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

ITA 620/2019 & CM APPL. 30811/2019

PR. COMMISSIONER OF
INCOME TAX( CENTRAL)- 2 ..... Appellant

Through: Deepak Anand, Standing Counsel

versus

M/S HARSH INTERNATIONAL PVT. LTD. ..... Respondent

Through: None.

\+ ITA 622/2019 & CM APPL. 30813/2019

PR. COMMISSIONER OF
INCOME TAX( CENTRAL)- 2 ..... Appellant

Through: Deepak Anand, Standing Counsel

versus

M/S HARSH INTERNATIONAL PVT. LTD. ..... Respondent

Through: None.

% Date of Decision: 22nd December, 2020

**CORAM:**
**HON'BLE MR. JUSTICE MANMOHAN**
**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**MANMOHAN, J: (Oral)**

**CM Appl. 30811/2019 in ITA 620/2019**
**CM Appl. 30813/2019 in ITA 622/2019**

For the reasons stated in the applications, the delay is condoned and the applications stand disposed of.

**ITA 620/2019 and ITA 622/2019**

1. Present appeals have been filed challenging the common order dated 22nd May, 2018 passed by the Income Tax Appellate Tribunal (ITAT), whereby the appeals filed by the respondent-assessee, being ITAs No.861/Del/2018 and No.862/Del/2018 for assessment years 2004-05 and 2005-06 respectively, have been allowed and the penalty amount added under Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') has been deleted.

2. Since both the present appeals arise out of a common impugned order and raise identical questions of law, the same are being decided vide this common order.

3. Briefly stated, the facts of the present case are that the assessing officer had passed the assessment under Section 153A read with Section 143(3) of the Act, which was challenged by the respondent-assessee before the appellate authorities and ultimately an appeal being ITA No. 948/2016 was filed before this Court wherein, vide order dated 18th July, 2017, the appeal of the assessee was admitted for assessment year 2004-05. The relevant portion of the order dated 18th July, 2017 is reproduced hereinbelow:-

*"1. Admit.*

*2. Having heard learned counsel for the parties, the following questions are framed for determination:*

> *"(i) Did the ITAT err in confirming the order passed under Section 153A of the Income Tax Act, 1961 for AY 2004-05 and was there any incriminating material qua the appellant/ Assessee justifying the said assessment?*
>
> *(ii) Was the ITAT correct in law in upholding the addition of Rs.6,27,02,640/- to the returned income on an estimation of profits upholding the rejection of the books of accounts under Section 145(3) of the Act?*
>
> *(iii) Has the ITAT erred in not adjudicating the ground raised by the Assessee on the addition of Rs.2,02,00,752/- on account of alleged unaccounted capital for making alleged unaccounted purchases?"*

4. Similarly, for assessment year 2005-06, appeal filed by respondent-assessee being ITA No. 1/2017 was admitted by this Court vide order dated 18th July, 2017. The relevant portion of the said order is reproduced hereinbelow:-

> "*1. Admit.*
>
> *2. Having heard learned counsel for the parties, the following question is framed for determination:*
>
> > *"Was the ITAT correct in law in upholding the addition of Rs.10,97,75,952/- to the returned income on an estimation of profits upholding the rejection of the books of accounts under Section 145(3) of the Act?"*

5. Both the aforesaid quantum appeals are pending adjudication before this Court.

6. Meanwhile, the assessing officer had initiated penalty proceedings against the respondent-assessee under Section 271(1)(c) of the Act and issued notices dated 30th December, 2006 under Section 274 read with Section 271(1)(c) of the Act for the respective assessment years. Initially the proceedings were kept in abeyance in view of the pendency of appeals before the CIT(A). After the said appeals were disposed of, a show cause notice dated 20th January, 2014 was issued to the respondent-assessee. After considering the reply to the notice, the Assessing Officer levied the penalties for relevant years vide order dated 20th March, 2014.

*7.* The said penalty order was challenged before the CIT(A), which confirmed the said order. Thereafter, it was challenged before the ITAT wherein the appeal of the assessee was allowed and the penalty amount was deleted vide the impugned order. The relevant portion of the impugned order is reproduced hereinbelow:-

> *"10. e have carefully considered the orders of the lower authorities of assessment, penalty proceedings, and rival contentions placed before us. Undisputedly the additions have been confirmed in the hands of the assessee on the above stated facts up to the level of the coordinate bench. The Hon'ble high court has admitted the appeal of the assessee for assessment year 2004 - 05 on two counts, (1) on whether addition can be made in the hands of the assessee in absence of any incriminating material, (2) on merits of the addition of gross profit and investment initially allegedly made. Therefore, for assessment year 2004-05 it is apparent that Hon'ble high court has admitted the appeal of the assessee on legal grounds as well as on the merits of the case. Similarly for assessment year 2005-06 the Hon'ble High Court has admitted the appeal of the assessee on the ground that whether the*

*coordinate bench is correct in confirming the additions made by the Ld. assessing officer by rejecting the books of accounts under section 145 (3) of the act or not. Hence it is apparent that appeal of the assessee has been admitted on the issue of invocation of the provisions of section l45 (3) as well as on the merits of the addition. Therefore, it is apparent that for both the assessment years the Hon'ble High Court has admitted the appeal of the assessee on merits as well as on legal grounds. The Hon'ble Bombay High Court in case of CIT Vs. Advaita Estate Development Private Limited in ITA No. 1498 of 2014 dated 17/2/2017 has dealt with the issue that when the Hon'ble high court admits the appeal of the assessee whether on such additions/disallowance, penalty under section 271(1)(c) of the act can be levied or not as under:-*

> *"4. In the above view, the impugned order followed its decision in Nayan Builders and Developers Pvt. Ltd. vs. The Income Tax Officer in Income Tax Appeal No. 2379/Mum/2009 rendered on 18th March, 2011 and the decision of the Delhi High Court in CIT vs Liquid Investment and Trading Co (ITA No.240/2009) rendered on 5th October, 2010 to hold that when an appeal has been admitted in quantum proceedings by the High Court, then that itself is an evidence of the issue being debatable, not warranting any penalty.*
>
> *5. The Revenue had filed an appeal from the order of the Tribunal in Nayan Builders and Developers Pvt. Ltd. (supra) deleting the penalty. This appeal being CIT vs. Nayan Builders and Developers [(2014) 368 ITR 722] was not entertained by this Court. It upheld the view of the Tribunal that the imposition of penalty was not justified as admission of appeal in quantum proceeding on this issue as substantial question of law was proof enough of the issue being debatable. The aforesaid decision in Nayan Builders and Developers Pvt. Ltd. (supra) was also followed by this Court in CIT-8 vs. Aditya Birla Power Co. Ltd. in Income Tax Appeal No. 851 of 2014 rendered on 2nd December, 2015.*

*6. However, Mr. Tejveer Singh, learned Counsel appearing for the appellant Revenue seeks to distinguish the decision of this Court in Nayan Builders and Developers Pvt. Ltd. (supra) on the ground that this Court had after recording the fact that where appeals from orders in quantum proceedings of this Court have been admitted as giving rise to substantial question of law then that itself discloses that the issue is debatable. However, Mr. Singh points out that it also further records "In our view there was no case made out for imposition of penalty and the same was rightly set aside." On the basis of the above observation, it is contention of Mr. Tejveer Singh that the appeal from penalty proceeding was not admitted by this Court as on merits no case for imposition of penalty was made out.*

*7. Mr. Dalal, the learned Counsel for the respondent-assessee invited our attention to the order of the Tribunal dated 18th March, 2011 in the case of Nayan Builders and Developers Pvt. Ltd. (supra). On perusal of the Tribunal order dated 18th March, 2011 we note that the Tribunal in Nayan Builders and Developers Pvt. Ltd (supra) had deleted the penalty only on the ground that as substantial question of law had been admitted by this Court in quantum proceedings the issue is debatable. It was on the basis of the aforesaid reasoning of the Tribunal in Nayan Builders and Developers Pvt. Ltd. (supra), that this Court held that no penalty is imposable. Thus the distinction sought to be made by Mr. Tejveer Singh does not assist the Revenue, as it does not exist.*

*8. In view of the decision taken by this Court in Nayan Builders and Developers Pvt. Ltd (supra) as well as in Aditya Birla Power Co. Ltd. (supra) the proposed question does not give rise to any substantial question of law. Thus not entertained."*

*11. The Hon'ble Delhi High Court in CIT versus liquid investments limited in ITA No. 240/2009 is also held that when the assessee has preferred an appeal under Section 260A of the act which has also been admitted as substantial question of law, this itself shows that the issue is debatable and for this reason the penalty under section 271(1)(c) is not leviable. The same view was*

*reiterated by the Hon'ble Delhi High Court in case of CIT Vs. Thomson Press India Ltd wherein, it has been held that where the question of law raised by the assessee has been framed and admitted in the circumstances of the case, imposition of penalty cannot, justify. Similar view has further been taken by the Hon'ble Delhi High Court in the 334 ITR 367 wherein it has been held in para No. 3 that once the appeal preferred by the assessee has been admitted that would show that substantial question of law on the income addition is involved and thus the issue is clearly debatable. We are also aware that Hon'ble Gujarat High Court has taken a contrary view in [2015] 58 taxmann.com 334 (Gujarat)/[2015] 232 Taxman 352 (Gujarat)/[2014] 272 CTR 353 (Gujarat CIT Vs. Prakash S Vyas holding that Unless there is any indication in order of admission passed by High Court, simply because tax appeals is admitted, would not give rise to presumption that issue is debatable; penalty under section 271(1)(c) could not be deleted on this ground. However as Hon'ble Delhi High Court being jurisdictional High Court binds us and further such view is also supported by the Hon'ble Bombay High Court, we take a view that when the appeal of the assessee has been admitted by the Hon'ble Delhi High Court on the merits as well as on the legal issue the penalty levied by the Ld. assessing officer and confirmed by the Ld. CIT(A) for assessment year 2004 - 2005 and 2005 - 06 is not sustainable.*

*12. Even otherwise we have also perused the show cause notice issued by the Ld. assessing officer under section 274 of the income tax act and find that for both the years the Ld. assessing officer has not cancelled one of the charge on the assessee. We have also perused the assessment orders for both the years wherein the Ld. assessing officer has also not levied any specific charge on the additions made but has simply stated that he is satisfied that the penalty proceedings under section 271(1)(c) should be initiated against the assessee company. Therefore we find that there is no specific charge levied by the assessing officer in the assessment orders as well as in the penalty notices but has levied the penalty on the assessee holding that assessee has furnished inaccurate particulars of his income. Therefore as held by Hon'ble Karnataka*

*High Court in case of CIT versus SSA Emerald Meadows in 396 ITR 538 which held so and against which the Hon'ble Supreme Court has dismissed the special leave petition of the revenue in 73 Taxmann.com 248, we also hold that when in the show cause notice the Ld. assessing officer has failed to create a specific charge and which has also not been specified in the assessment order the penalty cannot be levied under section 271(1)(c) of the act. The Ld. departmental representative could not show us any other contrary decision on this issue. In the result on this ground also the penalty deserves to be cancelled.*

*13. As we have already cancelled the penalty orders on two different submissions of the assessee, we do not deal with other issues raised as now they are purely academic in nature.*

*14. In view of the above facts, we direct the Ld. assessing officer to delete the penalty under section 271(1)(c) of the act for both the assessment years and reverse the finding of the Ld. CIT (A). In the result appeal of the assessee for both the years are allowed."*

8. Mr. Deepak Anand, learned standing counsel for the appellant states that the ITAT has erred in deleting the penalty without appreciating the fact that the additions made by the assessing officer had been confirmed by both the CIT(A) and ITAT. He emphasizes that levy of penalty is the normal consequence in a case of concealed income and merely because this Court has admitted the appeal filed by the respondent-assessee against the ITAT order, the said fact cannot absolve the respondent-assessee from levy of penalty.

9. Having heard the learned counsel for the appellant and having perused the impugned order, this Court is of the view that the ITAT was right in deleting the penalty levied under Section 271(1)(c) of the Act. It has to be

noted that penalty proceedings are an outcome of assessment and if the assessment itself is debatable, the penalty proceedings cannot survive.

10. This court is also of the opinion that levy of penalty cannot be a matter of course, as sought to be contended by the Revenue. It can only be levied in cases where the concealment of income has been proven. If the quantum order itself has been challenged and this Court has framed substantial questions of law in the appeal preferred by the respondent-assessee, it shows that the alleged concealment is not final and the issue is disputable. Consequently, the penalty levied by the assessing officer cannot survive in such a case.

11. It is pertinent to note that this Court in similar cases [***CIT Vs. Liquid Investment Ltd, ITA 240/2009, IT Vs H B Leasing & Finance Co. Ltd. I.T.A. No. 1612/2010*** and ***CIT Vs. Thomson Press India Ltd, ITA 426,440/2013***] has upheld the deletion of the penalty on the same ground i.e. the fact that appeals were admitted proved that the issue was debatable. The relevant portion of the orders in ***CIT Vs. Liquid Investment Ltd*** (supra) and***CIT Vs. Thomson Press India Ltd***(supra) is reproduced hereinbelow:-

A) Order dated 5th October, 2010 passed by this Court in ***CIT Vs. Liquid Investment Ltd*** (supra) :-

> *"Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 on the ground that the issue of deduction under Section 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction under Section 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court under Section 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For*

*these reasons, we are of the opinion that no question of law arises in the present case."*

B) Order dated 3rd March, 2014 passed by this Court in ***CIT Vs. Thomson Press India Ltd***(supra) :-

*"This Court is of the opinion that where the question of law as raised by the assessee has been framed and admitted in the circumstances of this case, imposition of penalty cannot be justified. The appeals being bereft of substantial question of law are dismissed."*

12. Keeping in view the aforesaid, this Court finds that no question of law arises in the present appeals for consideration of this Court.

13. Consequently, both the appeals, being bereft of merit, are dismissed.

**MANMOHAN, J**

**SANJEEV NARULA, J**

**DECEMBER 22, 2020**
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