

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

I.T.T.A. No.740 of 2017

Between:

The Principal Commissioner of Income Tax-II,
Visakhapatnam.

..Appellant

And

M/s.Sri Radha Krishna Vihar, Kakinada

..Respondent

JUDGMENT PRONOUNCED ON: 13th December, 2017

THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

1. Whether Reporters of local
Newspapers may be allowed : No
to see the Judgments?

2. Whether the copies of
judgment may be marked to : Yes
Law Reporters/Journals?

3. Whether their Ladyship/Lordship
wish to see fair copy of the : Yes
Judgment?

C.V.NAGARJUNA REDDY, J

T.AMARNATH GOUD, J

***THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY**
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

+ I.T.T.A. No.740 of 2017

% 13.12.2017

The Principal Commissioner of Income Tax-II,
Visakhapatnam.

..Appellant

Vs.

\$ M/s.Sri Radha Krishna Vihar, Kakinada

..Respondent

! Counsel for the appellant: Mr.K.Raji Reddy,
senior standing counsel for Income Tax Department

Counsel for the respondent: Mr.G.V.N.Hari

<Gist :

>Head Note:

? Cases referred:

1. (2009) 312 ITR 0112
2. (2009) 315 ITR 0172

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Counsel for the respondent: Mr.G.V.N.Hari

The Court made the following:



JUDGMENT: (Per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

The Revenue has filed this appeal on the following substantial questions of law.

“1. Whether on the facts and circumstances of the case and in law, the ITAT was justified and correct in deciding that the penalty u/S.158BFA(2) of the Income Tax Act, 1961 is leviable only on the amount of additions made over and above the undisclosed income declared by the assessee in its return filed u/S.158BC(a) by relying upon the decision of LD.ITAT, Cochin Bench, in the case of DCIT vs. Heera Construction co.(pvt) Ltd. – 125 TTJ 589, without appreciating the fact that the LD.ITAT, Cochin Bench, has ruled in the above mentioned decisions that the assessee forfeits the benefit of first proviso with regard to immunity from penalty or tax payable on undisclosed income and further whether as a result the order under reference had turned perverse in law as well as on facts?

2. Whether on the facts and circumstances of the case and in law, the ITAT was correct and justified to record a decision that the penalty u/S.158BFA(2) cannot be levied in respect of undisclosed income recorded in assessee's return furnished u/S.158BC(a) of I.T.Act, by ignoring and not appreciating the fact that the assessee did not pay the tax on its admitted income in return so furnished and hence failed to fulfill the conditions laid down in Clause (ii), (iii) and (iv) of first proviso to Section 158BFA(2) thus taking the case of assessee out from ambit of benefit provided in first proviso to the above Section and further whether the order of ITAT under reference had turned perverse both in law as well as on facts as a result?

3. Whether on the facts and circumstances of the case and in law, the ITAT was correct and justified in relying upon the decision of Ld. ITAT, Cochin Bench, in DCIT vs. Heera Construction Co.(pvt) Ltd. – 125 TTJ 589, despite the fact that no facility for installment was granted by the then CIT to the

assessee under reference making the observations by Ld. ITAT in the case of Heera Construction Co.(pvt) Ltd. (supra) inapplicable to the facts and circumstances of the case and in law assessee's case and further whether as a result the order under reference has turned perverse both in law and in facts?"

2. The brief facts leading to the filing of this appeal are as follows.

A search and seizure was conducted on the respondent-assessee on 13.03.2013; a notice under Section 158BC of the Income Tax Act, 1961 (for short 'the Act') was issued, in response to which, return for the block period was filed by the assessee declaring the undisclosed income of Rs.35,00,000/-. As against the tax of Rs.22,09,000/- payable on the said undisclosed income, the assessee paid Rs.9,00,000/- towards the tax along with the block return and the balance tax of Rs.13,09,000/- remained unpaid. The Assessing Officer, however, assessed the undisclosed income at Rs.85,30,933/-. The assessee took the matter in appeal to the Income Tax Appellate Tribunal, which partly allowed the appeal, consequent to which, the Assessing Officer determined the undisclosed income at Rs.42,59,159/- and levied penalty thereon on the ground that the block return was due by 01.08.2003, but it was filed on 11.08.2003 and that the total tax of Rs.22,09,000/- payable as per the block return was not paid. The Assessing Officer held that the assessee did not fulfill the conditions laid down under Section 158BFA of the Act and therefore, it is not entitled to the benefit of the second proviso to the said provision. Feeling aggrieved, the assessee carried the matter in appeal to the Commissioner of Income Tax (Appeals)-II, Mumbai CAMP at Visakhapatnam. On consideration of the extant provisions

and the relevant case law, the Commissioner (Appeals) partly allowed the appeal by restricting the levy of penalty only to the undisclosed income assessed in excess of the undisclosed income declared in the block return. This order was challenged in an appeal by the Revenue before the Income Tax Appellate Tribunal, Visakhapatnam Bench, Visakhapatnam (for short 'the Tribunal'), which by its order, dated 29.10.2015, dismissed the appeal. Assailing the said order, the Revenue filed the present appeal.

3. Mr.K.Raji Reddy, learned senior standing counsel for the Income Tax Department appearing for the appellant, has submitted that under Sub-Section (2) of Section 158BFA of the Act, the assessee is liable to pay penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under Clause (c) of Section 158BC of the Act and that as the assessee failed to satisfy some of the four exceptions of the first proviso to Sub-Section (2) of Section 158BFA of the Act, it is liable to pay penalty and that both the appellate *fora* have committed a serious error in partly setting aside the penalty.

4. Opposing the above submissions, Mr.G.V.N.Hari, learned counsel for the respondent-assessee, has submitted that the language of the provisions of Section 158BFA of the Act clearly suggests that payment of interest is made mandatory by using the words 'shall be liable' in Sub-Section (1) of Section 158BFA of the Act, whereas

imposition of penalty on the assessee for the delayed filing of the return and nonpayment of the tax on the undisclosed income falls within the realm of discretion of the Assessing Officer as evident from the words ‘may direct’ used in Sub-Section (2) of Section 158BFA of the Act. In support of this submission, the learned counsel has placed reliance on the judgments in **Commissioner of Income Tax vs.Dodsal Ltd.**¹ and **Commissioner of Income Tax vs. Satyendra Kumar Dosi**².

5. Before referring to the judgments cited by the learned counsel for the respondent-assessee, it would be useful to consider Section 158BFA of the Act and the same is, accordingly, reproduced herein-below to the extent it is relevant.

“Section 158BFA: Levy of interest and penalty in certain cases.

(1) Where the return of total income including undisclosed income for the block period, in respect of search initiated under Section 132 or books of account, other documents or any assets requisitioned under Section 132A on or after the 1st day of January, 1997, as required by a notice under Clause (a) of Section 158BC, is furnished after the expiry of the period specified in such notice, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent of the tax on undisclosed income, determined under Clause (c) Section 158BC, for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time specified in the notice, and –

(a) where the return is furnished after the expiry of the time aforesaid, ending on the date of furnishing the return;
or

¹ (2009) 312 ITR 0112

² (2009) 315 ITR 0172

(b) where no return has been furnished, on the date of completion of assessment under Clause (c) of Section 158 BC.

(2) The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, may direct that a person shall pay by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under Clause (c) of Section 158 BC:

Provided that no order imposing penalty shall be made in respect of a person if-

- (i) such person has furnished a return under Clause (a) of Section 158 BC;
- (ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, the assessee offers the money so seized to be adjusted against the tax payable;
- (iii) evidence of tax paid is furnished along with the return; and
- (iv) an appeal is not filed against the assessment of that part of income which is shown in the return.”

6. As could be seen from the above reproduced provision, under Sub-Section (1) of Section 158BFA of the Act, where the assessee furnishes return of total income including the undisclosed income for the block period in the circumstances explained therein after the expiry of the period specified in the notice or has not furnished, the assessee ‘shall be liable’ to pay simple interest at 1% of the tax on the undisclosed income. Sub-Section (2) of Section 158BFA of the Act envisages that in respect of such undisclosed income determined by the Assessing Officer

under Clause (c) of Section 158BC of the Act, he 'may direct' that the assessee shall pay a penalty as prescribed therein. The first proviso to Sub-Section (2) of Section 158BFA of the Act contains four exceptions. Dealing with this provision, the Rajasthan High Court in **Satyendra Kumar Dosi** (2 supra) held as under.

“A bare perusal of Section 158 BFA(2) goes to show that by virtue of the said provision, the Assessing Officer or the Commissioner of Appeal is vested with the power to direct the assessee to pay the penalty as specified in respect of the undisclosed income determined by the AO under Clause (c) of Section 158BC, however, the AO or the CIT(A) is not empowered to impose the penalty in respect of the person who fulfills the conditions enumerated in the first proviso to Section 158BFA. It is to be noticed that in the main provision providing for imposition of penalty, the word “may” has been used. It is settled law that the penal provision in the taxing statutes shall be construed strictly. From the plain reading of the Section 158 BFA(2), it does not appear that in all the cases where the undisclosed income is determined by the AO under Clause(c) of Section 158BC, the imposition of penalty as specified u/S.158BFA shall follow as a natural consequence thereof. In our considered opinion, in terms of Section 158BFA, a discretion is vested with the Assessing Officer to levy the penalty in respect of the undisclosed income but it cannot be inferred from the said provision that the liability for penalty is automatic. Of course, the proviso to Section 158BFA(2) enumerates the circumstances wherein no penalty is leviable but from that also it cannot be inferred that the absence of the circumstances enumerated will attract the provision of penalty automatically.”

A Division Bench of the Bombay High Court also in **Dodsal Ltd.** (1 supra) interpreted Sub-Section (2) of Section 158BFA of the Act as under.

“The terminology of the said Section makes it clear that there is a discretion in the Assessing Officer to direct payment of penalty. The proviso supports this interpretation. Only if the authority decides to impose penalty then, it will not be less than the tax leviable but shall not exceed three times the tax so leviable. It is, therefore, not possible to accept the submission on behalf of the Revenue that once the Assessing Officer comes to the conclusion that there is a breach of the mandate of Section 158BFA(1), then the penalty should be imposed. Merely because the expression used is shall not be less than the amount of tax leviable or not exceeding three times the tax, does not result in reading the first part of the Section as mandatory. The proviso to the Sub-Section makes it clear that there is direction conferred on the Commissioner for the reasons which are set out therein. Whilst considering taxing statute, the Supreme Court has held that it is settled law that the expressions used in a taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative intention. It is equally settled law that, if the language is plain and unambiguous, one can look fairly at the language used and interpret it to give effect to the legislative intention. Tax law, nevertheless, have to be interpreted reasonably and in consonance with justice adopting a purposive approach. See Commissioner of Income tax vs. Gwalior Rayon Silk Manufacturing Co. Ltd. (1992) 104 CTR (SC) 243 : (1992) 196 ITR 149 (SC). In the instant case, both C.I.T. and I.T.A.T. have recorded reasons for exercise of their discretion. Before us the Revenue has not challenged the said finding of fact as to the exercise of discretionary power. We, therefore, uphold the view

taken by I.T.A.T. that the Section is directory and not mandatory.”

7. While we respectfully agree with the views of both the High Courts referred to above, we notice an additional feature from the language of Section 158BFA of the Act. While in Sub-Section (1) thereof, which deals with the payment of interest on undisclosed income, the words ‘the assessee shall be liable to pay simple interest’ are used, whereas in Sub-Section (2) thereof, the words ‘may direct’ are used referring to the power of the Assessing Officer to direct the person concerned to pay penalty. No doubt, the words ‘shall’ may at times be construed as directory and the word ‘may’ may be construed as mandatory as the context warrants. However, in Section 158BFA of the Act, these phrases have been used by the Legislature in two different contexts, one in the matter of payment of interest and another in the matter of payment of penalty. The fact that varied phraseology is used in the same provision itself shows that Legislature treated Sub-Sections (1) and (2) of Section 158BFA of the Act in different veins. In the context in which these phrases are used, we are of the opinion that while the words ‘shall be liable’ in Sub-Section (1) of Section 158BFA of the Act are intended to be mandatory, the words ‘may direct’ in Sub-Section (2) thereof are intended to be directory. In other words, while payment of interest is mandatory, levy of penalty is discretionary. Sub-Section (2) of Section 158BFA of the Act, accordingly, vests discretion in the Commissioner (Appeals) whether to levy or not to levy penalty. It is trite position of law that any discretion vested in an

authority has to be exercised in a reasonable and rational manner depending upon the facts and circumstances of each case.

8. In the light of the true purport of Sub-Section (2) of Section 158BFA of the Act as explained above, we are of the opinion that the order of the Tribunal confirming the order of the Commissioner (Appeals) does not suffer from any illegality. Both the appellate *fora* have taken into consideration the fact that on receipt of the notice following the search and seizure, the assessee has filed his returns within ten days of the expiry of the time stipulated for filing such returns and paid a part of the tax on the admitted undisclosed income. The view was, therefore, taken by both the appellate *fora* that on the facts of the case, the Assessing Officer ought not to have exercised his discretion for imposition of penalty.

9. On the analysis as above, all the substantial questions of law framed by the Revenue are answered against it.

10. The appeal is, accordingly, dismissed.

C.V.NAGARJUNA REDDY, J

T.AMARNATH GOUD, J

13th December, 2017

Note: L.R. copies to be marked.

(B/o)

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