IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No.51, 52 & 53/SRT/2020

(AY 2009-10, 20010-11 & 2011-12)

(H*earing in Virtual Court)*

Shri Rajeshkumar Popatbhai Gabani, Bungalow No. 2, Ila Park Society, Katargam Surat- **PAN : AAZPG 7839 C**	Vs.	The Income Tax Officer, Ward-3(2)(4), Aayakar Bhawan, Majura Gate, Surat
Appellant/ assessee		Respondent/ revenue

Assessee by	Shri Pragnesh Jagasheth CA, /AR
Revenue by	Shri Vinod Kumar Sr. DR
Date of hearing	06.07.2022
Date of pronouncement	11.07.2022

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This set of three appeals by assessee is directed against the orders of ld. Commissioner of Income tax (Appeals)3, Surat dated 26.07.2017, which in turn arise against the penalty levied under section 271(1)(c) for the assessment year (AY) 2009-10 to 2011-12. The ld CIT(A) adjudicated all the appeals by his consolidated order. In all the appeals the assessee has raised common grounds of appeal except variation of amount of penalty levied under section 271(1)(c), facts in all the years are common, therefore, all the appeals were clubbed, heard together and are decided by common

order to avoid the conflicting decisions. For appreciation of facts, the facts in AY 2009-10 are treated as lead case. The assessee raised the following grounds of appeal:

> *"1. On the facts and in the circumstances of the case as well as law on the subject, the ld Commissioner of income tax (Appeals) has eared in confirming the action of penalty of assessing officer in levying penalty of Rs. 3,71,643/- under section 271(1)(c) of the I T Act.*
>
> *2. It is therefore prayedthat the above penalty may please be deleted as the learned members of the Tribunal may deem it proper.*
>
> *3. The appellant craves leave to add, amend, alter, delete/change or modify any or all the grounds ofappeal at the time of hearing."*

2. Perusal of record shows that the order impugned in these appeals was passed on 26.07.2017, however, the appeals were filed only on 26.02.2020, thus there is delay of 876 days in filing the appeals. The assessee has filed an application for seeking condonation of delay in filling all three appeals. The application if supported with the affidavit of the assessee. In the application, the applicant/ assessee fairly submitted that impugned order was served on the assessee on 04.08.2017 and he was required to file appeal on or before 03.10.2017. however, he could not file the appeal(s) in time as his Accountant Praful S Gulhane was

under medical treatment for kidney failure and was confined to bed for 12 months, due to which he could not provide appeal related documents to his representative. The assessee thereafter forgot to take initiative to file the appeal. The assessee realised when the quantum appeal came up hearing before Tribunal in February 2020 and when this fact was again inquired from his accountant about filing of appeal against the penalty appeals. The assessee immediately after taking advice filed the present appeals.

3. The learned authorised representative (ld. AR) for the assessee submits that the non-filing of appeal in time was neither intentional nor deliberate but due to the reasons beyond his control. The assessee is a law abiding citizen and took all necessary step immediately. The delay in filing the appeal was for the reason that accountant of assessee was suffering by kidney problem and ultimately his kidney was replaced, the copies of some medical prescription of 2017, 2018, 2019 and follow up papers up to the year to the year 2019 is placed on record. The said accountant he was not in a position to attend the hearing fixed before ld CIT(A) and ultimately the assessee suffered order against him. The ld AR for the assessee submits that the assessee will not get

any benefit in filing appeal belatedly, rather it may go against the assessee. The ld AR for the assessee submits that he has good case on merit and is likely to succeed if the appeal is heard on merit. The addition/ disallowance of set off of loss on the basis of which the penalty was levied, has already been allowed in appeal against the quantum assessment vide order dated 14.02.2020 in ITA (s) No. 1535, 1536 & 1537/Ahd/2017.

4. To support his submissions the ld AR for the assessee relied on the following case laws;

- N. Balakrishnan Vs M. Krishnamurthy (2008) (228) ELT 162 (SC),
- Collector of Land Acquisition Vs Mst Katiji (1987) taxmann.com 1072(SC),
- Jayvantsing N Vaghela Vs ITO (2013 40 taxmann.com 491 (Gujarat),
- Satradeo Prasad Shaw Cr Rev No. 1299 of 2022 dated 02.06.2022 by Kolkata High Court,
- Paschim Gujarat Vij Company Ltd Vs Shantuben Sanjaybhai Mer SCA No.16984 of 2021 (Gujarat High Court),
- Nimesh Dilipbhai Brahmbhatt Vs Hitesh Jayantibhai Patel SCA No. 6547 of 2020 (Gujarat High Court),

- ❖ Indian Home Pipe Company Ltd. Vs Gujarat Industrial Development Corporation & others SCA No. 10173 of 2018 (Gujarat High Court) and
- ❖ Nandlal Namdev Otwani Vs Vijai Jaiprakash Ahuja C.A No. 941 of 2020 (Gujarat High Court).

5. On the other hand the learned Senior departmental representative (ld Sr DR) for the revenue after going through the contents of the application for condonation of delay and the medical prescription of accountant of the assessee would submits that the Bench may take decisions as per law.

6. We have considered the rival submissions of the parties and perused the relevant medical record of the accountant of the assessee. On perusal of the copies of the medical papers filed with the application of condonation of delay in filing present appeals, we find that the assessee has shown sufficient cause that he was prevented in filing the present appeals in time due to the sickness of his accountant who was handling his tax matters, which require consideration. The ld AR for the assessee while making submissions vehemently submitted that the delay in filing appeal is not deliberate or mala fide, but due to the reasons explained in the application of condonation of delay. We find that the application is duly supported with the affidavit of assessee.

We find that ld AR for the assessee also relied on ratio of various case laws of Hon'ble Apex Court as well as Hon'ble Jurisdictional High Court as noted in para -4.

7. The Hon'ble Supreme Court in N. Balakrishnan Vs M. Krishnamurthy (supra) while discussing the scope of application under section 5 of limitation Act held it is axiomatic that condonation of delay is a matter of discretion of the Court, Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first cut refuses to condone the dela. In such cases, the superior cut would be free to

consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court. The reason for such a different stance is thus: The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations in not because on the expiry of such time a bad cause would transform into a good cause. It was also held that rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in

the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

8. The Hon'ble Apex Court in Collector of Land Acquisition Vs Mst Katiji (supra) held that when substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserve to be preferred, the other side cannot claim to have vested right in injustice being done because of non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence or on account of *mala fides*. The litigant does not stand to benefit by resorting delay, in fact he runs a serious risk.

9. Further, the Hon'ble Jurisdictional High Court in Jayvansing N Vaghela Vs ITO (supra) it was held that unless there is gross negligence or mala fides intention, delay in filing appeal to be condones.

10. Considering the aforesaid facts and legal position that there was no mala fides on the part of assessee in filing the delay, rather, the assessee is under serious risk. Moreover, the ld Sr DR for the revenue has not disputed the explanation given by the assessee and keeping in view that the assessee has a merit as the additions on the basis of which the penalty was levied has been deleted by tribunal in quantum assessment. Therefore, the delay of 876 days in filing all the appeals is condoned.

11. Now adverting to the facts of case on merit. Brief facts of the case are that assessee is individual, filed his return of income for the year under consideration that is assessment year (AY) 2009-10, declaring income of Rs.2,57,673/- on 15.10.2009. Subsequently, case of assessee was re-opened under section 147. Notice under section 148 was served upon the assessee. In response to notice under section 148, the assessee filed revised return of income declaring undisclosed income of Rs. 12,66,200/- and claimed loss of Rs. 11,11,080/-. The assessee paid additional tax on the undisclosed income at Rs. 3,80,000/-. The assessment was completed under section 147/ 143(3) on 25.03.2014 by making addition of Rs. 11,11,080/- by disallwaning set off of

loss. The assessing officer initiated penalty at the time of passing assessment order. On further appeal before CIT(A) the addition in quantum assessment was upheld. The assessing officer after serving notice under section 274 read with section 271(1)(c) levied penalty of Rs. 3,71,643/- being 100% of tax sought to be evaded vide order dated 15.09.2014. Aggrieved by the penalty levied under section 271(1)(c), the assessee filed appeal before Ld. CIT(A). The Ld. CIT(A) confirmed the penalty vide his consolidated order dated 26.07.2017 for all three assessment years. Further, aggrieved, the assessee has filed present appeal before this Tribunal.

12. We have heard the submissions of the ld AR for the assessee and the ld Sr DR for the revenue. The Ld. AR of the assessee submits that the additions on the basis of which the penalty was levied by assessing officer under section 271(1)(c) has been deleted by Tribunal in appeal in the quantum assessment vide order dated 14.02.2020 in ITA (s) No. 1535, 1536 & 1537/Ahd/2017, copy of which is filed on record. The ld AR for the assessee submits that the Tribunal while allowing the appeal of the assessee allowed the set off of loss

claimed by the assessee against the undisclosed income. The ld AR for the assessee submits that it is settled position under the law that once, the additions on the basis of which penalty is levied, is deleted, the order of penalty order will not survive.

13. On the other hand the ld. Sr. DR for the Revenue submits that the assessee that the assessing officer may be directed to verify the facts and modify the penalty order to the extent the additions/ set off of loss was not allowed by the Tribunal.

14. We have considered the rival submission of both the parties and have gone through the orders of Lower Authorities. We find that in the appeals in quantum assessment our predecessor has passed the following order in ITA No. 1535 to 1537/Ahd/2017;

> "10. We have heard both the Counsels and perused the material placed on records, judgments cited by the parties as well as orders passed by the Revenue Authorities. From the records, we noticed that the assessee had total undisclosed income of Rs.60,28,325/-. It was decided in three assessment years and the said undisclosed income was in the nature of investment made in shares future and options trading business. We also noticed that on the above undisclosed income, assessee paid tax of Rs.18,10,000/- on 17.03.2012, in this respect, challans have been submitted by the

assessee. The investments in shares future and option and share trading business had resulted in loss of Rs.59,64,585/- the details of which have already been given by the assessee in the table in the page no.5 of the order of the ld.AO. While filing the Return of Income, the assessee has shown undisclosed income, under the head 'Business Income' has provided u/s.14 of the Income Tax Act against which the assessee had claimed loss incurred on share business. In this respect, assessee had also filed written submissions before the ld.AO, the para 7 of the same are reproduced below:

> *"During the previous year relevant to subject AY, I have claimed - Shares 'Future and Options' (F & O) Loss Rs. 11,11,080/-. The same has been claimed by me as 'Business Loss' in terms of provisions of Section 43(5)(d) of the Income-tax Act, 1961 (Act). Clause (d) to Section 43(5) came into effect from AY 2006-07 which states '. an eligible transaction in respect of trading in derivatives referred to in the Securities Contracts (Regulation) Act, 1956 carried out in a recognized stock exchange shall not be deemed to be a speculative transaction Loss occurred under Future and Options contract is 'derivate' and hence, can be claimed as 'business loss' and not speculation loss. I wish to draw your attention to the FAQ from the website of SEBI and judicial ruling given by the Hon'ble ITAT, Delhi and various others in support of my claim being F&O Loss of Rs. 11,11,080/- as business loss. This business loss was then adjusted/ claimed against the undisclosed income, Rs. 12,66,200/- for that AY as 'set off as provided under Chapter VI of the Act read with Sections 70 and 71 of the Act in as much as the fact that if the undisclosed income is assessed as business income then the set off to be allowed under Section 70 and if the same is considered under any other head other than 'salaries', set off to be under Section 71 of the Act."*

15. We have also considered the decision in the case of Hon'ble Supreme Court in the case of CIT Vs. D.P.Sandu Bros. [2005] Taxman 713 (SC) wherein it has been held that section 14 and section 56 of the Act constitutes of complete code for the purpose of determining under which head of particular income would be taxed.

16. We have also considered the decision of Hon'ble Madras High Court in para no.10 and page 6 of the order of the ld.AO has held as under:

> *"..... The income-tax is only one tax and levied on the sum total on the income classified and chargeable under various heads. Section 14 has classified different heads of income and income under each head is separately computed. Income which is computed in accordance with law is one income and it is not collection of distinct tax levied separately on each heads of income and it is not an aggregate of various taxes computed with reference to each of the different source separately. There is only one assessment and the same is made after the total income has been ascertained. The assessee is subject to income-tax on his total income though his income under each head may8 be well below the taxable limit. Hence the loss sustained in any year under any heads of income will have to be set off against income under any other head. In this case, the Assessing officer made addition of Rs.28,50,000/- as undisclosed income under Section 69 of the Act. Once the loss is determined, the same should be set off against the income determined under any other head of income. The benefit provided under Section 71 of the Act cannot be denied....."*

17. We have also considered the decision of Hon'ble Gujarat High Court in para no.11 and page 7 of the order of ld.AO has held as under:

". The decisions of this court in the case of Fakir Mohmed Haji Hasan [2001] 247 ITR 290 (Guj.) Krishna Textiles [2009] 310 ITR 227 (Guj.) are neither relevant nor germane to the issue considering the fact that in none of the decisions the legislative scheme emanating from the conjoint reading of the provisions of section 14 and 56 of the Act have been considered. The apex court in the case of D.P. Sandu Bros. Chembur P. Ltd. [2005] 273 ITR 1 has dealt with this very issue. Suffice it to state that the Act does not envisage taxing any income under any head not specified in section 14 of the Act. In the circumstances, there is no question of trying to read any conflict in the two judgments of this court "

18. We have also considered the decision of Hon'ble Gujarat High Court in para no.12 and page 7 of the order of ld.AO has held as under:

". The AO had gone wrong by not considering the provisions of Section 71 of the IT Act. In this regard the law pronounced in the case of Chensing Ventures is to be followed, wherein it was held that once a loss is determined, the same should be set off against the income determined under any other head of income and there was no reason for denial of benefit u/s. 71 of the IT Act……."

.". The income-tax is only one tax and levied on the sum total on the income classified and chargeable under various heads. Section 14 has classified different heads of income and income under each head is separately computed. Income which is computed in accordance with law is one income and it is not collection of distinct tax levied separately on each heads of income and it is not an aggregate of various taxes computed with reference to each of the different sources separately. There is only one assessment and the same is made after the total income has been ascertained. The assessee is subject to income-tax on his total income though his income under each head may be well below the taxable limit. Hence the loss sustained in any year under any heads of income will have to be set off against income under

any other head. In this case, the Assessing Officer made addition of Rs. 28,50,000/- as undisclosed income under Section 69 of the Act. Once the loss is determined, the same should be set off against the income determined under any other head of income. The benefit provided under Section 71 of the Act cannot be denied "

". In our opinion, the statutory provisions contained in Section 71 was applicable in the present case. By applying the decision in the case of Fakir Mohmed Haji Hasan as explained in the case of Deputy Commissioner of Income- tax vs. *Radhe Developers India Ltd., the same cannot be declined....."*

19. We have also considered the administrative instructions for guidance of Income Tax Officers on the matters pertaining to the assessment and also Circular No.11/2019, wherein it has categorically been held as under:

"4. Thus keeping the legislative intent behind amendment in section 115BBE(2) vide the Finance Act, 2016 to remove any ambiguity of interpretation, the Board is of the view that since the term 'or set off of any loss' was specifically inserted only vide the Finance Act 2016, w.e.f 01.04.2017, an assessee is entitled to claim set-off of loss against income determined under section 115BBE of the Act till the assessment year 2016-17."

20. Thus, keeping in view of the amendment, we are of the view as no claim shall be available for any allowances or expenditure of income referred to any section 68, section 69, section 69A, section 69B, section 69C and section 69D from A.Y. 2013-14 onwards. This amendment being prospective and not retrospective and since the claim raised by the assessee is for the A.Y. 2009-10, therefore, this amendment is not applicable and thus the claim for set off of shares business loss is available to the assessee as benefit provided u/s.71 of the Act may not simply be denied on the ground that the assessee was not able to substantiate his claim for classification

under certain head of income. In our view, even if that claim is not substantiated, even then the income can be classified under any other head i.e. the income from other sources and benefit u/s.71 of the Act is also allowable. Therefore, keeping in view of the totality of the facts and circumstances as discussed above and also keeping in view of the decisions as mentioned above, we allow the claim of the assessee for set off of shares business loss against the undisclosed income for the year under consideration, accordingly solitary ground raised by the assessee are allowed.

21. In the result, appeal of the assessee is partly allowed.

ITA No's.1536 & 1537/AHD/2017 for A.Y's. 2010-11 & 11-12 :

22. Since, the given facts and circumstances are identical as in the above assessee's own case [I.T.A.No.1535/Ahd/2017 /A.Y.2009-10], therefore, our findings and directions contained therein shall apply *mutatis mutandis* to these two appeals of the assessee. Accordingly, following the same, grounds raised by the assessee in both the appeals are partly allowed.

23. To sum up, three appeals filed by the assessee in ITA No's.1535 to 1537/AHD/2017 for A.Y's.2009-10 to 2011-12 are partly allowed."

11. Considering the order of Tribunal in the quantum assessment, wherein the entire additions on the basis of which the penalty was levied has already been deleted, therefore, the order of penalty will not survive. Hence, we direct the assessing officer to delete the entire penalty levied under section 271(1)(c) of the Act.

12. In the result, the appeal of the assessee in for AY 2009-10 is allowed.

13. Further, considering the facts that additions in the quantum assessment in AY 2010-11 & 2011-12 was also deleted by Tribunal, therefore, the penalty order for these two years is set-aside/ quashed. The assessing officer is directed accordingly.

14. In the result, appeal of the assessee for all three assessment years is allowed

Order announced on 11July 2022 in open Court and the result was placed on the notice board.

Sd/-	**Sd/-**
(Dr ARJUN LAL SAINI)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Surat,
Dated: 11/07/2022
D.K.P. Outsourcing Sr.P.S
Copy to:
1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

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Assistant Registrar, ITAT, Surat