

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1215/PUN/2016
Block Period : 1987-88 to 1997-98

M/s. National Tempo House
407, Nana Peth,
Pune – 411002

.... अपीलार्थी/Appellant

PAN: AAAFN9703H

Vs.

The Jt. Commissioner of Income Tax (OSD),
Circle – 2, Pune

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by

: Shri Nikhil Pathak

प्रत्यर्थी की ओर से / Respondent by

: S/Shri Avadhesh Kumar and
Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 22.01.2019	घोषणा की तारीख / Date of Pronouncement: 24.01.2019
--	--

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against order of CIT(A)-2, Pune, dated 22.03.2016 relating to Block Period 1987-88 to 1997-98 against levy of penalty under section 158BFA(2) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following ground of appeal:-

1. *On the facts and circumstances of the case and in law the Hon. CIT(A) erred in confirming the order of the AO levying penalty of Rs.947484 u/s 158BFA(2) on the addition of Rs.1579140 sustained in assessment on account of undisclosed value of stocks on hand on 27.02.1997. The*

Hon CIT(A) and the AO failed to appreciate that the appellant had correctly declared undisclosed value of stocks in its return of income and that the addition made in the assessment is on account of varying estimates of gross profit adopted at the time of search and at the time of assessment. The appellant pleads that the levy of penalty is on the basis of an estimate and is not justified.

3. The issue raised in the present appeal is against levy of penalty under section 158BFA(2) of the Act.

4. Briefly, in the facts of the case, search under section 132 of the Act was conducted on 27.02.1997 and 28.02.1997 on the business premises of all the partners of assessee, Shri Krishanlal B. Nagpal, Shri Kashmirilal B. Nagpal, Shri Devendra B. Nagpal. Certain papers / documents / books of account were seized. Notice under section 158BC of the Act was issued to the assessee and the assessee furnished return of income for the block period showing undisclosed income of ₹ 47 lakhs. The assessee had bifurcated the said additional income for different years of the block period. The Assessing Officer noted that the assessee was a dealer in Automobile parts and Maruti Parts. The business of assessee partnership firm was carried out from various places in Pune. Search and Survey operations were carried out at the business premises of assessee. The assessee paid self assessment tax under section 140A of the Act on additional income of ₹ 23,30,000/- and it was requested that balance tax of ₹ 4,90,000/- be adjusted out of cash seized from the assessee during the course of search / survey. The said payment was made by Revenue Department. The Assessing Officer went through the seized documents and computed the valuation of stock as on the date of search / survey i.e. 28.02.1997 as undisclosed income of ₹ 42 lakhs. The Assessing Officer considered various aspects of stock valuation, the questions asked and GP rate being declared and vide para 13 of the order for the block assessment observed that profit declared by assessee @ 10.5% in the block return for

assessment years 1994-95 to 1997-98 was not correct as the same was not in consonance with the statement given by Shri K.B.N. under section 132(4) of the Act. The partner in the said statement had stated that the profit was in the range of 15% - 20%; therefore, the Assessing Officer applied profit rate of 18% and computed the income at ₹ 51,66,000/-. The Assessing Officer further allowed undisclosed expenditure out of the said profit and worked out the same at ₹ 67,93,946/- on the basis of *modus operandi* adopted by assessee. The Assessing Officer was of the view that the assessee has concealed investment in stock to the extent of ₹ 25,93,946/- i.e. ₹ 67,93,946/- (-) ₹ 42,00,000/- shown by the assessee as undisclosed income and the difference of ₹ 25,93,946/- was added in the hands of assessee in assessment year 1997-98. The JCIT, because of variation in the undisclosed income determined and the undisclosed income shown in the block return, initiated penalty proceedings under section 158BFA(2) of the Act. The JCIT further notes that since the assessee had appealed against the order of Assessing Officer before the CIT(A), penalty proceedings were kept in abeyance. Consequent to the order of CIT(A), undisclosed income of assessee worked out to ₹ 64,92,780/-. The assessee further preferred an appeal before the Pune Bench of Tribunal and the Tribunal in ITA No.561/PN/2000, relating to Block Assessment for the period 1987-88 to 1997-98, vide order dated 23.06.2006 had allowed assessee's appeal, consequent to which the undisclosed income worked out to ₹ 62,79,140/- as against ₹ 47 lakhs shown in the return of income. In response to the show cause notice issued for penalty proceedings, the plea of assessee was that variation in undisclosed income declared in the block return and as assessed, was due to the variation in gross profit percentage adopted by the Department at the time of search and in the block assessment. He stressed that the assessee had neither concealed nor furnished inaccurate particulars of income

in the block return and since levy of penalty under section 158BFA(2) of the Act was discretionary and the same may be dropped. The JCIT held that variation in undisclosed income assessed was on account of undisclosed stock found at the time of search. The stock inventory was taken during the course of search and it worked out to ₹ 95,60,548/- as against book stock of ₹ 27,66,602/- determined on the basis of sales and applying the GP rate, excess undisclosed stock was worked out at ₹ 67,93,946/-. In the statement recorded under section 132(4) of the Act, Shri Kashmirilal B. Nagpal (the main partner) had categorically admitted the correctness of the inventory taken and the value of excess undisclosed stock determined on the date of search. He further referred to the return of income filed in response to notice under section 158BC of the Act, wherein undisclosed income was ₹ 47 lakhs comprising of ₹ 42 lakhs on account of undisclosed stock and ₹ 5 lakhs of adhoc disclosure to cover peak credits, errors, omissions, etc. for the block period was offered. The details of undisclosed stock of ₹ 42 lakhs is reproduced under para 6.1 of penalty order. The JCIT further noted that there was difference of ₹ 25,93,946/- on account of undisclosed stock found on the date of search and undisclosed stock declared in block return and the Assessing Officer had made aforesaid addition of ₹ 25,93,946/- on account of undisclosed stock not disclosed in the block return treating the same as unexplained investment under section 69C of the Act. While making the aforesaid addition, the Assessing Officer further adopted GP rate of 10.5% in order to arrive at the value of closing stock on the date of search. However, the Tribunal had adopted the gross profit rate of 20% in order to arrive at the value of undisclosed stock on the date of search and confirmed the net addition of ₹ 15,79,136/- after reducing undisclosed stock of ₹ 42 / 47 lakhs admitted in block return. The contention of assessee before the JCIT was that the undisclosed income was determined on estimate basis and

where undisclosed income was merely estimated in excess of undisclosed income admitted in the block return, the levy of penalty under section 158BFA(2) of the Act was not justified. However, on verification of case records, the JCIT observed that value of closing stock was determined on the date of search based on actual sales and GP rate declared / admitted by the assessee. The physical inventory of stock was taken and same was confirmed by the main partner on the date of search. As on the date of search the value of closing stock as per books was found at ₹ 27,66,602/-, hence there was difference of ₹ 67,93,946/-. However, the assessee in the block return had only shown additional income of ₹ 42 lakhs on account of undisclosed stock and in appeal, the same was confirmed at ₹ 15,79,138/- due to adoption of 20% GP rate. He was of the view that in principle, the Tribunal had accepted the method adopted by the Assessing Officer for the purpose of valuation of closing stock as on the date of search but had adopted GP rate of 20% considering the facts and circumstances of the case. Hence, addition made in the hands of assessee was not on the basis of estimation but was determined on the basis of recorded statements, seized documents and applying the accounting principles.

5. Another point which was noted was the recorded statement of the main partner of assessee, wherein he had admitted that business was carried on with GP rate varying 15% - 20% of the turnover and on the basis of GP rate as on the date of search stock should have been worked out by the assessee. However, it was not so worked out. Considering the facts and circumstances, the JCIT held that penalty was clearly attracted on the excess portion of undisclosed income of ₹ 15,79,140/- and he imposed penalty of ₹ 9,47,484/-.

6. The CIT(A) upheld the levy of penalty in turn, relying on the ratio laid down by the Hon'ble High Court of Gujarat in *Kandoi Bhogilal Mulchand Vs. DCIT (2012) 341 ITR 271 (Guj)*.

7. The assessee is in appeal against the order of CIT(A).

8. The learned Authorized Representative for the assessee after taking us through the facts of case, pointed out that the Assessing Officer had made addition of ₹ 67 lakhs and had also taxed GP rate on undisclosed sales at 18%. However, the Tribunal had restricted the addition to ₹ 15,79,138/- by applying GP rate of 20%. The learned Authorized Representative for the assessee stressed that it is case of addition on the basis of estimation and where the levy of penalty under section 158BFA(2) of the Act was discretionary, then the authorities below had the authority to drop penalty proceedings. In this regard, first reliance was placed on the decision of the Hon'ble Bombay High Court in *CIT Vs. Dodsai Ltd. (2009) 312 ITR 112 (Bom)*. He then, placed reliance on the decision of the Hon'ble High Court of Rajasthan in *CIT Vs. Dr. Giriraj Agarwal Giri (2012) 346 ITR 152 (Raj)*, which was case of block assessment, wherein the addition was made on the basis of estimation and the Hon'ble High Court held that in such cases, no penalty is to be imposed under section 158BFA(2) of the Act. He further referred to the decision of Pune Bench of Tribunal in *ACIT Vs. Shri Chandrakant Kashinath Kele* in ITA No.804/PN/2013, relating to Block Period 1990-91 to 2000-01, order dated 13.03.2015, which was also case of block assessment, wherein the addition was made on account of unexplained investment in house property and unexplained marriage expenditure which was determined on the basis of estimation. The Tribunal had held that where the addition has been made on the basis of estimation and then it went on to say that no penalty is to be levied on such addition based on

estimate basis. The learned Authorized Representative for the assessee pointed out that the CIT(A) had relied on the decision of Hon'ble High Court of Gujarat in Kandoi Bhogilal Mulchand Vs. DCIT (supra), wherein the addition was confirmed not on estimate basis.

9. The learned Departmental Representative for the Revenue on the other hand, pointed out that the basis for making addition in the hands of assessee was stock found during the course of search / survey. So, the basis was the evidence found during the course of search. He then, referred to the decision of the Hon'ble Bombay High Court in CIT Vs. Dodsall Ltd. (supra) relied upon by the learned Authorized Representative for the assessee, which laid down the proposition that levy of penalty under section 158BFA(2) of the Act was discretionary. He pointed out that the Hon'ble High Court of Gujarat in Kandoi Bhogilal Mulchand Vs. DCIT (supra) relied upon by the CIT(A) on the other hand states that the discretion was not correctly exercised. With regard to reliance on the decision of the Hon'ble High Court of Rajasthan in CIT Vs. Dr. Giriraj Agarwal Giri (supra), he pointed out that it was purely on the basis of estimation and no evidence was found during the course of search.

10. We have heard the rival contentions and perused the record. The issue raised in the present appeal is against levy of penalty under section 158BFA(2) of the Act. After search and seizure operations on the premises of assessee firm and its partners, certain unaccounted stock was found and the assessee made declaration on account of undisclosed stock. The said declaration made by the assessee was honoured by way of including the same in the return of income filed for the block period. The taxes on the additional income were paid by the assessee. In addition to the value of undisclosed stock, linked addition was made on account of GP rate on the said stock to be applied. The Tribunal

had directed that GP rate of 20% be applied in turn, confirming the net addition of ₹ 15,79,136/-. The Revenue authorities had initiated penalty proceedings under section 158BFA(2) of the Act. It may be pointed out herein itself that no penalty has been levied on account of value of additional stock declared. However, penalty under section 158BFA(2) of the Act is restricted on the estimated gross profit applied to the value of undisclosed stock declared. The addition has been confirmed in the hands of assessee, thus on account of two aspects i.e. first, the value of undisclosed stock found from the premises of assessee and gross profit on the aforesaid stock by applying GP rate.

11. The question which arises before us is whether the aforesaid addition which has been made in the hands of assessee is exigible to levy of penalty under section 158BFA(2) of the Act. In respect of evidence found during the course of search in the hands of assessee the addition has been made being the value of undisclosed stock and no penalty on the said addition has been levied in the hands of assessee. However, the gross profit rate which has been applied on such stock is independent of evidence found during the course of search and though addition has been made in the hands of assessee on such account but the said addition is purely estimated addition, which is further strengthened by the fact that starting from Assessing Officer, CIT(A) and the Tribunal, various GP rates have been applied to estimate the aforesaid addition. In case, any evidence was found during the course of search, then where is the need to estimate the same? In such circumstances, we find no merit in the orders of authorities below that the addition is based on material found during the course of search. Undoubtedly, there was some material found during the course of search and additional income on that account was offered by the assessee and the same has been accepted by the Revenue Department but on that account, no penalty has been levied, since the

conditions of section 158BFA(2) of the Act are not attracted. Further, on the estimated income, we find no merit in levying penalty under section 158BFA(2) of the Act. In this regard, we find support from the ratio laid down by the Hon'ble High Court of Rajasthan in CIT Vs. Dr. Giriraj Agarwal Giri (supra). The Hon'ble Bombay High Court in CIT Vs. Dodsai Ltd. (supra) has also laid down the proposition that levy of penalty under section 158BFA(2) of the Act is discretionary and not mandatory. In view thereof, we direct the Assessing Officer to delete penalty levied under section 158BFA(2) of the Act. The ground of appeal raised by the assessee is thus, allowed.

12. In the result, the appeal of assessee is allowed.

Order pronounced on this 24th day of January, 2019.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 24th January, 2019.
GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-2, Pune;
4. The Pr.CIT-2, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune