

(2005) 09 KL CK 0032
In the High Court Of Kerala
Case No : Writ Appeal No. 2230 of 2002

P.P. Ummerkutty

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Constitution of India, 1950 — Article 226, 25
Finance Act, 1995 — Section 158B, 158C, 158D, 158E, 158F
Income Tax Act, 1961 — Section 132, 132(1), 132A, 158BC, 158BFA

Citation : (2005) 199 CTR 1

Hon'ble Judges : K.T. Sankaran, J; K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : C. Kochunny Nair and Dale P. Kurien, for the Appellant; P.K.R. Menon and George K. George, for the Respondent

Judgement

K.S. Radhakrishnan, J.—Original petition was preferred by the appellant seeking a writ of certiorari to quash Ext. P4 show-cause notice dt. 21st May, 2002 imposing penalty of Rs. 18,39,420 and Rs. 55,18,260 u/s 158BFA(2) of IT Act, 1961 and also for a declaration that the penalty provision in Sub-section (2) of Section 158BFA is illegal, oppressive and punitive.

2. Learned single Judge dismissed the Writ petition since the assessee had already challenged the penalty proceedings, before the Asstt. CIT. Learned single Judge felt, validity of Section 158BFA also could be raised before the CIT, if so advised. Assessed took up the matter in appeal and obtained a stay of the proceedings. While the matter was pending before this Court, appellate authority has already passed final order imposing total penalty of Rs. 25 lakhs. Assessee has already taken up the matter before the Tribunal and the same is pending consideration.

3. We are in this case concerned only with the legality of Sub-section (2) of Section 158BFA of IT Act and as to whether the penal provision is oppressive and violative of any of the fundamental rights guaranteed under the Constitution of

India.

4. Assessee is a builder engaged in the business of construction of commercial buildings and selling or letting out of the buildings. Assessee's premises were searched u/s 132(1) of the IT Act, 1961 on 21st March, 1997 and several incriminating documents were seized. Assessment was proceeded as per provisions under Chapter XIV-B of the IT Act, 1961 and a notice u/s 158BC was issued to the assessee. Assessee filed a return of income in response to this notice disclosing a sum of Rs. 12 lakhs. Assessment was completed u/s 158BC of the Act on 5th March, 1999. Total income determined was Rs. 80,69,510 and penal action was initiated u/s 158BFA(2). Assessment was contested by the assessee in appeal before the CIT(A), Kozhikode and the same was disposed of by the CIT(A) by order dt. 23rd July, 1999. Department went in second appeal to the Tribunal, Cochin Bench and the same was disposed of by the Tribunal by order dt. 22nd Dec., 2001.

5. Penalty proceeding u/s 158BFA(2) was initiated at a time when the assessment proceeding was on. Assessee appeared and represented his case and also filed detailed objection to the proposed penal action. Penalty proceeding u/s 158BFA(2) of the Act was initiated on 5th March, 1999 at the time of assessment for the block period 1st April, 1986 to 21st March, 1997. Asstt. CIT in the show-cause notice issued u/s 158BFA(2) has stated as follows :

"(a) You had claimed in your wealth statement that there was a cash balance of Rs. 11,50,000 as on 1st April, 1986. It has now been established and was held by the Tribunal that you had only a cash balance of Rs. 7,00,000 as on that date. The difference being the amount you claimed as available as cash balance, with an intention of evading tax payments, I propose to hold this amount as liable for penalty.

(b) The interest income earned from bank deposits which you had failed to disclose in the return filed in response to notice u/s 158BC amounting to Rs. 4,43,700 which has now been finally included in your income for the block period will attract the penal provisions u/s 158BFA(2).

(c) The amount of Rs. 19,72,000 which you had claimed as agricultural income of your brother Dr. P.P. Abdul Ghani and has subsequently been established as your own income has also riot been disclosed in the return filed u/s 158BC. This amount will also attract the provisions of Section 158BFA(2).

(d) Your income claimed as sale proceeds of gold ornaments and restrained from disclosure in the return filed u/s 158BC which was finally decided as your income amounting to Rs. 1,00,000 attracts penal provisions of Section 158BFA(2).

(e) The investment in Anubhav Finance amounting to Rs. 50,00,000 which you have failed to disclose u/s 158BC which has now been finally held as your income also attracts penal provisions u/s 158BFA(2).

(f) The investment made by you in M/s Multiscan which you have claimed in the

name of your brother Dr. P.P. Abdul Ghani amounting to Rs. 50,000 has now been established as your own investment. Since you had failed to disclose this amount u/s 158BC, this will also attract penal provision"s u/s 158BFA(2)."

According to the Department the abovementioned facts would attract the provisions of Sub-section (2) of Section 158BFA. We may in this connection extract Section 158BFA (1) and (2) for easy reference :

"158BFA. (1) Where the return of total income including undisclosed income for the block period, in respect of search initiated u/s 132 or books of account, other documents or any assets requisitioned u/s 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) 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 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 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 AO 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 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."

Counsel appearing for the assessee submitted that Sub-section (2) of Section

158BFA which provides for penalty on heavier terms is illegal and burdensome. Counsel submitted since block assessment covers a period of 10 years income assessed, the tax demanded would be on the higher side and therefore, if the assessee is compelled to pay huge disproportionate penalty at triple the tax demanded, the financial equilibrium of the assessee's business would be affected. So also his right to carry on free trade and business. Counsel submitted levy is wholly burdensome and oppressive and punitive. Counsel also submitted when penalty proceedings u/s 271(1)(c) can be initiated, there is no justification in following Section 158BFA. Counsel submitted Section 271(1)(c) does not specify that it cannot be initiated in block assessment proceedings. Further, counsel also submitted Sub-section (1) of Section 158BFA calls for levy of interest at the rate of 2 per cent of the undisclosed income where the return which is called for u/s 158BC is furnished after the expiry of the time specified in the notice or where no return at all has been furnished. Counsel submitted jurisdiction of Sub-section (2) of Section 158BFA should be limited to the territory of Sub-section (1) and such case that falls within Sub-section (1) shall only be met with punitive measures but with a lesser impact than Sub-section (2).

6. Counsel appearing for the Revenue on the other hand, contended that there is no basis in the abovementioned contention. Counsel submitted Sub-section (2) of Section 158BFA falls under Chapter XIV-B which was inserted by Finance Act, 1995. Chapter XIV-B deals with special procedure for assessment of search cases. Counsel submitted there is no illegality in levying interest and penalty in those cases which fall under Chapter XIV-B. Counsel also made reference to the decision of the Gujarat High Court in *Rahimbhai Karimbhai Nagriwala Vs. B.B. Patel and Others*, and also the decision of the apex Court in *Commercial Tax Officer and Others Vs. Swastik Roadways and Another*, to bring home this point.

7. Chapter XIV-B consists of Sections 158B to 158BH which was inserted by Finance Act, 1995 so as to provide for an assessment of the undisclosed income detected as a result of the search, and is devised to operate in the separate field of undisclosed income and in addition to the regular assessments covering previous years in the block period. We are not prepared to accept the contention of the assessee that Sub-section (2) of Section 158BFA is oppressive or in any way violative of any Article of the Constitution of India. There is no basis in that contention nor has he explained in the writ petition as to how Article 25 is attracted in this case.

8. Section 158BFA has been introduced in Chapter XIV-B which deals with special procedure for assessment of search cases with an object to achieve. The said provision is intended to provide an effective deterrent against evasion of tax and to put a stop to that practice which the legislature considers to be against the public interest. Merely because a penalty is provided for concealing income and also disclosing of undisclosed and unexplained investment during search conducted it cannot be said that such a provision is a piece of hostile legislation.

Assuming that the provision is harsh since it is a deterrent against tax evaders, we are not prepared to say that provision is expropriatory. Power to levy tax on income is vested in Parliament and power to impose penalties to vindicate that particular power of imposition of tax is also on the Parliament. Object and purpose of Section 158BFA is to provide penalty for concealment of income and providing a deterrent against tax evaders. Heavy penalty is prescribed to check tax evasion. Legislature in its wisdom felt in the matter of search cases such a penalty should be imposed, which in our view, cannot be canvassed in a writ petition under Article 226 of the Constitution of India.

9. We, therefore, find no infirmity in the said provision. The prayer of the petitioner to declare such provision as oppressive and violative of fundamental rights guaranteed under the Constitution cannot be sustained. We, therefore, repel that challenge and dismiss the writ appeal.