

No penalty u/s 158BFA if income disclosed during search by assessee doesn't exceed the income determined by AO

Summary – The High Court of Kerala in a recent case of C. Najeeb., (the Assessee) held that where in course of appellate proceeding Tribunal concluded that in block assessment proceedings only 15 per cent of total sales receipts be taken for purpose of levy of tax, in view of sub-section (2) of section 158B, impugned direction of Tribunal did not require any interference

In course of block assessment proceedings, only when final determination of income is in excess of that returned by assessee, under section 158BC, there can be a levy of penalty under section 158BFA

Facts

- The assessee was an architect and builder, who constructed apartment complexes and sold 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.
- The Assessing Officer treated the entire sale consideration received by the assessee as the undisclosed income and levied tax on it.
- The Tribunal, however, directed that only 15 per cent of the total sales receipts be taken for the purpose of levy of 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 per cent as per the statement of the assessee and the Tribunal directed adoption of 15 per cent as profits and hence the undisclosed income for the purpose of levy of tax. On revenue's appeal:

Held

- Sub-section (2) of section 158B which defines 'undisclosed income' as including *inter alia* any income based on an entry in the books of account 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.
- Here, the sale consideration, which was detected on search and seizure, was not reflected in the books of account 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 per cent of the total undisclosed receipts to be taken as the undisclosed income. The said direction was perfectly in tune with the provision under section 158BB of the Act and section 158BH, which specifies that unless otherwise provided all the provisions of the Act, applicable to assessments under Chapter XIVB.

- With respect to the penalty proceedings, the issue has to be answered in favour of the revenue, since the penalty provision under section 158BFA.
- 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.
- Obviously the details recovered on search, indicated the entire receipts received by the assessee having not been disclosed in the books of account 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.
- 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 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.
- 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. It is found from the assessment order that the assessee had filed a return under section 158BC disclosing a total income of Rs. 13,56,365/-, which was undisclosed in the regular return.
- 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 per cent of the undisclosed receipts. The order of the Tribunal has been upheld and the appeal of the revenue is rejected.
- Hence a re-computation of the undisclosed income is warranted. Penalty can be imposed only on the excess amounts determined at the rate of 15 per cent of the undisclosed receipts, from that conceded in the returns filed under section 158BC. Hence, the question is remanded back for limited purpose of computation and determination of income as directed by the Tribunal and imposition of penalty only in circumstances as detailed above on interpretation of the statutory provision.

- Ordered accordingly.