IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'E' MUMBAI

IT(SS)A No.160/Mum/2007
Block Period: 1.4.90 to 23.3.2001

TRIUMPH INTERNATIONAL FINANCE INDIA LTD
OXFORD CENTRE, 10 SHORFF LANE
COLABA - CAUSEWAY, MUMBAI-400005
PAN NO:AAACE0308A

Vs

ASST COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE-40, MUMBAI

P M Jagtap, AM and Vijay Pal Rao, JM

Dated: June 30, 2011

Appellant Rep by: Shri Rajjiv Khandelwal
Respondent Rep by: Shri P Daniel/Spl.Counsel

ORDER

Per: Vijay Pal Rao:

This appeal filed by the assessee is directed against the order dated 7.11.2007 of the CIT(A) arising from the penalty levied u/s 158BFA(2) of the Act relating to block assessment.

2. The assessee has raised the following grounds in this appeal:

"i) The CIT(A) erred in confirming the action of the Assessing Officer in levying penalty of Rs. 672,45,00,000 u/s 158BFA of the Act.

ii) The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have confirmed the levy of the impugned penalty u/s 158BFA of the Act.

The appellants further contend that without prejudice to the above ground and on the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the quantum of penalty without any reference to corroborative evidences in the form of confirmations and circumstantial evidences filed before the Assessing Officer."

3. The assessee company is a Member of Bombay Stock Exchange in the relevant assessment year and was engaged in the business of share broking and share

trading. A search and seizure action u/s 132 was carried out in Ketan Parekh Group of cases being involved in the security scam during 2001.

3.1 During the course of search, 12 CDs ROM taken from the computer and server were found, which contained accountings and trading data of Triumph Securities Ltd., and the assessee. Consequent to the search and seizure action, the assessee filed return of undisclosed income at Rs.nil on 29.10.2001. On the basis of data in the CDs Rom and on the basis of further evidences gathered by the Assessing Officer, it was found that in some of the transactions, the client code as shown in the Stock Exchange record at the time of striking the trade was different from the client code shown in the books of account of the assessee. Thus, the identity of the client, who allegedly undertaken the transaction through the assessee, became subject matter of further investigation. The matter was referred for audit u/s 142(2A) of the IT Act. The Assessing Officer noted that the Special Auditor has made certain observations that the approximately 50% to 55% of transitions, which shows variations vis-a-vis BSE and books on record regarding mismatching of clients ID code. The assessment was completed u/s 158BC w.r.s 143(3) on 26.9.2003 determining the undisclosed income at Rs. 9,91,79,95,660/-.

3.2 Against the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) vide his order dated 29.3.2004 has confirmed the assessment order. The assessee further filed appeal against the order of the CIT(A) before the Tribunal, which was dismissed by the Tribunal vide order dated 7.7.1005. Penalty proceedings were also initiated u/s 158BFA(2) and penalty of Rs. 672,45,00,000/- was levied vide order dated 7.3.2006.

3.3 The assessee challenged the levy of penalty before the CIT(A). the CIT(A) upheld the levy of penalty by observing that the assessment order has been upheld both by the CIT(A) and the Tribunal; therefore, he did not find any infirmity in the penalty order and held that penalty order is quite in consonance with the provisions of the Act.

4. Before us, the ld AR has submitted that the assessee has filed an appeal before the Hon'ble Bombay High Court against the order of the Tribunal and the appeal of the assessee has been admitted by the Hon'ble High Court; therefore, the addition made on the basis of mismatch of the client ID in the block assessment is a debatable issue pending adjudication before the jurisdictional High court. The ld AR then, submitted that when the issue of addition made by the Assessing Officer being undisclosed income is a debatable issue and two views are possible; therefore, in such circumstances, the penalty cannot be imposed and sustainable under the provisions of law.

4.1 It was further submitted that in the case of preponderance of probabilities concealment penalty cannot be levied. It was submitted that the order in the case of the assessee, in quantum has been doubted by the Hon'ble Divisional bench in the case of *Triumph Securities Ltd in ITA No.IT (SS) 444/Mum/04*and after referring to the decision of the Tribunal in the assessee's case for Assessment Year 1999-00 on the issue of, client ID mismatch, referred the matter to the President to constitute a Special bench because of inconsistent view is taken in the case of the assessee's block assessment. As such, special Bench has been constituted in the case of Triumph Securities Ltd., due to different opinions expressed on same facts. Thus, penalty, u/s 158BFA cannot be levied. He relied on the decision of the Tribunal, in

the case of *Maersk India P Ltd, in ITA No.1883/Mum/2006* and submitted that the Tribunal has held that concealment penalty cannot be levied on an addition, which is referred for decision of special bench. It was further submitted that the Bombay High Court has admitted the substantial questions of law in the case of the assessee on the additions made in the block assessment. Thus, it was submitted that the order of the Tribunal in upholding the additions in block assessment is not free from doubt and hence, penalty u/s 158BFA cannot be levied. Accordingly, the ld AR has submitted that when the issue of addition made in the block assessment is a debatable issue and not attained the finality then penalty cannot be levied on such an addition, which was a subject matter of the Special Bench.

5. On merit, the ld AR of the assessee has submitted that on the date of search, returns of income for Assessment Year 1998-99, 99-00 and 2000-01 were on record of the Assessing Officer. The issue of client ID is common to all the aforesaid years. However, the Assessing Officer has made addition on account of client ID mismatch in Assessment Year 1998-99 and 1999-00 in regular assessment whereas similar addition relating to AYs 2000-01 and 2001-02 have been made in block assessment. There is no difference in the facts for the aforesaid relevant 4 years but the approach of the Assessing Officer is different in the regular assessment i.e AYs 1998-99 and 1999-00 and for the block assessment for AYs 2000-01 and 2001-02. It was contended that the department should clarify this approach or else the addition for AYs 2000-01 and 2001-02 could not have been made in block assessment. It was contended that when a decision once taken in AY 1998-99 applied in AY 1999-00 by the Assessing Officer, then he should have gone to logical extent and should have been applied to rest of the years as well i.e. AYs 2001-02 and 2001-02. It was submitted that punching of client ID was not compulsory during the previous years' relevant to and upto assessment year 2001-02. It was submitted that when punching of client ID itself was not compulsory; there can be no question of a mismatch, if the client ID is not punched. Thus, to the extent that the report of the Special Auditors deals with details of transactions having client ID mismatch is of no relevance. However, in any view of the matter, the assessees have given detailed reasons for occurrence of mismatch.

5.1 It was submitted that it is crystal clear that the undisclosed income should be on the basis of evidence found as a result of search. In the case on hand, it is seen that the search party has taken 12 CDs containing accounting and trading data of Triumph International Finance India ltd for AYs 1999-2000 and 2000-01, which contain accounting data for the years inter alia AYs 1998-99 to 2001-02. Thus, as a result of search, no incriminating material was found which would suggest or reveal that there is undisclosed income. The CDs contain regular books of account. The department has also not found any unaccounted cash or undisclosed bank account or shares or any other investments. Further, it would be seen that undisclosed income can also be on the basis of such other materials or information as are available with the Assessing Officer, provided the same are relatable to 'such' evidence; ' such' means evidence found during search. Thus, there has to be live link or direct nexus between the details gathered during the course of search i.e. the data in CDs and further evidences gathered post search i.e. data collected from the stock exchange on the basis of evidence found that pointed at client ID mismatch. That is, what is the evidence that prompted instigated the Assessing Officer to call for such information from the stock exchange. The result of accounting data in the CDs are reflected in the audited accounts and the same are subject matter of regular assessment and hence, cannot be considered in block assessment. The fact of mismatch was within the knowledge of the Assessing Officer and the same cannot be

said to emanate as a result of search. The AO has brought to tax brokerage earned by the assessee on the said transactions which have been considered as undisclosed income. Thus, the stand of the Assessing Officer is inconsistent in as much as on one hand he brings to tax the transactions for which confirmation is not available as the assessee's own transactions and on the other hand taxes the brokerage on such transactions.

5.2 Out of total purchase turnover of Rs.11,716.54 crores in AY 2000-01, the Assessing Officer has made an addition of Rs. 288.56 crores which is just 2.46% of the total purchase turnover. Out of this addition, after considering the confirmation filed with the CIT(A)/Tribunal and other evidences, the assessee do not have confirmations for transaction of approximately Rs. 2.80 crores which is 0.02% of the total purchase turnover.

5.3 Similarly, out of total purchase turnover of Rs. 30,460.30 crores in AY 2001-02, the Assessing Officer has made an addition of Rs. 397.31 crores which is just 1.30% of the total purchase turnover. Out of this addition, after considering the confirmation filed with the CIT(A)/Tribunal and other evidences, the assessee do not have confirmation for transactions of approximately Rs. 38.62 crores which is 0.13% of the total purchase turnover. Hence, it was submitted that it is humanly not possible to furnish the confirmation in respect of 100% transactions.

5.4 Further, it was submitted that the addition has been made on assumptions, presumptions, surmises and conjectures as the Assessing Officer has started, without proving that the transactions are of the assessee and the CIT(A) has confirmed the impugned addition without considering the confirmations and circumstantial evidences filed with him in respect of clients whose conformations could not be obtained during the course of assessment proceedings. The Assessing Officer has levied penalty on tax including surcharge. The assessee, without prejudice to the contentions above submitted that penalty can be levied only on the tax calculated on undisclosed income.

5.5 It was further submitted that penalty proceedings in sec. 158BFA(2) are akin to the main clause of section 271(1)(c). As per the principles laid down in sec. 271(1)(c) applicable and the Assessing Officer has to show that assessee has conceded the particulars of undisclosed income or material facts and also to show that the explanation furnished by the assessee is not bonafide or satisfactory; hence, the burden is on the department to prove factum of concealment. It was further submitted that that an assessment cannot be framed in block was based on the law then prevailing with the attending fact that no incriminating documents found during search and that only regular books of account found on search. It was submitted that the entire addition has been made only for the reason that the confirmations from clients could not be furnished in respect of transactions carried out by the assessee as a broker or where the conformations received from the clients were considered incomplete by the Assessing Officer as the PAN not mentioned. It was submitted that the Assessing Officer has failed to prove that there was conscious or deliberate concealment of income or furnishing of inaccurate particulars of income. He relied on the decision reported in *106 TTJ 89(Kol)* and the decision of the Tribunal reported in *100 ITD 510 (Mum)* wherein it has been held that the element of concealment of particulars of income or income is not condition precedent for levy of penalty u/s 158BFA(2) because income for the block period is to be determined on the basis of seized material which is already in the possession of the department. The assessee

has to explain as to why it was not able to compute the true undisclosed income from the seized material and why it failed to return the true undisclosed income.

5.6 It was contended that the assessee having filed the confirmation, discharge the burden of proving the asessee's explanation of client ID mismatch, thus, the penalty need to be deleted. He relied on the decision reported in *10 TTJ 1143 (Ahd)*. It was contended that all the entries were entered in the regular books of account and no contrary evidence have been collected by the revenue during the search and hence the matter is beyond the ambit of Chapter XIV-B. He relied on the decision reported in *95 ITD 1 (Mum)(TM)*.

5.7 Further, it was submitted that the difference between undisclosed income assessed and returned is not result of intentional concealment and also not on the basis of incriminating documents found during the course of seizure but only for non furnishing of confirmations. Thus, the addition is not on the basis of some independent material found but on the basis of formula; hence this addition is akin to addition on estimate basis.

5.8 On the other hand, the ld DR has submitted that the assessee had 23 group of companies and mastermind of security scam of 2001 by using funds of corporate houses and banks. The addition of undisclosed income is based on material found and seized during the course of search. The CDs in question were taken from the computer of the assessee which lead to the information for unearthing the undisclosed income. The ld DR has further contended that the quantum has been confirmed by the Tribunal. Moreover, the issue whether the undisclosed income can be assessed in the block assessment has been considered and decided by the Special bench of the Tribunal in the case of the assessee's sister concern in *IT(SS) no. 444/Mum/2004* vide its decision dated 7.4.2010. The Special Bench of the Tribunal has held that the provisions of sec 69 of the Act is applicable to the extent of income not disclosed in the transaction recorded in the books of account; therefore, the same is assessable in the block assessment as undisclosed income. He has further contended that the CD taken from the computer records of the assessee during the search action is an incriminating evidence and showing undisclosed income.

5.9 As regards the similarity in section 271(1)(c) and 158BFA(2), the ld DR submitted that there is no pari materia between the two provisions. He relied upon the decision of the Lucknow Bench of the Tribunal in the case of *Shamil Industries P Ltd vs DCIT reported in 179 Taxman 30*. He further submitted that mere admission of the appeal by the High Court does not amount to expression of view that penalty should not levied. Since the assessee was involved in the circular trading by 23 group companies of the assessee and once the quantum has been decided against the assessee upto the stage of the Tribunal then the penalty is a natural consequence.

5.10 In rebuttal, the ld AR has submitted that security scam has no relevance in the addition of undisclosed income in the case in hand. The JPC is not investigating the case of taxation but for other offences; therefore, the allegation of security scam has no influence on the tax matter.

6. We have considered the rival contentions and relevant material on record. During the course of search, the data and information in the computer and server found in the premises of the assessee were taken in 12 CDs ROM. These data contain

accounting and trading of the assessee as well as the assessee's sister concern namely Triumph Security Ltd. On the basis of these data recorded in the CDs Rom and on the basis of further evidences gathered, it was found that in some of the transactions there were differences with regard to the identity of the parties/clients on whose behalf the transactions were allegedly undertaken and recorded in the books of account. Since there was a difference in the identity of the parties/clients as recorded in the books of account and client's code as per the Stock Exchange records, the matter was further investigated and subjected to audit u/s 142(2A) of the I T Act.

6.1 Finally, the block assessment was framed by making an addition u/s 69 of the I T Act. The addition made in the block assessment has been confirmed by the CIT(A) and on further appeal, the Tribunal has also upheld the action of the Assessing Officer as sell as the order of the CIT(A).

6.2 It is an undisputed proposition of law that, though the levy of penalty u/s 158BFA(2) is not automatic and mandatory; but the Assessing Officer has to take into consideration all relevant facts and circumstances and particularly whether the undisclosed income computed in the block assessment is based on the evidences/material found as a result of search or requisition of books of account or other documents and material or information available with the Assessing Officer and relatable to such evidences. It has to be taken into consideration whether the undisclosed income computed in the block assessment represents the income, which would not have been offered by the assessee or detected by the authorities, if the same was not detected in the search action or a result of evidence found in the search or consequent investigation on the basis of the material found during the course of search. Therefore, the Assessing Officer has to satisfy himself the existence of the circumstances which warrants levy of penalty u/s 158BFA(2). The proviso 1 & 2 to sub.sec 2 of sec 158BFA talks about some exception where no penalty can be imposed. For ready reference, we reproduce the provisions of sec. 158BFA(2) as under:

(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 taxed 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 section158BC;

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 art 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.

6.3 Sub. Section (2) of sec. 158BFA of the I T Act provides that the Assessing Officer or the CIT(A) in the course of proceedings under Chapter XIV-B may direct 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 taxed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer .

6.4 The first proviso to sec. sub.sec. (2) of sec. 158BFA refers certain circumstances being the exception in which no order of penalty shall be made. The second proviso to sub.sec 2 further restricts the applicability of the proviso (1) in case where undisclosed income determined by the Assessing Officer is excess of income shown in the return and in such cases, penalty shall be imposed on the portion of undisclosed income determined, which is in excess of the amount of undisclosed income shown in the return. Since the assessee's case does not even fall in the first proviso as the assessee disclosed nil undisclosed income in the return of income and therefore, exception provided in the first proviso would not be attracted in the case of the assessee. Once the case does not fall in the proviso to sub section 2 of section 158 BFA then, the Assessing Officer or the CIT(A), as the case may be is empowered to impose penalty on the person when the undisclosed income determined under clause (c) of sec. 158BC is in excess of the undisclosed income returned by the assessee in pursuant to the notice u/s 158BC/BD.

6.5 The term 'may direct' used in the sub.sec. (2) of sec. 158BFA gives discretion to the Assessing Officer or the CIT(A) to impose penalty, if the circumstances of the case so warranted.

6.6 The Tribunal while deciding the quantum appeal in IT(SS) 330/2004 has observed 6 under:

" 6. We have heard the rival submissions and are of the view that even it is assumed that the data found during the search was part of the books of account of the assessee but the real nature of the transactions recorded in the computers of the assessee aw the light of the day on the basis of the material fond during the search and follow up enquiry made by the Income Tax Authorities. We are also in agreement with the finding of the CIT(A) that the assessee has failed to explain satisfactorily the real nature of clients ID mismatch. The definition of undisclosed income as laid down in Section 158B(b) is an inclusive definition and as such, the ingredients of undisclosed income, need not to be limited to what is described in the definition but shall also include items which partake the character of income in terms of any item which was noticed or discovered as a result of search. In our view, the CIT(A) has rightly upheld the view of the Assessing Officer that the income arising out of the said ID mismatch is assessable as undisclosed income under Chapter XIV-B of the Income Tax Act.

7. The fact that the proceedings were initiated for assessment year 1998- 99 to refer the matter for special audit u/s 142(2A) on the basis of mismatch, does not mean that the true nature of these entries were also disclosed by the assessee. The real

nature of these entries i.e. ID mismatch entries were known after the material found during the search and inquires made thereafter. The income implications of the said ID mismatch entries have been rightly assessed as undisclosed income. The first ground of the assesse'es appeal is dismissed."

6.7 It is clear from the findings of the Tribunal that the real nature of transaction recorded in the computer of the assessee saw the light of the day on the basis of the material found during the course of search and follow-up enquiry made by the Income Tax Authorities. This fact of real nature of those entries i.e. ID mismatch entries, came in to the knowledge of Income Tax Authorities only after the material found in the search and enquires made thereafter. Therefore, but for the search action, the real nature of the entries would not have come to the knowledge of the income tax authorities, which ultimately led to the determination of the undisclosed income.

6.8 The issue is whether mere recording of the transaction in the books of account can be regarded as full disclosure of the assessee's true income came before the Special Bench of the Tribunal in the case of the assessee's sister concern *M/s Triumph Securities Ltd in ITA No.444/M/04* and the Special Bench of the Tribunal vide its decision dated 7.4.2010 has held that:

"42 As per section 158B(b), if an entry or transaction in the books of account represents wholly or partly income or property which has not been or would not have been disclosed then same comes within the purview of undisclosed income.

The term 'entry' has been defined in black's law dictionary as under:

"The act of making or entering a record, a setting down in writing of particulars, or that which is entered an item generally synonymous with recording"

The term 'transaction" has been defined in black's law dictionary as under:

"Act of transacting or conducting any business, negotiations; management proceedings; that which is done an affair. It may involve selling, leasing, borrowing, mortgaging or lending. Some action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned and by which the legal relations of such persons between themselves are altered. It is a broader term than contact."

It is pertinent to note that definition uses both the terms viz entry and transaction. The object is to cover all facts stated in the books of account. Mere recording of transaction in the books of account is of no consequence unless the true income has been disclosed If in the course of search any material is found, which, prima facie shows that the transaction recorded in the books of account does not disclose the assessee's income then on the basis of material found, inference is to be drawn about the true nature of the transaction, for determination of undisclosed income in block assessment. The material found during the course of search leads to a contrary inference than as contemplated u/s 132(4A) regarding the correctness of the entry in the books of account. However, if no material is found during the course of search then transaction in regular books cannot be the subject matter of block assessment.

43. Therefore, we conclude that if the material has been found during the course of search from which, it can be concluded that the transactions recorded in the books of account do not disclose the assessee's true income then such transactions are to be considered in the block assessment.

6.9 Further the issue of ID mismatch found during the course of search, constitute material as contemplated u/s 58BB(1) or not has also been considered and decided by the Special Bench of the Tribunal and held that the client ID mismatch found during the course of search and consequent enquiry carried out in that regard would be taken into consideration for block proceedings.

7. On the issue of applicable of provisions of sec. 69, the Special Bench of the Tribunal has held as under:

"We, accordingly, hold that the provisions of section 69 would be applicable to the extent of the income not disclosed in the transitions recorded in the books of account. It is pertinent to note that in section 69, unexplained investment has been defined with reference to the entre value of the investments not recorded in the books of account which is being treated as the income of the assessee of such financial year. Thus, it is primarily the income which has not been recorded in the books of account s of real consideration and the same, as noted earlier, has to be considered in the light of the provisions of block assessment."

7.1 Therefore, it is clear from the order of the Tribunal in assessee's own case in quantum proceedings as well as the decision of the Special Bench of the Tribunal that the determination of the undisclosed income u/s 158BC(c) strictly as per the provisions of Chapter XIV-B and based on the evidences found during the search and consequent enquiries and investigations.

8. As regards admission of the assssee's appeal by the jurisdictional High Court is concern, the undisclosed income determined in the case of the assessee is not as a result of disallowing any claim of the assesse because the same is not allowable as per the provisions of law but undisclosed income has been determined on the basis of the evidences found during the course of search, which has established the fact that the true nature of transactions have not been recorded by the assessee in the books of account and the same has resulted the undisclosed income. It is not the case where the assessee has claimed any expenditure, nature of income or exemption which has been denied by the tax authorities by applying the provisions of law; but it is a case where some facts were not at all presented by the assessee correctly and truly. Therefore, filing of appeal by the assessee before the jurisdictional High Court and admission of the same would not ipso-facto made out of a case of non levy of penalty. As per the provisions of sec. 158BFA and particularly sub sec.3 the penalty order can be passed within six months from the end of the month in which the order of the Commissioner (Appeal) or the Tribunal is received. Therefore, the authorities can wait up to the order of the CIT(A) or the Tribunal; but there is no such provisions or extension of time for waiting the outcome of the appeal filed before the jurisdictional High Court. Thus, filing of appeal before the jurisdictional High Court does not automatically make out of case in favour of the assessee until and unless the circumstance exists in the case does not warrant penalty at all. In any case if the assessee succeed in the appeal before the Hon'ble High Court, consequential effect would be given to penalty. In this view of the

matter, we do not see any error or illegality in the order of the lower authorities in imposing penalty u/s 158BFA(2).

9. In the result, the appeal filed by the assessee is dismissed.

(Order pronounced on the 30.6.2011.)