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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 640/2005**

Date of decision: 24th May, 2018

THE COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Deepak Anand, Jr. Standing Counsel for Mr.Zoheb Hossain, Sr. Standing Counsel for Revenue

Versus

PAWAN KUMAR JAIN ..... Respondent
Through Mr. Prakash Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

This appeal preferred by the Revenue impugns order dated 3rd September, 2004 passed by the Income Tax Appellate Tribunal (for short 'the Tribunal') in ITA No. 903/Del/2003 in the case of Pawan Kumar Jain versus Assistant Commissioner of Income Tax. The appeal relates to Assessment Year 1999-2000.

2. By the impugned order, the Tribunal has deleted penalty of Rs.21,47,019/- imposed by the Assessing Officer under Section 271D of the Income Tax Act, 1961 (for short 'the Act').

3. By order dated 12th July, 2006, present appeal was admitted for hearing on the following substantial question of law:

> "Whether the Tribunal was right in law in deleting the penalty of Rs.21,47,019/- levied under Section 271D of the Income Tax Act by holding that the amount in issue was not a loan within the meaning of Section 269SS of the Act?"

4. The Assessing Officer in the penalty order had referred to the assessment order and thereupon had given his finding wherein the contention of the assessee that cash payment of Rs.6,50,000/- and Rs.14,97,019/- received on 3rd April, 1998 and 26th June, 1998, respectively, were towards imprest was rejected, *inter alia*, observing as under:

> "Further the claim of the assessee that money was more of an imprest than loan is not acceptable for the following reasons:-
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> 1) There was no reason for keeping separate imprest if as per assessee's own admission, he was General Secretary of Jain Sahitya Sadan and was incharge of cash of Jain Sahitya Sadan. The assessee was never separate from Jain Sahitya Sadan according to his submissions, for all practical purposes, therefore, there was no need for creation of any separate imprest account out of funds received from Jain Sahitya Sadan.
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> 2) The assessee has purchased FDRs in his name and has in his I.T. return for A.Y. 1999-2000. Considering the fact that the assessee has utilized the money and even earned interest on the same goes against the claim of the assessee that it was merely an imprest money with him."

5. The aforesaid findings were upheld and sustained by the Commissioner of Income Tax (Appeals) [for short 'CIT(A)], who had elucidated:

> "....Therefore, the AO has rightly initiated and levied the penalty u/s 271D of the Act. The appellant submits that he received the amount for the purchase of old manuscripts. There is no evidence produced to show that any resolution was passed by the Sadan before transferring the money to the imprest account that it was for the purpose of purchase of old manuscripts. Secondly, even if it is accepted that it was meant for the purchase of old manuscripts, it is all the more justified to levy penalty because the appellant utilized the funds not for the purchase of old manuscripts but for his personal benefits of making FDRs and earning interest on that. Purchase of old manuscripts on behalf of the Sadan as claimed by the appellant does not absolve him of having utilized the funds unauthorizedly and immorally for his personal purpose and benefits. Secondly, the explanation is not credible. The appellant failed to give the names and address of the persons from whom the manuscripts were purchased. It is not known which manuscripts cost how much. No evidence is brought on record of the Sadan having a library or its inventory to show which manuscript was purchased when. The ld. AR showed some manuscripts but there was no proof that it belonged to the Sadan or to show when it purchased and from whom. Therefore, the claim that the money of Sadan has been returned to it through the purchase of manuscripts is itself doubtful."

6. The Tribunal in the impugned order had held as under:

"6. We have heard the submissions of the ld. Counsel for the assessee as well as ld. DR. We may at the outset point out that in the block assessment order while initiating the penalty and also in the order imposing penalty u/s 271-D and the order of the CIT(A) confirming the said order, the revenue authorities have proceeded on the basis that the money which the assessee possessed as General Secretary of Jain Sahitya Sadan, a charitable and religious organization was a loan by the said organization to the assessee. This receipt by the assessee was in cash and was beyond the limits laid down u/s 269 SS of the Act and therefore penalty proceedings were initiated and also levied. The plea of the assessee was that this money was kept as imprest with the assessee and was to be utilized for the purpose of purchase of old manuscripts. The fact that this sum was shown in the assessee's books of accounts is also not in dispute. A copy of the said account as appearing in the books of accounts of the assessee is placed at page no. 62 of assessee's paper book. The account is titled "imprest account" (Jain Sahitya Sadan), the description found therein also shows the receipts as for purchase of old manuscripts. As on 3/4/98 and (*sic*) amount of Rs.6,50,000/- was received and on 20/6/98 a sum of Rs.14,97,019/- under the heading "amount received from Jain Sahitya Sadan against imprest account" is duly recorded in this account. There is also some purchase of manuscripts which have been shown as a debit in this account. In the order of assessment passed by the AO while completing the block assessment there is a mention that the Inspector of Income Tax has also confirmed the plea as raised by the assessee on enquiry from Jain Sahitya Sadan. Thus it is clear from the facts available on record that the conclusions of the revenue authorities that the assessee availed of a cash loan from Jain Sahitya

Sadan is not correct. The essence of a loan is that there must be a debtor and creditor relationship, there must be an agreement between the parties namely the borrower and the lender and such agreement should be for return of the money by borrower from the lender. In the absence of such an agreement it can not be said that there was any loan. From the facts available on record it is clear that the money was lying with the assessee as the imprest account. This fact clearly stands established. There is no debtor-creditor (*sic*) relationship as between the assessee and Jain Sahitya Sadan. The penalty in the present case has been imposed on the assumption that there has been a loan availed by the assessee from Jain Sahitya Sadan. In view of our findings that there was no such loan there is no violation of provisions of S. 269 (SS) of the Act. There is a reference in the order imposing penalty that the utilization of funds by the assessee is contrary to the purpose for which the money was lying with him. In other words it was submitted that the assessee has unjustly enriched himself. We are not concerned in the present case as to whether the assessee is guilty of any misappropriation of funds of Jain Sahitya Sadan. The question before us is as to whether the assessee had taken loan in cash from Jain Sahitya Sadan. These arguments put forth before us are therefore considered as superfluous. In conclusion were (*sic*) hold that there was no loan availed by the assessee in cash from Jain Sahitya Sadan. The imposition of penalty on the assumption that the assessee had availed of loan in cash from Jain Sahitya Sadan cannot be sustained. The same is therefore directed to be deleted. We do not wish to go into the other arguments that were put forth before us namely the arguments that even assuming there was a violation of provisions of S. 269 (SS) of the Act no penalty can be imposed as there is a

> reasonable cause in as much as the transactions are bonafide. For reasons stated above the appeal of the assessee is allowed. The penalty imposed is directed to be cancelled."

7. It is noticeable that the Tribunal in the impugned findings has primarily relied on entries in the books of account that the two cash payments were imprest, and therefore neither loan nor deposit. The Tribunal has not considered and noticed specific aspects referred to in the order on penalty under Section 271D of the Act and the observations and findings of the CIT(A) holding that the contention and claim of imprest was sham and facile. Learned counsel for the Revenue had also drawn our attention to the assessment order under Section 158BC of the Act dated 31st January, 2003 in the case of the respondent/assessee, which states that interest accrued on the FDRs was duly reflected in the returns of income of the assessee in the Assessment Year 1999-2000. The assessment order states that Rs.6,50,000/- received in cash on 3rd April, 1998 was utilized for acquiring seven FDRs of Rs.90,000/- and one FDR for Rs.95,000/-,all dated 11th April, 1998 Similarly, Rs.14,97,019/- received in cash on 26th June, 1998 was utilized for acquiring 14 FDRs of Rs.90,000/- each and one FDR of Rs.87,000/- total amounting to Rs.13,47,000/- on the same day.

8. At this stage, learned counsel for the respondent/assessee submits that the matter may be remanded to the Tribunal for fresh adjudication without making and expressing firm comments. He submits that the assessee had raised a number of other points which

have not been considered by the Tribunal. Our attention is drawn to the arguments as recorded in the order of CIT(A).

9. We take the statement made by the counsel for the respondent/ assessee on record and accordingly set aside the impugned order dated 3rd September, 2004 with an order of remand to the Tribunal. We clarify that we have not given any firm or final opinion on whether penalty under Section 271D of the Act was justified. The Tribunal will independently apply its mind without being influenced by this order or the impugned order dated 3rd September, 2004. It will be open to the respondent/assessee to raise all contentions and issues in accordance with law. Substantial question of law would be treated as answered in favour of the revenue and against the respondent/ assessee, but with the aforesaid observations.

No costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

MAY 24, 2018
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