



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

% Judgment delivered on 12.11.2008

+ **ITA 1198/2008**

**COMMISSIONER OF INCOME TAX
DELHI –VIII, NEW DELHI**

... Appellant

- versus -

SHRI S.K. KATYAL

... Respondent

Advocates who appeared in this case:

For the Appellant : Ms Prem Lata Bansal

For the Respondent : Dr Rakesh Gupta with Mr Ashwani Taneja and
Ms Mahima Aggarwal

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE RAJIV SHAKDHER

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

BADAR DURREZ AHMED, J

1. This appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') is directed against the order dated 14.11.2006 passed by the Income Tax Appellate Tribunal in IT (SS) A No.302/Del/04 pertaining to the block period 01.04.1990 to 17.11.2000. The appellant/revenue is aggrieved by the fact that the



Tribunal held the block assessment order to be beyond the time specified under section 158BE(1)(b) of the said Act.

2. On the basis of a warrant of authorization dated 16.11.2000, a search, under the provisions of section 132 of the said Act, was conducted on 17.11.2000 in the residential premises of the assessee at E-147 Kalkajee, New Delhi. As per the *panchnama* drawn up on 17.11.2000, in the course of the search certain documents, cash and key no.765 of locker No. 725-B with Bank Of India, Nehru Place, New Delhi belonging to the assessee were purportedly seized. In the course of the said search conducted on 17.11.2000, amongst other things, jewellery was also found. The jewellery was inventorised and valued as per Annexure-5 to the *panchnama*. Paragraphs 8 and 9 of the *panchnama* are relevant and they are as follows:-

“8. The search commenced on 17.11.2000 at 8 a.m./~~p.m.~~ The proceedings were closed on 17.11.2000 at 7 a.m./p.m. as ~~finally concluded/~~ as temporarily concluded for the day to be commenced subsequently for which purpose seals were placed ~~on the entire place/~~ on Cash Box of the right hand side Almirah on the ground floor bed room of Sh. S.K. Katyal at E-147, Kalkajee, N. Delhi, seven seals in our presence.

9. An order under section 132(3) of the I.T. Act, 1961 in respect of the sealed premises/ lockers/ bank A/c any other (specify) As above was served on Shri/Smt S.K. Katyal by the said authorized officer.”



3. These paragraphs of the *panchnama* of 17.11.2000 reveal that the cash box of the almirah was sealed and a restraint order under section 132(3) of the said Act was passed in respect of the contents thereof. It is an admitted position that the contents of the sealed cash box were nothing but the jewellery listed and valued as per Annexure-5 to the *panchnama*. The revenue also contended that the *panchnama* also made it clear that the search had not finally concluded on 17.11.2000 but, had only “*temporarily concluded for the day to be commenced subsequently*”. This, however, is a bone of contention in as much as the assessee’s case is that the search, in fact, concluded on 17.11.2000 and no further search was conducted thereafter. We shall examine these contentions later. For now, we need to complete the narration of the sequence of events.

4. No further seizure was made from the said premises and on 03.01.2001 the Income Tax Officer (Inv) Unit-I, New Delhi passed the following revocation order: -

“Dated 3rd Jan. 2001

REVOCATION ORDER

Restraint order u/s 132(3) of I.Tax Act, 1961 dated 17.11.2000 in respect of Cash Box of Right hand Side Almirah in the Bed Room of Sh. S K Katyal at GF of premises E-147 Kalkajee New Delhi is hereby revoked. **The seals placed on the Almirah on the date of search were found to be intact.**”

(emphasis supplied)



5. On the same day (03.01.2001), the keys of the Almirah and safe (cash box) were returned to the assessee. A *panchnama* was also drawn up. This *panchnama* reveals that it was pursuant to the same warrant of authorization dated 16.11.2000 which was used for the search conducted on 17.11.2000. It is also clear that nothing was seized on 03.01.2001. Under the heading – “The following were found but not seized” – in the printed form *panchnama*, it is written in hand:-

“Jewellery worth Rs 6,05,731/- as per page 1 of Annexure-5 of *Panchnama* dated 17-11-2000.”

6. This makes it evident that nothing was found on 03.01.2001, because the jewellery shown to be found on 03.01.2001 had already been found on 17.11.2000 and had even been valued as per Annexure-5 to the *panchnama* of 17.11.2000. Paragraphs 8 and 9 of the *panchnama* of 03.01.2001 read as under:-

“8. The search commenced on 3/1/2001 at 5:05 a.m./p.m. The proceedings were closed on 3/1/2001 at 5:45 a.m./p.m. as finally concluded/~~as temporarily concluded for the day to be commenced subsequently for which purpose seals were placed on the entire place/~~ on _____ in our presence.

9. An order under section 132(3) of the I.T. Act, 1961 in respect of the sealed premises/ lockers/ bank A/c any other (specify)

_____ was served on Shri/Smt _____ by the said authorized officer.”



7. The notice under section 158BC was issued on 12.04.2002 and served upon the assessee on 22.04.2002. The block assessment order was passed on 30.01.2003. Before the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'the CIT(A)'], the assessee, *inter alia*, contended that the search had, in fact, concluded on 17.11.2000 as there was no search at all on 03.01.2001. The consequence of this would be that the period of limitation for passing the assessment order would end on 30.11.2002, being two years from the end of the month in which the search was concluded. The assessee contended that since no search had, in fact, been carried out on 03.01.2001, that date could not be regarded as the date on which the search had concluded and, therefore, the period of limitation could not be extended to 31.01.2003. This plea was rejected by the CIT(A) on the ground that since the "last" *panchnama* was drawn on 03.01.2001, the assessment order, which was passed on 30.01.2003, was within the time allowed under section 158BE(1)(b) of the said Act.

8. Allowing the appeal filed by the assessee, the Tribunal was of the view that the search and seizure was completed on 17.11.2000 and that, therefore, the assessment order was required to be passed on or before 30.11.2002. The Tribunal held that since the assessment was made on 30.01.2003, it was beyond the prescribed time limit. The



on 03.01.2001 could not extend the period of limitation and that the *panchnama* of 03.01.2001 was “merely a release order”.

9. The revenue is in appeal before us against the impugned order passed by the Tribunal. Mrs Bansal, appearing for the appellant/revenue argued that several substantial questions of law arose for our consideration. She submitted that since the “last” *panchnama* was drawn up on 03.01.2001, in view of the provisions of section 158BE(1)(b) and Explanation 2(a) to section 158BE, this would have to be deemed to be the date on which the last of the authorizations for search was executed. She placed reliance on (1) **M.B. Lal v. CIT: 279 ITR 298 (Del)**; and (2) **VLS Finance Ltd v. CIT: 289 ITR 286 (Del)**. On the other hand, the learned counsel for the respondent/assessee contended that the impugned order did not call for interference. He submitted that no substantial questions of law arose for the consideration of this court inasmuch as the issues sought to raised by the revenue in this appeal, already stand settled by various decisions including (1) **C. Balakrishnan Nair (Dr.) v. CIT: 237 ITR 70 (Ker)**; (2) **CIT v. Mrs Sandhya P. Naik: 253 ITR 534 (Bom)**; (3) **CIT v. Sarb Consulate Marine Products P. Ltd: 294 ITR 444**; and (4) **CIT v. Deepak Aggarwal: ITA 953/2008** decided by this Court on 12.08.2008.



10. An examination of the relevant statutory provisions would be appropriate at this point before we discuss the cases cited at the bar. Section 158BE stipulates the time limit for completion of block assessment. For the present appeal, we need notice only section 158BE(1)(b) and Explanation 2(a) which are as under:-

“158BE. Time limit for completion of block assessment.-- (1) The order under section 158BC shall be passed,--

(a) xxxx xxxx xxxx xxxx

(b) within two years from the end of the month in which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed in cases where a search is initiated or books of account or other documents or any assets are requisitioned on or after the 1st day of January, 1997.

xxxx xxxx xxxx xxxx

Explanation 2.--For the removal of doubts, it is hereby declared that the authorisation referred to in sub-section (1) shall be deemed to have been executed,--

(a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued ;

(b) xxxx xxxx xxxx xxxx”

11. The time limit for making a block assessment order has reference to the date of execution of the last of the authorizations for search under section 132. This is deemed to be the date of the



132 deals with search and seizure and, so much as is relevant, reads as under:-

“132. Search and seizure.--(1) Where the Director General or Director or the Chief Commissioner Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board, in consequence of information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 32 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account, or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as



then,--

(A) the Director General or Director or the Chief Commissioner or Commissioner, as the case may be, may authorise any Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or

(B) such Joint Director or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer,

(the officer so authorised in all cases being hereinafter referred to as the authorised officer) to—

(i) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

XXXX XXXX XXXX XXXX

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search;

XXXX XXXX XXXX XXXX

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing:

XXXX XXXX XXXX XXXX

Provided further that where it is not possible or practicable to take physical possession of any valuable



to its being of a dangerous nature, the authorised officer may serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it, except with the previous permission of such authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii).

XXXX XXXX XXXX XXXX

(3) The authorised officer may, where it is not practicable to seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing, for reasons other than those mentioned in the second proviso to sub-section (1), serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

Explanation.--For the removal of doubts, it is hereby declared that serving of an order as aforesaid under this sub-section shall not be deemed to be seizure of such books of account, other documents, money, bullion, jewellery or other valuable article or thing under clause (iii) of sub-section (1).

XXXX XXXX XXXX XXXX

(8A) An order under sub-section (3) shall not be in force for a period exceeding sixty days from the date of the order, except where the authorised officer, for reasons to be recorded by him in writing, extends the period of operation of the order beyond sixty days, after obtaining the approval of the Director or, as the case may be, Commissioner for such extension:

Provided that the Director or, as the case may be, Commissioner shall not approve the extension of the period for any period beyond the expiry of thirty days



account, other documents, money, bullion, jewellery or other valuable articles or things are relevant.

(13) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1) or sub-section (1A).

XXXX XXXX XXXX XXXX”

12. It is clear, the warrant of authorization for search and seizure is issued under section 132(1). The authorized officer can, not only search the building etc., but also seize documents, jewellery etc. Where seizure of a thing is not practicable owing to the volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorized officer may issue a restraint order to the owner or possessor of the thing and in such a case, as per the proviso to section 132(1), the order would operate as a seizure. Where, however, a restraint order is issued under section 132(3) for reasons other than those mentioned above, the order, as clarified by the Explanation to section 132(3), would not operate as a seizure. In the present case, the restraint order with regard to the the cash box in the Alimirah where the jewellery was placed was one which was passed under section 132(3). It follows that the restraint order did not amount to a seizure of the jewellery or the cash box or the Almirah. It is also pertinent to mention that by virtue of sub-section (8A), the restraint order under section



We also note that by virtue of sub-section (13), the provisions of the Code of Criminal Procedure, 1973, relating to searches and seizure have been made applicable, so far as may be, to searches and seizure under 132(1) of the said Act.

13. This takes us to the consideration of section 100 of the Code of Criminal Procedure. The relevant provisions are as under:-

“100. Persons in charge of closed place to allow search.—

XXXX XXXX XXXX XXXX XXXX

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.



prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860).”

(emphasis supplied)

14. These provisions make it clear that a search is to be conducted in the presence of two or more “*independent and respectable inhabitants*” of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search. Similar stipulations are to be found in Rule 112 of the Income Tax Rules, 1962 (hereinafter referred to as ‘the said Rules’). The relevant provisions of rule 112 of the said Rules are as under:-

“112. (1) The powers of search and seizure under section 132 shall be exercised in accordance with sub-rules (2) to (14).

XXXX XXXX XXXX XXXX XXXX

(6) Before making a search, the authorised officer shall,--

(a) where a building or place is to be searched, call upon two or more respectable inhabitants of the locality in which the building or place to be searched is situate, and



attend and witness the search and may issue an order in writing to them or any of them so to do.

(7) The search shall be made in the presence of the witnesses aforesaid and a list of all things seized in the course of such search and of the places in which they were respectively found shall be prepared by the authorised officer and signed by such witnesses; but no person witnessing a search shall be required to attend as a witness of the search in any proceedings under the Indian Income-tax Act, 1922 (11 of 1922), or the Act unless specially summoned.

(8) The occupant of the building, place, vessel, vehicle or aircraft searched, including the person in charge of such vessel, vehicle or aircraft, or some person on his behalf, shall be permitted to attend during the search and a copy of the list prepared under sub-rule (7) shall be delivered to such occupant or person. A copy thereof shall be forwarded to the Chief Commissioner or Commissioner and, where the authorisation has been issued by any officer other than the Chief Commissioner or Commissioner, also to that officer.

XXXX XXXX XXXX XXXX”
(emphasis supplied)

15. These provisions demonstrate that a search and seizure under the said Act has to be carried out in the presence of at least two respectable inhabitants of the locality where the search and seizure is conducted. These respectable inhabitants are witnesses to the search and seizure and are known as “*panchas*”. The documentation of what they witness is known as the *panchnama*. The word ‘*nama*’, refers to a written document. Its type is usually determined by the word which is combined with it as a suffix. Examples being, *nikah-nama* (the written



meaning – gift), *wasiyat-nama* (written will) and so on. So a *panchnama* is a written record of what the *panch* has witnessed. In **Mohan Lal v. Emperor: AIR 1941 Bombay 149**, it was observed that “[t]he *panchnama* is merely a record of what a *panch* sees..” Similarly, the Gujarat High Court in the case of **Valibhai Omarji v. The State: AIR 1963 Guj 145** noted that “[a] *Panchanama* is essentially a document recording certain things which occur in the presence of *Panchas* and which are seen and heard by them.” Again in **The State of Maharashtra v. Kacharadas D. Bhalgar: (1978) 80 BomLR 396**, a *panchnama* was stated to be “a memorandum of what happens in the presence of the *panchas* as seen by them and of what they hear”.

16. We have examined the meaning of the word *panchnama* in some detail because it is used in Explanation 2(a) to Section 158BE of the said Act although it has not been defined in the Act. A *panchnama*, as we have seen is nothing but a document recording what has happened in the presence of the witnesses (*panchas*). A *panchnama* may document the search proceedings, with or without any seizure. A *panchnama* may also document the return of the seized articles or the removal of seals. But, the *panchnama* that is mentioned in Explanation 2(a) to section 158BE is a *panchnama* which documents the conclusion



therein, reveal that a search was at all carried out on the day to which it relates, then it would not be a *panchnama* relating to a search and, consequently, it would not be a *panchnama* of the type which finds mention in the said Explanation 2(a) to section 158 BE.

17. This discussion leads us to the question – was the *panchnama* of 03.01.2001 of the type mentioned in the said Explanation 2(a)? From the facts narrated above, it is clear that the *panchnama* of 03.01.2001 itself reveals that nothing was seized on that date. Nor was anything “found” on that date. In fact, no search was conducted. The jewellery that was put in the cash box of the almirah had already been searched, found, inventorised and valued by the DVO on 17.11.2000 itself. Nothing remained to be searched thereafter. And, in fact, no further search was conducted after 17.11.2000. Obviously, nothing else could be found. All that was done on 03.01.2001, in the presence of the witnesses (*panchas*), was that the seals were removed from the cash box and the almirah and the keys were handed back to the assessee. Essentially, the revocation of the restraint order was given effect to. This is exactly what the Tribunal found as a fact and meant when it concluded that the *panchnama* dated 03.01.2001 was merely a release order and could not extend the period of limitation.



18. In *G.M. Agadi v. The Commercial Tax Officer, Belgaum:* [1973] 32 STC 243 (Kar), the meaning of the word ‘search’ in contrast to a mere inspection was considered. The Karnataka High court noted that the Corpus Juris Secundum (79 CJS 775) gives a neat definition of the word ‘search’ in the following words:-

“The term ‘search’ as applied to searches and seizures, is an examination of a man’s house or other buildings or premises, or of his person, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offence with which he is charged. **As used in this connection, the term implies some exploratory investigation, or an invasion and quest, a looking for or seeking out.** The quest may be secret, intrusive, or accomplished by force, and it has been held that a search implies some sort of force, either actual or constructive, much or little. **A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way.** While it has been said that **ordinarily searching is a function of sight, it is generally held that mere looking at that which is open to view is not a ‘search’.**”

(emphasis supplied)

Accepting the above definition, the Karnataka High Court further observed:-

“All searches are inspections, but all inspections are not searches. A search is a thorough inspection of a man’s house, building or premises or of his person, with the object of discovering some material which would furnish evidence of guilt for some offence with which he is charged. It implies a prying into hidden places for that which is



19. Examined in the light of this decision, what happened on 03.01.2001 as recorded in the *panchnama* of that date cannot be regarded as a search. There was no looking for, no quest for something hidden. All that was done was that the seals were inspected. After they were found to be intact, they were removed and the keys were handed back to the assessee. These circumstances clearly show that no search was conducted on 03.01.2001. For a search to conclude at a particular time and date, it must have continued till that time and date. Nothing was searched for after 17.11.2000. Thus, the search was concluded on that date. It did not continue any further and the mere mention in the *panchnama* that the search had been temporarily concluded for the day to be subsequently resumed, would not make any difference because the fact of the matter is that no further search was conducted after 17.11.2000. It follows that it is the *panchnama* of 17.11.2000 which is relateable to the conclusion of the search and not the *panchnama* of 03.01.2001. Consequently, the authorization for search was executed on 17.11.2000 and not on 03.01.2001.

20. It is now time to consider the decisions cited at the bar. We begin with those referred to by the learned counsel for the respondent/assessee. In *Dr C. Balakrishnan Nair (supra)* an



unreasonable by the Kerala High court and, consequently, the second search was considered to be illegal. The relevant portion of the said decision is extracted below:-

“The second undisputed fact is that the search was discontinued on October 27, 1995, and resumed only on November 10, 1995. The reasons stated for the gap of 14 days is hardly convincing. There is no provision in the Criminal Procedure Code or in the Income-tax Act or the rules for postponing the search for such a long period. N. Subramanian in his book Search and Seizure stated at page 108 that when once the search starts it can go on continuously day or night, rain or shine. To keep the affected parties in a suspended animation about the probable continuation of search would be agonising. In this case considering the nature of the allegations and the materials seized there is no reason why it could not be closed on October 27, 1995, and even if it is provisionally concluded why it could not be continued immediately. There is no bar for the operation to continue on holidays. The absence of the petitioners in the house is nothing but a lame excuse. If the respondents wanted the operation to be continued there are ways to secure the presence of the petitioners and continue the operations. **Therefore, unless there is convincing reason for not resuming search immediately the proceedings undertaken by the second respondent for a second search cannot be held to be legal. It is invading the right and freedom of the petitioners for a period more than required or necessary.** The averment that the petitioners were not available for two days is denied by them. Instead it is stated that they could not keep the house in order as the search was incomplete and that they had telephoned and required the officers to complete the search. Therefore, search has prolonged unreasonably without justification.”

(emphasis supplied)



be some cogent plausible reason for splitting the search and in not conducting it continuously till its conclusion. Viewed in this light, even if it were assumed for the sake of argument that a search took place on 03.01.2001, the same could not be regarded as legal on account of the unexplained gap of about a month and a half (from 17.11.2000 to 03.01.2001).

22. In *Sandhya Naik's case (supra)*, the Bombay High Court observed that “*by simply stating in the panchanama that the search is temporarily suspended, the authorised officer cannot keep the search proceedings in operation by passing a restraint order under section 132(3)*” and that “*by passing a restraint order, the time limit available for framing of the order cannot be extended*”.

23. After considering the aforementioned decisions (and, some others), this Court in *Sarb Consulate (supra)* held that:-

“A general consensus appears to have emerged among the High Courts to the effect that a search under section 132 of the Act should be continuous and if it is discontinued and thereafter resumed, then there must be a valid explanation for the gap. In so far as the present case is concerned, the facts on record show that prima facie there was absolutely no justification for keeping the search pending for more than one year and ten months without any semblance of any activity by the Revenue.”



24. The facts in *Sarb Consulate (supra)* were that a search under section 132 was conducted on 06.11.1996 and some documents were seized and a restraint order under section 132(3) was passed in respect of some fishing vessels/trawlers belonging to the assessee. The restraint order was extended upto 30.09.1997. No further orders were passed in respect of the restraint order. A further “search” was conducted on the fishing vessels/trawlers on 14.09.1998, though no seizure was made. However, a *panchnama* was drawn up. The block assessment order was passed on 30.09.1998. The question for consideration was whether the *panchnama* of 06.11.1996 or the *panchnama* of 14.09.1998 was the “last” *panchnama* for the purposes of Explanation 2(a) to section 158BE? The Court came to the conclusion that the search and seizure operation had come to an end on 06.11.1996 and that on 14.09.1998 there was no restraint order and, therefore, the “search” and the *panchnama* drawn on 14.09.1998 were not in accordance with law. It was argued before us, by the learned counsel for the appellant/revenue, that the absence of the restraint order on the date of the second search distinguishes the decision in *Sarb Consulate (supra)* from the present appeal. It was submitted that had the restraint order not continued till the date (03.01.2001) of the second “search”, it would have been a different matter and the decision in *Sarb Consulate (supra)* might have covered the present appeal. We do not



which weighed with the Court in holding that no search had been conducted on 14.09.1998. What is important is that although a *panchnama* was drawn up on 14.09.1998, it was held not to be the last *panchnama* for the purposes of Explanation 2(a) to section 158BE.

The court held:-

“This being the position, it cannot be said that the last *panchnama* drawn up in respect of the search and seizure operation pertaining to the assessee, in terms of Explanation 2 to section 158BE of the Act, was drawn up on September 14, 1998—it was actually drawn on November 6, 1996—and the period of limitation must, therefore, run from that date onwards.”

25. In *Deepak Aggarwal (supra)*, the gap between two purported searches was of 53 days. The Tribunal had concluded that the second purported search on 23.12.2000 was not a search at all and all that was required to be searched and seized had been done on 31.10.2000 itself. This court agreed with this view inasmuch as the revenue had not explained the gap of 53 days, that is, as to what transpired between 31.10.2000 and 23.12.2000.

26. These decisions clearly establish (i) a search is essentially an invasion of the privacy of the person whose property or person is subjected to search; (ii) normally, a search must be continuous; (iii) if it cannot be continuous for some plausible reason, the hiatus in the search



the hiatus in the search, the second or “resumed” search would be illegal; (v) by merely mentioning in the *panchnama* that a search has been temporarily suspended does not, *ipso facto*, continue the search. It would have to be seen as a fact as to whether the search continued or had concluded; (vi) merely because a *panchnama* is drawn up on a particular date, it does not mean that a search was conducted and/or concluded on that date; (vii) the *panchnama* must be a record of a search or seizure for it to qualify as the *panchnama* mentioned in Explanation 2(a) to section 158BE of the said Act.

27. Do the decisions in *M.B. Lal (supra)* and *VLS Finance (supra)*, on which heavy reliance has been placed by the learned counsel for the revenue/appellant, alter the position indicated above ?

In *M.B. Lal (supra)*, a Division Bench of this court observed:-

“From a plain reading of Explanation 2(a), it is evident that an authorisation referred to in sub-section (1) is deemed to have been executed on the conclusion of search as recorded in the last *panchnama* drawn in relation to any person in whose case the warrant of authorisation has been issued. What is noteworthy is that the time-limit for the making of an order under section 158BC read with section 158BE(1) will start from the last of the *panchnamas*.”

On the strength of this, it was argued on behalf of the revenue that the *panchnama* of 03.01.2001 being the last *panchnama*, the starting point



which it was drawn up, that is from 31.01.2001. It is true that the starting point of limitation has to have reference to the last *panchnama* but, that *panchnama* must be one which, in fact and not just in form, records the conclusion of search. Great emphasis was laid on the following sentence in the said decision:-

“If that be so, the search would end only upon revocation of the order passed under section 132(3) which, in the instant case, was revoked only on June 29, 2000.”

28. From this, the learned counsel for the revenue sought to derive the proposition that a search ends “only upon revocation” of a restraint order under 132(3). And, therefore, the search in the present appeal concluded on 03.01.2001 on which date the restraint order was revoked. This line of thought does not appeal to us. The illogicality of this submission is easily demonstrated by asking the simple question – when would the search conclude in a case where there is no restraint order? In any event, the sentence as it appears in the said decision is predicated upon the fact situation, the narration of which precedes it. This is clear from the phrase “[i]f that be so”. The paragraph in which the sentence appears reads as follows:-

“In the instant case, the authorisation was issued on February 2, 2000. **The search also started on the same date and continued till June 29, 2000, during which period various articles and documents were seized. The Tribunal has recorded a finding to the effect that there was no delay in executing the**



searched. There was, therefore, no artificial extension of the search proceedings as argued by the appellants. If that be so, the search would end only upon revocation of the order passed under section 132(3) which, in the instant case, was revoked only on June 29, 2000. The period of limitation for making an assessment order under section 158BC read with section 158BE of the Act would, therefore, have to be reckoned from June 30, 2000 (being the end of the month in which the last panchnama was drawn) and would end on June 30, 2002. The assessment order, in the instant case, was however made on June 27, 2002, which was well within the outer limit of two years prescribed by law. The Tribunal was, in that view, justified in repelling the contention of the assessee that the order of assessment was beyond the period of limitation prescribed for the same.”

(emphasis supplied)

29. It is obvious that the search started on 02.02.2000 and continued till 29.06.2000, during which period various articles and documents were seized. So, there was no unexplained break in the search. A finding was also recorded to the effect that there was no delay in executing the search. And that, there was no artificial extension of the search proceedings. It is in these circumstances that the court observed – “*If that be so, the search would end only upon revocation of the order passed under section 132(3) which, in the instant case, was revoked only on June 29, 2000*”. The facts in the present appeal are entirely different and would not warrant such a deduction. In any event, there is nothing in *M.B. Lal (supra)* which



takes away anything from what has been said in the decisions cited on behalf of the respondent.

30. The decision in *VLS Finance (supra)* also rests on a factual basis which is different from that of the present appeal. First of all, *VLS Finance (supra)* is a decision rendered in a writ petition under article 226 of the Constitution of India. In exercise of its writ jurisdiction a High Court decides cases on the basis of affidavits. It is open to the High Court to arrive at conclusions of fact (as well as of law) based upon the affidavits. The present case is an appeal from the order of the Tribunal, which is the final fact finding authority under the Income Tax regime. The facts, as determined by the Tribunal, unless they are held to be perverse, form the basis of the substantial questions of law which are to be determined by High Court's in appeals under section 260A of the said Act. It ought to be remembered that the Tribunal was of the view that the search and seizure, in the present case, was completed on 17.11.2000. The Tribunal also held that the *panchnama* of 03.01.2001 was "merely a release order". Secondly, in *VLS Finance (supra)*, the search and seizure operations commenced on 22.06.1998 and continued till 05.08.1998. As many as 16 *panchnamas* were drawn upon in respect of the visits made to the assessee's premises. There was a mass of documents which were searched and



05.08.1998 and not on 22.06.1998. The court also found that the search was also not unduly prolonged. The court held:-

“Consequently, we are of the opinion that the respondents did not complete the search on June 22, 1998, as alleged by the petitioners, **nor did they unduly prolong it**. The search concluded on August 5, 1998, and so in terms of Explanation 2 to section 158BE of the Act the period of limitation would begin from the end of August, 1998, that is, August 31, 1998 onwards.”

(emphasis supplied)

31. The factual basis of the decision in *VLS Finance (supra)* is entirely different to that of the present case. On law, there is nothing in *VLS Finance (supra)* which contradicts what we have explained above. If the search concluded on 05.08.1998, as held by the court, and the *panchnama* of that date was the last of the string of 16 *panchnamas*, obviously this would be the date on which the search was concluded and the date on which the warrant of authorization for search was executed. But, in the present appeal, no search whatsoever was conducted on 03.01.2001. Hence, the *panchnama* drawn up on 03.01.2001 cannot be regarded as a document evidencing the conclusion of a search. If that be so, 03.01.2001 cannot be regarded as the date on which the warrant of authorization was executed. Moreover, while in *VLS Finance (supra)*, the court held that the search was not unduly prolonged, in the present case the gap between 17.11.2000 and 03.01.2001 is unexplained.



32. The result of this discussion is that we agree with the learned counsel for the respondent/ assessee that the impugned order does not call for any interference on our part and that no substantial question of law arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

November 12, 2008

HJ