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Dcit Vs. Spark Electro Communication

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Aug-31-2005

Reported in : (2006)98ITD237(Mum.)

Judge : S K Yadav, A Garodia

Appellant : Dcit

Respondent : Spark Electro Communication

Judgement :
1. This appeal by the revenue is for the block period 1.4.88 to 23.2.99.

2. The only grievance of the revenue is directed against the order of learned CIT(A) in deleting the penalty of Rs. 596,200/- levied Under Section 158BFA(2) of the I.T. Act, 1961.

There was a search Under Section 132(1) on 23,2.99 in the case of the assessee and group concerns. In response to notice Under Section 158BC, the assessee filed the return in Form No. 2B on 11.2.2000 declaring undisclosed income at Rs. 14,00,000/-. Subsequently, the block assessment was completed at Rs. 23,93,610/-. This undisclosed income was arrived at after giving credit for the buffer declared by the assessee amounting to Rs. 155.257/-. Subsequently, penalty was imposed Under Section 158BFA(2). On appeal, learned CIT(A) cancelled the penalty by holding that means rea was absent as far as the assessee is concerned. Now, the revenue is in appeal before us.

4. Learned DR of the revenue supported the penalty order, whereas, learned AR of the assessee supported the order of learned CIT(A). He also relied upon the following Tribunal orders in support of his contention that penalty Under Section 158BFA(2) is not leviable in the case of the assessee.

a) DCIT v. Donyi Polo Petrochemicals Ltd. IT(SS) No. 226/M/2002 dated 24.2.05.

b) DCIT v. Sri Chetan V. Kothari IT(SS) A. No. 107/M/02 dated 24.12.2004.

5. In the rejoinder, it is submitted by learned DR of the revenue that every search assessment is on set of facts of that case and hence, these Tribunal orders are not applicable in the present case.

6. We have considered the rival submissions and have gone through the orders of learned CIT(A), Penalty order and assessment order. We find that in the block assessment, addition is made by the Assessing Officer for Rs. 614,302/- on account of loan and interest thereon. This issue is discussed by the Assessing Officer in page No. 7 on para No. 5 to 7 of assessment order. Another addition of Rs. 138,015/- is made by the Assessing Officer on account of difference in reconciliation between group concerns. This issue is discussed by the Assessing Officer in para No. 5 on pages 4 to 5 of assessment order. A further addition of Rs. 396,654/- has been made by the Assessing Officer on account of non-genuine transactions apart from interest on loan, which is separately added and is included in Rs. 614,302/-. This issue is discussed by the Assessing Officer in para No. 11 on page No. 12 to 23 of assessment order. Total of these three additions comes to Rs. 11,48,971/- from which, the buffer of Rs. 155.257/- is reduced and hence net addition sustained is Rs. 993,614/- on which, penalty is imposed by the Assessing Officer.

7. It is also noted by learned CIT(A) on pagae No. 3 of his order that additions are of Rs. 614,302/- on account of loans and interest thereon and Rs. 379,312/- being income from other sources but in his findings in second sub-para of para 2.5 of his order, he has discussed about additions of loans only and there is no discussion about the second addition and it is concluded by him that that element of mens rea is not there on this ground that circumstances prevailing subsequent to the search

definitely throw the operation of the tax payer out of gear and possibilities of error and omission cannot be ruled out.

8. This is a general reason given by learned CIT(A) in holding that mens-rea was not present without pointing out any specific reason for which these incomes were not offered by the assessee in block return; but subsequently offered during assessment proceedings that too in piecemeal vide letter dated 24.4.01 for Rs. 337,302/- and letter dated 7.5.2001 for Rs. 277,000/- both on account of loan and interest although income on account of loan and interest of Rs. 371,788/- was included by the assessee in block return. No cogent reason is given by the assessee for not including the entire amount on this account in block return and then making piecemeal offer by these two letters Similarly, Rs. 138,015/- was offered by the assessee vide separate letter dated 7.5.2001. Regarding the third addition of Rs. 396,654/-, the assessee has tried to explain the entries vide letter dated 24.1.2001, 15.2.201 and 24.4.2001 before the Assessing Officer in addition to submission dated 14.4.99 filed before DDI (Investigation), which was again filed before the Assessing Officer during assessment proceedings and finally vide letter dated 7.5.2001, the assessee has offered this amount of Rs. 396,654/-.

9. The Tribunal order in the case of DCIT v. Donyi Polo (supra) relied upon by learned AR of the assessee does not help the case of the assessee because facts are different. In that case, additional income was offered by the assessee on its own volition on finding that income declared was less after the voluminous papers were examined. In the present case, additional income is not offered because of subsequent examination of voluminous papers. In fact, out of various loans, part was offered in block return and balance was offered subsequently in two parts and hence, this Judgement is not applicable in present case.

The Tribunal order in case of Sri Chetan B. Kothari (supra) is also not applicable in the present case because in that case, bonafide disclosure of income was made by the assessee and assessee agreed to some additions due to non-availability of certain details. The facts are different in the present case. This is not the case of assessee that some details are not available and hence, he agrees to addition.

In the present case, the assessee declared additional income in piecemeal and hence, this Judgement is also not applicable here.

10. From the above, it is clear that the assessee has not offered these incomes in block return and tried to explain the same. When the Assessing Officer could not be satisfied, the assessee declared these incomes in piecemeal vide several separate letters. Under these facts and circumstances, we find no merit in the conclusion arrived at by learned CIT(A) that no mens-rea was present without any specific finding regarding reasons for which these incomes could not be included by the assessee in block return. The general basis, on which learned CIT(A) came to this conclusion regarding absence of mens-rea that due to search, the operations are rendered out of gear and errors and omission may take place, if accepted, then there can not be any case in which penalty can be imposed Under Section 158BFA(2) because all block returns are filed pursuant to search and hence, in all block returns, there will be possibility of error and omission as per this theory. If such reasons are found to be beyond the control of the assessee, then there may be a case for not levying the penalty in spite of assessed income being higher than returned income. This will make the provision of Section 158BFA(2) inoperative. In the present case, search has taken place on 23.2.1999 and the block return was fled on 11.2.2000 i.e.

almost after one year of search. It is true that the affairs of an assessee is thrown out of gear due to search but the same is for limited period and when the block return is filed after such a long gap, this theory has no relevance for failure of assessee in making a full and true disclosure in the block return. We do not say that in all cases, where the assessed income is more than returned income, penalty must be imposed. However, the assessee must be able to specify cogent reasons for his failure to include such income in block return. In the present case, no such reason is brought on record by the assessee. The very conduct of the assessee in the present case of making piecemeal declaration of additional income shows that the assessor never intended to make a full and true disclosure. In the facts and circumstances of this case, we are not in agreement with learned CIT(A) and hence, we reverse the order of learned CIT(A) and restore that of the Assessing Officer.

Order has been pronounced in the open Court on 31st Day of August 2005.

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