

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL NO.701 OF 2015**

Principal Commissioner of Income Tax-2,  
Mumbai .. Appellant

v/s.  
M/s. Shree Gopal Housing & Plantation  
Corporation, Mumbai .. Respondent

Mr. A.R. Malhotra a/w Mr.N.A. Kazi for the appellant  
Mr. Niraj Sheth a/w Mr. Atul Jasani for the respondent

**CORAM : M.S. SANKLECHA &  
RIYAZ I. CHAGLA J.J.  
DATED : 6<sup>th</sup> FEBRUARY, 2018.**

**PC.**

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 10<sup>th</sup> February, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2006-07.

2. The Revenue has urged the following questions of law for our consideration :-

*(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the penalty levied u/s 271(1)(c) by the Assessing Officer, on addition as endorsed by the CIT(A), that the amount of Rs.1 crore was the assessee's undisclosed income, without appreciating the fact that*

*its two partners had admitted such undisclosed income by filing revised computation of their income, declaring therein their share of the aforesaid amount as their undisclosed income?*

*(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the penalty levied u/s 271(1)(c) by the Assessing Officer on account of unaccounted cash receipts on sale of plots?*

*(iii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the penalty levied u/s 271(1)(c) by the Assessing Officer; on addition as endorsed by the CIT(A), that the amount of Rs.1 crore was the assessee's undisclosed income, without appreciating that by doing so that the Tribunal has contradicted its own findings in the case of the partners, since in the case of the partners, the Tribunal has itself endorsed the disclosure of the impugned amount of Rs.1 crore as the partner's undisclosed income, by further allowing telescoping benefit of unexplained investment in jewellery and undisclosed cash against the said unaccounted income?*

3. At the very outset, Mr. Sheth, learned Counsel appearing for the respondent Revenue points out that the Tribunal by the impugned order dated 10<sup>th</sup> February, 2015 deleted penalty by following its order dated 7<sup>th</sup> November, 2014 in quantum proceedings deleting the additions. It is further pointed out that an appeal being Appeal No.136 of 2015 from the order dated 7<sup>th</sup> November, 2014 of the Tribunal in quantum proceedings has been admitted by this Court on 12<sup>th</sup> December, 2017.

Therefore, no appeal against an order deleting penalty will lie to this Court in view of the fact that the admission of appeal in quantum proceedings by itself indicates that the question does give rise to a debatable issue. Therefore, no occasion to impose any penalty can arise. Consequently, no question of entertaining an appeal in respect of deletion of penalty can arise. In support, reliance was placed upon the decision of this Court in **Commissioner of Income Tax Vs. M/s. Nayan Builders and Developers** (Income Tax Appeal No.415 of 2012), decided on 8<sup>th</sup> July, 2014. Our attention was also invited to the order dated 18<sup>th</sup> March, 2011 of the Tribunal in the case of M/s. Nayan Builders and Developers (supra) where the Tribunal had deleted the penalty on the ground that as this Court has admitted an appeal in quantum proceedings on substantial question of law, evidences that the issue is debatable. Thus, not warranting any penalty.

4. We find that the decision of this Court in *Nayan Builders* (supra) upholding the order of the Tribunal proceeded on the basis that no case was made out for imposition of penalty and the same was rightly set aside by the Tribunal. Further, the order of the Tribunal against which the above appeal in *Nayan Builders* (supra) was filed by the Revenue, clearly records the fact that the issues which arose in the quantum

proceedings related to a bona fide claim of deduction under the Act. Further, the Tribunal held that the dis-allowance of claim of deduction which has been made bona-fide would not by itself lead to penalty. Therefore, each appeal in respect of the order deleting / imposing a penalty by the Tribunal would have to be considered in relation to the facts arising therein and also in the quantum proceedings. It cannot be said as a matter of rule that in case where this Court admits an appeal relating to quantum proceedings *ipso facto* i.e. without anything more, the penalty order get vitiated. Thus, the question of entertaining an appeal from an order imposing / deleting penalty would have to be decided on a case to case basis. There can be no universal rule to the effect that no penalty, if quantum appeal is admitted on a substantial question of law.

5. In fact, the admission of an appeal in quantum proceedings, if arising on a pure interpretation of law or on a claim for deduction in respect of which full disclosure has been made, may, give rise to a possible view, that admission of appeal in the quantum proceedings would suggest no penalty can be imposed as it is a debatable issue. However, it cannot be a universal rule that once an appeal from the order of the Tribunal has been admitted in the quantum proceedings,

then, *ipso facto* the issue is a debatable issue warranting deletion of penalty by the Tribunal. There could be cases where the finding of the Tribunal in quantum proceedings deleting addition could be perverse, then, in such cases, the admission of appeal in quantum proceedings would indicate that an appeal against deletion of penalty on the above account will also warrant admission.

**6. Regarding question no.(i) and (ii) :-**

(a) In the present facts, we note that the impugned order of the Tribunal has deleted the penalty only because in the order dated 7<sup>th</sup> November, 2014 in the quantum proceedings the additions have also been deleted. The appeal by the Revenue from the order of the Tribunal dated 7<sup>th</sup> November, 2014 has been admitted by us on 12<sup>th</sup> December, 2017 being Income Tax Appeal No.536 of 2015 (Pr. Commissioner of Income Tax Vs. M/s. Shree Gopal Housing and Plantation Corporation) on question nos. (i) and (ii) herein.

(b) However, the questions on which the quantum appeal has been admitted are not in respect of claim for deduction and / or pure interpretation of law and / or document which could lead to the appeal on deletion of penalty not being entertained.

(c) In the facts of this case, we are of the view the deletion of

penalty whether justified or not would depend upon the result in the quantum appeal namely Income Tax Appeal No.536 of 2015, in which question nos. (i) and (ii) with regard to the quantum i.e. similar to question nos. (i) and (ii) herein in relation to penalty has been raised.

(d) We, therefore, admit this appeal on substantial questions of law set out at question No.(i) and (ii) above.

7. **Regarding question No.(iii):-**

(a) The question no. (iii) raised herein with regard to penalty was also raised by the Revenue in Income Tax Appeal No.536 of 2015 in quantum proceedings. However, the same was not entertained by this Court.

(b) Therefore, in the penalty appeal, it would not be appropriate to widen the scope of controversy in the quantum appeal which after hearing the parties had not admitted it on this question as it was not insisted upon at the hearing of the appeal in the quantum proceedings. This appears to be so, as otherwise, we would have dealt with this question at that time as we are now dealing with it, as the Revenue insists on this question.

(c) Thus, we dismiss question no.(iii) in view of the fact that the above question was not admitted by us while admitting the Income Tax

Appeal No.536 of 2015 in quantum proceedings.

8. Needless to state that considerations for imposition of penalty are undoubtedly different from considerations which would come into play while deciding the appeal in quantum proceedings. In case, if the respondent assessee succeeds in the quantum proceedings, no occasion to impose penalty upon the assessee can arise. However, in case the Revenue succeeds in the quantum proceedings, then that by itself will not necessarily invite penalty. It would still be open to the respondent assessee to urge that in the facts and circumstances of the case, no penalty is imposable.

9. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

10. To be heard along with Income Tax Appeal No.536 of 2015.

**(RIYAZ I. CHAGLA, J.)**

**(M.S. SANKLECHA, J.)**