The Dcit Vs. Koatex Infrastructure Ltd.

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Aug-12-2005

Reported in : (2006)100ITD510(Mum.)

Judge : G Veerabhadrappa, Vice, R Yadav

Appellant : The Dcit

Respondent : Koatex Infrastructure Ltd.

Judgement :

1. Aggrieved with the deletion of penalty levied Under Section 158BFA(2) revenue is in appeal before us, against the order of ld.CIT(A) dated 25.2.02.

2. The brief facts of the case are that respondent was associated with M/s. Seaking Infrastructure Ltd, which is a group concern and engaged in construction of sea port etc. A search Under Section 132(1) was carried out on the premises of group concern including the assessee on 23.2.99. In response to notice Under Section 158BC assessee has filed the return for the block on 4.4.2000 declaring undisclosed income of Rs. 2.60 crores. The ld. A.O has passed an order Under Section 158BC of the Act on 31.5.01 and determined the undisclosed income at Rs. 5,47,09,980/-. This order was not challenged in appeal. Since there is a difference in undisclosed income declared by the assessee and the one determined by the A.O, ld. A.O issued notice Under Section 158BFA(2) of the Act, inviting respondent's explanation as to why the penalty be not imposed. The assessee filed a detailed reply vide letter dated 8.10.01 which has been

reproduced in the penalty order of ld. A.O. In the reply assessee has pleaded the circumstances responsible for the difference and also pleaded its bona-fide in not disclosing the undisclosed income for the block period equivalent to one determined by the A.O. Ld. A.O has gone through the explanation of the assessee in detail and rejected the same primarily on the ground that expression "shall" has been used in Section 158 BFA(2) which indicted the A.O to impose a penalty Under Section 158 BFA(2) whenever he find the difference in the undisclosed income declared by an assessee and ultimately determined by the A.O.Ld. A.O has dealt with the case law relied upon by the assessee in detail but did not find any merit in the contentions of the assessee.

3. Dissatisfied with the levy of penalty assessee carried the matter before ld. CIT(A). Ld. CIT(A) deleted the penalty on the ground that the assessment and penalty proceedings are two separate processes.

According to him penalty is quasi criminal in nature and must be levied only in case where mens-rea exists. He further observed that provisions of Section 158BFA(3) provide a reasonable opportunity of hearing before imposing any penalty. Therefore, before imposing penalty Under Section 158 BFA(2) the conduct of the assessee is also required to be looked into. In the opinion of ld. CIT(A) the assessee duly demonstrated the circumstances leading for determination of higher undisclosed income.

In his opinion it primarily happened on account of some adjustment relating to buffers. Ld. CIT(A) further observed that conduct of the assessee was bona fide. It cooperated with the department. The assessee always took active step in disclosing true picture to the department and did not enter into avoidable litigation. On the basis of the above ld. First appellate authority has deleted the penalty.

4. Before us ld. D.R while impugning the order of ld. CIT(A) fervently contended that the expression "shall" has been employed in Section 158 BFA(2) which does not give any discretion power to the A.O or the ld.CIT(A) for not imposing the penalty under this section. The levy of penalty is automatic as and when a difference in the undisclosed income returned by an assessee and ultimately determined by the A.O has arisen. He further submitted that admission of the

assessee for addition would not absolve it from levy of penalty. Assessee did not accept the addition voluntarily, rather during the course assessment proceedings when it was cornered only then it disclosed the undisclosed income. For buttressing his contention he relied upon the following decisions.(Ker) CIT v. D.K. B & Co.

5. On the other hand, ld. Counsel for the assessee relied upon the order of ld. CIT(A) and contended that similar penalty was levied in the cases of other group concerns. The ld. CIT(A) has deleted the penalty and the Tribunal has confirmed the order of ld. CIT(A). He placed on record the copies of the Tribunal's order passed in IT(SS)A No. 226/Mum/02 and IT(SS)A No. 107/Mum/02, wherein deletion of similar penalties have been upheld.6. The ld. D.R. while replying the submission of ld. Counsel for the assessee contended that the difference in the undisclosed income involved in the present case is of Rs. 2,87,09,980/-, which is a substantial amount and such a difference could not occur without any deliberate intention. The cases in which deletion of penalty have been upheld by the Tribunal are involving a minor difference of one or two lacs which could have been occurred on account of miscalculation, on account of some omissions whether a particular expense is allowable or not. Therefore, on the basis of those decisions the order of the ld.CIT(A) cannot be up held. He submitted that Tribunal has accepted the reasons for such differences. But in the present case assessee failed to show any reasonable cause for not disclosing the true undisclosed income.

7. We have duly considered the rival contention. Before adverting to the legal position we would like to deal with the peculiar facts of this case as to how the difference has occurred. In reply to the show cause notice for levy of penalty Under Section 158 BFA(2) the assessee submitted: (i) That Seaking Infrastructure is a group concern including individual entities, partnership concerns and group entities comprising 17 companies and 14 individuals. At the time of preliminary statement the group as a whole made a disclosure of 12.55 crores approximately. This sum of Rs. 12.55 crores was disclosed by the various entities in the group and included a buffer of Rs. 4.28 crores. This buffer was kept with an intention to honour the commitment with the department and to take care of errors and omissions and commissions which can arise out of complexities involved in the

volume and the multiplicities of entities.

(ii) In the search 84 files containing about 10000 voluminous sheets were seized. Going though the for ascertaining the income impact before filing the return was humanly an impossible and unrealistic task.

(iii) During the assessment proceeding in many cases the buffer could not be appropriated to any error. But since it was voluntarily offered in form No. 2B it got taxed.

(iv) The Group did not prefer any appeal except in seven case out of thirty one assessed. It shows that assessee group had co-operated with the department.

(v) The A.O has made the addition of Rs. 2,87,09,980/- in the undisclosed income of the assessee on the basis of a letter dated 24.4.01 submitted by he assessee. This letter has been reproduced in the assessment order and it reads as under: The letter of credit facility commonly known as L/C facility, is a facility for raising working capital. In such facility, the entire set of documents in respect of purchases made from respective parties are submitted to the bank against which bank releases the funds after deducing the discounting charges and at the end of the tenure (by which time the payment for supply is supposed to be made), the amount is re-paid to the bank. Normally, there is requirement to keep certain percentage as deposit in the form of margin money deposit.

In case of the assessee company, Dena Bank has sanctioned L/Cs.

Facility which till December 1997 were utilized by way of paper entries through paper parties and the group concerns only. In respect of these transactions, separate submissions have been made vide our letter dated 14.4.1999, 24.1.2000 and 23.4.2000. In these facilities, there was no question of booking any purchases and/or sales. However, somewhere from January 1998, the utilization of L/C facility was started for such paper entries of purchases and sales with other than group parties and although no particular movement of goods or actual purchase or sales was there, the entry of trading purchases and sale were made and income thereof was offered. The assessee company is also having large volume of

contract in business as civil construction contractors and the funds are also borrowed for working capital requirement for such business. The L/C charges, bank charges, interest incurred on the above mentioned paper transactions cannot be claimed as deduction against the genuine income. This aspect came into the consideration at the time of filing return for A.Y 1999-2000. However, the disallowance made while filing the return for A.Y 1999-2000 is on an ad-hoc basis.

On in-depth scrutiny, it is noticed that even for A.Y 1998-99, such expenses have been debited and inadvertently, remained to be disallowed in the computation of income while filing return of income. In the background, a comprehensive exercise have been done and the interest & finance charges; instead of considering adhoc basis, are considered on scientific basis on the turnover.

Accordingly, for A.Y 1998-99, an amount of Rs. 68,30,970/- and for A.Y 1999-2000, an amount of Rs. 98,49,354/- is working out as the disallowance interest and finance charges for the respective assessment years. In case of A.Y 1998-99, these are full expenses for such disallowance where as for A.Y 1999-00, they are worked after considering self disallowed amount of Rs. 74.61 lacs in the return of income. The comprehensive working of the amounts as aforesaid, has been made and the copies thereof are enclosed in Annexure to this letter.

In the similar manner, as finance charges, as analysis of transport charges was made and it is observed that for A.Y 1998-99, an amount of Rs. 6,51,360/- is excess charge which being on such paper trading activity should have been disallowed. Accordingly, the same is also being offered as additional income for A.Y 1998-99. As regard A.Y 1999-00, the transport charges already disallowed on ad-hoc basis at Rs. 35.00 lacs are in fact, marginally excess as compared to the actual disallowance of Rs. 32,17,298/- required to be made on the basis of above analogy, and as such, no further undisclosed income is warranted on this count for A.Y 1999-00.

In view of the above discussion, we offer the following additional income for the block
period:_____

A.Y	1998-99	A.Y	1999-

2000

allowable finance charges 68,30,970/- 98,48,354/-

Tran

charges 6,51,360/-

Nil

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74,82,330/- 98,48,354/-

However it is observed that the L/C charges and transportation charges considered in the return of income for A.Y 1999-00 on adhoc basis in fact pertain to the block period and as such the disallowance there of in A.Y 1999-00 in regular return is incorrect as the same forms part of the undisclosed income during the block period. Hence, all the L/C charges & transportation charges for paper transactions are to be covered in the block period itself.

Accordingly Rs. 74,61,000/- on account of L/C charges and Rs. 32,17,298 on account of transportation charges are further disallowed and added to the undisclosed income in the A.Y 1999-2000.

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A.Y-1998-99 A.Y 1999-2000

Dis

finance charges 68,30,970 98,48,354 74,61,000

charges 6,51,360 32,17,298

74,82,330 2,05,26,652

8. On the strength of above detail assessee has tried to demonstrate that difference in the undisclosed income as returned by the assessee and determined by the A.O is not the result of any intentional concealment, rather assessee has agreed for this addition on realizing the bona-fide mistake committed by it.

9. Section 158 BFA has a direct bearing on the controversy in hand.

Therefore, it is salutary for us to take note of this section.

(1) Where the return of total income including undisclosed income for the block period, in respect of search initiated under Section 132 or books of account, other document or any assets requisitioned under Section 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 and one-forth 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 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; (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 proceeding 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.

(3) No order imposing a penalty under Sub-Section (2) shall be made,- (a) unless an assessee has been given a reasonable opportunity of being heard; (b) by the Assistant Commissioner or Deputy Commissioner or the Assistant Director or Deputy Director, as the case may be, where the amount of penalty exceeds twenty thousand rupees except with the previous approval of the Joint Commissioner or the Joint Director, as the case may be; (c) in a case where the assessment is the

subject-matter of an appeal to the Commissioner (Appeals) under Section 246 or Section 246A or an appeal to the Appellate Tribunal under Section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Chief Commissioner or Commissioner, whichever period expires later; (d) in a case where the assessment is the subject-matter of revision under Section 263, after the expiry of six months from the end of the month in which such order of revision is passed; (e) in any case other than those mentioned in Clauses (c) and (d), after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later; (f) in respect of search initiated under Section 132 or books of account, other documents or any assets requisitioned under Section 132A, after the 30th day of June, 1995 but before the 1st day of January, 1997 Explanation.- In computing the period of limitation for the purpose of this section- (i) the time taken in giving an opportunity to the assessee to be reheard under the proviso to Section 129; (ii) the period during which the immunity granted under Section 245H remained in force; and (iii) the period during which the proceedings under Sub-section (2) are stayed by an order or injuction of any court.

(4) An Income-tax authority on making an order under Sub-section (2) imposing a penalty, unless he is himself an Assessing Officer, shall forthwith send a copy of such order to the Assessing Officer.

10. According to the ld. D.R expression "shall" employed in proviso of Sub-section (2) oust the discretion of ld. A.O whether to impose penalty or not to impose. The provision for opportunity of hearing enumerated in Sub-section (3) is only for the purpose as to what rate of penalty is applied, i.e. it is to be imposed @ 100% or 300%.

However, it is difficult for us to subscribe the view of ld. D,R, because on plain reading of Section 158 BFA(2) reveals that A.O as well as ld. CIT(A) in the course

of any proceeding 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 shall not exceed three time the amount of tax so leviable in respect of the undisclosed income determined by the A.O under Clause (c) of Sub-section. In Sub-section (2) the expression employed is " may direct that a person shall pay"...clearly indicate the discretionary nature of the penalty. The expression "may" employed in this section specifically postulate that discretion lies on the A.O or CIT(A) as the case may be to apply their mind before directing a party to pay the penalty. The expression "shall" coming in the second proviso in fact, is to restrict the applicability of the penalty only to the difference in the income and not to the entire income. The operative force of the word "shall" is directed towards the quantum and not on basic consideration as whether penalty is to levied or nor. Therefore, in a given case the competent authority even may refuse to levy the penalty. If we accept the contention of ld. D.R regarding Sub-section (3) and hold that opportunity of hearing is restricted to the extent of the rate penalty is imposable then in our opinion very purpose of the section would otiose.

11. As far as additions are concerned we find that while filing return for A.Y 1999-2000 assessee voluntarily noticed that certain expenses to the tune of Rs. 106.78 lacs were not co-relatable with the income and hence it disallowed them. This was purely a voluntary disclosure by the assessee. The rest of disallowances were emerges out during the course of assessment proceedings and assessee has accepted them.

12. The charge against the assessee is to show the reason why a difference has taken place in the undisclosed income shown in the return and ultimately determined by the A.O. In order to appreciate this controversy we have to keep in mind that element of concealment of particulars of income or income is not condition precedent for levy of penalty Under Section 158 BFA(2) because income for the block period is to be determined on the basis of seized material which is already in the possession of the department. The assessee has to explain as to why it was not able to compute the true undisclosed income from the seized material and why it failed to return the true undisclosed income.

13. In order to explain its position assessee has submitted that 84 files containing about 10000 voluminous sheets were seized involving 31 concerns. It was not humanly possible for the assessee to work out the exact figure. The group has already honoured whatever discloser was made at the time of search. The assessee further did not dispute the addition made by the A.O in the assessment, rather assessee itself filed the letter pointing out as to how it claimed the expenses which are not allowable and can be considered as undisclosed income for the block assessment purpose.

14. The first decision relied upon by ld. D.R is 242 ITR 29, in the case of A. Sreenivasa Pai. In this case the facts are that the assessee was a firm carrying on business in rice, sugar etc. Its original return for the assessment year 19987-88 was filed on 29.6.87. The case was posted on September 29, 1987. When the assessee's representative appeared before the Assessing Officer the date was adjourned to the next day, when several books of account were impounded for scrutiny of the correctness of the entries made therein. 15 days time available for retention expired on October 21, 1987, and before that date, the Commissioner's permission for retention till June 30, 1988 was sought for. Summons were issued to various persons on October 6, 1987 and October 21, 1987. On October 16, 1987, the assessee was served with a copy of the proceedings by the Commissioner of Income-tax sanctioning continued retention of the books of account. On October 14, 1987, the inspector's report after verifications and enquiries was received. On October 16, 1987, the assessee filed a revised return offering an additional income of Rs. 3,24,650/- under the head "Other Sources". The Assessee Officer initiated penalty proceedings Under Section 271(1)(c) on the view that the revised return filed by the assessee admitting a higher income could not be treated as a voluntary one as the same was filed only after the Department had started enquiries with regard to the credit balance and with regard to the demand draft accounts. The Tribunal cancelled the penalty being of the view that the income as shown in the revised return was accepted in the assessment and so there was full and complete disclosure of income by the assessee. On reference Hon'ble High Court has held that the impounding of books for the purpose of scrutiny of entries itself was a factor which had not been considered by the Tribunal in its proper perspective. The revised return was filed as an attempt to

plug the loopholes after detection and it was not intended to bring on record the materials which were discovered subsequent to the filing of the return. The inevitable conclusion was that the penalty was imposable and the Tribunal was not justified in canceling it.

15. Thus from this decision the ratio of law emerges out that admission in the shape of revised return should be bona-fide and not with a view to plug the loopholes after detection for avoiding the penalty etc. If revised return is not filed for the purpose of correcting the bona-fide omission then penalty for concealment would be leviable.

16. The next case law relied upon by ld. D.R is 273 ITR 401. In this case after the search and seizure the assessee has filed revised return disclosing an additional income which was accepted and assessment was made on the basis of the revised return. In the penalty proceedings the assessee took the stand that there was no concealment and it was only for the purpose of buying peace with the department that additional income was disclosed and the revised return was filed. The Hon'ble High Court has held that assessee had offered no explanation except to plead that he disclosed the income only to buy peace, whereas the assessee should have shown the reason for not having disclosed income earlier.

Hence penalty is justified.

17. The next case law relied upon by the ld. D.R is 273 ITR 369. In this case Hon'ble High Court has held that if the revenue has already detected the income contrary to the one disclosed by the assessee by filing the annual return then penalty would be justified.

18. In 265 ITR 611 the assessee has claimed deduction Under Section 35(1)(iv) of the Income Tax Act on the ground that it had purchased a land from various farmers and used the same for the purpose of scientific research. The A.O ultimately held that land was purchased in the month of March, just prior to four days of the accounting period.

Hence it has not used the land for which deduction can be granted. The Hon'ble High Court has upheld the levy of penalty for making a false claim.

19. The ld. D.R next relied upon 251 ITR 302. However, in this judgment the High Court refused to interfere in the order of the Tribunal vide which penalty was confirmed on the ground that no question of law involved.

20. We have gone through the other decisions relied upon by the ld. D.R and we think it is not necessary to recapitulate or recite all the decisions on this legal aspect but suffice to say that core of all the decisions of the Hon'ble Courts is to the effect that admission during the assessment proceedings made either by way of filing revised return or otherwise would ipso facto not absolve the assessee from the consequence of penalty. His admission has to be judged in the light of circumstances and assessee can be absolved from the penalty only if such revised return or admission is bona-fide. The omission and the mistake has been discovered by the assessee himself.

21. If we examine the facts of the present case vis-is the case laws relied by ld. D.R then it will reveal that ld. D.R cannot draw any benefit from these judgments. All these judgments relates to the concealment of income or particulars of income. In the present case particulars were already in the possession of the department. It is the computation of income which has not been properly disclosed by the assessee and the reasons demonstrated before us for not disclosing the true undisclosed income is that from the seized material it was not humanly possible to compute the income from such voluminous record. We have gone through the assessment order also. From the assessment order it is discernible that additions have been made purely on the basis of assessee's letter dated 24.4.01 extracted above. The A.O nowhere discussed independent material for making the addition. No doubt there is a difference in undisclosed income declared by the assessee and ultimately determined by the A.O but for that assessee has already demonstrated that it was not humanly possible to compute the alleged true undisclosed income as determined by the A.O out of the voluminous seized material. This argument of the assessee has been rejected by ld.A.O without assigning any reason. From the record we nowhere find mala fide intentions

attributable to the assessee, rather on going through the letter of the assessee dated 24.4.01 coupled with the explanation submitted by it during the penalty proceedings we are of the view that ld. CIT(A) has rightly deleted the penalty. Therefore, we do not see any good reason to interfere in the order of ld. CIT(A).