

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 20.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.A.No.854 of 2017

Commissioner of Income-tax,
Chennai. ... Appellant/Appellant

Vs.

Late Dr.K.C.G.Vergheese,
Rep By L/H Shri Anand Jacob Vergheese,
No.11, 4th Main Road,
Nehru Nagar, Adyar,
Chennai 600 020. ... Respondent/Respondent

Prayer: Tax Case Appeal is filed under Section 260A of Income Tax Act, 1961, against the order dated 01.07.2016, made in IT (SS)A No.16/Mds/2011, on the file of the Income Tax Appellate Tribunal Madras "B" Bench arising against the order of the commissioner of Income Tax(Appeals)-II, Chennai, dated 17.01.2011 confirming the panalty levied by the assessing officer, Viz, Assistant Commissioner of Income Tax, central Circle -III(2), chennai dated 31.03.2008.

For Appellant : Mr.TR.Senthilkumar

For Respondent : Mr.A.S.Sriram
for Mr.S.Sridhar

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Tax Case Appeal is filed against the order, dated 01.07.2016, made in IT(SS)A No.16/Mds/2011, on the file of the Income Tax Appellate Tribunal Madras "B" Bench.

2. Short facts leading to the Tax Case Appeal are that the assessee was the president of Hindustan Engineering Training

Centre, running professional colleges. Assessment was completed, by assessing the undisclosed income of Rs.1.23 Crores and after giving effect to the appellate orders, undisclosed income was quantified at Rs.88.71 Lakhs, which includes the unaccounted payment made towards the purchase of land. Assessee filed appeal before the CIT (Appeals) and CIT (Appeals) found that addition made to an extent of Rs.34,30,000/- was not furnished and accordingly, deleted the same. Assessee made further appeal to the Tribunal and pending appeal, he died. Legal representatives withdrew the appeal. Thereafter, the Assessing Officer initiated penal proceedings, under Section 158BFA(2) of the Income-Tax Act, 1961 (Hereinafter referred to as "the Act"), against the legal representatives, on 31.01.2002 and levied penalty of Rs.31,84,057/-.

3. Aggrieved by the order of penalty and also against the block assessment order, with respect to the undisclosed payment to purchase the land, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who confirmed the assessment. Against which, the assessee preferred an appeal in IT(SS)A No.16/Mds/2011, before the Income Tax Appellate Tribunal. Submissions made by the assessee, before the Income Tax Appellate Tribunal, Chennai, are as follows:-

(i) Shri S. Sridhar, the Ld.counsel for the assessee, submitted that the Assessing Officer levied penalty under Section 158BFA(2) of the Act consequent to completion of block assessment under Section 158BC of the Act. The Ld.counsel further submitted that the assessee has disclosed a sum of Rs. 53,06,762/- which was treated as undisclosed income in the block period. However, the Assessing Officer determined the income during the block period at Rs.1,23,01,214/-. The assessee filed appeal before the CIT(Appeals) and the CIT(Appeals) found that the addition made by the Assessing Officer to the extent of Rs.34,30,000/- was not justified. Accordingly, the CIT(Appeals) deleted the addition to the extent of Rs.34,30,000/-. The assessee filed further appeal before this Tribunal. During the pendency of the appeal, the assessee Shri K.C.G. Verghese expired. The legal heirs of Shri K.C.G. Verghese withdrew the appeal pending before this Tribunal. After withdrawal of appeal against the quantum addition made by the Assessing Officer, the Assessing Officer initiated penalty proceeding under Section 158BFA(2) of the Act. According to the Ld. counsel, the 3 I.T.(SS) A. No.16/Mds/11 penalty levied by the Assessing Officer is in respect of the conduct of the deceased assessee, therefore, after the expiry of the assessee no penalty can be levied against the legal heirs.

(ii) The Ld.counsel further submitted that in respect of investment made by the assessee in land at Karapakkam, the same was disclosed to the extent of Rs.18,41,238/-. However, the actual amount found to be invested by the assessee was Rs.71,48,000/-. According to the Ld. counsel, the assessee has disclosed the investment in the landed property in the VDI Scheme, 1997 to the extent of Rs.18,41,238/-. Therefore, according to the Ld. counsel, the investment in the land was within the knowledge of Revenue authorities. Merely because there was a difference which was found subsequently in the investment made in the land that cannot be a reason to levy penalty. According to the Ld. counsel, after the death of the assessee Shri K.C.G. Verghese, the legal representative could not trace out any papers with regard to investment made in the landed property. Therefore, he could not explain before the Assessing Officer why such difference has come. The handicap faced by the assessee, being the legal representative of the deceased, cannot be taken advantage by the Revenue for 4 I.T.(SS) A. No.16/Mds/11 levying penalty. According to the Ld. counsel, levy of penalty is a discretion of Assessing Officer in the facts of each and every case. The power to levy penalty is one thing and exercising of that power is entirely another aspect. Therefore, merely because there was difference in respect of the investment made in the landed property in the amount disclosed in the VDI Scheme and actual investment, and the person who actually invested is no more, according to the Ld. counsel, levy of penalty under Section 158BFA(2) of the Act is not justified. According to the Ld. counsel, there is reasonable cause on the part of the legal representative for not producing relevant details with regard to investment, therefore, the penalty levied by the Assessing Officer as confirmed by the CIT(Appeals) is not justified."

4. Before the Tribunal, departmental representative of the Office of the Assistant Commissioner of Income Tax, Chennai, made the following submissions,

(i) On the contrary, Shri M. Murugaboopathy, the Ld. Departmental Representative, submitted that the investment in the landed property at Karapakkam was made by the deceased assessee to the extent of Rs.71,48,000/-. However, what was disclosed in the VDI Scheme is only Rs.18,41,238/-. Therefore, the difference of Rs.53,06,762/- needs to be explained by the assessee. According to the Ld. D.R., the penalty is levied only on the assessee for not furnishing the

particular details and not on the legal representative. The penalty is to be recovered only from the assets of the deceased assessee. In order to comply with the procedural aspect, the legal representative was given an opportunity as provided in Section 159 of the Act. Therefore, the death of the assessee, namely, Shri K.C.G. Verghese cannot be a reason for not levying penalty.

(ii) Shri M. Murugaboopathy, the Ld. D.R. further submitted that there was a difference between the assessed income and the income returned by the assessee. Therefore, it is for the assessee to explain why such a difference has come. In the absence of any proper explanation on the part of the assessee, namely, the legal representative, the CIT(Appeals) has rightly confirmed the addition made by the Assessing Officer.

5. After considering the rival submissions and the facts and circumstances of the case, the Income Tax Appellate Tribunal 'B' Bench, Chennai, vide order dated 01.07.2016, made in I.T.(SS) A.No.16/Mds/2011, held as follows:-

"5. We have considered the rival submissions on either side and perused the relevant material available on record. Admittedly, during the pendency of the appeal before this Tribunal against the quantum addition made by the Assessing Officer, the assessee Shri K.C.G. Verghese expired. Therefore, the legal representative withdrew the appeal for the reason best known to them. Admittedly, after withdrawal of the appeal by the legal representative, the Assessing Officer initiated penalty proceeding under Section 158BFA(2) of the Act. The question arises for consideration is whether there was any concealment of income by the assessee, namely, Shri K.C.G. Verghese? We have carefully gone through the provisions of Section 158BFA(2) of the Act. When there was difference between assessed income and income declared by the assessee in the block period, the Assessing Officer was empowered to levy penalty on that portion of undisclosed income determined, which is in excess of the amount of undisclosed income shown in the return. In the case before us, the assessee expired during the pendency of quantum appeal before this Tribunal and the legal representative withdrew the appeal. Now the legal representative of the deceased assessee claims before this Tribunal that they could not trace out any papers and they are not able to explain why the undisclosed income determined by the Assessing Officer exceeded the undisclosed income

disclosed by the assessee in the return. The fact remains that the deceased assessee has disclosed the cost of acquisition of land in the VDI Scheme to the extent of Rs.18,41,238/-. The seized material, which was identified during the course of search operation, disclosed the investment to the extent of Rs.71,48,000/-. Therefore, the investment made by the deceased assessee is very much available before the assessing authority even before the date of search. Therefore, the deceased assessee may be in a better position to explain why Rs.18,41,238/- was disclosed in the VDI Scheme, 1997, when the actual investment was identified at Rs.71,48,000/-.

6. This Tribunal is of the considered opinion that the legal representative of the deceased assessee is handicapped because they could not trace out any papers after the expiry of the assessee. This impediment faced by the legal representative cannot be taken advantage by the Revenue authorities. This Tribunal is of the considered opinion that the power to levy penalty under Section 158BFA(2) of the Act is one thing and exercising of that power is entirely different. This Tribunal is of the considered opinion that the power to levy penalty has to be exercised judiciously. Therefore, mere withdrawal of the appeal pending before this Tribunal by legal representative cannot be presumed that the assessee could not explain the difference between the returned income and assessed income. This Tribunal finds that Punjab & Haryana High Court in CIT v. Tikka Ram through L/H Smt. Munni Devi (2008) 8 DTR 174, a copy of which is filed by the assessee, found that since the legal representative was ignorant of the source of impugned investment and was not in a position to explain the same, they accepted the notice issued by the Assessing Officer under Section 148 of the Act. Therefore, the disclosure made by the legal representative is a bonafide and voluntary. Hence, the penalty cannot be levied at all. This principle was laid down by Punjab & Haryana High Court in a proceeding for levying penalty under Section 271(1)(c) of the Act. This Tribunal is of the considered opinion that the same principle is equally applicable in respect of penalty levied under Section 158BFA(2) of the Act. Therefore, merely because the legal representative withdrew the appeal pending before this Tribunal after the expiry of the assessee Shri K.C.G. Verghese and the legal representative is not in a position to explain the source of investment, this Tribunal is of the considered opinion that that cannot be a reason for

levying penalty under Section 158BFA(2) of the Act. This Tribunal is of the considered opinion that it is not a fit case for levy of penalty under Section 158BFA(2) of the Act. Accordingly, the orders of the lower authorities are set aside and the penalty levied under Section 158BFA(2) of the Act is deleted.

7. In the result, the appeal filed by the assessee is allowed."

6. Aggrieved by the same, the present Tax Case Appeal has been filed by the Commissioner of Income Tax, Chennai, on the following substantial question of law:-

"Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the penalty u/s 158 BFA r/w Section 159(2) (a) cannot be levied on the legal heir of assessee with the perverse finding that the penalty proceedings were initiated after the demise of the assessee and the legal representative did not have the necessary details to explain the source of investment before the Assessing Officer."

7. In supporting of the above substantial question of law, the following grounds have been raised in the appeal,

(i) The Tribunal has erred in holding that the penalty u/s 158 BFA r/w Section 159(2) (a) cannot be levied on the legal heir of the assessee by perversely assuming that the penalty proceedings were initiated after the demise of the assessee and the legal representative does not have the necessary details to explain the source of investment before the Assessing Officer.

(ii) The Tribunal ought to have appreciated that the search, statements of the assessee and consequent assessment were completed 4 years prior to the demise of the assessee. The penalty proceedings were also initiated on 31.1.2002 and the assessee had demised on 14.2.06 and therefore the tribunal reasoning is faulted and not acceptable.

(iii) The Tribunal has erred in holding that the Legal Heirs was handicapped without details after the demise of the assessee in as much as the assessee himself was very much alive and had participated during the assessment and initiation of the penalty proceedings and the legal heir in non other than the son of the assessee.

(iv) The Tribunal ought to have appreciated that the assessee had deliberately filed wrong particulars suppressing the income and investments in the land and even during the assessment was well as the appeal

proceedings the assessee had not explained the investments and the income.

(v) The Tribunal ought to have appreciated that the penalty was rightly levied on the legal heir of the assessee on the demise of the assessee as per proceedings u/s 159(2)(a) and the decision reported in 241 ITR 468 (CAL) supports the revenues case. The decisions relied by the tribunal reported in 8 DTR 74 is distinguishable to the fact of the case.

Heard the learned counsel appearing for the parties and perused all the materials available on record.

8. Before adverting to the rival contentions, let us consider the relevant provisions of the Income-Tax Act, 1961. Section 158BFA pertains to levy of interest and penalty in certain cases. Sub-section (2) of Section 158BFA, reads as under:-

"158BFA. Levy of interest and penalty in certain cases:-

.....

(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 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."

9. Section 159 of the Income Tax Act, 1961, dealing with legal representatives, is extracted hereunder:

"159. Legal representatives:- (1) Where a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased.

(2) for the purpose of making an assessment (including an assessment, reassessment or recomputation under Section 147) of the income of the deceased and for the purpose of levying any sum in the hands of the legal representative in accordance with the provisions of Sub-section (1),-

(a) any proceeding taken against the deceased before his death shall be deemed to have been taken against the legal representative and may be continued against the legal representative from the stage at which it stood on the date of the death of the deceased;

(b) any proceeding which could have been taken against the deceased if he had survived, may be taken against the legal representative; and

(c) all the provisions of this Act shall apply accordingly."

10. Upon perusal of sub-section (2) of Section 158BFA of the Act, it is evident that the Assessing Officer or Commissioner (Appeals) has the power to impose penalty in course of any proceedings, on the undisclosed income determined by the Assessing Officer under clause (c) of Section 158BC of the Act. As per Section 159(1), the legal representatives shall be liable to pay in the like manner and to the same extent as the deceased, any sum which the deceased would have been liable, if he had not died. Sub-Section (2) of Section 159, states that for the purpose of making an assessment (including an assessment, reassessment or recomputation under Section 147) of the income of the deceased and also for the purpose of levying any sum in the hands of the legal representative, in accordance with the provisions of Sub-section (1).

11. As per Section 271(1)(c) penalty can be levied only on that person who has concealed the particulars of income or filed inaccurate particulars of income. The use of the words "such person" in Section. 271(1)(c) clearly mandates the authority to levy penalty only on the same person who has filed the return of income and concealed the particulars or filed inaccurate particulars in such return. In the present case, return was filed by the deceased but penalty has been levied on the legal representatives. In the case on hand, return has been filed by the deceased assessee, against whom, no penalty proceedings have

initiated and levied any sum. Penalty was not levied on the "same person.

12. There is no definition of the word "proceeding" in Income-Tax Act. In Keshab Nataytm Banerjee v. Commissioner of Income-Tax reported in 252 ITR 888 (Cal.), in the context of Section 263, the Hon'ble Calcutta High Court held that since "proceeding" has not been qualified in Section 263, it cannot exclude any proceeding and cannot be confined only to mean a proceeding for assessment, by the Income- tax Officer." Similarly, in Section 159(2), the word "proceeding" has not been clarified. Therefore, the same cannot be confined to mean the proceeding for assessment, would also cover the proceeding for penalty also.

13. In the present case, pursuant to a search, under Section 132 of the Income-Tax Act, 1961, order under Section 158BC r/w. 143(3) of the Act, has been passed. Therefore, in the assessment order, apart from other additions, undisclosed income of Rs.53,06,762/-, on account of investment in lands at karapakkam, Chennai, was made. On appeal by the assessee, addition of undisclosed income was upheld and further appeal was made before the Income Tax Appellate Tribunal and during the pendency of the appeal, the assessee died. The legal representative of the assessee withdrew the appeal filed before the ITAT, Chennai, which dismissed the appeal. Consequent to the disposal of the appeal, penal proceedings under Section 158BFA (2) have been initiated in the block assessment order.

14. Penal proceedings have been initiated, only after the withdrawal of the appeal, filed by the deceased assessee, before the Income Tax Appellate Tribunal, at the instance of the legal representative of the deceased assessee. If the word, "proceedings", includes "penal proceedings", then the same should have been taken before the death of the deceased. The assessee expired on 14.02.2006. Appeal came to be dismissed as withdrawn. Only after the withdrawal of the appeal, proceedings under Section 158BFA(2) have been initiated only on 31.03.2008, in the block assessment order.

15. Section 159(1) imposes a liability on the legal representatives to pay any sum (including interest and penalty) in the like manner and to the same extent, as the deceased, had he not died. Liability to pay "any sum" arises only after an order is passed either for assessment or for penalty or for interest. Section 159(2) provides that (1) for making assessment in the hands of legal representatives and (2) for levying any sum (including interest and penalty) in the hands of legal representatives, proceedings taken against the deceased before his death would continue against the legal representatives.

Clause (b) of Section 159 deals with a situation where no proceeding were initiated against the deceased, but could have been initiated against him, since he had expired and the same can be initiated against the legal representatives. In case, where the deceased earned income but did not file the return and expired, notice to file the return can be issued to the legal representatives and proceedings can be taken against the legal representatives. Clause (a) deals with a situation where proceedings have been initiated against the deceased, when he was alive, but before finalizing, expired. Clause (a) provides that those proceedings would continue against the legal representatives, from the stage at which they stood at the time of the death of the deceased. A fiction is created whereby proceedings initiated against the deceased when he was alive, would continue against the legal representatives, as they have stepped into the shoes of the deceased, without there being any effect on the legality of the proceedings. Once this legal fiction comes into operation, then Clause (c) will have the consequential effect of applying all the provisions of the Act. In the case on hand, no penal proceedings have been initiated against the assessee, when he was alive. Assessment has not been done in the hands of the legal representatives and therefore, Section 159 of the Income-Tax Act, cannot be applied to the legal representative.

16. The Tribunal has properly considered the facts, provisions and by applying the judgment of the Punjab and Haryana High Court in CIT v. Tikka Ram, through legal heir, Smt. Munni Devi reported in (2008) 8 DTR 174, held that there is no justifiable reason to impose penalty, on the legal representatives, under Section 158BFA(2) of the Income Tax Act. Going through the material on record, we concur with the same.

17. On the facts and circumstances of this case, substantial question of law is answered against the revenue. In view of the above, the Tax Case Appeal is dismissed. No costs.

सत्यमेव जयते
Sd/-

Assistant Registrar (CS-iii)

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Sub Assistant Registrar

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TO

1. The Income Tax Appellate Tribunal Madras B Bench.
+1cc to Mr. T.R. SENTHILKUMAR, Advocate, S.R.No.13055
+1cc to Mr. S. SRIDHAR, Advocate, S.R.No. 13355

T.C.A.No.854 of 2017

RSK (CO)
TR(17/04/2018)