IN THE INCOME TAX APPELLATE TRIBUNAL
Pune Bench A, Pune

Before Shri I.C. Sudhir, Judicial Member
and Shri G.S. Pannu, Accountant Member

I.T.A. No. 934/PN/2010
Block period : 1-4-1990 to 14-2-2001

Sanjay Rathod
660 Raviwar Peth,
Pune-411 002
PAN AAZPR 9209 H — Appellant

Vs.

Dy. CIT Cir. 5, Pune — Respondent

Appellant by: Shri Nilesh Khandelwal
Respondent by: Shri A.S. Singh

ORDER

PER G.S. PANNU, AM

This appeal by the assessee is directed against the order of CIT(A)-III Pune dated 3-3-2010 pertaining to block period from 1-4-1990 to 14-2-2001, which in turn arises from the order passed u/s 158BFA(2) of the Income-tax Act, 1961 (hereinafter referred to as "the Act" for short) by the A.O on 24-1-2007.

2. In this appeal, the assessee has raised two grounds of appeal. In so far as ground of appeal No. 1 relating to the order of penalty u/s 158BFA(2) of the Act being time barred is concerned, the same has not been pressed at the time of hearing and is accordingly dismissed.

3. The second ground of appeal raised by the assessee reads as under:

> "Without prejudice to ground no. 1, on facts and circumstances prevailing in the case and as per provisions of law, it be held that the penalty of Rs. 1,87,434/- imposed by the A.O in terms of sec.

158BFA(2) on the quantum of Rs. 3,12,390/- and upheld by the first appellate authority is unjustified, unwarranted and contrary to the provisions of law and facts prevailing in the case. It further be held that no penalty is imposable in the case of the appellant in terms of provisions of sec. 158BFA(2) of the Act. The penalty imposed by the A.O be deleted. Just and proper relief be granted to the appellant in this respect."

4. In this case, consequent upon search action on the assessee on 14-2-2001 block assessment u/s 158BC of the Act was finalized wherein the undisclosed income for the block period was determined at Rs. 5,29,880/- as against the undisclosed income returned by the assessee at Rs. 92,000/-. The additions made were the subject matter of appeal proceedings and ultimately the Tribunal disposed off the appeals of the assessee as well as of the Revenue vide ITA No. 859/PN/2003 and 928/PN/2004 on 16-7-2004 and 25-5-2006 respectively. Subsequently, the A.O vide order dated 24-1-2007 has imposed penalty u/s 158BFA(2) of the Act of a sum of Rs. 1,87,434/-. The said penalty has been imposed on the difference in the amount of undisclosed income disclosed by the assessee and finally assessed by the A.O.

5. In the above background, the first and foremost plea of the assessee is that the penalty has been levied on the quantum of income which has been partly deleted by the Tribunal and in that regard, the addition was invited to an order of the Tribunal dated 16-7-2004 (supra). It is pointed out that the addition of Rs. 1,93,550/- which was made by way of enhancement by the CIT(A) has since been deleted by the Tribunal vide its order dated 16-7-2004 (supra) whereas the A.O while considering the finally determined undisclosed income has considered the same as inclusive of the said sum of Rs. 1,93,550/-. As per the appellant, if the

said modification is made the only difference remaining between the assessed income and the returned income would be Rs. 1,18,550/-. On this aspect, the learned DR fairly consented to the factual matrix brought out by the learned counsel for the appellant and accordingly, we proceed on that basis. Even with regard to the penalty imposed for the balance of income, the plea set up by the assessee is that the lower authorities have imposed a penalty on wrong consideration, inasmuch as the penalty has been levied merely because the finally assessed undisclosed income is higher than the undisclosed income returned by the assessee. In this connection, reliance has been placed on the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Dodsal Ltd. (2009) 312 ITR 112 (Bom) to contend that the penalty u/s 158BFA(2) of the Act is not mandatory or automatic. It is further pointed out that in this case, the assessee had duly evaluated and determined the undisclosed income on account of investment made in pawned ornaments at Rs. 75,000/- whereas A.O has determined the same at Rs. 1,93,550/-, resulting in the difference of Rs. 1,18,550/-. The assessee had explained that the balance investment pertaining to the pawned ornament was available and the same was supported by cash flow and withdrawals from the bank. However, the said explanation has been rejected ultimately. However, the same does not partake the character of any deliberate concealment on the part of the assessee and therefore, according to the learned counsel, there was no justification to impose penalty u/s 158BFA(2) of the Act.

7. On the other hand, the learned DR appearing for the Revenue, has defended the orders of lower authorities by pointing out that higher assessment of undisclosed income than the undisclosed income declared in the return by the assessee is exigible to penalty u/s 158BFA(2) of the Act inasmuch it is only on account of search that such assessment has been made.

8. We have carefully considered the rival submissions. Ostensibly this is a case where penalty has been levied merely for the reason that undisclosed income assessed is higher than the undisclosed income stated by the assessee in his return of income. It is quite clear in terms of the judgment of Hon'ble Bombay High Court in the case of Dodsal Ltd (supra) that the imposition of penalty u/s 158BFA(2) is not mandatory or automatic and is indeed discretionary in nature. In terms thereof, it would suffice to say that the penalty is not imposable merely because the undisclosed income has been assessed at a figure higher than the undisclosed income disclosed in the return of income. In the present case, we find that the difference in returned income and the assessed income is primarily because of non-accepting of explanation furnished by the assessee and is not a case where the explanation has been found to be false or otherwise fanciful. Considering the aforesaid, we are of the view that no penalty u/s 158BFA(2) is maintainable in the present case. Accordingly, we set aside the order of the CIT(A) and direct the A.O to delete the penalty.

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

Decision pronounced in the open court on 16th February 2012.

Sd/-	sd/-
(I.C. Sudhir)	(G.S. Pannu)
Judicial Member	Accountant Member

Pune dated the 16th February 2012
Ankam
Copy of the order is forwarded to :

1. The Appellant
2. The Respondent
3. The CIT- III Pune
4. The CIT(A)-IV Pune
4. The D.R, 'A' Bench, Pune

By order

Senior Private Secretary

Income Tax Appellate Tribunal
Pune