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* **HIGH COURT OF DELHI : NEW DELHI**

+ **ITA No.273/2005**

Judgment reserved on: July 13, 2006

% Judgment delivered on: September 07, 2006

COMMISSIONER OF INCOME TAX

Delhi - II, New Delhi

Through:

..... Appellant

Ms. Premlata Bansal, Adv.

versus

M/S JUPITER BUILDERS PVT. LTD.

1, Ram Kishore Road,

Civil Lines, Delhi

Through:

..... Respondent

Mr. Rakesh Gupta, Adv.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR

HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J.

1. This is an appeal under Section 260A of the Income Tax Act, 1961 (for short 'the Act') preferred by the Revenue against



the order dated 8.9.2004 passed by the Income Tax Appellate Tribunal (for short 'the Tribunal') in the case of the respondent in IT (SS) No. 26/Del/2001 for the Block period 1987-88 to 1997-1998 whereby the Tribunal has agreed with the Commissioner of Income Tax (Appeals) in deleting various additions made by the Assessing Officer.

2. The Assessee is in the business of dealing in real estate. A search operation under Section 132(1) of the Act was conducted at the residential and business premises of the Assessee on 21.2.1997. In response to a notice under Section 158 BC of the Act, the Assessee filed its return for the block period. The Assessing Officer passed an assessment order dated 31.3.1999 whereby the following amounts were added as concealed income in the assessment years mentioned against each of them:-

<u>AY</u>	<u>Concealed Income</u>
1993-94	Rs.4,00,000/-
1994-95	Rs.4,00,000/-
1995-96	Rs. 50,000/-
1997-98	Rs.28,92,000/-

3. The addition as concealed income of Rs. 4 lakhs made by the Assessing Officer in the assessment year 1993-1994 was



justified by him on the basis that the Assessee had claimed a sur of Rs. 4 lakhs towards project expenses as being the amount paid on 19.4.1992 to one Sh. K. L. Sehgal for vacating a tenanted portion. The Assessing Officer notes that the Assessee's reply to the notice under Section 158BC of the Act was silent on this payment. Consequently, the sum which was claimed as a revenue expenditure was disallowed and added back to the income of the Assessee.

4. In respect of the addition made as concealed income of Rs. 4 lakhs for the assessment year 1994-95, the Assessing Officer had justified the addition on the ground that one Sh. Anil Gupta and Sh. Q. R. Gupta the purchasers from the Assessee had agreed to make payment of Rs. 2 lakhs each to a tenant, Sh. Amitabh Bhattacharya for vacation of the tenancy premises. On enquiry it was found that the payments were in fact credited in the Assessee's account and the said amount of Rs. 4 lakhs was utilised by the Assessee for making payment to one Sh. Sukhbir Saran Aggarwal. The Assessing Officer held that the monies which were meant to be used as charges for getting the property vacated as per the sale deed had been used to square off past dues of the Assessee owed to Mr. Sukhbir Saran Aggarwal. The Assessing



Officer observed that there was no account of Sh. Amitabh
Bhattacharya in any of the years and that as a matter of fact the
said tenant, Sh. Amitabh Bhattacharya had vacated the premises
and Sh. Anil Gupta and Sh. Q.R. Gupta were in fact residing in the
properties purchased from the Assessee. He therefore, concluded
that a sum of Rs. 4 lakhs had been paid to Mr. Amitabh
Bhattacharya by the Assessee and the said payment was not
reflected in the books of account. He, therefore, treated the
amount of Rs. 4 lakhs as concealed income of the Assessee and
made addition as aforesaid.

5. In respect of the addition of Rs. 50,000/- made in
Assessment Year 1995-96, there is no justification recorded by the
Assessing Officer.

6. In the Assessment Year 1997-98, additions aggregating
to Rs. 28,92,000/- was made on three counts. Rs. 2,92,000/- out of
the amount of Rs.28,92,000/- was added as concealed income for
the reason that the Assessee had been asked to confirm the
brokerage claimed to have been paid to various parties. It was
stated that the asseeee had merely filed the PAN numbers of these
persons. He, therefore, concluded that the payment of brokerage
remained unconfirmed and therefore disallowed the same.



7. In relation to the second addition for the said assessment year, addition of an amount of Rs. 1 lakh was justified by the Assessing Officer on the ground that in the seized documents there was an entry showing that the Assessee had to receive a sum of Rs. 1 lakh from one D.S Imports. He held that D.S. Imports is an untraceable party and that the Assessee had been unable to produce or give confirmation of this party. Consequently the Assessing Officer proceeded to add a sum of Rs. 1 lakhs as concealed income.

8. The Assessing Officer made the third addition of Rs. 25 lakhs in the assessment year 1997-98 on the ground that valuation of the property of the Assessee was referred to the Valuation Officer. Despite notices and reminders the Assessee had deliberately delayed the valuation in not complying with the proceedings. The plea of the Assessee that he had sold the property and had no control over the same was not justified at least in respect of self occupied portion that is 328.5 sq.yds plus super structure built thereon. It was stated that the Assessee had delayed the valuation by stating that in the month of March the Valuation Officer was extremely busy. Under the circumstances the Assessing Officer proceeded to add a sum of Rs. 25 lakhs as an



investment in self occupied portion on an estimated basis in the assessment year 1997-98.

9. The Assessee appealed to the Commissioner of Income Tax (Appeals) [for short CIT (Appeals)] against the aforesaid additions made by the Assessing Officer in her order dated 31.3.1999. It was argued that there was no incriminating material found or detected during the course of search and, therefore, there was no concealed income as defined under Section 158B (b) of the Act. The Assessee also argued that the additions in the block assessment were illegal as the amounts/assets stood disclosed in regular books of accounts and were included in the Profit and Loss account and balance sheet filed along with the regular return of income and consequently the same items could not be covered by the notice issued under Section 158BC of the Act. It was argued that in the block assessment under Section 158BC, undisclosed income detected on the basis of material found during the course of search alone can be taxed. The Assessee placed reliance on the decision of Gujarat High Court reported in **N.R. Paper Board vs. DCIT (1999) 234 ITR 733**. It was also argued that block assessments are distinct from regular assessments and matters which can be examined under Section



143 (3) or Section 147 of the Act cannot be examined under Section 158BC or vice-versa. Reliance was also placed on the decision of the Kerala High Court in **Dr. C.Balakrishnan Nair & Another vs. CIT (1997) 237 ITR 71** and also that of the Gujarat High Court in **CIT vs. Shambhu Lal C Back Kariwala (2000) 108 Taxman 515 (Guj)** as well as the decision of the Delhi Bench of the Tribunal in the case of **Smt. Sheela Aggarwal vs. DCIT** in ITA No. 5602 and 5604 of 1996 dated 20.3.1998 to contend that only supporting evidence found during the search can justify the addition.

10. The CIT (Appeals) relying upon the aforesaid decisions of the High Courts and the Delhi Bench of the Tribunal observed that there was no overlapping of incomes in the nature of assessment made under Chapter XIV-B of the Act and regular assessment made under Section 143 (3)/144/147 of the Act, and that matters required to be examined under Section 143 (3)/147 cannot be examined under Section 158BC and vice-versa. Relying on the aforesaid decisions he also held that the Assessing Officer cannot reopen regularly concluded assessments and assess undisclosed income on account of credit entries which stood disclosed and accepted in the course of regular assessment



proceedings and no evidence was found during the search to prove those entries to be bogus. He thereafter proceeded to examine each of the additions made by the Assessing Officer to see whether they are connected/detected or found during the search and whether the additions can stand the test of classification as "undisclosed income" under Section 158B (b) for making assessment under Section 158BC of the Act.

11. In relation to the addition of Rs. 4 lakhs for the assessment year 1993-94 the Assessee stated that the said expense was debited to the Profit and Loss Account and accepted by the department in the regular assessment. The relevant evidence in the shape of balance sheet filed along with original return which was duly audited by the Chartered Accountant was also produced. The Assessee also produced the agreement entered into with the recipient Sh.K.L.Sehgal showing receipt of money and vacation of the tenanted portion. The CIT (Appeals) noticed that in the block assessment the Assessing Officer had not doubted the genuineness of the payment. Since the said expense was already reflected in the regular assessment proceedings the addition was held to be outside the purview of Section 158BC of the Act.

12. Similarly, in relation to the addition of Rs. 4 lakhs for



the assessment year 1994-95 the CIT (Appeals) found that the payments received by the Assessee from the buyers Sh. Kimat Roy Gupta (It is unclear whether the name is Kimat Roy Gupta or Qimat Rai Gupta) and Sh. Anil Gupta were entirely towards consideration for sale of property and that these receipts were shown by the Assessee in the regular assessment proceedings which were duly completed. The CIT (Appeals) also found upon verification that the payment made to Sh. Amitabh Bhattacharya for vacating the tenanted portion was duly reflected in the books of Sh. Kimat Roy Gupta and Sh. Anil Gupta and that the Assessee had nothing to do with the said payment.

13. The CIT (Appeals) held that no evidence having been found in the search to suggest that any amount had been paid by the Assessee to Sh. Amitabh Bhattacharya, the additions made by the Assessing Officer was based on presumption and surmise and it was outside the scope of "concealed income" as envisaged under Section 158B (b). Consequently, he deleted the said addition of Rs. 4 lakhs for the assessment year 1994-95.

14. In relation to the addition of Rs. 50,000/- for the assessment year 1995-96 the Assessing Officer conceded before the CIT (Appeals) that the said addition was made inadvertently



and consequently the same was deleted.

15. In relation to the addition made by disallowing the amount claimed as payment of brokerage of Rs. 2,92,000/-, it was argued by the Assessee that that said expense towards brokerage had already been considered during regular assessment proceedings for the assessment year 1996-97 and same had also been examined by the CIT (Appeals) during the regular appellate proceedings. It was also noticed that on the basis of the report called for by the CIT (Appeals), the Assessing Officer had found the expense to be genuine during the course of regular assessment proceedings. The CIT (Appeals) relied upon Explanation (a) and (b) to Section 158BA and held that in view of the said expense towards brokerage having been considered and allowed during the course of regular assessment proceedings, the same was outside the scope of Section 158BC. Consequently, the said addition was deleted.

16. In relation to the addition of Rs. 1 lakhs on account of payment receivable from M/s D.S. Imports, the CIT (Appeals) noted that the said addition had been confirmed in the case of one M/s Standard Brands in Appeal No. 338/98-99 dated 6.9.2000. Consequently, he deleted the addition in the hands of the



Assessee. However, the CIT (Appeals) reserved the right of the Assessing Officer to take appropriate action in the event of the amount of Rs. 1 lakh being deleted from the assessment of M/s Standard Brands in the course of further appeal in the case of the said Assessee.

17. In relation to the addition of Rs. 25 lakhs made towards the estimated cost of the self acquired portion of the property developed by the Assessee, the CIT (Appeals) held that there was no evidence found during the course of search indicating any unexplained investment in the said property. The Assessee stated that it had constructed one room and the investment in respect thereof was duly disclosed in the books of account for an amount of Rs. 4,12,879/-. In the absence of any material being found during the search, no addition could be made under Section 158BC towards unexplained investment in the property. The CIT (Appeals), however, held that the matter regarding reference to the valuation cell and unexplained investment, if any, can be considered in the regular assessment proceedings. He consequently deleted the addition of Rs. 25 lakhs for the assessment year 1997-98 without prejudice to any action that the Assessing Officer may take during any regular assessment



proceedings under Section 143(3)/144/147 of the Act.

18. Thus, the CIT (Appeals) decided the appeal in favour of the Assessee on 16.11.2000.

19. Against the order of the CIT (Appeals) dated 16.11.2000 the Revenue preferred an appeal before the Tribunal which has been dismissed by the impugned order.

20. The Tribunal agreed with the findings of the CIT (Appeals) in relation to the addition of Rs. 4 lakhs in the assessment year 1993-94. The Tribunal also held that since the payment stood duly disclosed in the regular books of account of the Assessee and the action under Section 132 did not reveal any evidence to show that the payment was not genuine or that it gave rise to undisclosed income of the Assessee, no addition could be made by the Assessing Officer merely because the Assessee has chosen to remain silent on the question of payment to Sh. K.L.Sehgal during the block assessment proceedings. The Tribunal held that mere silence on the part of the Assessee would not change the character of the payment so as to treat the same as "undisclosed income".

21. With regard to the addition of Rs. 4 lakhs in the assessment year 1994-95 the Tribunal relied upon the finding of



the CIT (Appeals) that the payment received by the Assessee from Sh. Anil Gupta and Sh. Q.R. Gupta was in terms of the sale deed and it was received by the Assessee in his own right. Moreover, no evidence was found as a result of search to show that the Assessee had made any payment to Sh. Amitabh Bhattacharya. The Tribunal held that there was no justification for the Assessing Officer to presume that payment of Rs. 4 lakhs had been made by the Assessee to Sh. Amitabh Bhattacharya. The same could not be treated as "undisclosed income" unless the Assessing Officer had established that the payment had in fact been made by the Assessee. In the present case there was evidence to the contrary to show that Sh. Anil Gupta and Sh.Q.R.Gupta had directly made payment to Sh. Amitabh Bhattacharya for vacation of the rented premises. Consequently, the Tribunal agreed with the finding of the CIT (Appeals) and upheld the deletion of the said addition made by the Assessing Officer.

22. On the issue relating to the addition of Rs. 2,92,000/- claimed as expenditure towards brokerage by the Assessee the Tribunal found that the said expenditure had been duly disclosed in the regular books of account as well as in the regular return filed by the Assessee. The Assessing Officer had not found any



evidence as a result of the search to show that the payment was not genuine or that it otherwise gave rise to any "undisclosed income" during the block period. Consequently, the deletion of the said addition by the CIT (Appeals) was also upheld by the Tribunal.

23. Lastly, coming to the deletion of addition of Rs. 25 lakhs on account of estimated unexplained investment in immovable property, the Tribunal held that initial onus lay upon the Revenue to show that the Assessee had made investment in property over and above what was disclosed in his accounts. The search did not reveal any unexplained investment. The Tribunal held that without any material or basis no estimates could be made particularly since the Assessing Officer was not an expert. The Tribunal upheld the order of the CIT (Appeals) in relation to this aspect of the matter as well.

24. Before us learned counsel for the Appellant has once again tried to justify all the four additions made by the Assessing Officer during the block assessment proceedings.

25. We may at this stage, quote the relevant extracts from Section 158BA and Section 158BB of the Act :

158BA (1).....
(2)



Explanation.- For the removal of doubts, it is hereby declared that -

(a) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

(b) the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

(c) the income assessed in this Chapter shall not be included in the regular assessment of any previous year included in the block period;

(3) Where the Assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period.

Computation of undisclosed income of the block period.

158BB. (1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, [in accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of



books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence], as reduced by the aggregate of the total income, or as a case may be, as increased by the aggregate of the losses of such previous years, determined, -

(a) where assessments under section 143 or section 144 or section 147 have been concluded [prior to the date of commencement of the search or the date of requisition], on the basis of such assessments;

(b) where returns of income have been filed under section 139 [or in response to a notice issued under sub-section (1) of section 142 or section 148] but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;

[(c) where the due date for filing a return of income has expired, but no return of income has been filed,-

(A) on the basis of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such entries result in computation of loss for any previous year falling in the block period; or

(B) on the basis of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such income does not exceed the maximum amount not chargeable to tax for any previous year falling in the block period;

(ca) where the due date for filing a return of



income has expired, but no return of income has been filed, as nil, in cases not falling under clause (c);]

(d) where the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 has not expired, on the basis of entries relating to such income or transaction as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;

(e) where any order of settlement has been made under sub-section (4) of section 245D, on the basis of such order;

(f) where an assessment of undisclosed income had been made earlier under clause (c) of section 158BC, on the basis of such assessment."

26. Assessment proceedings undertaken under Chapter XIV-B are only in respect of undisclosed income that is that income which has not been, or would not have been disclosed and which has been unearthed as a result of the search or requisition.

27. Assessment proceedings under Chapter XIV-B are not concerned with that income which has already been disclosed and in respect of which regular assessment proceedings stand concluded or are still pending, or in respect of which time for filing of return has not expired on the date of search/requisition and



which stand recorded in the books of account on the date of search. The proceedings under Chapter XIV-B cannot be used as an opportunity to either reopen concluded assessments or to reassess the returned income by taking a fresh look at the disclosed facts and figures, unless, of course, they are found to be false as a result of the search or requisition.

28. To arrive at the figure of undisclosed income, the aggregate of the total income in the previous years falling within the block period is first computed *"on the basis of the evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence"* as reduced by the aggregate of the total income, or as increased by the aggregate of the losses of such previous years, calculated in accordance with clauses (a) to (f) of Section 158BB (1). Clearly the scheme under the Act is to reduce from the aggregate of the total income of the previous years falling within the block period computed on the basis of evidence found as a result of search or requisition, all such incomes which have previously been disclosed and assessment in respect whereof is either complete or pending, or yet to be filed and for which time



has not yet expired and which is reflected in the books of account as on the date of search or requisition. It is evident from Clauses (a) & (b) of Section 158BB that in assessment proceedings under Chapter XIV-B, assessments completed under Section 143 or 144 or 147 cannot be reopened. Consequently, those elements of income which already stand disclosed in the relevant assessment years falling within the block period must be excluded while computing the undisclosed incomes under the Act. It is for this reason that assessments under Chapter XIV-D have been declared to be in addition to the regular assessment proceedings for the previous years included in the block period.

29. We may at this stage cite a few decisions of the other High Courts dealing with the relevant provisions of the Act. In ***N.R. Paper & Board Ltd. Vs. DCIT (1998) 234 ITR 733***, Gujarat High Court considered the scope of Chapter XIVB of the Act. In this case the Assessee had challenged the issuance of notice under Section 143 (2) of the Act on the ground that the relevant assessment year was a part of the block period in respect of which a notice under Section 158BC had already been issued and assessment concluded. It was contended that no further



assessment proceedings could be undertaken in respect of the same assessment year for which block assessment proceedings have already been concluded. The High Court by a detailed and considered judgment came to the conclusion that assessment of undisclosed income is altogether a different matter from regular assessments. Since we are in agreement with the view taken by the High Court in the said case, we quote from the said decision as follows:

“Under section 158BB of the Act, for computing the undisclosed income of the block period, the Assessing Officer has to compute the total income of the relevant previous years on the basis of the evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer. The evidence found as a result of search or requisition would be the evidence that has been gathered by the authorised officer under sections 132 and 132A of the Act. This would also include the statements recorded by the authorised officer during the course of search and seizure under section 132(4) of the Act which empowers him to record the statement of any person in possession of such assets or books of account or documents on oath and which can be used in evidence in any proceeding under the Act. The evidence so gathered by the authorised officer under section 132 along with other material seized, marked, or inventoried, would be available before the Assessing Officer when he exercises his power to assess the undisclosed



income under Chapter XIV-B of the Act. This evidence found and material available is to be the basis for computing the aggregate of the total income of the previous years falling in the block period. This exercise is undertaken as an initial step for computation of the undisclosed income under section 158BB(1) for which the aggregate of the total income of the previous years falling within the block period is to be computed in accordance with Chapter IV of the Act, i.e., under various heads mentioned in that Chapter, on the basis of the evidence found as a result of search and the material or information as available with the Assessing Officer. For the purpose of working out the undisclosed income for the block period, he is then required to reduce the aggregate of the total income so worked out for the block period by aggregate of the total income determined, on the basis indicated in clauses (a) to (f) of section 158BB(1) of the Act or increase it by the aggregate of losses of such previous year determined on the basis of these clauses."

"Under Section 158BB(1), read with section 158BC of the Act, what is assessed is the undisclosed income of the block period and not the total income or loss of the previous year required to be assessed in the normal regular assessment under section 143(3), where the Assessing Officer makes an enquiry to ensure that the Assessee has not understated the income or has not computed excessive loss or had not underpaid the tax in any manner and on the basis of the evidence produced by the Assessee, the evidence obtained on the specific points and all relevant material which he has gathered assesses the total income or loss and determines the sum payable thereon as per that assessment. This exercise under section 143(2) and (3) for regular assessment stands in contrast



to the exercise of the Assessing Officer under section 158BB read with section 158BC(b), where he has to assess only the undisclosed income of the block period on the basis of the evidence found and material available as a result of the search conducted by the authorised officer under section 132 of the Act. Therefore, there is no merit in the contention raised on behalf of the petitioners that once the petitioners-Assesseees' total income of the previous year falling in the block period for which regular assessment is pending, is computed while computing the aggregate of the total income of the previous years falling in the block period under section 158BB(1) in the process of finding out the undisclosed income, there would be a second assessment of the total income if the regular assessment of that previous year is allowed to proceed under section 143(3) of the Act. These provisions operate entirely for different purposes, one for assessing undisclosed income of the block period while the other for assessing the total income or loss of the previous year in a regular assessment."

"Therefore, where there is a pending regular assessment for one of the previous years falling in the block period for which the proceedings under Chapter XIV-B are commenced as a result of search under section 132, there is nothing that would prevent the Assessing Officer to proceed with and complete the regular assessment of such previous year in the regular assessment, before the block assessment of undisclosed income is made. There would be no warrant for withholding the regular assessment which is pending for the previous year falling in the block period. The assessment of undisclosed income of a block period is, thus, different from the regular assessment of the total income of a previous regular assessment year and both can



operate together. The block assessment procedure is not intended to have the effect of excluding the regular assessments that may be pending. The block assessment targets the area of undisclosed income that was not disclosed and would not be disclosed, while the regular assessment is to assess the total income or loss of the previous year where a return is filed under section 139 and the Assessing Officer considers it necessary or expedient under section 143(2) to ensure that the Assessee had not understated the income or has not computed excessive loss or has not underpaid tax in any manner. Both these areas are different and there is no warrant to prevent the statutory power of regular assessment from being exercised where the block assessment is undertaken or completed for assessing the undisclosed income."

"The essence of the special procedure of Chapter XIV-B is to provide for an assessment of the undisclosed income detected as a result of the search without affecting the regular assessments made or to be made. The special provisions are devised to operate in the separate field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period."

This decision has been followed by the Gujarat High Court in ***CIT v/s N.R.Papers and Boards Ltd.*** (2001) 248 ITR 526 and in ***CIT v/s Shambhulal C.Bachkaniwala*** [2000] 108 Taxman 515 (Guj.)

30. In ***CIT v. Rajendera Prasad Gupta*** (2001) 248 ITR 350,(Rajasthan), the Revenue challenged the decision of the



Tribunal whereby the Tribunal had not accepted resort to process of estimation by the Assessing Authority on the ground that the Assessing Authority had not examined the material that had come in his possession during the course of search while resorting to best judgment assessment. It was the contention of the Revenue that there was no prohibition against making a best judgment assessment under Section 158BB, since explanation to Section 158BB permitted resort to the provisions of Section 144 & 145 of the Act. While agreeing with the contention of the Revenue that the Assessing Officer had jurisdiction to resort to best judgment assessment in proceedings under Section 158BB, High Court proceeded to observe as follows:

“However, under the scheme of the provisions for block assessment, it is apparent that it relates to assessment of “undisclosed income” of the Assessee excluding the income subjected to regular assessment in pursuance of the returns filed by the Assessee for such period. It is also apparent from the perusal of section 158BB that the returns are also required to be filed in pursuance of the notice under section 158BC(a) and the assessment is to be framed on that basis in the light of material that has come into possession of the assessing authority during the course of search which is the foundation of the proceedings. That being so, the correctness or otherwise of the returns filed in pursuance of the notice under section 158BC(a) has to be examined with reference to the material in the



possession of the assessing authority having nexus to assessment of "undisclosed income" which is with the assessing authority, and premise of such proceedings. If the returns filed by the Assessee do not accord with the materials which are already in the possession of the authority, it can be estimated to the best judgment by the assessing authority on the basis of the material in his possession. However, the assessing authority is not conferred with power to make estimation of income de hors the material in his possession, while making regular assessment order under section 158BB. It has to be borne in mind that proceedings under sections 158BB and 158BC are that of undisclosed income. Therefore, the proceedings carries with it a presumption that returns filed in pursuance of such proceedings are of undisclosed income and not necessarily in accordance with the books of account. Its verification has to be searched outside regular books with reference to material that has been found during search. That makes it imperative to adjudicate the return with reference to material that has come in the possession of the assessing authority during the course of search proceedings and on which basis the belief about the existence of undisclosed income is entertained by the assessing authority inviting invocation of sections 158BB and 158BC. The enquiry into the correctness of such returns with reference to material so found has nexus with the object of the special provisions, to adjudge whether the Assessee is still honestly disclosing his income correctly after incriminating material has been found in the possession of the Revenue authority before such returns can be rejected and thereafter to frame assessment estimating the income liable to tax to the best of judgment on the basis of the material that is available with him."



We respectfully agree with this decision of the Rajasthan High Court.

31. We may also refer to a decision of the Kerala High Court. In **Malayali Bankers Vs. Assistant Commissioner of Income Tax [1999] 236 ITR 869**. The petitioner had challenged the assessment on the ground that the Assessing Officer had no jurisdiction to complete the assessment under Section 143 (3) after the issuance of a notice under Section 158BC of the Act. The petitioner had relied on two decisions, one from the Kerala High Court in the case of **N.T. John v. Commissioner of Income Tax & Anrs. (1999) 228 ITR 314** and another of the Punjab and Haryana High Court in the case of **Raja Ram Kulwant Rai v. Assistant Commissioner of Income Tax (1997) 227 ITR 187**. The Court did not agree with the contention of the petitioner and held as follows :

Chapter XIV-B of the Act provides a special procedure for assessment of search cases. Section 158BA defines block period as well as undisclosed income. Section 158 BA deals with the assessment of undisclosed income as a result of search. This provision empowers the Assessing Officer to proceed to assess the undisclosed income in accordance with the provisions of this Chapter where there was a



search under section 132. Sub-section (2) of section 158BA states that the total undisclosed income relating to the block period shall be charged to tax. Therefore, by a plain reading of section 158BA and the heading, it is clear that this provision is intended to assess the undisclosed income in contradistinction with a regular assessment. This section though refers to a block period, cannot make an assessment other than the undisclosed income. The Explanation inserted by the Finance (No.2) Act of 1998, with effect from July 1, 1995, clears all the doubts, if any, on the issue. Explanation (a) states that the assessment made under this Chapter shall be in addition to the regular assessment. Explanation (b) states that the total undisclosed income relating to the block period shall not be included in any regular income, in any assessment. In the light of the Explanation to Section 158BA the question is to be answered against the Assessee. The contention that once an assessment has been framed for a block period under section 158BC the Income-tax Officer is debarred from framing an assessment under section 143 cannot be accepted. The judgment referred to on behalf of the petitioner can have no application since the Explanation has been inserted to remove any doubt and it is now made clear that the block assessment shall be in addition to the regular assessment. Therefore, there is no scope for any ambiguity or doubt in this regard. Clarification in the Memorandum explaining the provisions of the Finance (no.2) Bill, 1998, states as follows (see [1998] 231 ITR (ST.) 228, 256):

"To set at rest the controversy as to whether block assessment subsumes the regular assessments or independent of the latter, the Bill proposes to clarify that block assessment shall be made in addition to the regular



assessment of previous years included in the block period. Further, it proposes to provide that income assessed in regular assessment shall not be included in the block period and income assessed in the block period shall not be included in the regular assessment. The clarificatory amendment is proposed to be inserted retrospectively from the 1st day of July, 1995."

If the argument of learned counsel is accepted, ultimately, it will lead to disastrous consequences. The Assessing Officer assessing undisclosed income of block period may have to assess all the ten preceding previous years and part of the current year up to the date of search by reopening them which will have an undesirable effect on the Assesseees in general. The very purpose of making procedure for assessment in such cases simple and effective would become unwieldy and protracted.

The decision cited by learned counsel for the petitioner reported in *Kelappan Nair v. Payingaten* [1961] KLT 527, held that the Explanation does not explain or add to the scope of the original section. The Explanation in this case is inserted probably in the light of the two decisions referred to by learned counsel for the petitioner and for removal of doubts. It is the declaration of the intention of the Legislature as to the scope of section 158BA."

32. We agree with this view of the Kerala High court. The two decisions in *N. T. John and Raja Ram Kulwant Rai* have been critically examined by Gujarat High Court in the earlier *N.R. Paper & Board Ltd's case*, and we concur with the decision of



the Gujarat High Court that these two decisions do not correctly interpret the law.

33. We may also refer to a decision of the Gauhati High Court in **Dr. Mrs. Alaka Goswami and Dr. Anil Kumar Goswami vs. CIT**, (2004) 268 ITR 178. In the course of this judgment, the High Court observed as follows:-

“Chapter XIVB of the Act lays down the special procedure for assessment of search cases and provides for assessment of undisclosed income as a result of search. Under section 158BB(1) read with section 158BC of the Act, what is assessed is the undisclosed income of the block period and not the total income or loss of the previous year required to be assessed in the normal regular assessment under section 143(3) of the Act. The exercise under section 143(2) and (3) for regular assessment stands on a different footing than the exercise undertaken by the Assessing Officer under section 158BB read with section 158BC(b), where the Assessing Officer has to assess only the undisclosed income of the block period on the basis of the evidence found and material available as a result of the search conducted under section 132 of the Act. The regular assessment is to assess the total income or loss of the previous year where a return is filed under section 139 and the Assessing Officer considers it necessary or expedient under section 143(2) to ensure that the Assessee had not understated the income or has not computed excessive loss or has not underpaid tax in any manner. The proceedings under the regular assessment and the assessment for the block period stand to operate on different fields. Therefore, the considerations



which would be attracted while making the assessment in exercise of the powers under section 143(2) and (3) for the regular assessment would stand on a different footing and will be governed by different provisions of the Act whereas the assessment for the block period as a result of the search and seizure would be governed by different provisions of the Act and would be made by the Assessing Officer in accordance therewith."

We agree with the aforesaid observations of the Gauhati High Court.

34. Lastly, the respondent has relied upon decision of this Court in *CIT vs. Shri Vishal Aggarwal* in ITA 268/2005 decided on 5.5.2005. In the said decision, like in the present case, the additions made by the Assessing Officer under Section 158BC were deleted by the CIT (Appeals) on the ground that for the amounts to be considered for the purposes of block assessment, it was important that some material document or information should have been discovered pertaining to the said amounts under consideration during the search operations which would indicate that they constituted concealed income of the Assessee. In that case the Tribunal had upheld the order of the CIT (Appeals) on the same ground. This Court also affirmed the said view. This Court held that since no incriminating material was found in the course



of search, the Assessing Officer could not take resort to the provisions of Chapter XIV-B of the Act to tax what was said to be "undisclosed income" or concealed income of the Assessee. We find that the said decision consequently applies in the facts of the present case as well.

35. In so far as the deletion of additions of Rs. 4 lakhs in the assessment year 1993-94, Rs. 4 lakhs in the assessment year 1994-95 and Rs. 2,92,000/- for the assessment year 1997-98 are concerned, the same are pure questions of fact, on which there are concurrent findings given by the CIT(Appeals) and the Tribunal.

36. We find that both the CIT (Appeals) and the Tribunal have duly considered and appreciated the relevant facts and found that the said additions were liable to be deleted. Their finding is well supported with reasoning and is in accordance with the law as we have discussed herein above. We agree with the reason given by the CIT (Appeals) and the Tribunal that since there was no evidence found during search for the Assessing Officer to make the said additions and the relevant expenses/income had been duly reflected and disclosed in the course of assessment proceedings by the Assessee, the same could not be said to be the undisclosed income of the Assessee and assessed in proceedings under



Chapter XIV-B of the Act.

37. With regard to deletion of Rs. 1 lakh, as being the amount receivable from M/s D.S. Imports, the deletion was justified since the addition of Rs. 1 lakh had been confirmed in the case of M/s Standard Brands. Pertinently the CIT (Appeals) also held that the Assessing Officer would be justified in taking appropriate action in the eventuality of the said amount being deleted from the assessment of M/s Standard Brands.

38. We also agree with the reasoning of the Tribunal with regard to deletion of the addition of Rs. 25 lakhs towards estimated unexplained investment in immovable property in proceedings under Chapter XIV-B of the Act. The Respondent has relied on the proviso to Section 142A to contend that it was not open to the Assessing Officer to order valuation of the property by the DVO since the assessment was made by the Assessing Officer on 31.3.1999 and the CIT (Appeals) decided the appeal on 16.11.2000. He relies on two decisions of this Court in **CIT vs. Sudhish Kumar** [2005] 276 ITR 536 and **CIT vs. Manoj Jain** (2006) 200 CTR 327 which we find fully supports the Respondent's case. Since no valuation could be ordered by the DVO, it was much less competent for the Assessing officer, who is not even an



expert, to make an estimation of the value of the property on his own, and that too in proceedings under Chapter XIV-B.

39. In view of the aforesaid, we find that no substantial question of law arises for our consideration in the present appeal and accordingly we dismiss the same.


VIPIN SANGHI
JUDGE


MADAN B. LOKUR
JUDGE

September 07, 2006
as/mw/ak