IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

and

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) No.940 of 2008

Shri C.Mohan. ... Appellant

-vs-

The Assistant Commissioner of Income-tax,
Company Circle-II(2),
121,Mahatma Gandhi Road,
Chennai-600 034. ... Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai "A" Bench, dated 20.03.2008 in I.T.(SS) A.No.50/Mds/2004 for the assessment year Block Period 01.04.1989 to 22.03.2000, against the order of the Office of the Commissioner of Income Tax (Appeals)-II Chennai-600 034 in IT Appeal No.103/03-04 dated 10.03.2004 and against the proceedings of the Assistant Commissioner of Income Tax, Central Circle-II (2), Chennai-34 in 705M (Ce.Cir II(2) /Block dated 27/3/2003 and against the order of Deputy Commissioner of Income Tax, Central Circle II(2), Chennai dated 28/06/2002 PA.No./G.I.R.No.AFEPM680SJ/G.I.No.M.705 for the Assessment period ended on 22.3.2000.

For Appellant : Mrs.Sree Lakshmi Valli

For Respondent : Mrs.K.G.Usha Rani,
Junior Standing Counsel

J U D G M E N T

[Delivered by T.S.Sivagnanam, J.]

This appeal, filed by the assessee under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), is directing against the order passed by the Income Tax Appellate Tribunal Madras "A" Bench, Chennai, in I.T.(SS)

A.No.50/Mds/2004, dated 22.04.2008 for the assessment year Block Period 01.04.1989 to 22.03.2000.

2.This appeal has been admitted on 09.07.2008, on the following substantial question of law:

> "Whether on the facts and in the circumstances of the case, the Tribunal is right in confirming the levy of penalty under Section 158BFA(2) of the Income Tax Act?"

3.Heard Mrs.Sree Lakshmi Valli, the learned counsel for the appellant and Mrs.K.G.Usha Rani, learned Junior Standing Counsel for the respondent.

4.The short question, which falls for consideration, is whether the computation of the undisclosed income for the purpose of invoking the Second Proviso to Section 158BFA of the Act is proper and justified.

5.The learned counsel for the assessee vehemently contended that the computation of the undisclosed income for such purpose was not based on the materials recovered from the search but, was based on the letter given by the assessee.

6.In support of the contention, the learned counsel placed reliance on the decision of the High Court of Delhi in the case of Commissioner of Income Tax vs. Harkaran Das Ved Pal [(2011) 336 ITR 0008].

7.The learned Junior standing counsel appearing for the respondent/Revenue seeks to sustain the impugned order by contending that the Assessing Officer, the first appellate authority and the Tribunal concurrently held on facts that penalty and surcharge is leviable in terms of the Second Proviso. Further, it is submitted that the undisclosed income has been properly computed based on the seized materials and details furnished by the assessee pursuant to the search. For better appreciation Section 158BFA of the Act is quoted hereinbelow:

> "Levy of interest and penalty in certain cases.
>
> Section 158BFA. (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 [18][one] per cent of the tax on undisclosed income, determined under clause (c) of 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

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

(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 158BC:

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 158BC;

(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 :

Provided further that the provisions of the preceding proviso shall not apply where the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return and in such cases the penalty shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return.

(3) No order imposing a penalty under sub-section (2) shall be made,—

(a) unless an assessee has been given a reasonable opportunity of being heard;

(b) by the Assistant Commissioner [19][or Deputy Commissioner] or the Assistant Director [19][or Deputy Director], as the case may be, where the amount of penalty exceeds twenty thousand rupees except with the previous approval of the [20][Joint] Commissioner or the [20][Joint] Director, as the case may be;

(c) in a case where the assessment is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 [21][or section 246A] or an appeal to the Appellate Tribunal under section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Chief Commissioner or the Commissioner, whichever period expires later;

(d) in a case where the assessment is the subject-matter of revision under section 263, after the expiry of six months from the end of the month in which such order of revision is passed;

(e) in any case other than those mentioned in clauses (c) and (d), after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later;

(f) in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995 but before the 1st day of January, 1997.

Explanation.—In computing the period of limitation for the purpose of this section,—

(i) the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129;

(ii) the period during which the immunity granted under section 245H remained in force; and

(iii) the period during which the proceedings under sub-section (2) are stayed by an order or injunction of any court, shall be excluded.

(4) An income-tax authority on making an order under sub-section (2) imposing a penalty, unless he is himself an Assessing Officer, shall forthwith send a copy of such order to the Assessing Officer.]”

8.We are required to examine as to whether the undisclosed income for the block period, which is to be determined under Chapter XIVB, has been determined on the basis of the evidence discovered during the search.

9.The Assessing Officer while passing the penalty order dated 27.03.2003, has recorded a finding that the block assessment was finalised after considering the seized materials, details furnished by the assessee and making enquiries. The assessment order dated 28.06.2002, which was completed under Section 158BC of the Act, gives the full details.

10.We find that more than 19 hearings took place before the assessment was drawn. It may not be necessary for this Court to refer to all the statements, which were recorded and the materials, which were called for and placed before the Assessing Officer but, it would suffice to state that there are abundant references in the assessment order to show as to how the undisclosed income was computed. On facts, the Assessing Officer clearly recorded the finding that the undisclosed income has been properly computed based on the seized materials as well as the details furnished by the assessee.

11.The assessee seeks to dispute the fixation by contending that the fixation is based on the letter given by the assessee, which according to the assessee is voluntary.

12.We do not accept the stand taken by the assessee before us, since it is factually established that the determination of the undisclosed income was based upon the materials, which were available at the time of search and the information given by the assessee pursuant thereto.

13.The first appellate authority has considered the issue independently, especially the contention now put forth before us and noted that the undisclosed income has been properly computed. The Tribunal also has examined the factual position and noted the particulars of the undisclosed income and then rendered a finding confirming the orders passed by the first appellate authority and the Assessing Officer.

14.Thus, we find that the three authorities have concurrently appreciated and re-appreciated the factual position and held that the undisclosed income has been determined based on the documents and other materials and information available at the time of search. For the above reasons, the assessee has not made out any case for interfering with the order passed by the Tribunal.

15.Accordingly, the appeal fails and the same is dismissed and the substantial question of law, framed for consideration, is answered against the assessee and in favour of the Revenue. No costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

nsd/abr
To

1.The Income Tax Appellate Tribunal Madras 'A' Bench,
Chennai.

2.The Assistant Commissioner of Income Tax,
Company Circle-II(2),
121,Mahatma Gandhi Road,
Chennai-600 034.

3.The Commissioner of Income Tax,
Appeals(II), Chennai-34.

4.The Deputy Commissioner of Income Tax,
Circle II(2), Chennai-34.

5.The Assistant Registrar,
Income Tax Appellate Tibunal,
3rd Floor Rajaji Bhavan, Besant Nagar,
Chennai-90.

+1cc to M/S.T.R.Senthilkumar, Advoate Sr.65355
+1cc to M/S.Mallika Srinivasan, Advocate Sr.65217 [25/01/2019]

T.C.(A) No.940 of 2008

rk[co]
srg 15/10/2018