Dinesh Kumar Singhania, Kolkata vs Assessee

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IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "A", KOLKATA

(¢)Before , Û /and
Smt.Diva Singh, Judicial
Member.
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Shri Akber Basha, Accountant Member
É /
IT(SS)A No.34/Kol/2009
i ¢ £//Block Period 01.04.1989 to
20.03.2000

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(¥ƒ/APPELLANT) - (§× ¥ƒ/RESPONDENT)
Shri Dinesh Kumar Singhania, Kolkata Versus- A.C.I.T., Central Circle-
(PAN : AIXPS 9807 J) . III, Kolkata,

¥ƒ ' " / For the Appellant: Shri Subash Agarwal
§× ¥ƒ ' " /For the Respondent: Shri P.C.Nayak

/ORDER
( ),Û
Per Smt.Diva Singh, JM

This is an appeal filed by the assessee against the order of the CIT(A)-Central- I, Kolkata dated 15.09.2009 pertaining to block period 01.04.1989 to 23.03.2000 wherein the sole issue agitated by the assessee is the action of the CIT(A) in confirming the penalty u/s 158BF(2) of the Act.

2. The relevant facts of the case are that there was a search and seizure u/s 132(1) of the Act on 23.03.2000 which was concluded on 22.05.2000. As a result of the search the assessee declared undisclosed income of Rs.1,81,91,340/-. 2.1. In the course of the assessment proceedings u/s 158BC addition of Rs.93,44,94,834/- was made by the AO.

2.2. In appeal before the CIT(A) out of the total addition made Rs.49,13,84,664/- was deleted and the following additions stood confirmed by him :

"(i) Seized document BP/1 : Page-3		Rs. 18,000.00
(ii) Seized document BP/1 : Page-21		Rs.25,71,100.00
(iii)Seized document BP/II : Page-31		Rs. 2,24,223.00
(iv) Seized document BP/1 : Pages-38&39		Rs.10,00,000.00
	Total	Rs.38,13,323.00

2.3. In appeal before the Tribunal in the quantum proceedings additions appearing at sl. No.1,3,4 and 5 were confirmed and consequently addition of Rs.70,29,000/- stood deleted. Thus the total additions which stood confirmed were amounting to Rs.38,13,323/-.

2.4. Based on these additions which finally stood confirmed the AO after giving the assessee an opportunity of being heard imposed penalty u/s 158BFA(2) of the Act 2.5. Aggrieved by this the assessee went in appeal before the CIT(A). 2.6. Before the CIT(A) it was submitted that as against the original additions made in the quantum proceedings by the AO amounting to Rs.93,44,00,000/- the same stood reduced to Rs.1 crore by the CIT(A) and finally before the Tribunal in the quantum proceedings the addition which stood confirmed was only to the extent of Rs.38,13,000/-. It was stated that the additions which stood confirmed have been based on certain loose documents. Each of these additions made on the basis of loose sheets was addressed specifically and the submissions are found recorded at pages 5 to 8 of the impugned order. For ready reference they are being reproduced hereunder :-

> "(a) Addition of Rs.18,000/- on the basis of seized documents (BP:1:Page-3:
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> Submissions made before CIT(A) :- Seized couemtns bearing BP-1 of page 3 which is a bills for interest for Rs.36,000/- against loan received from Pioneer Distributors for Rs.5,00,00/-. Although, the said bill is for Rs.36,000/- in respect of interest against said loan, I have stated before learned (DDIT) that I have paid Rs.18,000/- to the said party on account of interest. The amount of Rs.18,000/- is not shown in my regular books of accounts. The said bill for interest does not contain any evidence for payment of such interest. It simply contains instruction to pay. But at the time of payment, it was found that rate of interest has wrongly been mentioned and the bills has wrongly been drawn. The payment was made for Rs.18,000/- only. In absence of any concrete proof for payment, the statement made by me u/s 131 on 7.4.2000 should have been relied on. If I had to tell lie, I could also state that it was only a bill but no payment has yet been made. But since I told the truth that Rs.18,000/- has been paid. The learned assessing officer did not rely upon the same. It normally happens in the business that bill amount is not paid in full if bills are wrongly made. Therefore, addition made in respect of interest for Rs.18,000/- should be deleted."

(b) Addition of Rs.25,71,100/- (including interest of Rs.3,0110001/- on the basis of seized documents (BPII:page 21):-

> (i) Submissions made before CIT(A) :- BP/1 contains details of loans received various relatives. The principle amount and interest calculation is shown on the page. The loan taken by me is not recorded in my regular books of accounts.

The principal amount shown and the calculation made against such amount justifies that this pages contain entries in respect of loan and interest thereon. I have already accepted that such loans are not recorded in my regular books of accounts and hence the question of furnishing evidence does not arise. The learned assessing officer has stated in his assessment order that sources of interest

payment was also not established. It clearly shows that said amount was not my undisclosed income. I would further submit that loans are liabilities and not income and should not be considered as income in light of followings judgements:

> T.S.Kumar Swamy vs Asst. CIT (1968) 65 ITD 188 Mad Ratan Lal Baid vs CIT ITA No.07(Gau) of 1996, Namak Chand Kamhaiyalal vs DCIT (2001) 73 TTJ (JP) 585."
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> (c) Addition of Rs.2,24,223/- on the basis of seized documents (BPII:page
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> 31):
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> (i) Submissions made before CIT(A) :- This page contains rough calculation for making comparison in connection with scheme for investing in Badla instead of investing in shares. For making discussion with clients, such calculations are often made. But the learned assessing officer has presumed that the said page shows purchases and sale of 50,000/- shares on 30.09.1999 and 31.11.1999 of prism. He has further presumed that HCB is getting loss entry of Rs.10,25,000/- 8, 67,500/- + Rs.1,51,000/- when 50,000 shares of prism were sold. In addition HCB is getting interest in cash amounting to Rs.66,723/- plus cash amount equal to difference of purchase and sale consideration which ahs been settled in cash. The learned assessing officer's assumption has no basis.

The remarks paid or received are not mentioned in the said page. Furthermore, the learned assessing officer's observation that HCB is getting loss entry and have settled the difference of loss in cash is fully based on presumption and not on reality. The said page does not show any such noting from which it can be assumed that cash was paid by HCB in place of loss. The addition should not be made on the basis of presumption only."

(d) Addition of Rs.10,00,000/- on the basis of seized documents (BP/1 :

> page 38 & 39):
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> (i) Submissions made before CIT(A):- This page no.38 and 39 of BP/2, did not belong to me. As stated earlier a large numbers of clients and their representative come to office every day. The client sits before the terminal for whole day. It might be that any of such clients has left its personal account in my office. The pay is not in my or my staffs hand writing. It is further submitted that form page 38, it is revealed that a payment of Rs.4,00,00/- in cash was made by my s called client to some one. But from page 39 it is not revealed that any payment of Rs.6,00,000/- was made by my such client it simply shows a noting of Rs.6,00,000/-. Assuming but not admitting that said pages contain my receipt of Rs.10 lakh. The same has not been found recorded in books of accounts but only on a loose papers and hence cannot be cash credit u/s 68 of the Income Tax Act, 1961."

2.7. In regard to these above additions attention was invited before the CIT(A) to the orders of the CIT(A) and Tribunal in the quantum proceedings. The same are being reproduced hereunder from the impugned order. Namely in regard to the addition of Rs.18,000/- the following findings of the CIT(A) and the ITAT are found recorded in the impugned order from the quantum proceedings

(ii) Findings of Hon'ble CIT(A) : Since the assessee has not been able to provide corroborative evidence as to the payment of Rs.36,000/- the impugned amount was rightly treated as unexplained expenditure and as such undisclosed income of the assessee. This ground of appeal is dismissed.

(iii) Findings of Hon'ble ITAT : Since the assessee had only booked 1 per cent of interest in his regular books of accounts whereas the seized materials clearly indicate that the assessee was paying 2 per cent interest on the loan taken by him. The ld. CIT(A) was justified in restricting the addition of Rs.18,000/- i.e. 1% of such loan on account of interest. We therefore, do not find any infirmity in the order of the ld. CIT(A) and therefore, uphold the same and reject the same raised by the assessee."

2.8. Similarly in the context of the seized documents BP-! Page 21 pertains to Rs.25,75,100/- The following findings of the CIT(A) and the Tribunal were referred to at page 5 of the impugned order :-

> "(ii) Findings of Hon'ble CIT(A) :- The assessee has admitted that the loan of Rs.22,70,000/- was received him from various members of family. The assessee ahs not filed affidavits/confirmation letter from those relatives who had advanced loan of Rs.22,70,000/- to him. In absence of these details, the creditworthiness of the loan creditors cannot be established. Since provision of section 68 has been specifically mentioned in section 158BB (2) with the stipulation that provision of Section 68 should "so far as may be apply," it is held that though these amounts were not found credited in the assessee's books of account but on a loose page, the assessee was under obligation to furnish details such names, addresses, etc. of loan creditor and to establish their credit worthiness. Hence, the loan and interest thereon amounting to Rs.25,71,100/- is sustained.
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> (iii) Findings of Hon'ble ITAT : Since the assessee has himself conceded that the above page contained loans taken by him and interest paid thereon and was also not able to produce any confirmation or affidavit in support of such loans either before the Revenue or even before us. In our considered opinion, the AO has no option but to treat the same as undisclosed income of the assessee and the ld. CIT(A) was justified in confirming such action of A.O. We therefore do not find any infirmity in such order of Ld. CIT(A) and therefore, upheld the same and reject the ground of assessee.

We also rely upon the decision in CIT -v- Aggarwal Pipe Co. (1993) 240 ITR 880 (Del), wherein it was held that the surrendering of cash credit for assessment just because of the inability to produce the creditors cannot be considered as concealment of income and penalty u;/s 271(1)(c) cannot be levied."

2.9. Similarly in regard to addition of Rs.2,24,223/- the seized documents BP-II page 31 the following findings of the CIT(A) and the Tribunal's findings are found reproduced at pages 6 and 7 of the impugned order are reproduced for ready reference hereunder :-

> "(ii) Findings of Hon'ble CIT (A) : The explanations offered by the assessee appear to be far fetched. Such specific calculations are not made to convince clients about desirability of one course of investment over other. It is apparent that cash of Rs.2,24,223/- was paid to HCB out of undisclosed income. Hence, the amount so paid was rightly treated as undisclosed income u/s 158B(b), the addition is sustained.
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> (iii) Findings of Hon'ble ITAT : In above page it is clearly mentioned that the assessee has paid an amount of Rs.2,24,223/- by cash to M/s. HCB the fact against which the assessee was not able to offer any plausible explanation and hence in the circumstances the AO has no option but to consider the same as assessee's undisclosed income and the ld. CIT(A) was justified in sustaining such addition for want of satisfactory reply by the assessee. We, therefore, do not see any reason to interfere with such order of ld. CIT(A) and therefore, uphold the same and reject the ground raised by the assessee."

2.10. In the same manner addressing the addition of Rs.10,00,000/- based on seized documents BP/1 (pages 38 and 39) which have been reproduced at pages 7 and 8 are reproduced as under :-

> "(ii) Findings of Hon'ble CIT(A) : Since these papers indicate and provide specific details of cash receipts of Rs.10,00,000/- which were not found recorded in the regular books of account, the assessing officer had rightly treated the same as undisclosed income. The addition is confirmed.
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> (iii) Findings of Hon'ble ITAT : Since the above seized papers clearly indicated that the assessee has received Rs.4 lakhs and Rs.6 lakhs respectively and such receipt were not found recorded in the regular books of accounts, in our considered opinion, the AO has rightly treated the above receipt by the assessee as his undisclosed income and the ld. CIT(A) was justified isn sustaining such addition made by the AD as these were not found recorded in the regular books of accounts of the assessee. IN view of above facts we do not see any infirmity in such order of Ld. CIT(A) and therefore uphold the same and reject the ground raised by the assessee."

2.11. Based on these facts and arguments it was contended that the penalty should not have been imposed as they are entirely based on the additions made in the quantum proceedings. Simply because additions have been sustained it was argued does not automatically lead to the levy of penalty. Addressing the basis of the additions it was stated that these are based on rough notings on loose sheets and cannot be held as evidence leading to the conclusion that these were suppressed income of the assessee. It was his argument that apart from the reason that the addition was sustained in the quantum, the AO has made no effort or enquiry to justify levying of penalty. No reasoning has been given by him to justify the penalty and it has been levied in a mechanical

manner. It was argued that since there was no specific finding for levy of penalty in the quantum proceedings in the penalty order no penalty should have been levied. It was also argued that penalty proceedings and assessment proceedings are separate and distinct and simply because the addition has been made penalty cannot be imposed. Reliance was placed upon the following judgements :-

i) CIT vs Jalaram Oil Mills (2001) 171 CTR (GUj) 426
ii) Vishwakarma Industries vs CIT (1982) 29 CTR (P&H) 243 (FB) 135 ITR 652 (P&H): TC 50R 98,.
iii) CIT vs Ravail Sincjh & Co. (2002) 173 CTR (P&H) 429.
iv) Laxmi Platers vs ACIT ITAT, Ahmedabad 'B' Third Member Bench (2001 73 TTJ (Ahd) ™ 171.
v) CIT vs Bengal Galvanising Works (1987) 165 ITR 249 (Cal)
vi) Hindustan Steel Ltd. vs State of Orissa (1972) 83 ITR 26 (SC)"

2.12. Considering the submissions the CIT(A) was of the view that on a plain reading of the Section it is clear that the only requirement for the imposition of penalty u/s 158BFA(2) of the Act is that the assessed income should be in excess of the returned income. Such excess income is in the nature of undisclosed income. He further holds as under :-

> "The plain reading of the above section it is clear that the only requirement for the imposition of penalty under s.158BFA(2) of the Act is that the assessed income should be in excess of the returned income and such excess income is in the nature of undisclosed income. In other words, since the assessment is made under Chapter-XIV-B and the undisclosed income is computed as a result of search, nothing further is required to be proved except that the amount in question is undisclosed income detected on the basis of seized material."

2.13. Thereafter holding that it is not disputed that imposition of penalty u/s 158BFA(2) of the Act is discretionary and not mandatory. However, since the addition of Rs.38,13,323/- found assessed as undisclosed income and these are based on seized material the penalty action was confirmed. The CIT(A) further goes on to observe :

> "6. Therefore, there is no dispute that the undisclosed income assessed was in excess of the undisclosed income returned by Rs.38,13,323/- accordingly the assessee was liable for penalty. Moreover, for the imposition of penalty under s.158BFA(2) of the Act, there is no requirement that the Department should establish that the income assessed in excess of the income returned was on account of any deliberate action of an assessee. There is also no condition that in case an assesee has reasonable cause for not reflecting its undisclosed income in the return for the block period correctly, penalty cannot be levied. For imposition of penalty us/ 156BFA(2) the only condition should be satisfied that the undisclosed income under Chapter-CIV-B is computed

based on material found as a result of search and there is no room either for estimation or for presumption.

7. In the case under consideration the seized material has lead to computation of undisclosed income based on evidences found, which was precise enough to compute the undisclosed income. The addition of Rs.18000/- was based on the fact recorded in the seized material that interest was being paid @2% as against 1% disclosed in the regular books. Like wise addition of Rs.25,71,100/- was based on seized document BP/1 pg.21 where detail of undisclosed receipt was recorded which could not be explained by the assessee. The addition of undisclosed income of Rs.2,24,223/- is based on unaccounted payments recorded in pg.31 of the seized document and the addition of undisclosed income of 10,00,000/- is on account of unaccounted cash receipts clearly indicated in the pg.38 & 39 of the seized papers.

8. Considering above facts and the provision of the Act it is held that the assessee is liable for penalty u/s 158BFA(2) of the Act for non disclosure of undisclosed income of Rs.38,13,323/-. The decision relied by the appellant is not applicable as the facts of each and every search cases are exceptional. Moreover none of the ratio cited by the appellant is related to the provision of section 158BFA of the Act. With these remarks the appeal of the appellant is dismissed."

2.14. Aggrieved by this the assessee is in appeal before the Tribunal.

3. The ld. AR addressing at length the seized documents on the basis of which the addition of Rs.38,13,323/- has been confirmed by the Tribunal in the quantum proceedings. It was his argument that the CIT(A) had ignored the various judgements relied upon by the assessee contending that the decisions are not applicable and the ratio cited are not related to provisions of Section 158BFA. It was his argument that it has been canvassed that in the penalty proceedings that the very basis of additions were loose sheets one of which was not acted upon and was being negotiated to the extent it was honoured it was accepted the remaining portion of Rs.18,000/- could not be added as such the occasion to make the basis of attracting penal provisions could not have been done. Similarly the other addition of Rs.24 lakh odd were loans from family members since the family members could not be prevailed upon to give affidavits/confirmations being liabilities the amount could not be added as the assessee's income. As such he had relied on certain decisions to canvass that the document could not have been sufficient evidences for an addition. Consequently it definitely was not sufficient to attract penalty. The argument in regard to another document was that it did not belong to the assessee and was not even in the handwriting of the assessee's staff and may have belonged to some client who may have dropped it by mistake in front a terminal. Similarly for another loose sheet it contained merely calculations to convince a client to opt for a certain mode of investment as opposed or comparable to different investment strategy it did not disclose any income having been earned. It was argued that these arguments applying the case law were disregarded without any discussion. Inviting attention to the block assessment order page-30 it was submitted that despite the fact that the search was conducted on the business premises of the assessee a perusal of page-30 of the block assessment order would show that no valuables were

found either pertaining to properties or otherwise only loose sheets have been the basis for the additions and as against the excessively high pitched addition of Rs.93 crore odd ultimately addition sustained was only Rs.38 lakhs. The said addition too it was his argument based on loose sheets which were dumb documents could not have been made and these being penalty proceedings where the arguments and reasoning has to be considered separately by the AO and the CIT(A) which has not been done and the Department has proceeded on the basis that additions stood confirmed as such penalty is to be levied. Inviting attention to each of these documents in regard to the specific explanations offered by the assessee before the CIT(A). It was his submission that a perusal of the PB-1 which contains a photo copy of BP-1 page 3 would show that nowhere it states that the assessee had paid 2% which was being demanded and the assessee has merely paid 1%. It is only a bill and not an evidence that the same was honoured and since it was being negotiated and the full demand had not been paid there is no occasion to sustain the penalty.

3.1. It was his arguments that in the case of addition of Rs.25,71,000/- it has been a consistent stand of the assessee that these were loans taken by the assessee from various relatives. No doubt the same has been added to the income of the assessee but the arguments on behalf of the assessee has consistently been that there is no case made out that this was undisclosed income of the assessee. In the quantum proceedings it was argued that in fact being loan these are liabilities of the assessee do not part of his income. However the addition had been sustained. The fact remains that simply because the assessee was unable to procure letters of confirmation from the relatives in regard to the loans given and taken the additions have been made this consistent argument should have been considered in the penalty proceedings. It was submitted that taking into consideration the explanation of the assessee the same cannot be dis-regarded as unrealistic admittedly having received the loans the assessee has no hold or power over his relatives to insist that they must further support their loans by way of confirmation letter and solely because of his inability to convince his relatives he has been visited by the action of the authorities in sustenance of the addition made. However, in the quantum proceedings keeping the realities in mind the explanation of the assessee can be accepted and sufficient case law has been advanced on the basis of which in fact in the quantum proceedings the addition could not have been made and these are penalty proceedings.

3.2. Addressing the next addition of Rs.2,24,223/- , it was his submission that these were merely calculations to convince the clients about desirability out of one course of investment over the other and this has been consistent argument of the assessee right from the assessment stage. The addition has been sustained by the ITAT holding that the explanation of the assessee was not plausible. Addressing paper book page no.3 which is the photo copy of page-31 on the basis of which the addition has been made it was his submission that the same cannot be the basis for making the addition let alone confirming the penalty.

3.3. Addressing the next addition of Rs.10,00,000/- it was his submission that all along the assessee has been contending that this is not working either of the assessee nor in the handwriting of the assessee or his staff members and the same probably belongs to some client who may be sitting behind the terminal and have dropped it inadvertently. The said document is a dumb loose document not leading to any evidence of income earned despite this the addition in the quantum

proceedings had been made and sustained. It was argued that it would be too harsh on the assessee that these dumb documents and loose sheets are made the basis for upholding the action of the tax authorities in levying penalty. It was his vehement contention that the tax authorities have proceeded as though simply because the addition has been sustained in the quantum proceedings. The penalty is to be levied. The authorities have acted as though the explanation offered by the assessee has to be dis-regarded and the penalty has to be levied in the mechanical manner. The said action it was submitted is contrary to the settled position of law. Levying of penalty is a separate proceeding by itself and is not a mechanical act. In the facts of the present case, it was his submission that even the additions would not have been made and the various case laws the assessee has relied upon before the CIT(A) for the proposition that on these facts even the additions could not have been made are dis-regarded holding that these apply to the quantum proceedings. The fact that the assessee was trying to draw strength form the settled position of law to canvass that the evidences were lacking even for addition. The occasion to consider the same for confirming penalty does not arise was not considered at all. In the facts of the present case, it was his submissions that in the penalty proceedings a liberal view is normally taken and once the assessee has sufficiently established that the evidences were not sufficient even for addition in the penalty proceedings the explanation of the assessee can be considered and a view in accordance with law can be taken. Reliance was placed upon the following judgements in support of his claim :-

> "(a) Gist of ITAT order in DCIT vs. Suresh Kumar 97 ITD 527 (Kol) Proposition : (i) Penalty u/s 158BFA(2) is not mandatory but discretionary and the discretion should be exercised according to the rules of reason and justice.

. (ii) Provision/ratio of judgements relating to section 271(1)(c) would apply mutatis mutandis to section 158BFA(2).

Application : To all the additions on which penalty was imposed.

(b) Gist of Judgement in National Textiles vs CIT 249 ITR 125 (Guj.) Proposition : (i) It is not enough for the purpose of penalty that the amount in question has been assessed as income..

(ii) Penalty cannot be imposed if two views are possible on the facts and circumstances of the case.

Application : To all the additions on which penalty was imposed.

(c) Gist of Judgement in S.P.Goel vs DCIT 82 ITD 85 (Bom) Proposition : (i) Mere entry on a loose sheet of paper does not indicate undisclosed income unless circumstantial evidence in the form of extra cash, jewellery or investment Outside books is found.

Application : To all the additions on which penalty was imposed.

(d) Gist of Judgement in Ashwini Kumar vs ITO 39 ITD 183 (Del) Proposition : (i) In the case of dumb document, revenue should collect necessary evidence that the figures represent incomes earned by the assessee. Application : Additions relating to :-

(I) Seized document BP/1 ; page 21 : Rs.25,71,100/-
(II) Seized document BP/1 ; Page 31 : Rs.2,24,223/-
(III) Seized document BP/1; page 4 & 5 : Rs. 10,00,000/-

(e) ITAT order in the case of JCIT vs West Bengal Trading Agency, IT(SS) NO.49(Cal) of 2001 Proposition : There has to be direct or circumstantial material to establish that the intention expressed in the seized document/books has actually been implemented (vide para 8) Application : Additions relating to Seized document BP/1; page 3 : Rs.18,000/-

(f) ITAT order in the case of Kantilal & Bros vs. ACIT 52 ITD 412 (Pun) Proposition : A piece of paper impounded at the time of search cannot be construed to be a book. So, addition cannot be made u/s 68 based on such documents.

Application : Additions relating to seized document BP/1:page 21:

Rs.25,71,100/-

(g) ITAT order in the case of P.R.Patel v. Dy.CIT 78 ITD 51 (TBOM) Proposition : No addition can be made on the basis of a seized documents which do not bear the name of assessee.

Application : To all the additions on which penalty was imposed."

4. The ld. DR heavily relied upon the order of the CIT(A) on the basis of which it was his submission that the assessee's explanation has been considered by the CIT(A) and has been found wanting as such a reasoned and speaking order has been passed, taking into consideration the order of the Tribunal in the quantum proceedings wherein the additions have been sustained and thus since the penalty proceedings have taken into consideration the explanation offered in the quantum proceedings and before the CIT(A) the action should be upheld.

5. The ld. AR, on the other hand, submitted that due care and attention may kindly be paid to the fact that these are quantum proceedings and already the assessee has been subjected to the addition having been sustained in the quantum proceedings. As such a liberal view may kindly be taken.

6. We have heard the rival submissions and perused the materials available on record. On a careful consideration of the same, we are of the view that in as far as the judgements in regard to the nature of penalty proceedings u/s 158BFA(2) is concerned it is a settled position of law that these are not mandatory and the penalty to be imposed is discretionary. Thus simply because the addition has been made that itself does not lead to the conclusion that penalty has to be automatically levied as it is a settled position of law that quantum proceedings and penalty proceedings are separate and distinct proceedings. Thus though the explanation offered by the assessee in the quantum

proceedings may not at times be accepted but for levying of penalty the same reasoning can not mechanically applicable. The explanation offered by the assessee has to be considered as per facts available on record and the settled legal position. The conclusion whether the explanation can be accepted or is it to be rejected being too far fetched would depend on the facts of each case. On a perusal of the various pages in the paper book namely pages 1 to 4 of the paper book containing photocopies of the documents which have led to the addition having been made, it is seen that in regard to the first document pertaining to the addition of Rs.18,000/- the consistent stand of the assessee has been that as against the interest of 2% the assessee was able to settle at 1% and made a payment of only Rs.18,000/-. The assessee has canvassed right from the beginning that had he been a liar he could have straightaway stated that no payment whatsoever had been made. However, the honest explanation of the assessee that he was able to settle at Rs.18,000/- i.e. 1% of interest has been held against the assessee. It has been canvassed that in the absence of the said documents which the assessee accepted, there was nothing on record to justify the addition. Looking into the explanation offered consistently and the amount involved, we find no good reason to hold that the explanation offered by the assessee cannot be accepted. Thus the common business practice that amongst the parties bills at times are settled at a lesser amount than the amount set out in the penalty proceedings, in the peculiar facts and circumstances of the case can be accepted. As such, we are of the view that penalty for the said amount of Rs.18,000/- deserves to be quashed.

6.1. Coming to the next addition of Rs.25,75,100/- it is seen that consistent stand of the assessee before the tax authorities has been that the said documents contain the details of the loans received from his various relatives. Since the said loans were not recorded in the books of accounts the assessee accepted the addition. In the circumstances, it was argued that there was no occasion to hold that he could not furnish the evidences of having the said loans. The fact remains that the assessee was required to show that the loans were from various members of the family. The CIT(A) has decided the issue against the assessee in the quantum proceedings holding that the assessee has not filed affidavits/confirmation letters from those relatives and thus in the absence of these details the addition stood confirmed. The said action was sustained by the Tribunal in the quantum proceedings again holding that since the assessee was not able to procure any confirmation or affidavit in support of such loans the tax authorities had no option but to make the addition. It is seen that the assessee has relied upon the judgements of the Hon'ble Delhi High Court in the case of CIT Vs.Aggarwal Pipe Co. - 240 ITR 880 wherein it has been held that surrender of cash credit in an assessment because of inability to produce creditors cannot be considered as concealment of income and imposition of penalty u/s 271(1)(c). In the facts of the case, the assessee is on a stronger footing as he has not surrendered and stated all along that these were advances from relatives. However, he could not procure affirmations from them. The bona-fide explanation offered by the assessee does not lead to any concealment. It is a settled position of law that the reasoning and the ratio of judgements in the context of 271(1)(c) would apply to Section 158BFA(2). As such, considering the facts, circumstances and position of law, we are inclined to accept the explanation offered and holding that in the face of the consistent stand of the assessee, the penal provisions of Section 158BFA(2) qua the addition of Rs.25,71,100/- are not attracted. The explanation offered by the assessee as such is accepted. Penalty thereon is struck down.

6.2. Qua the addition of Rs.2,24,223/- we have taken into consideration the impugned order and the order of the Tribunal in the quantum proceedings and considering the same along with the consistent explanation of the assessee, we are inclined to accept the same as for these workings, the calculations stated to be for discussions with clients as such do not attract the penal provisions as the explanation is consistent, bona-fide and plausible looking at the nature of assessee's work. Penalty thereon as such is not maintainable.

6.3. Qua the next addition of Rs.10,00,000/- it is seen that the consistent stand of the assessee is that it does not pertain to the assessee. Nowhere the department has made an offer that it pertains to the assessee. The assessee has right from the beginning canvassed that these notings are neither in the hands of the assessee nor are they in the handwriting of his staff members. It has been explained that the loose sheet probably would belong to some client who may have sat before the terminal and dropped it. As such these loose sheets/dumb documents are stated to be completely unrelated to the assessee as such cannot be the basis of attracting penal provision of section 158BFA (2) of the Act. On a consideration of the consistent stand, facts, circumstances and position of law qua such documents, we are of the view that penalty imposed even on this ground deserves to be quashed.

7. Accordingly, for the reasons given therein above, in the peculiar facts and circumstances of the case, the penalty imposed is quashed and the impugned order sustaining the same is set aside.

Order pronounced in the court on 10/06/2011.

Sd/-
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,
Akber Basha, Accountant Member

Sd/-
, Û
Diva Singh, Judicial Member.

(‹)
‹)Date : 10.06.2011.

Order pronounced by

Sd/- Sd/-
SVM MS
(AM) (JM)

R.G.(P.S.)

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Copy of the order forwarded to:

1. Shri Dinesh Kumar Singhania, 9, India Exchange Place, Kolkata-700001.

2 The A.C.I.T., Central Circle-III, Kolkata

3. The CIT, 4. The CIT(A)-Central-I, Kolkata

5. DR, Kolkata Benches, Kolkata × › § /True Copy, ¡ □ / By order, Deputy /Asst. Registrar, ITAT, Kolkata Benches