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**(1997) 225 ITR 1027**

**Madhya Pradesh High Court (Indore Bench)**

**Case No:** Miscellaneous Civil Case No. 290 of 1992

Commissioner of  
Income Tax

APPELLANT

Vs

Gajraj Singh Nathu  
Singh

RESPONDENT

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**Date of Decision:** March 22, 1996

**Acts Referred:**

Income Tax Act, 1961 " Section 256, 271(1)

**Citation:** (1997) 225 ITR 1027

**Hon'ble Judges:** Nirmal Kumar Jain, J; Asha Ram Tiwari, J

**Bench:** Division Bench

**Advocate:** D.D. Vyas, for the Appellant; None, for the Respondent

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### **Judgement**

N.K. Jain, J.

By this application u/s 256(2) of the Income Tax Act, 1961 (for short, "the Act"), the applicant-Department seeks a

direction to the Income Tax Appellate Tribunal, Indore Bench, Indore, to state the case and refer the undernoted three questions said to be of law

for the opinion of this court arising out of its order dated June 27, 1991, passed in I. T. A. No. 460/Ind. of 1989 and its refusal to refer the case

by order dated November 26, 1991, passed in R. A. No. 252/Ind. of 1991 :

(1) Whether on the facts and in the circumstances of the case, there was any material with the Income Tax Appellate Tribunal justifying

cancellation of penalty u/s 271(1)(c) ?

(2) Whether, on the facts and in the circumstances of the case, the cancellation of penalty on the ground that the assessee would have succeeded in

quantum appeal, if filed, was a relevant consideration when penalty u/s 271(1)(c) was held imposable even in agreed assessments ?

(3) Whether the order of the Income Tax Appellate Tribunal was not perverse ?

2. The assessment year involved is 1983-84. The assessment in the case had been completed at a total income of Rs. 1,12,750 by an order dated

March 6, 1986, u/s 143(3) of the Act. The assessee had returned the income at Rs. 99,690 but the Assessing Officer made additions of Rs.

10,000 on account of certain undisclosed transactions of purchase and sale and of Rs. 2,563 on account of discrepancies in the matter of Bardana

use by the assessee. The assessment was not challenged by the non-applicant/assessee in appeal and as such the additions became final.

Subsequently, the penalty proceedings were also initiated by the Assessing Officer u/s 271(1)(c) and were finalised after considering the

assessee's reply and the penalty of Rs. 40,940 was imposed on him. Aggrieved by the said penalty, the assessee filed an appeal before the

Commissioner of Income Tax (Appeals) who, vide his order dated February 22, 1989, confirmed the penalty holding that there was deliberate

concealment on the part of the assessee. The assessee then filed an appeal before the Tribunal which vide its order dated June 27, 1991, set aside

the order of penalty holding that the assessee would have well succeeded in getting the entire additions deleted but for his own omission of not filing

any appeal against the assessment order. The Tribunal further held that the order imposing penalty is unreasonable and vindictive in nature.

3. Since the order was not acceptable to the Department, it moved an application before the Tribunal u/s 256(1) seeking reference. The Tribunal,

however, rejected the application by its order dated November 16, 1991, holding that the order of the Tribunal is based on appreciation of facts

on record and as such no referable question of law arises therefrom. The Department has, therefore, come up before this court u/s 256(2) of the

Act.

4. We have heard Shri D.D. Vyas, learned counsel for the Department. None has appeared for the non-applicant assessee.

5. The Tribunal, in allowing the appeal of the assessee, has obviously proceeded on the assumption that had the assessee filed an appeal against

the assessment, the additions made by the Assessing Officer would have been deleted. We refrain from making any comments on the finding of the

Tribunal as we propose to make a direction to the Tribunal to make the reference. We are, however, satisfied that the order of the Tribunal does

give rise to a question of law stated at No. 1 by the Department. The Department has, however, not pressed other questions (Nos. 2, and 3).

6. We, therefore, allow the application in part and direct the Tribunal to state the case and refer the following question of law for the opinion of this

court :

Whether, on the facts and in the circumstances of the case, there was any material with the Income Tax Appellate Tribunal justifying cancellation

of penalty u/s 271(1)(c) ?

7. The application accordingly stands allowed as aforesaid without any order as to costs. Counsel's fee Rs. 750 is allowed, if certified. A copy of

this order be transmitted to the Tribunal.