SECTION 69D AMOUNT BORROWED OR REPAID ON HUNDI

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Bare text of section 69D: Where any amount is borrowed on a hundi from, or any amount due thereon is repaid to, any person otherwise than through an account payee cheque drawn on a bank, the amount so borrowed or repaid shall be deemed to be the income of the person borrowing or repaying the amount aforesaid for the previous year in which the amount was borrowed or repaid, as the case may be :

Provided that, if in any case any amount borrowed on a hundi has been deemed under the provisions of this section to be the income of any person, such person shall not be liable to be assessed again in respect of such amount under the provisions of this section on repayment of such amount.

Explanation.—For the purposes of this section, the amount repaid shall include the amount of interest paid on the amount borrowed.

Legislative history and scope of section 69D

This section was introduced by the Taxation Laws (Amendment) Act, 1975, with effect from April 1, 1977. Unlike sections 69 to 69C, this section and the principles underlying it are operative only with effect from the assessment year 1977-78 onwards. It is not a clarificatory provision. It is a specific provision enabling the Assessing Officer to insist that certain loans, unless taken in a particular form, will be disbelieved and treated as the assessee's income.

Section 69D lays down that a hundi loan, and interest thereon, which has either been obtained or repaid otherwise than through an account-payee cheque, shall be treated as the income of the borrower. The object of this section is to unearth black money and to ensure that the transactions of borrowing by a hundi are made visible by routing them through a bank. The Andhra Pradesh High Court had pointed out that the object of section 69D introduced on the recommendations of Wanchoo Committee Report was to check black money. In the light of this object and adopting a purposive approach, the High Court felt that a crossed cheque or account-payee bank draft would serve the purpose well.

The proviso is intended to prevent double taxation of the same amount, once at the stage of borrowal, and, again at the stage of repayment.

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The term "Hundi", which has not been defined in the Income-tax Act, denotes, in the common commercial parlance, an indigenous instrument in vernacular language which can be used by the holder thereof to collect money due thereon without using the medium of currency. It may also be regarded as an indigenous form of a bill of exchange expresses in vernacular language which has been in use in the mercantile community in India for the purpose of collecting dues. What is relevant is that they are recognized as negotiable instruments without being affected by the provisions of Indian Negotiable Instruments Act, 1881. As has been pointed by the Courts, a bill of exchange may include a hundi, but a hundi does not necessarily include a bill of exchange. (*Biswanath* v. *Govinda* 23 CWN 534 (Cal). A hundi may be written on more papers than one, provided the aggregate value of the stamp paper used represents the correct value of the stamp to which hundi is liable. They are sometimes bill of exchange and at the other time promissory notes, and are subject to local usages.

Main characteristics of hundi transactions

From all the authorities describing the hundi transaction, the common denominator to be found out regarding the hundi transaction may be stated as follows :

(a) There are always three parties to such a transaction. They are the drawer, the drawee and the payee. The drawer cannot himself also be the drawee. If the transaction is bilateral it is a very strong indication to show that it is not a hundi transaction.

(b) A hundi is payable to satisfy a person or order but negotiable without endorsement by the payee.

(c) The holder of a hundi is entitled to sue on its basis without any endorsement in his favour.

(d) A hundi once accepted by the donee, could be negotiated without endorsement.

(e) In the case of loss of a hundi, the owner can claim duplicate or triplicate from the drawer and present the same, to the drawee for claiming payment.

(f) A hundi is normally in the oriental language as per the mercantile custom.

Payment of interest also included—The words "any amount due thereon" used in the section in relation to repayment signify that even interest on the loan has to be paid by an account-payee cheque. This is made more clear in the *Explanation* to the section.

Chance of double taxation averted—The proviso, by way of abundant caution, averts the chance for a double taxation. If in any case any amount borrowed on the hundi has been deemed under the provisions of this section to be the income of the borrower because of the fact that the hundi loan proceeded otherwise than through an account-payee cheque, he shall not be liable to be assessed again in respect of such account if the repayment of such loan is made otherwise than through an account-payee cheque.

The meaning of word "hundi" covered under section 69D was explained in *CIT* v. *Ram Niwas* in the following words :

The primary requirement for invoking the deeming provision of section 69D of the Act is that the document must be a hundi and it is only thereafter that the deeming provision comes into play. The authorities below have found that the document is not a hundi as explained by the Andhra Pradesh High Court, the Calcutta High Court and the Madras High Court, which decisions we have no reason to disagree with. Clearly, the document in question is not a hundi because it represents a bilateral transaction and it is also not on a hundi paper. In the absence of these vital ingredients, the document cannot be described as a hundi and, therefore, the presumption under section 69D of the Act would not be available to the Revenue.

Section 40A(3) now clearly incorporates that transactions could be by crossed bank drafts. However, section 269SS and section 269T require account-payee cheque or account-payee draft. Section 69D which came in between was also concerned with transparency of transactions and in the light of such objective, there was no reason why the payment by account-payee draft drawn on a bank, which helped identification of parties should not be treated on par with account-payee cheque drawn on a bank. In other words, draft was held to be equally acceptable as a cheque. This decision brings to light lack of harmony between sections 40A(3), 69D and 269SS and 269T. Section 40A(3) would expect crossed cheque or a crossed bank draft. Section 69D required account-payee cheque drawn on a bank. Section 269SS and section 269T require account-payee cheque or account-payee draft.

There are numerous varieties of hundis, for example, Darshani Hundi (sight or demand hundis), Muddati Hundi (Usance Hundis), Shaha Jogi Hundi, Jokndi, Nam Jog Hundi, Chit, etc. The characteristics of Hundi will differ according to the variety of the same. It may, however, be mentioned here that the characteristics are found in most of the hundis :

I. A hundi is payable to a specified person or order or negotiable without endorsement by the payee.

II. A holder is entitled to sue on a hundi without an endorsement in his favour.

III. A hundi accepted by the drawee could be negotiated without endorsement.

IV. If a hundi is lost, the owner could claim a duplicate or a triplicate from the drawer and present it to the drawee for payment. Interest can be charged where usage is established.

There is Departmental Circular No. 208, dated November 15, 1976 ([1977] 107 ITR (St.) 195), which contained that the section 69D is not applicable to some transactions of Darshani Hundi (payable at sight). It is created solely for the purpose of remittances of funds or financing in land trade or for operating accounts through indigenous banking channels, does not involve borrowing of amounts and as such does not fall within the scope of section 69D. Normally four parties are involved in the case of a Darshani Hundi, viz.,

(i) The rakhya (the holder or purchaser)

(ii) The drawer (an indigenous banker or a vyapari)

(iii) The drawee (normally an indigenous banker but can also be a vyapari), and

(iv) The payee

If the payee is also the rakhya (the holder or purchaser), the parties will be three.

The provisions of section 69D are not applicable to Darshani Hundi transactions mentioned hereinafter :

(i) (a) "A", who is the rakhya, obtains on payment from "B", the drawer, a hundi drawn on "C", the drawee, in favour of "D", the payee.

(b) "A", the rakhya having a running account or an overdraft account with "B", obtains from him a hundi drawn on "C", the drawee, in favour of "D", the payee.

(ii) (a) "A", a purchaser of goods from "B", draws a hundi on "C", the drawee in favour of "B" or a third party "D" for the purpose of payment of the price of goods purchased or for settling the account.

(b) For such purposes "B" can also draw a hundi on "A" either in his own favour or in favour of a third party "D".

(iii) "A" has an account with an indigenous banker "C" who has granted a credit facility to "A" and handed over a hundi book to him. "A" draws amounts through such hundis payable either to self, or bearer or third party. Such an arrangement arises out of the credit facility already

granted and, therefore, no debtor-creditor relationship has arisen between the parties because of the drawal of a hundi.

Normally borrowal on hundi arises when a person gets money by execution of a hundi but in the instances cited above the hundi is given in the nature of a security and there is no borrowing on such hundis. Thus, in cases of transactions referred to at (i), (ii) and (iii) above, section 69D is not applicable. The settlement of account between any of the parties to such a Darshani hundi can, thus, be otherwise than through an account-payee cheque within the meaning of section 69D.

The transactions not of the type referred to above on Darshani hundis have to be examined with reference to the facts and circumstances of such cases so as to determine whether or not there is a borrowal on such hundis.

The Constitutional validity of this section was challenged in *Dulichand Gulsari Lal Jain* v. *Union of India* [1997] 226 ITR 753 (MP). It was held that section 69D does not infringe articles 14 to 19 of the Constitution, and that it is a reasonable provision enacted with the object of ensuring transparency in the financial transactions.

Although, section 69D does not specifically make a reference to an account-payee demand draft, when it is seen that the repayment by an account-payee demand draft is equally efficacious in verifying the identity of the payee, an account-payee demand draft also should be treated as an account-payee cheque drawn on a bank for the purposes of section 69D (*CIT* v. *Intraven Pharmaceuticals (P.) Ltd.* [1996] 219 ITR 225, 227-28 (AP)]

In the facts of *CIT* v. *Paranjothi Salt Co.* [1995] 211 ITR 141, 143-44 (Mad), the Tribunal has deleted an addition of Rs. 30,972, made by invoking section 69D, after rendering a finding that documents in question were not hundis at all and that the major portion of the transactions of borrowing and repayment was made by cheques and the requirements of section 69D had also been satisfied. Such deletion has been upheld by the High Court on the ground that the contents of the documents executed by the assessee, though written on hundi papers, showed that the essential characteristic of a hundi, viz., an unconditional order signed by the maker directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument, is absent. *The only circumstance that the documents have been executed on hundi papers will not clothe them with the character of hundis.* In this case, the documents after referring to receipt of cash, contain a clear and categorical promise and undertaking to pay those, who had made available the amounts, together with interest on and from the date on which the

amounts were repayable. Thus, the contents of the documents in question do not satisfy the requirements of hundis. In this view, irrespective of whether the documents are couched in English or any other language, they cannot be considered to be hundis for purposes of section 69D of the Act. From the order of the Tribunal, it is also seen that, amongst others, the language employed in the documents had also been taken into consideration by it, though that, by itself, may not be decisive. It would, therefore, be unnecessary for us to consider the question of the applicability of section 69D of the Act to hundis couched in English, or any other language in that they could not be considered to be hundis for purpose of section 69D. The Madras High Court decision [1995] 211 ITR 141 (Mad) has been followed in *CIT* v. *S. Ramanathan* [1995] 215 ITR 79, 80 (Mad) ; *CIT* v. *Prithivi Fire Works Industries* [1996] Tax LR 328, 329 (Mad) and *CIT* v. *P. Sivapiran* [1996] Tax LR 546, 547 (Mad).

In the case of *CIT* v. *P. S. T. S. Thiraviarathna Nadar* [1991] 187 ITR (St.) 37, the Supreme Court dismissed the special leave petition on the finding of the Tribunal that a document written in English could not be treated as a hundi because hundis are generally understood as a document written in vernacular language.

Where, on the facts, an instrument is held to be a promissory note and not a hundi, section 69D is not applicable to such an instrument. The instruments in question here, as already noticed, contain a definite promise to pay, which promise is unconditional, is signed by the maker, the sum of money to be paid is certain, the identity of the payee is set out, and a provision is made for payment to him or to his order. The time of payment, however, is not merely on demand, but at the expiry of the period specified in the instrument. These features answer the definition of promissory note contained in section 4 of the Act read with para 2 of section 5 of the Act. Section 5 of the Act defines a bill of exchange and in para 2 thereof provides that "a promise or order to pay is not 'conditional' within the meaning of the section and section 4 by reason of the time for payment of the amount or any installment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain". The fact that the borrower is to pay the amount after the specified number of days, therefore, does not render the document a conditional document to pay. It remains an unconditional promise to pay. Section 69D of the Act is, therefore, clearly inapplicable and the Tribunal has reached the right conclusion in this regard.

Whether the documents executed were promissory note or hundi is only a question of fact. *CIT* v. *K. P. Abdullah* [1999] 240 ITR 947, 951-52 (Mad)

Language of the instrument is not decisive

The language in which the instrument is written is not decisive. Though normally hundis are written in the vernacular language as the traders who used hundis in the past were, by and large, illiterate in English, that does not lead to the conclusion that if a document, which is otherwise a hundi, is written in the English language, such a document cannot be regarded as a hundi. It is the content of the document that matters and not the language in which it is written.

(*CIT* v. *Dexan Pharmaceuticals Pvt. Ltd. : Instrument Techniques Pvt. Ltd.* [1995] 214 ITR 576, 582, 581 (AP))

A plain reading of section 69D shows that it can be brought into service only when the loan transaction is of a hundi loan. It may be stated that one of the reasons for bringing section 69D in the statute book is to cover the hundi transaction in view of the section providing that the local usage relating to any instrument in an oriental language is not affected by the provisions of the said Act 26 of 1881.

Bilateral Transactions do not show that the instrument is "hundi"

It has been held that where the transaction is only bilateral and not tripartite, the instrument is more on the lines of a promissory note. Even if such instrument is titled as "hundi", it is really not a hundi transaction and, therefore, section 69 cannot apply.

Tax rates applicable to amount charged to tax section 69D

As per section 115BBE, income-tax shall be calculated at 60 per cent. where the total income of assessee includes the following income :

(a) Income referred to in section 68, 69, 69A, 69B, 69C or 69D and reflected in the return of income furnished under section 139 ; or

(b) which is determined by the Assessing Officer and includes any income referred to in section 68, 69, 69A, 69B, 69C or 69D, if such income is not covered under clause (a).

Such tax rate of 60 per cent. will be further increased by 25 per cent. surcharge, 10 per cent. penalty, i.e., the final tax rate comes out to be 83.25 per cent. (including cess). No deduction in respect of any expenditure or allowance [or set-off of any loss] shall be allowed to the assessee in computing his income referred to in clause (a) of sub-section (1) of section 115BBE.

***Arihant Jewels* v. *ITO,* Ahmedabad**

Addition as headless deemed income – Unaccounted income under section 68 to section 69D – in sub-section (2) of section 115BBE as introduced by the Finance Act, 2012 considers only disallowance of expenditure against unaccounted income under section 68 to section 69D but not business loss. Only the Finance Act, 2016, with effect from April 1, 2017 inserted this provision to deny benefit of set-off of any loss.

Section 271AAC of the Income-tax Act imposes penalty in case the income has been determined under sections 68 or 69/69A/69B/69C/69D.

It is important to mention here that the penalty under section 271AAC is payable only in case the Assessing Officer directs the assessee to do so. Order imposing penalty can be passed only after giving the assessee reasonable opportunity of being heard.

Further, penalty under section 271AAC is not leviable in case the income referred to in section 68 or sections 69/69A/69B/69C/69D has been reflected in the income-tax return filed under section 139, and the relevant tax on the same has also been paid by the assessee under section 115BBE(1)(i).

It should be noted here that penalty under section 270A (i. e. penalty for under-reporting and mis-reporting of income) shall not be imposed on the assessee in respect to income referred to in section 68 or sections 69/69A/69B/69C/69D.

In case section 271AAC gets attracted, the assessee would be liable to pay penalty amounting to a sum computed at 10 per cent. of the tax payable under section 115BBE(1)(i).

Conclusion

Where any amount is borrowed on a hundi from, or any amount due thereon is repaid to, any person otherwise than through an account-payee cheque drawn on a bank, the amount so borrowed or repaid shall be deemed to be the income of the person borrowing or repaying the such amount. It will be treated as income for the year in which it was borrowed or repaid, as the case may be. However, it should be noted that if any amount borrowed on a hundi has been treated as income of any person by virtue of section 69D, than such person shall not be liable to be assessed again in respect of the same amount on repayment thereof. Amount repaid shall include the amount of interest paid on the amount borrowed. This provision will come into force with effect from April 1, 1977. Accordingly, any payment on or after April 1, 1977 in respect of an amount borrowed on a hundi will have to comply with the requirements of this provision

regardless of whether the hundi was executed prior to the said date or on or after that date. The primary requirement for invoking the deeming provisions of section 69D is that the document must be a hundi and it is only thereafter that the deeming provision comes into play. However, sections 68, 69, 69A, 69B and 69C have been held to be applicable in computation of block assessment since these are merely rules of evidence. A separate provision for hundi had apparently been considered necessary because of the widespread practice of introduction of black money through the medium of hundi at the time the provision was introduced. But this is a practice which could be tackled even under the normal law relating to cash credits under section 68 of the Income-tax Act, 1961. After the introduction of sections 269SS and 269T the section has also become largely redundant since loans or deposits in the form of hundis are not saved by these sections.