IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

INCOME TAX APPEAL No.42 OF 2007
...

Shri Mahavir Manakchand Bhansali,
Aged about 47 years, Businessman
Dealing in gold and silver jewellery,
articles etc. at Pratap Chowk, Sarafa
Bazar, Amravati, Tah. & Dist.
Amravati, State of Maharashtra .. **APPELLANT**

.. **Versus** ..

The Commissioner of Income Tax
Central Circle, Nagpur Aaykar Bhawan,
Telankhedi Road, Nagpur, Tah. &
Dist. Nagpur, State of Maharashtra, .. **RESPONDENT**

Mr. C.J. Thakar Advocate for Appellant.
Mr. Bhushan N. Mohta, Advocate for Respondent.

....

CORAM : M.S. Sanklecha & Manish Pitale, JJ.
RESERVED ON : 16th JUNE, 2017.
PRONOUNCED ON : 29th JUNE, 2017.

JUDGMENT (per M.S. Sanklecha, J.)

1. This appeal under Section 260A of the Income Tax Act, 1961 (Act) impeaches the order dated 16.06.2016 passed by the Income Tax Appellate Tribunal, Nagpur (Tribunal). The

impugned order relates to assessment for block period 01.04.1990 to 04.08.2000.

2. This appeal was admitted on 23.10.2007 on the following substantial question of law:-

> *"Was the Tribunal justified in law in confirming charging of interest for the period of delay attributable to the revenue in supplying copies of accounts and relevant record and statements?"*

3. Briefly, the facts leading to this appeal are as follows:-

(a) On 04.08.2000 there were search and seizure operations under Section 132 of the Act at the premises of the appellant. During the course of the search, books of account, documents and cash of Rs.25,00,000/- were seized. At that time statements of the assessee and his various family members were also recorded.

(b) On 17.04.2001 a notice was issued (served on 27.04.2001) to the appellant under Section 158-BC of the Act. The above notice dated 17.04.2001 called upon the appellant to file his return for undisclosed income of the

block period i.e. 01.04.1990 to 04.08.2000 on or before 26.05.2001.

(c) On 09.05.2001 the appellant sought copies of the statement recorded during the search as well as xerox copies of the entire seized documents as recorded in the panchanama. However, as the same was not furnished, the appellant by another letter dated 24.05.2001, once again requested the xerox copies of the documents seized and statements recorded so as to enable him to file his return of income. The appellant also sought inspection of the record as early as possible to enable him to prepare his return of income.

(d) Inspite of the aforesaid request, no copies of the documents seized and/or statements recorded were furnished to the appellant. However, on 03.01.2002 partial inspection of the documents seized, i.e. account books, record and statements was given to the appellant.

(e) Thereafter on 26.02.2002 the appellant filed his return of income in the status of an individual. In the return as filed, the appellant declared an income of Rs.15,00,000/-

(Rs.14,99,850/-) on an estimate basis determining the tax payable at Rs.9,00,000/-. In the return of income, the appellant had appended a note that the tax payable of Rs.9,00,000/- may be adjusted out of the seized cash. Moreover it was also pointed out that inspection was granted only on 03.01.2002 resulting in delay in filing the return of income.

(f) On 29.08.2002 the Assessing Officer completed the assessment for the block period 01.04.1990 to 04.08.2000 under Section 158BC read with Section 143(3) of the Act determining the total undisclosed income at Rs.15,00,000/- The tax thereon was determined at Rs.9,90,000/- and interest payable for the delayed filing of the return of income under Section 158BFA(1) was Rs.1,23,750/-. The demand was adjusted against the seized cash.

(g) Being aggrieved with the order dated 29.08.2002 of the Assessing Officer to the extent it charged interest at Rs.1,23,750/-, the appellant filed an appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). The order dated 29.08.2002 of the CIT(A) does record the fact that the

total demand payable by the appellant and his brother was approximately Rs.17,34,000/- and the amount lying with the department was Rs.25,00,000/-. Nevertheless by the order dated 29.08.2002 the CIT(A) dismissed the appellant-assessee's appeal. This on the ground that in terms of Sections 158BFA(1) of the Act, there is no discretion with the authorities to waive the interest payable.

(h) Being aggrieved, the Appellant-Assessee carried the issue of the payment of interest in appeal to the Tribunal. By the impugned order dated 16.06.2006, the Tribunal held that charging of interest was compensatory in nature. However, in the present facts, the impugned order holds that the delay in filing the return of income could not be attributed to the revenue for the reason that the return was filed on 26.02.2002 on an estimated basis disclosing undisclosed income at Rs.15,00,000/- I.e. before copies of the documents seized were made available to the appellant. This indicated capacity to file a return even in the absence of the seized records. Therefore, the explanation offered was not found acceptable. Further the impugned order holds that the charging of interest under Section 158-BFA(1) of the Act is mandatory and there is no discretion available

with the Assessing Officer not to charge interest. Thus, the impugned order dated 16.06.2006 dismissed the appeal of the appellant-assessee.

4. Being aggrieved, the appellant-assessee is in appeal before us.

5. Before dealing with the rival submissions, we may usefully reproduce Section 158-BFA (1) of the Act as in force during the relevant time:-

> *"158BFA(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 documents 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 percent 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".*

6. Mr. Thakar, learned counsel appearing for the appellant, in support of the appeal submits as under:-

(a) The interest under Section 158BFA of the Act is charged for delay in filing the return of income consequent to a notice under Section 158BC of the Act. In this case, the delay in filing of the return was entirely attributable to the Revenue, inasmuch as it failed to supply copies of the seized record and account books, which were necessary for the purposes of preparing the return of income. Further the inspection of the record was also granted only on 03.01.2002. Therefore, the period from 26.05.2001 to 03.01.2002 is excludable while computing interest;

(b) The finding of the Tribunal that as the appellant had filed the return of income on estimate basis even before receiving copies of the documents as sought for, would indicate that there was no requirement of obtaining the documents before filing the return of income. This finding of the Tribunal is perverse, as the return of income was filed only after grant of inspection on 03.01.2002. Consequently the interest payable from the period

26.05.2001 (when the return had to be filed) till 03.01.2002 (when filed) ought to be excluded.

(c) In any case the amount of Rs.25,00,000/- had been seized by the Revenue and was in their possession from the date of search i.e. 04.08.2000. The tax determined upon the appellant and his brother collectively was less than Rs.25,00,000/-, which were seized. Consequently as there was no delayed payment of the tax, the occasion to charge interest would not arise, considering the fact that the impugned order of the Tribunal itself holds that the interest under Section 158- BFA of the Act is compensatory in nature.

7. As against the above, Mr. Mohta, learned counsel appearing for the Revenue submits in support of the impugned order as under:-

A. The requirement to pay interest under Section 158-BFA of the Act is mandatory. There is no discretion available with the Assessing Officer to waive interest;

B. The amount of Rs.25,00,000/- which was seized

cannot be adjusted against the tax determined for the purposes of non levy of interest. This is so as the tax was determined only on passing of the Assessment order and prior thereto the seized amount is with the Revenue only in trust. In the above view, it was submitted that the appeal may be dismissed.

8. We have considered the rival submissions. Section 158-BFA(1) of the Act clearly provides that where the return of undisclosed income for the block period consequent to a search is not furnished within the time specified in the notice issued under Section 158BC of the Act, the assessee is liable to pay simple interest on the tax determined under Section 158BC(c) of the Act on the undisclosed income. This simple interest is charged at one percent for every month commencing from the period of the expiry of the time to file a return as specified in Section 158BC notice till the date of filing of the return.

9. Thus, the tax on the undisclosed income is determined only on an assessment order being passed under Section 158BC(c) of the Act. Therefore, any amount which may have been seized prior thereto, cannot be adjusted against a

demand to be ascertained on a subsequent date. The submission on behalf of the appellant-assessee, is that the impugned order holds that the Section 158BFA(1) of the Act is compensatory in nature. Therefore, where the amounts determined as tax subsequently was already with the Revenue, no loss was caused to it. Therefore, the Revenue cannot seek compensatory interest under Section 158BFA(1) of the Act. This submission overlooks the fact, that prior to determination of the tax payable on the undisclosed income, the amount seized does not belong to the Revenue. The right to adjust the seized cash can only be post determination of tax payable. This has been so held by the Madras High Court in **Ashok Kumar Sethi Vs DCIT, 387 ITR 375,** with which we respectfully agree. Thus the submission that there was no delay in paying the tax on the undisclosed income as the amount of Rs.25,00,000/- has already been seized by the Revenue, cannot be sustained. Moreover in the facts of the present case the offer to adjust the amount of Rs.25,00,000/- which had been seized with the tax which would be ultimately determined, was only made along with the filing of the return. Therefore, for the delay post filing of the return, it could be argued that no interest is payable, but prior thereto there is not even an offer made to adjust the amount. Section

158BFA(1) of the Act seeks to recover interest only till the date of filing of the return of income after the expiry of the period stipulated in Section 158BC notice. Therefore, no occasion to examine the levy of interest post the filing of return arises.

10. It was next contended that the delay in filing the return of income is completely attributable to the revenue for non-furnishing of copies of the documents and not giving inspection of the documents seized, within a reasonable time after making the demand. The notice dated 17.04.2001 under Section 158BC of the Act called upon the appellant to file his return of income for undisclosed income for the subject block period on or before 26.05.2001. On 09.05.2001 and on 24.05.2001, the appellant requested the revenue to furnish him the copies of the entire seized documents as recorded in the panchanama including the statements made at the time of the search. Further inspection of the seized record was also sought so as to enable the appellant to file his return of income. In spite of the aforesaid request, no copies of the documents seized and/or statements recorded were furnished to the appellant. However, on 03.01.2002 an inspection of the seized documents was given to the appellant. Immediately thereafter on 26.02.2002 the appellant filed his return of income. It is an

accepted position as recorded in the impugned order that the return of income was on an estimated basis. It was in the aforesaid circumstances that the appellant submits that no interest should be charged under Section 158BFA(1) of the Act, as the delay in filing the return was entirely due to the respondent. However, the impugned order disbelieves the aforesaid explanation for the delay offered by the appellant on the ground that the same is not acceptable as the return of income has been filed even though the copies of the documents and account books and statements which were seized, were never furnished to the appellant, till the date he filed his return of income. However, this finding to our mind, overlooks the fact that the return was filed after inspection was given to the appellant-assessee on 03.01.2002. Therefore, it is on the basis of the inspection given to the appellant that the return of income was filed. Thus even though no document was furnished, the inspection given was sufficient compliance of the requisition made by the appellant, as he had occasion to examine his record which was seized by the revenue and file his return of income. In these circumstances, the finding arrived at by the impugned order that the reason for the delay in filing the return of income made out by the appellant was not believable, cannot be sustained. The delay is certainly

attributable to the late giving of inspection of the seized documents on the part of the revenue.

11. This now takes us to the final issue viz. is it open under the provisions of Section 158-BFA(1) of the Act to the Assessing Officer to waive interest imposable thereunder even in the absence of any discretion provided to waive interest under Section 158-BFA(1) of the Act. There can be no dispute that bare reading of the section does not provide for any discretion to waive and/or reduce the interest imposable on account of the late filing of the return of income. It is a settled position in law that a fiscal statute has to be strictly interpreted, particularly when there is no ambiguity in the statute. The normal rule of interpreting a fiscal statute is the literal rule of interpretation. However, when the Parliament makes a law, it proceeds on the basis that the Executive i.e. the State will act fairly and not cause unjustified burden upon the subject. The provisions of Section 158BFA(1) of the Act proceeds on the above premise and it was expected of the State to grant copies of the documents seized and/or inspection of the record as expeditiously as possible, so as to enable the appellant to file his return of income. This particularly so, as to delay in filing of return, leads to levy of

interest. This not having been done, as was expected under the Statute, the subject cannot be made to pay for the negligence of the Officers of the State. Therefore, in a case like this where strict construction may result in injustice, an equitable construction may be preferred. As observed by the Apex Court in **CIT .vs. J.H. Gotla- (1985) 4 SCC 343** :-

> *"Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might modify the language used by the Legislature so as to achieve the intention of the Legislature..... ..... Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."*

Therefore, where law and equity can both be reconciled to achieve justice , then the same should be attempted and achieved For after all they are not enemies.

12. In fact Mr. Thakar, learned counsel for the appellant placed reliance upon the decision of the Delhi High Court in **Commissioner of Income-tax .vs. Mesco Airlines Ltd. - (2010) 327 ITR 554 (Delhi)** and decision of the Karnataka High Court in **Commissioner of Income Tax and another**

.vs. B. Nagendra Baliga- (2014) 363 ITR 0410 (Karn), where both the Courts have taken a view that where there is a delay in filing the return of income which is attributable to the revenue in not having supplied documents sought for, then the period attributable to that delay ought to be excluded. In both the aforesaid cases, the Assessing Officer had delayed to furnish necessary documents seized during the course of the search and sought for the by the assessee. This resulted in delay in filing the return of income. The only distinction which exists in the facts of the above two cases with that which arises before us, is that the return of income in both the cases were filed on the revenue supplying the assessee with the copies of the seized documents. In this case the return has been filed even before the seized documents were supplied. However, this distinction is of no consequence as the basis for filing the return of income was the inspection of the documents given to the appellant on 03.01.2002. Therefore, the period between 26.02.2001 till 03.01.2002 has to be excluded for the purposes of computing the period on which interest can be levied under Section 158BFA(1) of the Act. However, Mr. Mohta, learned counsel appearing for the revenue sought to rely upon the decision of the Karnataka High Court in **Commissioner of Income Tax .vs. K.L. Srihari –**

(2011)335 ITR 215 (Karnataka) and **Commissioner of Income-tax Central Circle .vs. B. Suresh Baliga – (2014) 364 ITR 560 (Karnataka)**. In both the aforesaid decisions, the Karnataka High Court has taken a view that the provisions of Section 158BFA(1) of the Act are mandatory in nature and interest would have to be levied in terms thereof irrespective of the reason for delay. In both the aforesaid cases, the reason for the delay was not attributable to the revenue as in the case before us. From the facts stated in both the cases, it does not come out that the delay in filing the return of income was on account of the revenue in not furnishing copies and/or not giving inspection of the seized documents to the assessee, which would form the basis for filing the return of income of undisclosed income. Therefore, the aforesaid two decisions relied upon by the Revenue are completely distinguishable on facts, as the delay in those cases was not held to be attributable to the revenue, for the purposes of waiving of interest.

13. In the above view, the decision of the Delhi High Court in **Mesco Airlines Ltd.** (supra) and of the Karnataka High Court in **B. Nagendra Baliga** (supra) appeals to us in the present facts. We wish to make it clear that after the

introduction of Section 158BFA of the Act in Section 119(2)(a) of the Act, the waiver of interest, if any, would have to be in terms and/or in accord with the directions laid down by the Central Board of Direct Taxes (C.B.D.T.). At the relevant time when the assessment orders were passed under the Act, Section 158BFA of the Act was not a part of Section 119(2)(a) of the Act which empowered C.B.D.T. to set guidelines for waiver of interest. Therefore, from the date Section 158BFA of the Act has been incorporated in Section 119(2)(a) of the Act i.e. with effect from 01.06.2002, the proper remedy would be to apply the circulars/instructions issued by the Board relaxing the circumstances in which the interest payable under the said section could be relaxed. However, in the present case we are concerned for the period prior to June 2002, as the return of income was filed on 26.02.2002. At that time Section 158BFA of the Act was not a part of Section 119(2)(a) of the Act. Therefore, no occasion for the C.B.D.T. to give instructions to liberalise the rigour of Section 158BFA of the Act in respect of interest could arise.

14. In these circumstances the question of law posed for our consideration is answered in the negative i.e. in favour of the appellant-assessee and against the revenue. Although the

question as admitted questions the justifiability of the Tribunal in charging interest for the delay attributable in not supplying the copies of accounts and relevant record and statements, the words "copies of account and relevant record and statements" would also include within it, giving inspection of the accounts and relevant record and statements. Therefore, the interest for the delay in filing the return of income in this case has to be computed after excluding the period from the date the inspection was asked for i.e. 24.05.2001 till the inspection was given i.e. 03.01.2002. The Assessing Officer to work out the exact demand for interest in the above terms.

15. Appeal allowed in above terms. No order as to costs.

(Manish Pitale, J.) **(M.S. Sanklecha, J.)**

...

halwai/p.s.