The Commissioner of Income Tax-9 Vs Smt. Anju R. Innani

Court: Bombay High Court

Date of Decision: April 5, 2010

Acts Referred: Income Tax Act, 1961 â€" Section 158BC, 158BFA, 158BFA(2), 246A, 260A

Citation: (2010) 231 CTR 417 : (2010) 323 ITR 626 : (2010) 191 TAXMAN 350

Hon'ble Judges: J.P. Devadhar, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: Suresh Kumar, for the Appellant; S.J. Mehta and A. Vissanji, for the Respondent

Final Decision: Allowed

Judgement

D.Y. Chandrachud, J.
Admit.

2. This is an appeal by the Revenue u/s 260A of the Income Tax Act, 1961. The appeal arises out of an order of the Income Tax Appellate

Tribunal, dated 7th May 2008, in relation to the block period of 1st April 1988 to 22nd December 1998. The following questions have been

raised in the appeal:

(A) Whether on the facts and in the circumstances of the case and in law, the Tribunal is correct in law in deleting the penalty of Rs. 42,90,000/-

imposed u/s 158BFA(2) of the I.T. Act by the A.O. and confirmed by the CIT(A) on the undisclosed income of Rs. 65 lakhs;

(B) Whether on the facts and in the circumstances of the case, the Tribunal is correct in law in deleting the penalty on the ground of applicability of

Sub-clause (iv) of proviso to Section 158BFA(2), even though an appeal was filed by the assessee against the assessment order before the

CIT(A) who rejected the appeal in respect of which the Assessee did not file any further appeal before ITAT.

3. The assessee filed a return for the block period from 1st April 1988 to 22nd December 1998 and declared an undisclosed income of Rs. 65

lakhs. The assessment was completed u/s 158BC and the Assessing Officer accepted the returned income.

4. Penalty proceedings were initiated u/s 158BFA(2) with a notice calling upon the assessee to show cause as to why an order imposing a penalty

should not be passed. The Assessing Officer, by an order dated 27th February 2006, imposed a penalty in the amount of Rs. 42.90 lakhs. The

contention of the assessee was that she had complied with all the conditions prescribed in the first proviso to Section 158BFA and that

consequently, no order imposing a penalty could be passed. The Assessing Officer, however, held that the assessee had preferred an appeal

against the block assessment order and one of the grounds of appeal was that the rate of tax on the capital gains included in the undisclosed

income declared in the return of income for the block period, should be computed at 20% and not 60%. The CIT (Appeals) had on 17th October

2001 dismissed the appeal of the assessee holding that the rate of tax for any income taken as undisclosed in the return for block assessment is

60%. While holding that the assessee had not complied with the conditions stipulated in the first proviso to Section 158BFA(2), the Assessing

Officer held that since the assessee had preferred an appeal against the assessment of income which was shown for the block period, she had not

fulfilled the fourth condition laid down in the first proviso to Section 158BFA(2). On the basis of this, the Assessing Officer held that the assessee

was liable to be penalized and proceeded to impose the penalty.

5. The appeal filed by the assessee was dismissed by the CIT (Appeals). The Tribunal, however, held that since the assessee had filed an appeal

only on the rate of tax, she was not in breach of Clause (iv) to the first proviso to Section 158BFA which requires that an appeal should not be

filed against the assessment of that part of income which is shown in the return. Applying a rule of strict interpretation, the Tribunal held that an

appeal against the rate of tax could not be equated with an appeal against any part of the income assessed. On this ground, the Tribunal set aside

the imposition of the penalty.

6. Counsel appearing on behalf of the Revenue submitted that Clause (iv) of the first proviso to Section 158BFA(2) stipulates that an appeal

should not be filed against the assessment of that part of the income which is shown in the return. In the present case, the assessee filed an appeal

to the CIT (Appeals), questioning the rate at which tax has been imposed by the Assessing Officer. An appeal before the CIT (Appeals) u/s 246A

would lie even in respect of the rate of tax. It was urged that by contesting the imposition of the tax before the CIT (Appeals), the assessee had not

fulfilled the requirement of the first proviso.

7. On the other hand, it was urged on behalf of the assessee that an appeal against the rate of tax would not be hit by Clause (iv) of the first

proviso to Section 158BFA(2). Moreover, it was urged by Counsel that in any event, the imposition of a penalty is not mandatory and is

discretionary.

8. Section 158BFA provides for the levy of interest and penalty in certain cases. Sub-section (2) of Section 158BFA provides as follows:

(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 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 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. The substantive part of Sub-section (2) of Section 158BFA is an enabling provision by which the Assessing Officer or, as the case may be, the

Commissioner (Appeals) is empowered to impose a penalty in the course of any proceedings under Chapter XIV-B. Parliament has indicated its

intent by using the expression ""may direct that a person shall pay by way of penalty a sum...."" Consequently, under the substantive part of Sub-

section (2), the imposition of a penalty is not mandatory, but lies in the discretion of the Assessing Officer or, as the case may be, the

Commissioner (Appeals). It is trite law that the imposition of a penalty is not mandatory merely because it is lawful. The imposition of a penalty

is a matter which lies in the exercise of discretion which has to be determined judiciously. The first proviso to Sub-section (2) stipulates that in

certain circumstances, no order imposing a penalty shall be made. Once the conditions which are provided in the first proviso are fulfilled by the

assessee, the effect is to prohibit the Assessing Officer or, as the case may be, the Commissioner (Appeals) from imposing a penalty. The

conditions which have been spelt out in the first proviso are that the assessee must furnish a return under Clause (a) of Section 158BC; the tax

payable on the basis of the return ought to have been paid (or if money is seized, the assessee must offer the money seized to be adjusted against

the tax payable); evidence of the payment of tax must be furnished together with the return and an appeal should not be filed ""against the

assessment of that part of income which is shown in the return"". Clauses (i) to (iv) of the first proviso cannot be read in isolation and form part of a

comprehensive intent expressed by Parliament. The intent of Parliament in legislating the first proviso is that the assessee, in order to have the

benefit of a protective provision against the imposition of a penalty, must file a return, pay the tax on the basis of the return, furnish evidence of the

payment of the tax and should not contest the assessment in appeal. In other words, a certain degree of finality is brought to bear upon the

assessment during the course of the block period and if the assessee accepts the assessment as final and pays the tax thereon, the protective

provision is brought into force. Clause (iv) of the first proviso stipulates that an appeal should not be filed against the assessment of that part of the

income which is shown in the return. An appeal Ã¯Â¿Â½against the assessment of that part of the income which is shown in the returnÃ¯Â¿Â½ also

comprehends an appeal disputing the rate at which the tax has been computed. It would not be permissible for the Court to artificially restrict the

ambit of Clause (iv) by stipulating that an appeal against the rate of tax would not be hit by Clause (iv) to the proviso. To accept such a contention

would be to render the object and purpose of legislating the first proviso otiose. An assessee who files an appeal against the assessment of that

part of the income which is shown in the return is disabled from seeking the benefit of the first proviso. An appeal on the rate of tax is no exception.

Having challenged the assessment of that part of the income which is shown in the return, the assessee cannot invoke the protection of the first

proviso. The initiation of penalty proceedings will not be invalid.

10. In the present case, it is an admitted position before the Court that the assessee filed an appeal to the Commissioner (Appeals) against the

order of block assessment on the ground that the rate of tax payable in respect of capital gains was not 60%, but 20%. As a result of the filing of

the appeal, the assessee failed to comply with Clause (iv) of the first proviso to Section 158BFA(2). As a result, the assessee was not entitled to

the benefit of the prohibitory provision contained in Sub-section (2) of Section 158BFA.

11. The Tribunal was, in our view, in error in holding that an appeal against the rate of tax will not fall within the ambit of Clause (iv) of the first

proviso.

12. Having said this, we must clarify that the consequence of the non fulfillment of the conditions prescribed by the first proviso to Section

158BFA(2) would be that the prohibition against the imposition of the penalty does not come into force. Whether a penalty should or should not

be imposed under the substantive part of Section 158BFA(2) is a separate matter. This is an issue which will have to be considered separately.

The Tribunal has not done so, since it came to the conclusion that the assessee had fulfilled all the requirements of the first proviso and the Revenue

was prohibited from initiating penalty proceedings. Since we have come to the conclusion that the Tribunal erred in holding that the assessee has

fulfilled conditions of the first proviso to Section 158BFA(2), it would be only appropriate and proper for this Court to remand the proceedings

back to the Tribunal for deciding as to whether the imposition of the penalty was justified in the facts and circumstances of the case.

13. The question of law that has been formulated in the appeal shall accordingly stand answered in favour of the Revenue and against the assessee

subject to the clarification that the question as to whether a penalty should or should not be imposed in the facts of the present case shall be

reconsidered by the Tribunal upon remand. The appeal is accordingly allowed and the impugned order of the Tribunal dated 7th May 2008 is set

aside. The appeal (IT(SS)A No. 34/Mum/2007) is restored to the file of the Tribunal for disposal afresh in view of the observations made in this

judgment. There shall be no order as to costs.