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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 04.03.2015

\+ **ITA 134/2014, C.M. APPL.5666/2014**

JRD STOCK BROKERS (P) LTD. ……Appellant

Through: Sh. R.P. Garg, Advocate.

Versus

COMMISSIONER OF INCOME TAX-II ……Respondent

Through: Sh. Kamal Sawhney, Sr. Standing Counsel with Sh. Sanjay Kumar, Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. In this appeal, the assessee claims to be aggrieved by an order of the Income Tax Appellate Tribunal (ITAT) dated 18.07.2008 in IT(SS) A. No.236/Del/2006. The question of law urged is:

> *"Whether in the circumstances of the case, the penalty under Section 158BFA(2) of the Income Tax Act, 1961 could be levied in respect of income which was not undisclosed income but was determined on the basis of estimation on the application of Weight Formula on gross credits in various bank statements considered as turnover?"*

2. The brief facts are that a search operation was carried on 24.11.2000 in the office of the appellant assessee and the residence of its Directors. The books of accounts, documents and other materials were seized. The assessee, when called upon to file the return, filed a NIL return for the relevant block period, on 11.10.2002. The Assessing Officer (AO) completed assessment under Section 158BC(c) at ₹8,90,36,597/- which comprised of *inter alia* undisclosed provisional income of ₹1,57,15,409/- arrived at by adopting a flat rate of 1.5% on the aggregate of all credit entries in the bank account statements of the assessee. Other than this amount, the AO also added sums of money on the basis of unexplained cash deposits and negative balances; the Commissioner of Income Tax (Appeals) [hereafter referred to as "CIT(A)] directed the cancellation of the sums added on account of negative balances. However, the CIT(A) rejected the assessee's contentions with respect to addition of ₹1,57,15,409/-. The assessee had, in the original returns, declared the amounts to be derived on account of share trading transactions. The assessee's contentions were rejected because the AO and the CIT(A) found that in the statement recorded under Section 132(4) of the Income Tax Act, 1961 (hereafter referred to as "the Act"), the assessee had admitted that the said sum of ₹1,04,76,94,004/- was actually not entirely based on share transactions but was also based on accommodation entries. The assessee had stated in the returns that the commission received on the share transactions ranged between 0.25% and 0.5%. The CIT(A), however, found that there was material suggestive of receipt of commission of upto 1% even on the share transactions. In these circumstances, the estimated income added back by the AO on the basis of his assessment of the true income (on the business activity of providing accommodation entries which

the assessee was engaged in) was to the extent of 1.5% of the total turnover indicated.

3. The ITAT, in the appeal preferred by the assessee, upheld the substantive decisions of the AO and the CIT(A) [in IT(SS)A No.54/Del/2004 dated 30.11.2004]. However, the ITAT directed rejection of the 1.5% turnover of commission attributed by the AO – and upheld by the CIT(A) in the following terms:

> *"10. As far as application of rate of 1.5% to the turnover was concerned, the learned CIT(A) referred to seized documents – pages 6 to 8 of Annexure A-40 and pages 1 to 16 of Annexure A-2 which showed that commission of 1% to 1.25% was charged whereas the same was shown between 0.05% to 0.1% in the accommodation bills as per books of accounts. The balance commission was settled outside the books of accounts and received in cash. After considering facts and circumstances of the case, the learned CIT(A) observed that the AO in this case after giving due consideration to assessee's submissions and information available as per seized record and gathered during the course of search, was justified in applying rate of 1.5% to compute commission earned by the assessee in the block period. Accordingly, addition of Rs.1,57,15,409/- was upheld.*
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> *18. We now face the question as to what should be reasonable rate of commission in this case having regard to material available on record. The assessee did not dispute that quantum of turnover for providing the accommodation entries to various clients during the year as computed by the AO at Rs.1,04,76,94,004/- is not correct. The commission stated to have been charged and admitted by the assessee ranged from .25% to .5%. The rate as evident from the seized material which has been referred to by the lower authorities, does reflect that the assessee had charged a rate as high as 1%. As against this, the revenue*

authorities have applied @ 1.5% to the entire turnover irrespective of the nature of entries whether long term, short term gain etc. It is also note worthy that the gross rate of commission charged by the assessee can also not be said to be profit exigible to tax. The credit for the expenses incurred in running the business is also required to be considered while estimating the income from business of providing accommodation entries. The total turnover also includes some genuine transactions carried on by the assessee on which rate of commission was admittedly much lower ranging between 0.25% to 0.50%. Therefore, having regard to the entire gamut of facts, circumstances and material which is available on record, there does not appear to be justifiable reasons to estimate the commission/brokerage of the assessee by applying rate of 1.5% of the total turnover. In our view it would be in the fitness of the things that the income earned by the assessee by way of commission/brokerage on the turnover including accommodation entries provided to its clients is computed @ .6% on the total turnover of Rs.1,04,76,94,004/- on which there is no dispute. We accordingly direct the AO to compute income on count of commission/brokerage."

4. The AO had, in the meanwhile initiated penalty proceedings under Section 158BFA(2) of the Act which culminated in the order dated 29.06.2005. The AO directed payment of ₹15,34,375/-. The assessee's appeal to the CIT(A) was not successful. In the meanwhile, it is worth mentioning that the assessee had not appealed against the ITAT's order finally determining the income @ 0.6% of ₹1,04,76,94,004/-. Therefore, the matter became final. In these circumstances, when the ITAT was approached in the present round of issue of penalty, it rejected the assessee's contentions.

5. Learned counsel for the assessee urges that the ITAT fell into error. It was submitted that the trigger for a penal action under Section 158BFA(2) is if in the course of a search, some material is found. Placing emphasis on

Section 158BB, especially, the phrase, "undisclosed income found", learned counsel submitted that the pre-condition for imposition of penalty under Section 158BFA(2) is that the "undisclosed income" determined by the AO is necessarily linked with the undisclosed income found – which in turn is based on some material. Arguing that in the present instance, the assessee had concededly declared a sum of ₹1,04,76,94,004/- in the books of accounts, learned counsel highlighted that in the circumstances, the penalty could not have been imposed. It was argued in this context that any income determined in the course of block assessment proceedings must necessarily relate to that adjudicated upon and must be based on objective material found. In other words, it cannot be based on an estimation or a voluntary act of the assessee such as surrender. To say so, learned counsel relied upon two judgments of the Rajasthan High Court, i.e. *CIT v. Satyendra Kumar Dosi* 2009 (222) CTR 258 (Raj) and *CIT v. Dr. Giriraj Agarwal Giri* 2013 (33) Taxman 536 (Jaipur). Learned counsel also relied upon the judgment of a Division Bench of this Court in *CIT v. Harkaran Das Ved Pal* 2009 (177) Taxman 398 (Del). In *Satyendra Kumar Dosi (supra)*, the Rajasthan High Court held that Section 158BFA(2) textually empowers the AO to levy penalty on the undisclosed income determined by him but that the power does not extend to imposing penalty in the cases excluded in the first proviso. Thereafter, the Court observed as follows:

> *11. The contention raised by the learned counsel on the strength of the provisions of Sections 273B and 158BFA(3) is also devoid of any merit. Of course, as per the provision of Section 273B no penalty shall be imposable on the persons or the assessee as the case may be, on their failure referred to in the said provisions if he proves that there was reasonable cause for*

the said failure. But then, the said provision in no manner leads to the presumption that in respect of the cases other than covered by Section 273B for any failure or violation imposition of the penalty is automatic. Each provision of penalty has to be construed independently keeping in view the language employed therein.

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13. Moreover, in the instant case, after due examination of the facts and the material on record, the CIT(A) and learned Tribunal have concurrently found that the difference of the undisclosed income assessed and the undisclosed income shown in the return does not relate to the block period as such. The Tribunal has arrived at the finding that the assessees had claimed to give reduction of amounts calculated on reasonable basis on account of their opening capital as on 1st April, 1995 from the unaccounted money-lending business prior to block period out of the undisclosed income determined in their hands. The learned Tribunal has rightly held that the addition is result of estimation of the opening capital involved prior to the block period and in the block assessments while computing the undisclosed income for the block period, capital possessed by the assessees prior to the block period as revealed from the ledger and the material seized during the search could not be treated as undisclosed income of the first assessment year in the block period. Thus, in view of the concurrent finding of fact arrived at by the two appellate authorities, as aforesaid, in our considered opinion, no substantial question of law arises for consideration of this Court in these appeals.

In the result, the appeals fail, the same are hereby dismissed. No order as to costs."

6. The same High Court later in *Giriraj (supra)* echoed the same view as follows:

"9.....A fact or allegation based on estimation, cannot be said to be correct only, it can be incorrect also.

Therefore, in the facts and circumstances of the case, penalty was wrongly imposed by the Assessing Officer. In these circumstances, we find that the judgment of the hon'ble apex court, referred to by the learned counsel for the appellant, is not applicable, in the facts and circumstances of the present case."

7. *Harkaran (supra)* was a case that concerned itself with whether on facts the assessee had, during the course of the proceedings after the survey under Section 132 of the Act surrendered the amounts which were ultimately brought to tax. The Court relied upon various rulings to say that the proceedings under Chapter XIV-B were special in nature and rather constituted a complete code and that in the circumstances, the surrender of amounts would not *ipso facto* lead to the inference that the amounts were determined by the AO pursuant to material seized in the course of search.

8. Section 158BFA(2) reads as follows:

"[Levy of interest and penalty in certain cases.

158BFA. (1) XXXXXX XXXXXX

(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. The plain terms of the provision – which *Harkaran (supra)* emphasised occur in a separate part of the Income Tax Act. Chapter XIV-B entitled *"Special procedure for assessment of search cases"* nowhere indicates that an estimation of income tax logically based upon inference drawn in the case of block assessment procedure is *per se* excludable from the ambit of the penal provision. The plain text of the enactment says that the AO has the discretion to levy penalty, *"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*"*. In the present instance, there is no doubt at all that the AO did determine the undisclosed income; that it was based upon estimation or an inference is a matter of detail. The plain text of the enactment admits no room for doubt that all manners of determination of income, *per se* might call for action at the discretion of the AO. As to whether the AO has properly exercised

discretion in a particular matter or otherwise can certainly be subject to further scrutiny. The plain text of enactment, however, does not admit of the interpretation which was favoured by the two Rajasthan High Court judgments cited by the assessee. The assessee's argument that there was no fresh material since the entire amount was disclosed earlier and that amount has not been varied, in our opinion, is not accurate. The sum of ₹1,04,76,94,004/- was claimed in entirety (originally) to have been derived from share business. However, it did not exclusively stem from the share business and in fact the assessee admitted, in the course of search proceedings under Section 132(4) of the Act, that the said amount also included sums forming part of the turnover on account of providing accommodation entries. Now, that radically changed the complexion of the nature of declaration made and certainly formed the basis for materials discovered during the course of proceedings. Furthermore, having regard to this admission, the AO, most importantly, was entitled to determine: having regard to the nature of commission originally declared, whether that was in line with the new activity disclosed. It is a matter of record – noted by the CIT(A) in the quantum proceedings that the commission ranged upto 1%. Having regard to the conspectus of circumstances, therefore, the AO determined the commission to be 1.5% on the said total turnover; the ITAT decreased it. Nonetheless, the important fact is that the determination in the course of block assessment order was based upon a material discovered, i.e. in the form of statement made by the assessee under Section 132(4) of the Act; that radically changed the character of the income originally declared. Consequently, the estimation directed by the ITAT was accepted by the assessee.

10. In view of the above circumstances, this Court is of the opinion that the question of law urged has to be answered against the assessee and in favour of the Revenue. The appeal is consequently dismissed along with the pending application.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

MARCH 04, 2015