HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.169 OF 2017

Pr. Commissioner of Income Tax-22, Mumbai.] ... Appellant

Versus

Rasiklal M. Parikh.] ... Respondent

Mr. Sham Walve for Appellant.
Mr. Sean Wassodew i/b Rupesh Mandhare for Respondent.

CORAM :- AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE :- 19 MARCH, 2019

P. C. :-

1. This Appeal is filed by the Revenue. Following substantial question is presented for our consideration :

> *"Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was correct in taking different view while deleting penalty under section 271(1)(c) of the Act following the decision of Hon'ble High Court in the case of Nayan Builders and Developers without appreciating the fact that the ITAT has confirmed penalty on similar facts in the case of Emblem Fashion Wear Exports Pvt. Ltd. vs. Income Tax Officer 4(1)(4), ITA No.2101/M/2012 holding that penalty is imposable as explanation offered by the assessee was both false and not bona fide and is guilty of a dishonest conduct ?"*

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2. The Respondent - Assessee is an individual. He has filed return of income tax for the Assessment Year 2006-2007. The assessment of his return gave rise to disallowance of exemption under Section 54F of the Income Tax Act, 1961 ('the Act', for short). The Assessee had transferred the tenancy rights in a premises for consideration of Rs.1.67 Crores and claimed exemption of Rs.1.45 Crores under Section 54F of the investment in residential house. Such exemption was disallowed by the Assessing Officer. He also initiated penalty proceedings. The disallowance was confirmed up to the stage of the Tribunal upon which the Assessee had Appeal before the High Court, which was admitted. The Assessing Officer imposed penalty of Rs.50 Lakhs. This was challenged by the Assessee before the CIT (A) and then the Tribunal. The Tribunal, by the impugned Judgment, deleted the penalty only on the ground that since the High Court has admitted the Assessee's quantum Appeal, the issue is a debatable one. Thereupon, the Revenue has filed this Appeal.

3. Having heard the learned Counsel for parties, we are not in agreement with the observations of the Tribunal that merely because the High Court has admitted the Appeal and framed

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substantial questions of law, the entire issue is debatable one and under no circumstances, the penalty could be imposed. In this context, we may refer to a decision of a Division Bench of Gujarat High Court in the case of ***Commissioner of Income Tax Vs. Dharamshi B. Shah***[1] in which referring to the earlier decision of the Court, the following observations were made :

> *"8. Identical question came to be considered by the Division Bench of this court in Tax Appeal No.606 of 2010 and in paragraphs 10 to 13 the Division Bench of this court has observed as under and has quashed and set aside the order of the Tribunal deleting the penalty on the aforesaid ground and has remanded the matter to the Tribunal to consider the appeal afresh in accordance with law and on its own merits.*
>
> > *"10. Having, thus, heard learned counsel for the parties, we reiterate that the sole ground on which the Tribunal deleted the penalty was that with respect to the quantum additions, the assessee had approached the High Court and the High Court had admitted the appeal framing substantial questions of law for consideration. In view of the Tribunal, this would indicate that the issue was debatable and that, therefore, no penalty under section 271(1)(c) could be imposed.*
> >
> > *11. We are of the opinion that the Tribunal erred in deleting the penalty on this sole ground. Admission of a tax appeal by the High Court, in majority cases, is ex parte and without recording even prima facie reasons. Whether ex parte or after by-parte hearing, unless some other intention clearly emerges from the order itself, admission of a tax appeal by the High Court only*

1 **[2014] 366 ITR 140 (Guj)**

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indicates the court's opinion that the issue presented before it required further consideration. It is an indication of the opinion of the High Court that there is a prima facie case made out and the questions are required to be decided after admission. Mere admission of an appeal by the High Court cannot without there being anything further, be an indication that the issue is debatable one so as to delete the penalty under section 271(1)(c) of the Act even if there are independent grounds and reasons to believe that the assessee's case would fall under the mischief envisaged in said clause (c) of sub-section (1) of section 271 of the Act. In other words, unless there is any indication in the order of admission passed by the High Court simply because the tax appeal is admitted, would give rise to the presumption that the issue is debatable and that therefore, penalty should be deleted.

12. This is not to suggest that no such intention can be gathered from the order of the court even if so expressed either explicitly or in implied terms. This is also not to suggest that in no case, admission of a tax appeal would be a relevant factor for the purpose of deciding validity of a penalty order. This is only to put the record straight in so far as the opinion that the Tribunal as expressed in the present impugned order, viz., that upon mere admission of a tax appeal on quantum additions, is an indication that the issue is debatable one and that, therefore, penalty should automatically be deleted without any further reasons or grounds emerging from the record.

13. This is precisely what has been done by the Tribunal in the present case. The order of the Tribunal, therefore, cannot be sustained. The question framed is answered in favour of the Revenue and against the assessee. The order of the Tribunal is reversed. Since apparently the assessee had raised other contentions

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> *also in support of the appeal before the Tribunal, the proceedings are remanded before the Tribunal for fresh consideration and disposal in accordance with law. The tax appeal is disposed of accordingly.*"

9. In view of the above, the impugned order passed by the Tribunal also deserves to be quashed and set aside and the matter is required to be remanded to the Tribunal to consider, decide and dispose of the appeal afresh in accordance with law and on its own merits. "

4. Despite these observations, in our opinion, this Appeal need not be entertained. This is so because independently also, we can safely come to the conclusion that the entire issue was a debatable one. The dispute between the Assessee and the Revenue was with reference to actual payment for purchase of the flat and whether when the Assessee had purchased one more flat, though contagious, could the Assessee claim exemption under Section 54F of the Act. Learned Counsel for the Assessee submitted that this latter issue is covered by the decisions of High Court. It can thus be seen that the Assessee had made a bona fide claim. Neither any income nor any particulars of the income were concealed. As per the settled legal position, merely because a claim is rejected, it would not automatically give rise to penalty proceedings. Reference in this

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respect can be made to the decision of Supreme Court in the case of ***Commissioner of Income Tax, Ahmedabad Vs. Reliance Petroproducts Pvt. Ltd.***[2]

5. Under the circumstances, for the reasons different from those recorded by the Tribunal in the impugned Judgment, this Appeal is dismissed.

(SARANG V. KOTWAL, J.) **(AKIL KURESHI, J.)**

2 **[2010] 322 ITR 158 (SC)**

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