

In the High Court of Judicature at Madras

Dated : 03.7.2019

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Tax Case Appeal No.948 of 2009

The Commissioner of Income
Tax, Central-III, Chennai.Appellant

Vs

Shri S.V.SrinivasanRespondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 14.8.2008 made in IT(SS)A.No.0163/Mds/2006 on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench for the block assessment period from 1996-97 to 2002-03 and upto 13.9.2001. and against the order of the Commissioner of income Tax, (Appeals) II, Coimbatore, dated 19.12.2006 made in I.T.Appeal No. 359C/05-06 and against the order of the commissioner of Income Tax (Appeals) II, Coimbatore dated 24.04.2006 made in I.T.A.No. 231-C/05-06.

For Appellant : Mr.T.R.Senthilkumar, SSC and
Mrs.K.G.Usharani

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

Judgment was delivered by T.S.Sivagnanam, J

We have heard Mr.T.R.Senthilkumar, Senior Standing Counsel appearing for the Revenue and Mr.A.S.Sriraman, learned counsel appearing for Mr.S. Sridhar, learned counsel for the respondent - assessee.

2. This appeal, filed by the Revenue under Section 260A of the Income Tax Act, 1961 (for short, the Act), is directed against the order dated 14.8.2008 passed in ITA.No.0163/Mds/2006

on the file of the Income Tax Appellate Tribunal, Chennai 'D' Bench for the block assessment period from 1996-97 to 2002-03 and upto 13.9.2001.

3. The appeal was admitted on 19.10.2009 on the following substantial questions of law :

"i. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that penalty under Section 158BFA(2) was not leviable on the difference between the undisclosed income returned by the assessee and the undisclosed income finally determined after giving effect to the Tribunal's directions based on suppression of quantum and value of gold, diamonds and other assets in the quantum of appeal ? and

ii. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the Assessing Officer had not established that there was any willful or deliberate concealment and furnishing of inaccurate particulars on the part of the assessee ignoring the settled law that mens rea was not essential for attracting civil liability or penalty especially in view of the terminology used in Section 158BFA(2)?"

4. During the course of the search conducted in the premises of the assessee on 13.9.2001, gold jewellery, diamonds and other valuable articles were found and seized. In the block return, the assessee admitted the undisclosed income of Rs.85 lakhs. However, the Assessing Officer made the assessment at Rs.5,05,93,070/-. Since the assessment being a block assessment, the assessee preferred an appeal before the Tribunal. The Tribunal appears to have granted substantial relief to the assessee. Consequently, the giving effect to order was passed by the Assessing Officer on 14.7.2005 revising the total undisclosed income at Rs.1,34,73,770/- and computed the tax payable and after adjustment of the tax collected, a refund order was issued on 31.3.2005 for a sum of Rs.42,12,751/-.

5. It is only thereafter proceedings were initiated for levy of penalty under Section 158BFA(2) of the Act. The assessee resisted the proposal to levy penalty by contending that the levy of penalty was not automatic in terms of Sub-Section (2) of Section 158BFA of the Act and more particularly when the conditions stipulated in Clauses (i) to (iv) of the Proviso under Sub-Section (2) of Section 158BFA stand attracted in the case of the assessee. The Assessing Officer did not agree with the stand taken by the assessee and by order dated 19.7.2005,

the Assessing Officer levied penalty under Section 158BFA(2) of the Act equivalent to that of the amount of tax.

6. The matter was taken on appeal to the Commissioner of Income Tax (Appeals)-II, Coimbatore [for brevity, the CIT(A)] and it was dismissed vide order dated 24.4.2006. As against that, the assessee filed an appeal before the Tribunal, which, by the impugned order, allowed the appeal and set aside the levy of penalty and this is how the Revenue is before us by way of this appeal.

7. Before examining the correctness of the order passed by the Tribunal, we wish to point out that in the instant case, the facts clearly disclose that the provisions of Section 158BFA of the Act could not have been invoked. The reason being that as against the block assessment, the assessee filed an appeal before the Tribunal and as admitted by the Revenue, the assessee succeeded and substantial relief was granted in favour of the assessee. As against such findings, the Revenue did not file any appeal. It is only thereafter the giving effect to order was passed revising the total undisclosed income and as seen from the order dated 19.7.2005, it is clear that the penalty was sought to be levied on the revised total undisclosed income of Rs.1,34,73,770/- less the undisclosed income returned at Rs.85 lakhs equivalent to Rs.49,73,770/-. Thus, on this amount, the question of levying penalty under Section 158BFA(2) of the Act does not arise. Therefore, on the above ground, the levy of penalty is held to be not sustainable. Nevertheless, since the substantial questions of law were framed for consideration, we proceed to consider the same.

8. The first contention of Mr.T.R.Senthilkumar, learned Senior Standing Counsel for the Revenue is that the assessee cannot escape from the levy of penalty, which is virtually imposable in the facts and circumstances of this case.

9. There has been a long line of decisions by various Courts on the issue as to whether any discretion is vested with the Assessing Officer in the matter of levy of penalty under Section 158BFA(2) of the Act. We refer to a few decisions.

10. In the decision of the Division Bench of the Delhi High Court of in the case of CIT Vs. Harkaran Das Ved Pal [reported in (2011) 336 ITR 8], it was held that the the Assessing Officer has discretion to impose penalty, as it is apparent from the use of the expression 'may direct that a person shall pay by way of penalty'. It was further held that once the Assessing Officer exercising his discretion comes to the conclusion that penalty is imposable, the Statute requires that such sum of penalty 'shall' not be less than the amount of tax leviable, but 'shall' not also exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer. Thus, it is discretionary for the Assessing Officer to direct that a person shall pay penalty and it is mandatory that in case the Assessing Officer is of the opinion that such

penalty is leviable, the penalty amount shall not be less than the amount of tax leviable in respect of the undisclosed income and shall be not more than three times the amount of tax. Thus, the Legislature did not intend imposition of penalty by itself to be mandatory and the same is left to the discretion, which, of course, has to be exercised upon judicial considerations of the Assessing Officer.

11. In the decision of the Division Bench of the Rajasthan High Court in the case of CIT Vs. Satyendra Kumar Dosi [reported in (2009) 315 ITR 172], it has been held that levy of penalty under Section 158BFA(2) of the Act is discretionary and not mandatory.

12. To the same effect is the decision of the Division Bench of the Bombay High Court in the case of CIT Vs. Dodsall Ltd. [reported in (2009) 312 ITR 112].

13. The above legal principles were rightly noted by the Tribunal and on its own part, it had referred to other decisions including the decision of the Hon'ble Supreme Court in the case of Dilip N.Shroff Vs. JCIT [reported in (2007) 291 ITR 519]. Therefore, in our considered view, the Tribunal is fully justified in allowing the appeal filed by the assessee.

14. Before the Tribunal, the assessee contended that penalty was not leviable, as the assessee did not commit any willful default and the assessee claimed that the additions made were only due to the difference in estimate and interpretation and that no mistake was committed by the assessee willfully.

15. In fact, identical is the issue in the case of Harkaran Das Ved Pal wherein also the Division Bench of the Delhi High Court held that computation of undisclosed income could not be considered as undisclosed income determined by the Assessing Officer under Clause (c) of Section 158BC of the Act, as it was found that no amount was found to have been invested by the assessee in the first instance for the transactions of the whole year and that the estimate of 1% net profit was mere guesswork. It was further found that de hors the surrender, there was no evidence, which could be said to have been found as a result of the search and therefore, the computation of undisclosed income by the Assessing Officer in the block assessment proceedings could not be construed as a determination of undisclosed income contemplated under Section 158BC(c) or Section 158BB of the Act.

16. In the decision in the case of Satyendra Kumar Dosi, the CIT(A) and the Tribunal concurrently found that the difference between the undisclosed income assessed and the undisclosed income shown in the return is a result of estimation of the opening capital prior to the block period and the capital proposed by the assessee prior to the block period could not be treated as undisclosed income of the first assessment year in the block period.

17. On a reading of the penalty order under Section 158BFA(2) of the Act dated 19.7.2005, in which the assessment order has

been referred to, we find that the difference is on account of the valuation of the gold jewellery and the diamonds. Thus, it was the consistent case of the assessee that the difference between the returned income and the assessed income was not willful, but it was voluntary and requested for dropping the penalty proceedings. These factors were rightly taken into consideration by the Tribunal while passing the impugned order.

18. Mr.T.R.Senthilkumar, learned Senior Standing Counsel for the Revenue has referred to a decision of the Division Bench of the Rajasthan High Court in the case of Apex Metchem (P) Ltd. Vs. ACIT [reported in (2014) 46 Taxmann.com 443].

19. Though the decision in the case of Apex Metchem (P) Ltd. arose under Section 158BFA of the Act, it is not applicable to the case on hand, because, on facts, in the said case, it was found by all the three Authorities that the assessee was involved in undisclosed transactions on the basis of overwhelming evidence and all those transactions were out of books. It is never the case of the Revenue that the undisclosed income was on account of any transaction, which was out of books. But, the entire case arose out of valuation of the gold jewellery and the diamonds. Thus, for the above reasons, we find that the Revenue has not made out any ground to interfere with the order passed by the Tribunal.

20. Accordingly, the above tax case appeal is dismissed and the substantial questions of law framed are answered against the Revenue. No costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

RS

To

1.The Income Tax Appellate Tribunal,
Chennai 'D' Bench, Chennai.

2.The Commissioner of Income Tax,
Central III, Chennai.

3.The Commissioner of Income Tax,
(Appeals) II, Coimbatore.

4. The Assistant Commissioner of Income Tax,
Central Circle III,
Coimbatore.

+1cc to Mr.S.Sridhar, Advocate, S.R.No.55363

+1cc to Mr.T.R.Senthil Kumar, Advocate, S.R.No. 55854

TCA.No.948 of 2009

BR(CO)
GN(05/08/2019)



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