In the High Court for the States of Punjab and Haryana at Chandigarh

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ITA No.372 of 2007

Date of decision: 25 .3.2008

The Commissioner of Income Tax Patiala(Punjab)

Appellant

Versus

Shri Jai Parkash c/o
M/s Mangal Engineering Works

..Respondent

Coram: **Hon'ble Mr.Justice Satish Kumar Mittal**
**Hon'ble Mr.Justice Rakesh Kumar Garg**

Present: Mr.Yogesh Putney, Advocate
for the appellant-Revenue.

Rakesh Kumar Garg,J

1. The Revenue has filed the present Appeal under Section 260A of the Income Tax Act, 1961(for short 'the Act') against the order of the Income Tax Appellate Tribunal, Chandigarh, Bench 'A' Chandigarh (for short 'ITAT'),dated 25.4.2007 (Annexure A-5) passed in IT(SS)A No.130/CHANDI/2005 in the case of M/s Jai Parkash c/o M/s Mangal Engineering Works, Factory Area, Patiala (Punjab) Vs. ACIT Circle, Patiala for the Block period 1.4.1986 to 2.1.1997, raising the following proposed substantial questions of law:-

(i) Whether on the facts and in the circumstances of the case, the ITAT was right in law in deleting the penalty imposed under Section 158BFA (2) of the Act by ignoring its own finding that the income of Rs.3,76,640/- constituted

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undisclosed income within the meaning of section 158BB(1)(ca) read with Section 158BC(c ) of the Act and that such undisclosed income attracted penal provisions under Section 158BFA(2).”

(ii)Whether on the facts and in the circumstances of the case, the ITAT was justified in deleting the penalty on the ground that the assessee still had time to file the return income under Section 139(4) and that it had paid entire advance tax ignoring the mandate of 2nd proviso to sub section (2) to Section158 BFA of the Act.”

2. A search and seizure under Section 132(1) of the Act had been carried out at the premises owned by the assessee/respondent on 2.1.1997 and upto the date of search, the assessee had not filed his return of income for the Assessment Year (for short ‘A.Y’.) 1996-97, which was otherwise due to be filed on or before 31.10.1996. The return was filed on 17.1.1997, therein declaring an income of Rs.3,76,640/-. During the course of search, three saving bank accounts bearing Numbers 1499, 1760 and 1453 with Oriental Bank of Commerce, Anaj Mandi, Patiala belonging to the assessee were detected, which were in the fictitious names of M/s Goyal Traders, M/s Shiv Traders and M/s National Engineering having deposits of Rs.69,33,866/-, 57,15,604/- and Rs.54,72,439/- respectively. The Assessing Officer while completing Block Assessment under Section 158BC read with Section 143(3) of the Act treated the income of Rs.3,76,640/- as an income from undisclosed sources in view of the specific provisions under Section 158BB(1)(ca) of the Act, though the same was declared by the assessee under Part III of his return of income filed under Section 158BC(a)(i) of the Act. Simultaneously, penalty proceedings under Section 158 BFA (2) read with Section 158BC(c) of the Act were

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initiated vide order-dated 31.12.1998. The appeal filed by the assessee against the order of the assessment was partly allowed vide order dated 12.11.1999. However, the findings of the Assessing Officer pertaining to the addition of Re.3,76,640/- shown as income by the appellant in his return filed on 17.1.1997 for the Assessment Year 1996-97 were upheld by the Commissioner of Income Tax(Appeals).

3. Aggrieved against the order of the Commissioner of Income Tax(Appeals), the assessee filed further appeal before the Tribunal challenging the order of the Assessing Officer, which was confirmed by the Commissioner of Income Tax(Appeals) adding the income of Rs.3,76,640/- as an undisclosed income within the meaning of Section 158 BB(1)(ca) on the ground that the assessee had not disclosed the same before the search operation carried out on 2.1.1997. The Tribunal vide its order dated 15.9.2004 dismissed the said appeal filed by the assessee.

4. The Assessing Officer initiated penalty proceedings against the assessee and an opportunity was given to the assessee. The assessee vide letter dated 19.12.2004 furnished his reply as under: -

> "By way of reply, it is submitted that no penalty survives as in appeal, the entire addition made in terms of para 6(iii) of the assessment order was deleted in terms of order dated 12.11.1999 passed by the Learned CIT(A) Patiala while giving appeal effect to the appellate order dated 12.11.1999, leaving the balance income at Rs.3,76,637/- which was assessed u/s 158 BC.
>
> Thus, no income survives to which provisions u/s 158 BFA (2) may be applicable.
>
> The only income which survived out of assessment order dated 31.12.1998 was Rs.3, 76,637/- which was income

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declared u/s 158 BC.

Had the normal return been filed in time before search, even this income of Rs.3, 37,637/- would not have survived."

5. On the basis of this reply, it was submitted by the assessee that there was no such income on which any penalty under Section 158BFA(2) of the Act was leviable and therefore, the penalty proceedings under Section 158 BFA (2) of the Act initiated on the basis of assessment may kindly be dropped. However, the Assessing Officer vide his order dated 19.5.2005 held as under:-

> "I have carefully gone through the above reply put forth by the assessee which is not correct because return of income for the assessment year 1996-97 was due on 30.10.1996 and the same was filed on 17.1.1997 declaring income of Rs.3,76,640/- after the search and seizure operation conducted by the department on 2.1.1997 i.e., precisely a fortnight after the search u/s 132(1) of the Income Tax Act, 1961. It was an after thought on the part of the assessee which clearly shows that the assessee had concealed particulars of his income and declared his income only after the search operation conducted on 2.1.1997. Accordingly, the declaration under Part III of the Block Assessment by the assessee of income of Rs.3,76,640/- is the undisputed income and not what it has claimed. Moreover, the CIT as well as the Hon'ble ITAT in their respective orders (Supra) rejected the assessee's contention that income of Rs.3,76,640/- relate to A.Y. 1996-97 but upheld the action of the Assessing Officer that this income relates to undisclosed sources because the assessee not disclosed this income before search operation

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conducted on 2.1.1997.

In view of the facts elaborated above, it is crystal clear that the assessee deliberately did not disclose the income of Rs.3, 76,640/- which tantamounts to concealment of income. I therefore, treat the assessee in default under the provisions of Section 158 BFA (2) read with Section 158 BC(c ) of the Income Tax Act, 1961 and impose a penalty of Rs.2,26,020/-."

6. Aggrieved against the said order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), Patiala on the ground that the penalty has been imposed only in respect of the income of Rs.3,76,640/- which was a regular income of the A.Y. 1996-97 for which the return could not be filed by the due date and was only filed on 17.1.1997,i.e., after the search action under Section 132 of the Act conducted on 1.1.1997. The penalty has been levied without appreciating that there was no contumacious conduct on the part of the assessee to conceal the income and therefore, there was no question of levy of any penalty. It was also argued by the assessee that penalty under Section 158 BFA (2) of the Act is not mandatory and is discretionary and such discretion has to be exercised by the Assessing Officer considering the facts and circumstances of the case.

7. The Commissioner of Income Tax (Appeals) dismissed the appeal vide order dated 19.9.2005.The relevant part of the order is reproduced as under: -

" The assertion made by the learned counsel of the appellant that imposition of penalty u/s 158 BFA(2) of the Act is discretionary and not mandatory is not disputed. Nevertheless, it is noted that 2nd proviso to sub section 2 of section 158 BFA stipulates that penalty "shall" be imposed on such portion of

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undisclosed income determined which is in excess of amount of undisclosed income shown in the return. In the case under consideration, there is no dispute that the sum of Rs. 3,76,640/- was not shown in the return of income filed for block period inasmuch as the appellant had claimed deduction of an equivalent amount whereas as per clause( c) of sub section1 of section 158 BB of the Act, no such deduction was admissible to the appellant as due date for filing of return had expired and no return of income had been filed. Therefore, there is no dispute that the undisclosed income assessed was in excess of the undisclosed income returned by Rs. 3,76,640/-. The case of the appellant also is not covered under the Ist proviso of section 158 BFA (2) of the Act. No material has been placed on record, which can establish that the appellant was prevented by A.Y. reasonable cause in not filing the return for the A.Y. 1996-97 by the due date and why the same was filed only after the search action. The failure to file the return of income by the due date being attributed to inadvertence is not acceptable. Even if it were so, it is noted that for the imposition of penalty u/s 158 BFA (2) of the Act, there is no requirement that the Department should establish that the income assessed in excess of the income returned was on account of any deliberate action of an assessee. There is also no condition that in case an assessee has reasonable cause for not reflecting its undisclosed income in the return for the block period correctly, penalty cannot be levied. The only requirement for the imposition of penalty u/s 158 BFA(2) of the Act is that the assessed income should be in excess of the

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returned income and such excess income is in the nature of undisclosed income."

8. Not satisfied with the order of the Commissioner of Income Tax (Appeals), the assessee filed further appeal before the Tribunal challenging the said order. The Tribunal allowed the appeal vide order dated 25.4.2007 filed by the assessee and reversed the order of the Commissioner of Income Tax (Appeals) by holding that it is not the case of the revenue that the assessee either concealed the income or furnished inaccurate particulars of such income. It can be said rather the assessee is on more sound wicket due to the fact that the assessee filed the advance tax before the search and secondly there was still time available with the assessee to file the return under Section 139(4) of the Act Hence this appeal by the appellant-Revenue.

9. We have heard Shri Yogesh Putney, Advocate,learned counsel for the Revenue. He has argued that while allowing the appeal the Tribunal has erred while holding that the respondent/assessee's case was covered under second proviso to sub clause (2) to Section 158 BFA of the Act, as the second proviso to Section 158 BFA(2) over rules the first proviso where the undisclosed income determined by the Assessing Officer was in excess of the income shown in the return as in the present case. Learned counsel has further argued that the assessee had not disclosed the income of Rs.3, 76,640/- within the time allowed under Section 139(1), which implies that the same related to the undisclosed income because the income in question was not disclosed before the date of search and therefore, as per the provisions, Section 158 BFA(2) read with Section 158 BC(c ) of the act, penalty is leviable on the amount of undisclosed income.

10. After hearing the counsel, we find no force in the arguments raised by the learned counsel for the Revenue. The only contention raised

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by the Revenue before the Tribunal was to the effect that the assessee had filed the return only due to search operation, but at the same time, the fact remains that the assessee was still having time to file the return as provided under Sub Section (4) of Section 139 of the Act up to 31.3.1997 as the search took place on 2.1.1997 and before the expiry of the said period as provided under Section 139(4) of the Act. Undisputedly, the assessee had paid the entire Advance Tax and was claiming refund. Therefore, in such a situation, the assessee was saved by the proviso (i) to sub clause (2) to Section 158 BFA of the Act. For imposing penalty under Section 158 BFA (4), there is discretion with the Assessing Officer but at the same time, the said discretion has to be used in a judicious way. As in the present case, there is no concealment of income since the assessee has already paid the advance tax. If the assessee was having any intention not to pay the tax, he would not have paid the advance tax.

11. In the present case, the penalty is not imposable as there was no conscious breach of law by the assessee and still there was a time available to file the return under Section 139(4) of the Act. The Revenue has failed to prove that there was conscious or deliberate concealment of income or furnishing of inaccurate particulars by the assessee. Rather, the Tribunal has given a finding of fact that it is not the case of the Revenue that the assessee either concealed the income or furnished inaccurate particulars of such income. It may also be mentioned here that the argument raised by the counsel for the Revenue regarding the applicability of proviso (ii) to sub clause (2) of Section 158 BFA in the present case does not arise from the order of the Tribunal. The ground raised by the counsel for the Revenue before us was never raised before the Tribunal. Thus, the questions of law as proposed by the Revenue in the present appeal do not arise from the order of the Tribunal.

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12. Hence, we find no merit in the appeal and the same is dismissed.

(RAKESH KUMAR GARG)
JUDGE

March 25,2008
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(SATISH KUMAR MITTAL)
JUDGE

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