction is proved by the fact that the said amounts received in cash were deposited in the Bank on the same day. Certain advances received were also returned by way of cheque, to the staff members. With respect to the loan taken from

the daughter of the President of the Trust, it is argued that there is clear evidence that she had taken a loan from the Bank and had advanced it to the Trust; since at that point the President of the Trust was abroad and there was immediate need of funds.

5. The Revenue contends that the decision relied on by the majority of the Tribunal members in ***Commissioner of Income Tax v. P.K.Shamsuddin*** in I.T.A.No.237 of 2010 dated 04.02.2011 has been distinguished by another Division Bench in ***K.V.George v. Commissioner of Income Tax*** in I.T.A.No.279 of 2013 dated 18.12.2013. The learned Senior Counsel for the Revenue also relies on ***Commissioner of Income-tax (TDS), Cochin v. Thomas Muthoot*** [(2015) 233 TAXMAN 557 (Ker.)], ***Manural Huda Trust v. Commissioner of Income Tax*** [2016 (3) KHC 683], ***Grihalakshmi Vision v. Addl.CIT*** [(2015) 379 ITR 100 (Ker.)], ***Commissioner of Income Tax (TDS) v. Muthoot Bankers*** [(2017) 398 ITR 276 (Ker)] and ***CIT v. Muthoot Bankers (Aryasala)*** [(2016) 385 ITR 51 (Ker.)] to contend that “*reasonable cause, as applied to a human action is that which would constrain a person of average intelligence and ordinary prudence*” (sic- ***Dy. CIT Vs. Adinath Industries*** {[2001] 252 ITR 471 (Delhi)}).

Ignorance of law under no circumstance can be a reasonable cause; especially here, looking at the status and stature of the assessee.

6. The learned Senior Counsel appearing for the assessee would take us through the decision in ***Assistant Director of Inspection (Investigation) v. Kum.A.B.Shanthi [(2002) 255 ITR 258 (SC)]***, in which the Constitutional validity of Section 269SS was upheld. The decision was relied on to urge that Section 273B, which speaks of reasonable cause intends mitigation of undue harshness in cases of genuine and *bona fide* transactions. ***Commissioner of Income Tax v. Saini Medical Store [(2005) 276 ITR 79 (P&H), Commissioner of Income Tax v. Kundrathur Finance & Chit Co. [(2006) 283 ITR 329 (Mad)], Commissioner of Income Tax v. Lakshmi Trust Co. [(2008) 303 ITR 99 (Mad)], Commissioner of Income Tax v. Manoj Lalwani [(2003) 260 ITR 590 (Raj)]*** and a decision in I.T.A.No.86 of 2010 dated 12.01.2011 [***Commissioner of Income Tax v. Smt.Rosary Prem***] are also relied on.

7. The facts indicate that for the year 2005-06, there were loans and advances of Rs.1,29,40,000/- and in the second

year [2006-07] Rs.15,25,000/-. In the first year, out of Rs.1,28,40,000/-, Rs.49,00,000/- is with respect to the loan advanced from the daughter of the President; a further Rs.1,00,000/- again a loan from the daughter, having been paid in cheque. The AM in his order remanded the issue regarding Rs.49,00,000/- for fresh consideration on verification of the relevant facts and adjudication on merits, since a specific contention was taken of the daughter having taken loan from a Bank and advanced it on the very same day to the Trust. The JM passing the order at the first instance and the Vice-President after the split verdicts; deleted the penalty in toto.

8. The explanation of the assessee was manifold: (i) no evasion of tax , hence no penalty can be levied, (ii) deposits taken from staff were refundable, (iii) Rs.50 lakhs was a loan taken from one Zeenath, since cash was required urgently and (iv) no penalty proceedings issued by A.O. The loans and deposits taken from staff members was detailed in a list produced at Annexure-B. Annexure-B also indicated that some of those loans were repaid by cheques. The Addl. Commissioner who passed the original order under Section 271D found that there is no mandate of detection of

evasion to impose penalty. Section 269SS was intended at plugging inflow of black money, to ensure transactions above a threshold limit are traceable and there is no differentiation as far as genuine transactions are concerned. The contention of refundable advance even if accepted, would not offer any mitigation to the assessee insofar as the penalty imposed under Section 271D since the law does not distinguish refundable or non-refundable loans or deposits. As far as urgent requirement of funds, it was found that the ground raised is of a general and vague nature without any substantiating material produced. The next contention as to the Assessing Officer having not initiated any proceedings was rejected on the finding that the Assessing Officer had clearly recorded in the assessment order, the fact of the assessee having accepted loans and advances in violation of Section 269SS and noticed the penalty proceedings initiated separately. The A.C imposed penalty on the amounts received by the assessee other than by way of cheque or drafts. The first appellate authority also affirmed the same. The Tribunal, by majority deleted the penalty on the ground that the assessee had offered a reasonable cause for having accepted money in cash.

9. As to reasonable cause, various decisions were placed before us. **P.K.Shamsuddin** was a case in which an assessee who retired from a Circus Company, started an industry and took loans from various Banks through his relatives. A Division Bench of this Court found that borrowers from Bank having themselves taken a loan could not have issued cheques to further lend the amounts and in such circumstance there was a reasonable cause put forth. Especially in the context of there being no possibility of tax evasion or infusion of black money, the explanation offered by the assessee was found to be plausible. **K.V.George** was a case in which the assessee again contended ignorance of law as a ground for having accepted money other than by way of cheque in excess of the limit as prescribed under Section 269SS. This Court distinguished **P.K.Shamsuddin** and specifically referred to **Kum.A.B.Shanthi**. In **Kum.A.B.Shanthi**, it was held that '*if there was a genuine and bona fide transaction and the taxpayer could not get a loan or deposit by account payee cheque or account payee demand draft for some bona fide reason, the authority vested with the power to impose penalty has a discretionary power not to levy penalty*'. K.V.George, the assessee

contended before the Department that he was putting up an industrial unit and had received loans from various agriculturists who were residing in the State of Tamil Nadu. It was found that there was no proof of the same; not was there proof of the assessee having applied for a loan; which was not sanctioned and disbursed in time, as pleaded. The Division Bench distinguished the decision in **P.K.Shamsuddin** on facts and upheld the imposition of penalty. What is discernible from a reading of the above decisions is that **P.K.Shamsuddin** has application only in the peculiar facts coming out in the said decision; and cannot be applied across the board in all cases where there is violation of Section 269SS leading to imposition of penalty under Section 271D.

10. **A.B. Shanthi** found Sections 269SS and 271D to be constitutionally valid. The amendment was found to have been brought in, to put an end to the practice of false and spurious explanation by the taxpayers, on recovery of unaccounted cash, in the searches conducted by the I.T department and to plug the loopholes insofar as subsequent explanation offered of loans and deposits; with confirmatory letters from third parties. The attack on

the ground of violation of Article 14; since the lender or depositor; whose income the loan or deposit would be, has not been taxed or penalised, was negated. It was found that the amendment intends to curb the menace of frivolous explanations being offered for unaccounted money, with certificates obtained from third parties, of loans and deposits. The borrower who adopts such device, to account for unaccounted money, was found to have been rightly penalised especially viewing it from the angle of tax evasion. The penal provision, as it exists with Section 271D, which replaced the earlier provision providing for even imprisonment, was found to be neither draconian nor expropriatory in nature. Section 273B was also noticed, which offered mitigation insofar as genuine and *bonafide* transactions, whenever reasonable cause is shown for acceptance of cash. Mitigation cannot be without reasonable cause and the provision alone will not absolve a defaulter assessee of penalty, whenever an explanation is offered. It had to be reasonable. What is reasonable is the vexing question for which we get some guidance from the decisions cited on both sides.

11. ***Saini Medical Store*** and ***Lakshmi Trust Company*** are cases in which the two High Courts found no

substantial questions of law arising from the order of the Tribunal, which held the explanation offered by the respective assessees to be reasonable so as to provide mitigation under Section 273B. From a reading of the aforesaid decisions nothing is discernible as to the facts or the explanation. **Smt.Rosary Prem** caused interference to the penalty on the ground of limitation. None of these decisions are applicable to the facts of the present case.

12. **Kundrathur Finance & Chit Co.** carrying on chit business offered an explanation for accepting cash deposits; that its activities were carried on in a locality where no banking facility was available, which was found to be acceptable by the High Court of Madras. **Manoj Lalwani** again was a case in which the assessee an exporter had obtained a cash loan from his brother-in-law, for the purpose of ensuring time bound supplies, from his suppliers to fulfill his export obligations. It was in this context that the Rajasthan High Court found reasonable cause, especially when the amounts were deposited in the bank account so as to satisfy the demands of the assessee's suppliers. On facts, we do not see any of these decisions coming to the aid of the assessee to be absolved from penalty; based on the frivolous explanation

offered.

13. **Muthoot Bankers (Aryasala) [(2016) 385 ITR 51 (Ker.)]** was a case in which penalty under section 271C was imposed for non-deduction of tax at source. The assessee offered no explanation, but only prayed for a lenient view for the technical lapse. The first appellate authority as well as the Tribunal held, that the Assessing Officer did not establish absence of a reasonable cause and hence there could be no penalty imposed. Relying on **Thomas Muthoot** it was held: *“the burden under section 273B is entirely with the assessee and that a case which is beyond the control of the assessee and which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or inaction or want of bonafides, alone make out a reasonable cause” (sic-para-6)*. The Division Bench found that the appellate authorities in the said case, shifted the burden on to the revenue; against the statutory mandate. The assessee having not established reasonable cause, the penalty was found to have been properly imposed, without any reasonable cause for mitigation under Section 273B.

14. **Thomas Muthoot** elaborately dealt with the issue

of what reasonable cause is. The penalty which came up for consideration was for non-deduction of tax at source. The Tribunal interfered with the penalty finding the belief, entertained by the assesseees that there was no liability to deduct tax from the interest paid by them, to the firm in which they were partners, was reasonable. It was also found that the partnership firm had disclosed the interest income, but had no liability to tax for reason of the declared loss and hence there was no cause to find revenue loss. The Patna High Court in ***C I T Vs. Jagadish Prasad Choudhary (1995) 211 ITR 472***, held “reasonable cause” to mean a cause which is beyond the control of the assessee and which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or inaction or want of *bonafides*, to satisfy the obligation under the Act. This view was followed by the Delhi High Court in two cited decisions which also found favour with the Division Bench of this Court. On facts, it was found that the belief of the assessee of there being no liability to deduct tax, from the interest paid by the partners to the firm, was only a plea of ignorance of law, which was not reasonable, especially considering the status of the assessee, who has the

services of experienced Chartered Accountants. The further finding of the Tribunal that there was no revenue loss, was held to be inconsequential as a defense against penalty; which also was not a reasonable cause.

15. **Manural Huda Trust** dealt with the imposition of penalty under Section 271(1)(c) for concealment of income or furnishing incorrect particulars of income. The assessment of the appellant for the subject year was complete and final disallowing the deductions claimed, resulting in a finding of concealment of income, which led to penalty proceedings. The assessee as explanation, submitted that the books of accounts were impounded by the Revenue, disabling an audit and hence the wrong deductions claimed. It was argued that **Hindustan Steel Ltd Vs. State of Orissa (1969) 2 SCC 627** held that penalty will not ordinarily be imposed, unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. The Division Bench relied on **Chairman, SEBI Vs. Shriram Mutual Fund (2006) 5 SCC 361** to find that the Apex Court had itself clarified the earlier decision in **Hindustan Steel**

having been rendered in the context of a quasi-criminal proceeding; which principles laid down, having no application insofar as a proceeding for imposition of civil liabilities. There can be no doubt that in the present case also the explanation of the assessee, if found to be not tenable and reasonable, the penalty imposed would be not one relating to a quasi-criminal proceeding and would be for civil liability.

16. In **[2017] 398 ITR 276 (Ker.)**, Muthoot Bankers had paid interest to its sister concerns, on which there was no deduction of tax at source under Section 194A. The Joint Commissioner imposed penalty under Section 271C, in response to which the assessee submitted that the non-deduction of tax was not deliberate and also that the recipient sister concerns had included the interest income in their returns and paid tax thereon. There was, hence, no deliberate attempt to evade payment of tax, was the ground raised. The Tribunal deleted the penalty accepting the explanation, which was overturned by a Division Bench of this Court. The explanation did not come within the ambit of reasonable cause and there was even absence of such pleading as also proof and, hence, the penalty was rightly imposed was the finding.

Grihalakshmi Vision was a case in which the assessee took amounts in cash from the partners of the firm allegedly to meet urgent business expenditure. The explanation was concurrently found by all the three fact finding authorities to be insufficient and not a reasonable cause. The Division Bench refused to interfere with such finding of fact, holding that no question of law arises.

17. **Thomas Muthoot** and **Manural Huda Trust** apply squarely to the facts of the instant case. The questions of law raised of deletion of penalty on the explanation offered, is in effect; on the perversity of the findings of the Tribunal. The only explanation offered was that the deposits were those received from the staff, many of which were refunded by cheque. The explanation as to urgent requirement of funds, was only with respect to the loan from one Zeenath who is said to be the daughter of the President of the Trust. **A.B. Shanthi** upheld the provisions finding the same to be intended at curbing the menace of unaccounted money being accounted on false claims of loans and advances from third parties. The assessee does not proffer any explanation as to why the deposits were received from the staff. The deposit of such funds in the bank account and refunds as claimed, also

cannot be relied on to find a reasonable cause since these are measures adopted to evade tax as found by the Apex Court. There is also no reasonable cause shown, even if the claim of the deposits from staff is accepted as genuine, for the assessee to have not directed it to have been made by way of cheque or draft. The explanation is only ignorance of law which, as already found cannot offer any mitigation under Section 273B; for which further support is garnered from ***Sitaram Ramcharan Vs. M.N. Nagrashana A I R 1960 SC 2601.***

18. Answering the questions of law; we hold that the Tribunal erred egregiously in deleting the penalty levied under Section 271D, on the facts disclosed and cause shown, which approach and conclusions are perverse. The assessee failed to discharge its burden in proving that there was a reasonable cause in accepting the deposits from staff members other than by way of cheque or draft. The Tribunal failed to appreciate the import of Section 271D in the correct perspective. We answer the questions of law arising from the order of the majority, against the assessee and in favour of the Revenue. We affirm the order of the Administrative Member and in that context the remand made in this

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order, to further enquire about the facts and circumstances of the loan from Zeenath shall be gone into afresh by the Additional Commissioner. There shall be no order as to costs.

Sd/-
K.Vinod Chandran
Judge

Sd/-
Ashok Menon
Judge

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