(2011) 04 KL CK 0115

In the High Court Of Kerala

Case No : IT Appeal No. 202 of 2010

Commissioner of Income Tax — APPELLANT

Vs

Heera Construction Co. (P) Ltd. — RESPONDENT

Date of Decision : 04-04-2011

Acts Referred:

Income Tax Act, 1961 — Section 132, 158BC, 158BC, 158BC(1), 158BFA(2)

Citation : (2011) 245 CTR 208 : (2011) 337 ITR 359 : (2012) 210 TAXMAN 112

Hon'ble Judges : C.N. Ramachandran Nair, J;B.P. Ray, J

Bench : Division Bench

Advocate : P.K.R. Menon and Jose Joseph, for the Appellant; S. Sreedhar and Bhagavathiperumal Kamalahasan, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—Respondent assessee is a private limited company engaged in real estate business i.e. construction and sale of commercial and residential apartments and buildings. A search was conducted by the IT Department in the business premises and in the residence of directors of the company under s. 132 of the IT Act (hereinafter referred to as the Act for short). Pursuant to the search, the AO proposed to make block assessment under s. 158BC of the Act and as the first step, the assessee was called upon to furnish return of disclosed income in Form No. 2B. Even though assessee filed return disclosing undisclosed income of Rs. 79,10,187 the assessee did not remit the tax thereon, which was Rs. 48,41,034 prior to or along with filing of returns. The AO proceeded to make assessment by making substantial addition to the returned income and the total income assessed was Rs. 1,32,89.530. However, in appeal, the CIT(A) reduced the addition to the returned income to Rs. 23,32,026. We are informed that assessment appeal has become final and the addition to the returned income assessed is Rs. 23,32,026. Besides completing the assessment on the undisclosed income, which comprises the income returned by the assessee and the addition made thereto by the Officer, the AO proceeded to levy penalty under s. 158BFA(2) of the Act. The AO noticed that the assessee though disclosed Rs. 79,10,187 as undisclosed income by filing return in Form No. 2B pursuant to notice issued by the Officer under s. 158BC(1) the assessee did not pay the tax on the admitted undisclosed income returned either prior to or along with filing of return as required under the proviso to s. 158BFA(2) to get immunity from payment of penalty at least in respect of tax on such undisclosed income returned by the assessee. Therefore, penalty was levied at equal amount of tax on the entire undisclosed income assessed under s. 158BC(c) of the Act, which comprises the undisclosed income returned by the assessee and addition made by the AO thereto. Even though the penalty levied by the Officer with reference to the income originally assessed was Rs. 81,33,192 being the minimum of penalty leviable on the total income, when the assessee filed appeal against the penalty order, the CIT(A) held that no penalty could be levied with reference to the tax payable on the undisclosed income returned by the assessee pursuant to notice issued by the Officer after search. So far as the penalty on the balance income assessed is concerned, the CIT(A) held that only minimum penalty is leviable i.e. at equal amount of tax on the additions sustained by him. Accordingly, he reduced penalty to Rs. 13,99,216, which is the tax on the addition sustained by him in the assessment appeal which is Rs. 23,32,026. The Department challenged the CIT(A) order before the Tribunal by specifically taking the ground that the assessee is not entitled to get any immunity from penalty on the tax payable on the undisclosed income returned by it for the reason that they have not complied with the mandatory condition of payment of admitted tax along with return filed in Form No. 2B as required in the first proviso to s. 158BFA(2) of the Act. When the appellant was heard by the two member bench of the Tribunal, the Judicial Member allowed the Department Appeal by reversing the order of the CIT(A) and by restoring the minimum penalty levied by the Officer with reference to the tax payable on the total undisclosed income assessed. However, the Accountant Member disagreed with the order of the Judicial Member and he dismissed the Department Appeal confirming the order of the CIT(A). When the matter was referred to the Third Member, the President of the Tribunal, he concurred with the Accountant member through separate order, as a result of which, by majority, the Tribunal dismissed the appeal filed by the Revenue. It is against the majority decision of the Tribunal, the Revenue has filed this appeal before us.

2. We have heard Senior counsel Shri P.K.R. Menon appearing for the Revenue and advocate Shri S. Sreedhar along with advocate Shri B. Kamalahasan, appearing for the respondent assessee.

3. Since we have to only consider the scope of s. 158BFA(2) of the Act, we extract hereunder the said provision.

158FBA. Levy of interest and penalty in certain cases.-(1)...........

(2) The AO or the CIT(A) 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 by

less than the amount of tax leviable but which shall not exceed three times the amount of tax leviable in respect of the undisclosed income determined by the AO under cl. (c) of s. 158BC :

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

(i) such person has furnished a return under cl. (a) of s. 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 AO 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.

4. The main controversy is whether the Tribunal is justified in holding that penalty under the above provision could not be levied with reference to tax on undisclosed income returned by the assessee, even if such assessee has not complied with the requirements of cls. (ii) and (iii) of the first proviso above stated, which requires the assessee to remit tax before filing return and produce proof thereof along with return. The assessee does not dispute its liability for penalty on the additional income assessed i.e. the income assessed over and above the returned income and the minimum penalty attributable to the tax on such income stands sustained by orders of the CIT(A), which is not contested by the assessee in further appeal.

5. The contention raised by the senior counsel for the Revenue is that the four conditions provided in the first proviso are mandatory for getting immunity from payment of penalty on the undisclosed income returned by the assessee. In other words, the Revenue''s stand is that filing of return on undisclosed income does not give any immunity to the assessee from penalty under s. 158BFA(2) unless the assessee satisfies all the conditions including payment of tax prior to filing of return and production of proof of such payment along with the return so filed. Admittedly, the assessee did not pay tax along with the return filed returning undisclosed income. The assessee did not even pay the admitted tax for maintainability of the appeal filed against assessment before the first appellate authority and consequently the first appeal filed got dismissed on account of non-payment of admitted tax. The assessee however approached the CIT on the administrative side and based on the instalment facility obtained by the assessee, the assessee paid admitted tax in easy instalments and only on payment of arrears of tax, the quantum appeal filed against the assessment itself

was entertained by the CIT(A) that too after remand by the Tribunal.

6. In short the question to be considered is whether assessee forfeits immunity available to it from penalty on the undisclosed income returned on account of non-payment of admitted tax along with the return filed declaring undisclosed income. While the Revenue''s counsel submitted that satisfaction of the conditions in the first proviso is mandatory to get immunity from penalty with reference to the undisclosed income, the learned counsel for the assessee relied on the decision of the Rajasthan High Court in Commissioner of Income Tax Vs. Satyendra Kumar Dosi and Nagendra Kumar Dosi, : (2009) 315 ITR 172 (Raj) and contended that the penalty under s. 158BFA(2) itself is discretionary and when the CIT(A) as well as the Tribunal exercised discretion in favour of the assessee, then there is no scope for interference by this Court on the reduction granted by CIT(A).

7. Even though learned counsel for both sides relied on several decisions, we do not think there is any need to consider those decisions which are on general principles applicable to penalty matters and not on the special provision above referred. Further we have to take note of the fact that the defence of reasonable cause provided under s. 273B of the Act against all other cases of penalty covered by the Act is not applicable for penalty that could be levied under s. 158BFA(2) of the Act. Therefore, we have to consider the nature and scope of penalty strictly in accordance with the provisions contained in the above specific provisions of the Act.

8. On an analysis of s. 158FBA(2) extracted above, what we find is that penalty on undisclosed income assessed under s. 158BC is discretionary and it can be levied by the AO as well as by the CIT(A). The power is given to the CIT(A) because if the AO does not levy penalty after completion of assessment, the CIT(A) while considering assessment appeal is always free to consider whether penalty is to be levied, no matter the AO has not levied penalty, the CIT(A) can order levy of penalty under the said clause. While there is discretion in regard to levy of penalty, depending on facts and circumstances of each case once the authority competent to levy penalty chooses to levy penalty then the discretion of quantum of penalty ranges from 100 per cent to 300 per cent of the tax, which means that the minimum penalty leviable is equal to the amount of tax and maximum is at three times of tax. The discretion in regard to levy of penalty is controlled by two provisos to the said sub-section, which are discussed below.

9. Subject to the second proviso, the first proviso provides complete immunity from penalty on the tax due in respect of the undisclosed income returned by the assessee based on notice issued by the AO after search or survey. However, the conditions provided in cls. (i) to (iv) of the first proviso are that the assessee should have filed return pursuant to notice issued by the Officer and tax due in respect of the undisclosed income returned has to be paid before filing of return and the evidence of tax payment has to be furnished along with the return filed. However, if cash is seized in the course of search, the requirement of the proviso

is satisfied if instead of making payment assessee allows the AO for adjustment of the seized cash towards tax payment based on return of undisclosed income filed. Apart from the requirement of payment of tax prior to or along with filing the return the assessee should also confirm to the AO that no appeal will be filed challenging the assessment on the income voluntarily disclosed by the assessee in the return filed. In other words, if the assessee files appeal challenging the assessment of undisclosed income returned by the assessee, the benefit of exemption from penalty will not be available under the first proviso to the said section. The second proviso is a further condition qualifying the first proviso which says that if the assessment under s. 158BC(c) of the Act includes income other than the undisclosed income returned by the assessee then the immunity from the penalty in respect of the undisclosed income returned by the assessee will be lost to the assessee. In other words, the absolute immunity from penalty on the tax payable in respect of the undisclosed income is available only if the AO accepts the return filed by the assessee declaring the undisclosed income, which is the undisclosed income assessed under s. 158BC(c) of the Act. In other words, if the undisclosed income returned is not accepted by the Officer and any addition is made to the income so returned, then the assessee will not be entitled to immunity from penalty on the tax payable on the undisclosed income returned as a matter of right. However, the fact that immunity from penalty is not available as a matter of right does not mean that penalty in respect of undisclosed income returned by the assessee is automatic. It is still within the discretion of the AO to consider penalty with reference to income returned by the assessee also. The second proviso to the main section states that penalty is mandatory in respect of undisclosed income assessed over the undisclosed income returned by the assessee pursuant to notice issued by the Officer as stated above. In other words, what the section means is that whatever is the income assessed by way of addition to undisclosed income, the same shall be treated as income concealed by the assessee and the assessee has no escape from penalty. Of course, the said section provides that the AO has discretion to levy penalty from minimum to maximum as provided under the main section depending on facts and circumstances of each case. From the above, we conclude the scope of the said section as follows :

(1) Where the income finally assessed under s. 158BC(c) of the Act is the only undisclosed income returned by the assessee based on return filed under sub-cl. (a) of s. 158BC and the assessee has complied with all the conditions of cls. (i) to (iv) of the first proviso, i.e. payment of tax on the undisclosed income or request to the Officer to adjust full tax against cash if any seized and held by the Department sufficient to adjust the tax and if the assessee files statement that no appeal will be filed against the undisclosed income returned and assessed based on return filed, no penalty could be levied.

(2) Penalty will be leviable in all cases where undisclosed income finally assessed under cl. (c) of s. 158BC is in excess of the undisclosed income returned by the assessee in the return filed under cl. (a) of s. 158BC. In such cases, there is no

complete immunity from penalty on the tax payable on the undisclosed income returned by the assessee even though the assessee has complied with all the conditions of cls. (i) to (iv) of the first proviso as stated above. This is because the assessee in such a case will be treated as partly dishonest and partly honest and therefore the penalty will certainly in the discretion of the AO. Of course if the addition made when compared to the undisclosed income returned by the assessee is relatively small and if the assessee had complied with the conditions of the proviso on the undisclosed income returned by the assessee then certainly the officer will not be justified in levying penalty with reference to the tax payable on the total income assessed under cl. (c), which includes tax on undisclosed income returned by the assessee. On the other hand, if on final assessment under cl. (c) of s. 158BC it is found that the addition made to the undisclosed income returned by the assessee is very high, i.e. substantial either in absolute terms or in relation to the income returned by the assessee, then the Officer should consider penalty on the total income assessed including undisclosed income returned by the assessee. no matter the assessee has complied with the conditions of the first proviso above referred in respect of the undisclosed income returned by the assessee. In other words, the assessee''s dishonesty outweighs the little honesty shown by him and so much so, penalty should be levied with reference to the tax payable on the entire income assessed. So far as range of penalty between 100 per cent to 300 per cent of tax is concerned it will depend upon the nature of concealment, conduct of the assessee etc. which will have to be considered while fixing quantum of penalty.

10. Applying the above principle to the facts of this case, we notice that the addition made to the returned undisclosed income is around to 25 per cent of the disclosed income. Therefore, it is not a case of minor addition to the disclosed income or a case of substantial addition to the income disclosed by the assessee. Therefore, we do not think it is a case of levy of maximum penalty. However, the assessee''s contention regarding the immunity from penalty on the tax payable on the undisclosed income returned by them is concerned, we are unable to agree with the findings of the Tribunal because of the payment of tax in instalments under orders issued by the CIT is not in compliance with the requirement of cls. (ii) and (iii) of the first proviso to the said section, which requires payment of full tax on the undisclosed income returned either prior to or along with filing of return and production of proof of payment of tax along with the return so filed. The assessee''s financial difficulty which found acceptance by the CIT in granting instalment facility for payment of tax and the compliance of the said direction of the CIT, is no substitute for the mandatory requirements of cls. (ii) and (iii) of the first proviso above stated. Probably these are matters which the AO has to consider i.e. whether penalty should be levied with reference to the undisclosed income returned by the assessee without payment of tax along with the return filed by it, or the assessee forfeits the right of immunity from penalty, which in any case will not be available to the assessee because of the second proviso by which the benefits of the first proviso will not

be available to the assessee as a matter of right, if the undisclosed income assessed is more than the undisclosed income returned by the assessee.

11. We therefore, hold that in view of the application of the second proviso, the assessee is not entitled to complete immunity from payment of penalty on the undisclosed income returned by them under cl. (a) of s. 158BC, not only because of their failure to comply with the provisions of cls. (i) to (iv) of the first proviso but by virtue of the addition made in the assessment of substantial amount of undisclosed income by which the assessee forfeits the benefit of the first proviso in regard to immunity from penalty on the tax payable on undisclosed income returned. In view of our above findings, we have to necessarily allow the appeal by vacating the orders of the Tribunal and that of the first appellate authority, and therefore we do so.

12. In the normal course we should remand the matter to the AO to reconsider the penalty. However, in view of the proved financial difficulty of the assessee and in view of the discharge of tax liability in instalments granted by the CIT, we feel the penalty order could be modified by excluding tax on undisclosed income returned by the assessee but by refixing the penalty on the tax payable on the additional income assessed at twice the amount of tax as against one time fixed by the CIT(A) and confirmed by the Tribunal.

13. This IT Appeal is allowed in part as stated above.