

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 29TH DAY OF OCTOBER 2018 / 7TH KARTHIKA, 1940

ITA. No.1312 of 2009

AGAINST THE ORDER IN ITA NO.17/2007 OF THE INCOME TAX
APPELLATE TRIBUNAL, COCHIN BENCH DATED 15-04-2008

APPELLANT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX
COCHIN.

BY ADVS.
SRI.P.K.R.MENON, SR.COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH, SC FOR INCOME TAX

RESPONDENT/APPELLANT:

SHRI. C.NAJEEB,
NAJEEB ASSOCIATES, 3RD FLOOR,
GOLDEN PLAZA, KOCHI.

BY ADVS.
SRI.T.M.SREEDHARAN (SR.)
SRI.V.P.NARAYANAN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
29.10.2018, ALONG WITH ITA NO.1549/2009, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 29TH DAY OF OCTOBER 2018 / 7TH KARTHIKA, 1940

ITA. No.1549 of 2009

AGAINST THE ORDER IN ITA NO.41/2005 OF THE INCOME TAX APPELLATE
TRIBUNAL, COCHIN BENCH DATED 23.02.2006

APPELLANT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX (CENTRAL) ,
COCHIN.

BY ADVS.

SRI.P.K.R.MENON, SR.COUNSEL, GOI (TAXES)
SRI.JOSE JOSEPH, SC FOR INCOME TAX

RESPONDENT/APPELLANT:

SHRI.C.NAJEEB
M/S. NAJEEB ASSOCIATES, 3RD FLOOR,
GOLDEN PLAZA, CHITTOOR ROAD,
ERNAKULAM.

BY ADVS.

SRI.T.M.SREEDHARAN (SR.)
SRI.V.P.NARAYANAN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 29.10.2018,
ALONG WITH ITA NO.1312/2009, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

JUDGMENT

K. Vinod Chandran, J.

Two appeals are filed by the Revenue, one on assessment and the other on penalty. The questions of law arising in I.T.A No.1549 of 2009, which deals with the assessment proceedings, are as follows:

(i) Whether the Tribunal was correct in having directed levy of income tax only on 15% of the total receipts disclosed in proceedings under Section 158BC of the Income Tax Act, 1961 [for brevity, the Act]?

(ii) Ought not the Tribunal have found that when an undisclosed income is detected on search, then the entire income has to be treated as subject to levy of income tax?

2. I.T.A. No.1312 of 2009 is with respect to the penalty proceedings on the basis of the assessment completed under Section 158BC read with Section 143(3) of the Act.

3. The question raised is reframed as follows:

(i) Has not the Tribunal erred in setting aside the penalty finding the provision to be

under Section 158BFA of the Act to be a quasi criminal proceeding relying on *Hindustan Steels Ltd. v. State of Orissa [(1972) 83 ITR 26 (SC)]*?

(ii) Ought not the Tribunal have found that the liability incurred by non-disclosure of income is a civil liability arising from the failure to return the proper income?

4. On the question of assessment, we notice that on search conducted what was recovered is the undisclosed receipts, which the assessee received by way of sale consideration in various projects undertaken by the assessee. The assessee was an Architect and builder, who constructs apartment complexes and sells them to purchasers. Specific details of such sale consideration received from certain purchasers were recovered at the time of search, on which basis the assessment proceedings were carried out under Section 158BC of the Act. Admittedly these were not returned nor did it find a place in the accounts. The Assessing Officer treated the entire sale consideration received by

the assessee, as revealed from the materials recovered, as the undisclosed income and levied tax on it. In first appeal, the assessment order for the block period was confirmed.

5. The assessee was before the Tribunal. The Tribunal directed that only 15% of the total sales receipts be taken for the purpose of levy of income tax. This was after looking into the statement filed by the assessee as to the net profit from the four projects, in which, there was found suppression of sale consideration. The net profit worked out to 14.47% as per the statement of the assessee and the Tribunal directed adoption of 15% as profits and hence the undisclosed income for the purpose of levy of tax.

6. We do not see any infirmity in the said direction. We specifically notice sub-section (2) of Section 158B of the Act, which defines "undisclosed income" as including *inter alia* any income based on an entry in the books of accounts or other documents or transactions representing

whole or part of the income, which has not been or would not have been disclosed for the purposes of this Act. The provision does not permit tax to be levied on the entire receipt of money by an assessee and also does not deem undisclosed income to be the entire undisclosed receipts, revealed on search or otherwise.

7. Here, the sale consideration, which was detected on search and seizure, was not reflected in the books of accounts nor the profit returned as income for the subject years. The sale consideration was also for the purchase of apartments in different complexes, the development of which was promoted by the respondent/assessee. In such circumstances, the income of the assessee, which stood undisclosed, has to be determined for the purpose of levying income tax. The Tribunal, after looking into the net profit of the assessee in the different projects, directed 15% of the total undisclosed receipts to be taken as the undisclosed income. We are of the opinion that the

said direction was perfectly in tune with the provision under Section 150BB of the Act and Section 158BH, which specifies that unless otherwise provided all the provisions of the Act, applicable to assessments under Chapter XIVB. We answer the questions of law framed in I.T.A. No.1549 of 2009 in favour of the assessee and against the Revenue and we reject the appeal.

8. On the question of penalty, the provisos under sub-section (2) of Section 158BFA and the two provisos are to be extracted hereunder:

"Section 158BFA(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. With respect to the penalty proceedings, we are of the opinion that the question of law has to be answered in favour of the Revenue and against the assessee, since the penalty provision under Section 158BFA of the Act is not a quasi criminal proceeding. *Hindustan Steel (P) Ltd.* [supra] was a case in which the order imposing penalty was found to be a quasi criminal proceedings, which required *mens rea*. Finding that the party had not acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest, or acted in conscious disregard of this obligation the penalty was set aside. The aforesaid decision has been distinguished in *Chairman, SEBI v. Shriram Mutual Fund* [(2006) 131 Comp Cas 591 (SC)] and *Union of*

India v. Dharamendra Textile Processors [(2008) 306 ITR 277 SC]. These decisions found that when the statutory obligation is clearly a civil liability cast on the assessee, without requirement for *mens rea*, then there is no question of application of *Hindustan Steel Ltd.* In the present case, the question raised is as to whether the assessee had undisclosed income in the subject assessment years, which were taken up for block assessment based on the search conducted under Section 158BC of the Act.

10. Obviously the details recovered on search, indicated the entire receipts received by the assessee having not been disclosed in the books of accounts or conceded in the returns. There is a statutory obligation to file a return as provided under the Act conceding the income received in the year and paying the applicable tax. This is definitely a civil liability and even otherwise the fact of discovery of the details from the premises of the assessee itself postulates a

deliberate defiance in complying with the applicable provisions of law. However, penalty could only be with respect to that income, which was not disclosed in the returns or in the return filed under Section 158BC of the Act.

11. The first proviso, to sub-section (2) of Section 158BFA, makes it clear that no order imposing penalty shall be made in respect of a person, if such such person has furnished a return under Clause (a) of Section 158BC of the Act. Second proviso makes inapplicable the first proviso, if the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return and in such cases penalty shall be imposed only on that portion. The return referred to therein is a return filed under clause(a) of section 158BC.

12. Only when final determination of income is in excess of that returned by the assessee, under Section 158BC, could there be a levy of penalty under Section 158BFA of the Act. We see from the

assessment order that the assessee had filed a return under Section 158BC of the Act disclosing a total income of Rs.13,56,365/-, which was undisclosed in the regular return. The break up of the amounts undisclosed are also tabulated in the assessment order.

In such circumstances, what is to be looked at is whether the returns filed under Section 158BC, for each of the assessment years, in the block period conceded income less than that determined finally in the block assessment. As of now the Tribunal had set aside the determination in assessment, levying tax on the entire undisclosed receipts in the respective years and directed determination of income at 15% of the undisclosed receipts. We have upheld the order of the Tribunal and rejected the appeal of the Revenue. Hence a re-computation of the undisclosed income is warranted. Penalty can be imposed only on the excess amounts determined @ 15% of the undisclosed receipts, from that conceded in the returns filed

under Section 158BC. We hence answer the question of law in favour of the Revenue and against the assessee and allow ITA No.1312 of 2009 to the limited extend of a remand for computation and determination of income as directed by the Tribunal and imposition of penalty only in circumstances as detailed by us on interpretation of the statutory provision.

Ordered accordingly. There is no order as to costs.

Sd/-

K. VINOD CHANDRAN
JUDGE

Sd/-

ASHOK MENON
JUDGE

sp/27/10/18

//True Copy//

P.A. To Judge

APPENDIX OF ITA 1312/2009PETITIONER'S EXHIBITS:

- ANNEXURE A COPY OF ASSESSMENT ORDER U/S. 158BC DATED 30/10/2003 FOR THE BLOCK PERIOD 01/04/1995 TO 20/09/2001.
- ANNEXURE B COPY OF THE ORDER DATED 23/02/2006 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN IT (S&S) A NO.41/COCH/2005.
- ANNEXURE C COPY OF THE ORDER DATED 28/09/2006 OF THE ORDER OF PENALTY U/S. 158BFA(2) .
- ANNEXURE D COPY OF ORDER DATED 30/01/2007 OF THE COMMISSIONER OF INCOME TAX (APPEALS) .
- ANNEXURE E COPY OF THE ORDER DATED 15/04/2008 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH IN IT(SS)A NO.17/COCH/2007.

RESPONDENT'S EXHIBITS:- NILAPPENDIX OF ITA 1549/2009PETITIONER'S EXHIBITS:

- ANNEXURE A TRUE COPY OF THE ASSESSMENT ORDER DATED 30/10/2003.
- ANNEXURE B TRUE COPY OF THE ORDER OF THE CIT(A) DATED 23/11/2004.
- ANNEXURE C CEWRTIFIED COPY OF THE ORDER OF THE ITAT DATED 23/02/2006.
- ANNEXURE D TRUE COPY OF THE RRA-24 (PAGES 61-66) .
- ANNEXURE E TRUE COPY OF RRA-24 (PAGES 67-70) .
- ANNEXURE F TRUE COPY OF ANNEXURE JJA-12.
- ANNEXURE - G TRUE COPY OF ANNEXDURE JJA-12.
- ANNEXURE H TRUE COPY OF ANNEXURE JJB-6

RESPONDENT'S EXHIBITS:- NIL

//TRUE COPY//

P.A. TO JUDGE