



THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 12.11.2008

+ **ITA 1005/2007**

**COMMISSIONER OF INCOME TAX
DELHI- IX**

... Appellant

- versus -

HARKARAN DAS VED PAL

... Respondent

Advocates who appeared in this case:

For the Appellant : Ms Prem Lata Bansal

For the Respondent : Mr Ajay Vohra with Ms Kavita Jha

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE RAJIV SHAKDHER

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|---|-----|
| 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 260 A of the Income Tax Act, 1961 (hereinafter referred to as the 'said Act') raises the following substantial questions of law :-

- “a) Whether the Income-tax Appellate Tribunal was correct in law in cancelling the penalty imposed by the Assessing Officer under Section 158 BFA(2) of the Income-tax Act, 1961 ?



- b) Whether the Income-tax Appellate Tribunal was correct in law in cancelling the penalty on the ground that the assessee himself had surrendered the amount and therefore it could not be said that the assessee had either concealed or furnished inaccurate particulars of income?"

2. The appeal is directed against the order dated 02.02.2007 passed by the Income Tax Appellate Tribunal in IT (SS) A No. 172/Del/2005 and pertains to the block period 01.04.1999 to 06.07.2000. As the questions set out above would indicate, the appeal arises out of penalty proceedings under Section 158 BFA (2) of the said Act. The facts are that a search under Section 132 of the said Act was conducted on 06.07.2000 on the JMD Group of Companies. Certain material (Annexure A-6/R-2 of the seized papers) which related to the assessee was found in the course of the search. The said material indicated cash receipt from the assessee against goods sold to the assessee by the JMD Group on earlier dates. Although in the present case the search was conducted in respect of the JMD Group of Companies and not in respect of the assessee, and, consequently, the provisions of Section 158 BD would be applicable, however, in terms of Section 158 BD itself the Assessing Officer having jurisdiction over the assessee, was required to proceed under Section 158 BC and the provisions of Chapter XIV-B were to apply accordingly. Action under



in respect of the assessee on account of the aforesaid material. Initially, the assessee had challenged the validity of the action under Section 158 BD. However, those proceedings are not of much relevance for the present appeal. The assessee had filed his return of income for the block period on 10.03.2003 in compliance with the notice issued on 26.03.2002 under Section 158 BD of the said Act. The return filed by the assessee declared undisclosed income at nil.

3. Thereafter notices under Section 143 (2) and 142 (1) of the said Act were issued along with a detailed questionnaire. In the course of assessment proceedings, statement of Sh. Gulshan Kumar of the JMD Group was recorded. The relevant questions as extracted in the impugned order are as under:-

“Q6. I am showing Annexure A-6/R-2 of the seized paper (page No. 18), there is an entry in the name of M/s Har Karn Das Ved pal. Can you explain the same?

Ans. This shows cash receipt against goods sold to them on earlier dates.

Q.7 Can you identify the person who is supposed to have paid cash to you?

Ans. I cannot identify the person who has made the payments as all payments were received through brokers and were entered in names stated by brokers.

Q.8. Can you categorically state that cash was paid



Ved Pal Ltd., Lawrence Road, Delhi or any of his partners and/ or staff?

Ans. I have already stated that payments were received through brokers only. I cannot categorically, therefore, state that these payments have been made by Shri Ved Pal Gupta or any other person on behalf of Har Karan Das Ved Pal operating from 470, Lawrence Road, Delhi.

Q9. Do you have evidence to prove that goods were sold and delivered to the above firm against which supposedly cash has been received ?

Ans. No.

Q10. How can you say that the entry relates to M/s Har Karan Das Ved Pal in which Mr Ved Pal Gupta is partner?

Ans. I do not know whether Har Karan Das Ved Pal entered in seized paper is the firm belonging to Shri Ved Pal Gupta. I have entered this name on the instruction of the broker.

Q11. Do you have regular business dealings with Har Karan Das Ved Pal, 470, Lawrence Road, Delhi?

Ans. Yes, we purchase oil from them.

Q12. Are the transactions recorded in your books and what is the evidence in support thereof?

Ans. Yes, these transactions are recorded in my books of account, bills are available for such purchases and payments are made by account payee cheques.

Q.13. Were any broker involved in such dealings?



Q14. I am showing you entry at page 20 Annexure A-2/R-1, there is one entry on the right side in the name of Har Karan Das Ved Pal. Can you explain the same.

Ans. This entry shows payments made to M/s Harkaran Das Ved Pal against the supply made by them.

Q15. Can you categorically state that the goods subject of sale belong to Harkaran Das Ved Pal operating from 470, Lawrence Road, Delhi.

Ans. No, as already stated above, these entries are entered in the names which are stated by brokers.

Q16. Can you identify the person to whom cash was paid?

Ans. Entire purchase and sale is carried out through brokers. I cannot, therefore, identify the person to whom cash was paid.

Q17. Can you confirm that cash was paid to Mr Ved Pal Gupta or any of the partner/ staff member?

Ans. No.

Q18. When the broker gives you a name of the party, did you same before entering the same in the loose papers?

Ans. No, because this is faith business and we write whatever name is stated by brokers.

Q19. Can you categorically state that the transactions recorded in loose papers in the name of Harkaran Das Ved Pal relates to the firm with the same name operating from 470, Lawrence Road, Delhi.



4. The statement of Sh. Gulshan Kumar Dhingra reveals that the entry in the name of the assessee shows cash receipts against goods sold to the assessee on earlier dates. It also reveals that the entire dealings were carried out through brokers who used to take delivery of goods and make payments on behalf of the parties. It is also apparent that Sh. Gulshan Kumar Dhingra was not in a position to categorically state that the transactions recorded in the loose papers in the name of Har Karan Das Ved Pal related to the firm with the same name operating from 470, Lawrence Road, Delhi, i.e., the assessee. Apart from this material there is no other evidence against the assessee. In order to avoid protracted and time consuming litigation and in order to buy peace, the assessee, by a letter dated 25.03.2004, surrendered an amount of Rs 8 lacs as undisclosed income. The Assessing Officer completed the assessment on 25.03.2004 itself holding that on the basis of the material found, there was undisclosed turnover of Rs 39.73 lacs for the financial year 1999-2000 and Rs 14.49 lacs for the financial year 2000-2001. He applied the net profit rate of 1% for computing the net profit for the financial year 1999-2000 at Rs 38,100/- and for the financial year 2000-2001 at Rs 14,487/-. The Assessing Officer rounded off all these figures and computed net figures at Rs 40,000/- for the financial year 1999-2000 and Rs 15,000/- for the financial year



purchase and sales could not be carried out without some initial investment. He assumed that the initial investment would be 1/5th of the total turnover of the first year and, therefore, he worked out the undisclosed investment at Rs 8,00,000/-. Consequently, the Assessing Officer held that the undisclosed income for the financial year 1999-2000 worked out at Rs 8,40,000/- and for the financial year 2000-2001 at Rs 15,000/-. He computed the undisclosed income for the block period as under:-

A.Y	Total income including undisclosed income	Returned/ assessed income	Undisclosed income
1993-94	36290	36290	Nil
1994-95	105340	105340	Nil
1995-96	304206	304206	Nil
1996-97	232260	232260	Nil
1997-98	259130	259130	Nil
1998-99	270175	270175	Nil
1999-00	294120	294120	Nil
2000-01	1187020	347020	840000
2000-02	137310	122310	15000
(upto 6.7.2000)	36290	-	855000

Assessed on undisclosed income of Rs 855000. Charge interest under Section 158 BFA (1) of the I. T. Act. Initiate



Thus, the total undisclosed income was held to be Rs 8,55,000/- for the block period. The assessee did not challenge the same any further.

5. Thereafter, the Assessing Officer issued a show cause notice before the levy of penalty under Section 158 BFA (2) of the said Act. The Assessing Officer noted that the assessee had shown the total undisclosed income for the block period to be nil but, that in the block assessment, the assessee had been assessed at undisclosed income of Rs 8,55,000/-. Adverting to the second proviso to Section 158 BFA (2), the Assessing Officer observed that the said proviso specifically stated that penalty “shall” be paid on the difference between the “undisclosed income determined” and the undisclosed income shown in the return. He was of the view that since the undisclosed income as per the return was nil, the difference between the undisclosed income determined and the undisclosed income returned was Rs 8,55,000/-. He computed the tax leviable on the difference at Rs 5,13,000/- and imposed a penalty of 100% of the differential tax at Rs 5,13,000/- by virtue of his order dated 28.09.2004.

6. The Commissioner of Income Tax (Appeals) confirmed the penalty imposed by the Assessing Officer. He was of the view that the



he was confronted with the seized documents relating to the assessee. Since the assessee could not give a satisfactory explanation, the surrender could not be treated as voluntary. He was also of the view that the provisions of Section 271 (1) (c) of the said Act were different from the provisions of Section 158 BFA (2). The Commissioner of Income Tax (Appeals) was of the view that the provisions of Section 158 BFA (2) did not give any option but to levy the penalty on undisclosed income determined by the Assessing Officer. He observed that the use of the words – “... *the penalty shall be on the portion of undisclosed income determined in excess of the amount of disclosed income shown in the return*” – makes the provision mandatory in nature. Consequently, he upheld the Assessing Officer’s levy of penalty of Rs 5,13,000/- on the difference of Rs 8,55,000/-.

7. The Tribunal, after hearing the arguments advanced on behalf of the assessee as well as on behalf of the revenue, came to the conclusion that the levy of penalty under Section 158 BFA (2) is not mandatory. The Tribunal took the view that where the action of the assessee was bonafide, penalty may not be attracted. The Tribunal also noted that in the facts of the present case, the undisclosed income as computed by the Assessing Officer comprised of a sum of Rs 8 lacs by way of estimate of investment on undisclosed transaction of purchase



amounting to 1% of the net profit on undisclosed transactions of purchase and sale. The Tribunal noted that from the statement of Sh. Gulshan Kumar Dhingra of the JMD Group of Companies, it is clear that the payment was received by them in respect of sales made earlier. Consequently, the Tribunal was of the view that the sales made by the JMD Group to the assessee were on credit terms which, in turn, implied that the assessee was not required to make any investment while making the purchases. The Tribunal also noted that even otherwise there was no evidence found as a result of search, which suggested that the transactions for whole of the year required investment in the first instance. While the Assessing Officer had estimated undisclosed investment at 1/5th of the total turnover of the first year, the Tribunal returned a finding of fact that no amount was found to have been invested in the first instance for transactions for whole of the year and that, therefore, the estimate of undisclosed investment was based merely on the surrender made by the assessee.

8. The Tribunal also held that the adoption by the Assessing Officer of the 1% net profit of undisclosed transactions was also without any basis. It noted that the chart reproduced by the Assessing Officer in the assessment order suggested that the net profit rate of earlier years ranged between 0.45 to 0.62%. From this, the Tribunal



the basis of these findings, the Tribunal concluded that, just because the assessee had surrendered the amount of Rs 8 lacs, it could not be said that the assessee had either concealed the particulars of income or had furnished inaccurate particulars and that the Explanation appended to Section 271 (1)(c) could not be invoked in such a situation to levy the penalty.

9. In the backdrop of such findings, the Tribunal held that since the surrender by the assessee was bonafide and truly in the spirit of avoiding protracted and long drawn litigation, penalty under Section 158 BFA(2) was not justified. Consequently, the Tribunal cancelled the penalty under Section 158 BFA (2).

10. Before us, the learned counsel for the revenue/ appellant contended that Chapter XIV–B of the said Act provides a separate scheme for assessment in search cases and also includes the provision for levy of penalty in such cases. It was submitted that the provisions of Section 271 (1)(c) cannot be read into Section 158 BFA (2) and the two provisions are separate and distinct. The learned counsel for the revenue argued that under Chapter XIV –B of the said Act, even after search, the assessee is given an opportunity to declare his true and correct undisclosed income. It is only when there is a difference



income that a penalty can be levied under Section BFA (2) on this difference. She also submitted that while the main portion of subsection (2) of Section 158 BFA uses the term “may direct” the second proviso thereto uses the term “shall”. According to her, whenever the second proviso to Section 158 BFA (2) is applicable, imposition of penalty becomes mandatory. The learned counsel also submitted that the surrender made by the assessee had prevented the Assessing Officer from making any further investigation and, therefore, no extra burden should be put on the Assessing Officer to prove that the assessee had evaded the tax by consciously not disclosing his income. The learned counsel placed reliance on a decision of this Court in the case of *Durga Timber Works v. CIT: 79 ITR 63* to submit that it would amount to laying an impossible burden of proof on the department and making the provisions for imposition of penalty wholly unworkable if, even after the surrender by the assessee of its concealed income, the department is still required to prove by independent evidence that the assessee had concealed its income. At the outset, we may point out that the decision in *Durga Timber Works (supra)* was in the context of Section 271 (1)(c) of the said Act which, even as per the submissions of the learned counsel for the revenue, are distinct and different from the provisions of Section 158 BFA (2). Moreover, this is not a case where the department is being asked to establish the extent of undisclosed income



The question in the present case is different and that is as to whether a penalty can be imposed on the assessee under Section 158 BFA (2). The observation made in *Durga Timber Works (supra)* was in entirely different circumstances and would, in any event, not be of any advantage to the revenue in the present case.

11. On the other hand, the learned counsel for the assessee submitted that Chapter XIV-B is a self-contained code and is a mode of assessment of undisclosed income, which has been detected as a result of search. He also submitted that it is settled law that the findings in the assessment proceedings are not conclusive for the purposes of deciding the question of penalty. As regards the first proposition that the procedure under Chapter XIV-B is a special one, the learned counsel for the assessee / respondent placed reliance on a decision of this Court in the case of *CIT v. Ravi Kant Jain: 250 ITR 141 (Del)* wherein this Court held as under:-

“The special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. As the statutory provisions go to show, it is not intended to be a substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of account or documents and



of search is clearly relatable to sections 132 and 132A.”

“The admitted position before the Tribunal was that the undisclosed income was not determined on the basis of any search material. That being the position, the Tribunal was justified in its view that section 158BA had no application to the facts of the case. The inevitable conclusion is that no substantial question of law arises out of the order of the Tribunal which needs adjudication.”

12. Insofar as the second proposition with regard to assessment proceedings not being conclusive for the purposes of imposition of penalty is concerned, the learned counsel for the assessee placed reliance on, *inter alia*, **CIT v. Anwar Ali: 76 ITR 696 (SC)**; **CIT v. Khoday Eswarsa and Sons: 83 ITR 369, 376 (SC)** and **CIT v. J.K. Synthetics Ltd.: 219 ITR 267 (Del)**. The relevant observations in the said decisions are as under:-

“CIT v. Anwar Ali: 76 ITR 696 (SC)

“It must be remembered that the proceedings under section 28 are of a penal nature and the burden is on the department to prove that a particular amount is a revenue receipt. It would be perfectly legitimate to say that the mere fact that the explanation of the assessee is false does not necessarily give rise to the inference that the disputed amount represents income. It cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However, it is good evidence. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously



CIT v. Khoday Eswarsa & Sons:83 ITR 369, 376 (SC)

“From the above it is clear that penalty proceedings being penal in character, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. Apart from the falsity of the explanation given by the assessee, the department must have before it before levying penalty cogent material or evidence from which it could be inferred that the assessee has consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount is a revenue receipt. No doubt the original assessment proceedings, for computing the tax may be a good item of evidence in the penalty proceedings but the penalty cannot be levied solely on the basis of the reasons given in the original order of assessment.”

CIT v. J.K. Synthetics Ltd.: 219 ITR 267 (Del)

“However, the proceedings for imposition of penalty and assessment proceedings are two separate and independent proceedings and, therefore, separate and distinct provisions have been enacted in the statute for initiation of the same. Under the provisions of section 271(1), a person becomes liable to pay penalty within the term and language of clause (a) or (b) or (c). Therefore, the findings recorded by the Tribunal in the quantum appeal cannot be said to be decisive and concluded factor in the penalty proceedings.”

13. The learned counsel for the assessee submitted that the assessment had been framed purely on the basis of the surrender made by the assessee to avoid protracted litigation and to buy peace. He submitted that *de hors* the surrender made by the assessee, the



income during the course of the search. The assessment has been made on pure estimate and, notwithstanding the fact that the assessee did not file an appeal against the quantum assessment, it was open to the assessee in penalty proceedings to show that an addition made on the basis of pure estimate and guesswork did not constitute undisclosed income.

14. He submitted that the finding of the Tribunal is also to the effect that the assessment was based on pure estimate / guesswork and that in the light of such a finding recorded by the Tribunal, the imposition of penalty cannot be sustained. He reiterated that unless there is “undisclosed income” within the scope of Chapter XIV-B, there is no question of levying penalty under Section 158 BFA (2) of the said Act. He submitted that the assessee had voluntarily surrendered Rs 8 lacs to buy peace and avoid protracted litigation and that *de hors* the surrender, the department has not been able to establish any undisclosed income. Consequently, the surrender made by the assessee cannot be made the basis for levy of penalty under Section 158 BFA (2) of the said Act.

15. The learned counsel for the assessee referred to the decision of the Supreme Court in the case of *Sir Shadilal Sugar and General*



submit that where a surrender has been made voluntarily and bonafide prior to detection by the department, no penalty under Section 271 (1) (c) would be leviable with reference to the surrendered income. In *Sir Shadilal Sugar and General Mills Ltd (supra)* the Supreme Court observed as under:-

“The High Court accused the Tribunal of not considering the time when the assessee admitted the additions. We find that it was duly considered by the Tribunal. We find that the assessee, admitted that these were the incomes of the assessee but that was not an admission that there was deliberate concealment. From agreeing to additions, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reasons for such admission, i.e., when the assessee realises the true position, it does not dispute certain disallowances but that does not absolve the Revenue from proving the mens rea of a quasi-criminal offence.”

At this stage itself, we may note that the learned counsel for the revenue / appellant contended that the decision in *Sir Shadilal Sugar and General Mills Ltd (supra)* is no longer good law as observed by a larger Bench of the Supreme Court in the subsequent decision in the case of *K.P. Madhusudhanan v. Commissioner of Income-tax: 251 ITR 99 (SC)*. The exact manner in which the later decision has referred to the earlier decision in the case of *Sir Shadilal Sugar and General Mills Ltd (supra)* is as follows:-

“Learned counsel for the assessee then drew our



705. He submitted that the assessee had agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to be added was concealed income. That it did not follow that the amount agreed to be added was concealed income is undoubtedly what was laid down by this court in the case of *Sir Shadilal Sugar and General Mills Ltd.* [1987] 168 ITR 705 and that, therefore, the Revenue was required to prove the mens rea of a quasi-criminal offence. But it was because of the view taken in this and other judgments that the Explanation to section 271 was added. By reason of the addition of that Explanation, the view taken in this case can no longer be said to be applicable.”

The observation of the Supreme Court in *K.P. Madhusudhanan (supra)* clearly relates to the addition of the Explanation to Section 271 of the said Act. There is no such provision in Chapter XIV-B of the said Act and in particular in Section 158 BFA (2) thereof. The general proposition laid down in *Sir Shadilal Sugar and General Mills Ltd (supra)* was that the surrender of undisclosed income made by an assessee to buy peace did not necessarily lead to the conclusion that the amount surrendered was indeed concealed income, cannot be said to have been overruled in *K.P. Madhusudhanan (supra)*. The Supreme Court in *K.P. Madhusudhanan (supra)* itself noted that because of the view taken in *Sir Shadilal Sugar and General Mills Ltd (supra)*, the revenue was required to prove the mens rea of the quasi-criminal offence and it was because of such a view that the Explanation to



reason of the said Explanation that the view taken in *Sir Shadilal Sugar and General Mills Ltd (supra)* could no longer be said to be applicable. Because there is no such explanation or provision introduced in Section 158 BFA (2), it cannot be said, in our view, that the general observations in *Sir Shadilal Sugar and General Mills Ltd (supra)* as noted above, would not apply to cases of penalty under Section 158 BFA (2).

16. It was lastly contended on behalf of the learned counsel for the assessee that the levy of penalty under Section 158 BFA (2) of the said Act was discretionary and not automatic as was evident from the use of the word “may” in the said provision. The learned counsel submitted that the Tribunal was right in deleting the penalty under Section 158 BFA (2) of the said Act on the basis of the findings returned by it and consequently, both the questions ought to be decided in favour of the assessee and against the revenue.

17. Before we proceed to answer the questions in the light of the arguments advanced by the counsel for the parties, it would be necessary to notice the statutory provisions. Section 158 BFA (2) reads as under:-

“158BFA. Levy of interest and penalty in certain



(1) xxxx xxxx xxxx xxxx

(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 exceed 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 section 158BC;
- (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 part 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.

(3) xxxx xxxx xxxx xxxx”



penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed 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*”. This, in our view, implies that the Assessing Officer has discretion in imposing a penalty. This is apparent from the use of the expression “may direct that a person shall pay by way of penalty”. Once the Assessing Officer, exercising his discretion, comes to the conclusion that penalty is imposable, the statute requires that such sum of penalty “shall” not be less than the amount of tax leviable but “shall” not also exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer as indicated above. While it is discretionary for the Assessing Officer to direct that a person shall pay penalty, it is mandatory that, in case the Assessing Officer is of the opinion that such penalty is leviable, the penalty amount shall not be less than the amount of tax leviable in respect of the undisclosed income and not more than three times of such tax. A plain reading of Section 158 BFA (2) gives us the indication that the legislature did not intend the imposition of penalty by itself to be mandatory. The legislature intended the same to be left to the discretion, which of course has to be exercised upon judicial considerations, of the Assessing Officer.



18. The first proviso clearly stipulates the circumstances under which an order imposing penalty cannot be made. Where a person has furnished a return under Clause (a) of Section 158 BC and 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 and the evidence of tax paid is furnished along with the return and an appeal is not filed against the assessment of that part of income which is shown in the return, no order imposing a penalty can be made under Section 158 BFA (2). The intention of the legislature is clear. Where, after a person receives a notice under Section 158 BC and he furnishes a return indicating undisclosed income and tax is paid or the money seized is offered to be adjusted against the tax payable and if the assessee does not appeal against the assessment completed on that basis, then no penalty can be imposed on such an assessee. The intention of the legislature is that where a person, who has been granted an opportunity of making a clean breast of things, comes forth and declares his undisclosed income and also pays the tax thereon, then no penalty ought to be imposed on him for his earlier transgressions.

19. The second proviso to Section 158 BFA (2), however,



the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return. It further stipulates that 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. The indication of the legislature, which can be discerned upon a plain reading of the second proviso, is that when an opportunity has been granted to a person to file return of his undisclosed income and he still does not disclose the income which is undisclosed then, where the assessment is made in excess of the amount of undisclosed income shown in the return, the provisions of the first proviso would not apply. In other words, in such a situation, the penalty would be imposable. And, it shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return. The expression “the penalty shall be imposed on that portion.....” appearing in the second proviso, in our view, has reference to the basis on which the penalty is to be imposed. To be clear, the word “shall” used in the said expression does not have reference to the imposition of penalty in the sense that penalty would be mandatory but has reference to the mode of quantification of the penalty. All that the second proviso means is that where there is a difference between the undisclosed income shown in the return filed under Section 158 BC (a) and the undisclosed income



notwithstanding the fact that the circumstances stipulated in the first proviso are satisfied, penalty would still be imposable by the Assessing Officer and the same shall be imposed on the portion of the undisclosed income determined by the Assessing Officer which is in excess of the amount of undisclosed income shown in the return.

20. The expression “undisclosed income determined” has to be understood in the context used in Section 158 BFA (2). It refers to the undisclosed income determined by the Assessing Officer under clause (c) of Section 158 BC. Section 158 BC prescribes the procedure for block assessment. Clause (b) thereof stipulates as under:-

“(b) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 31, section 144 and section 145 shall, so far as may be, apply;”

This is followed by clause (c) which reads as under:-

“(c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;”

Thus, determination of the undisclosed income has to be done in the manner laid down in Section 158 BB and the provisions of Section 142, sub-section (2) and (3) of Section 143, Section 144 and Section



computation of undisclosed income of the block period. Section 158

BB (1), so much as is relevant for our purposes, reads as under:-

“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 the case may be, as increased by the aggregate of the losses of such previous years, determined,—.....”

This provision clearly stipulates that the undisclosed income of the block period has to be determined or computed “on the basis of evidence found as a result of search or requisition of books of accounts or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence”.

This Court in *Ravi Kant Jain (supra)*, as indicated above, has already observed that the procedure of assessment under Chapter XIV-B is a special procedure intended to provide a mode of assessment of undisclosed income which has been detected as a result of search. The procedure under Chapter XIV-B is not intended as a substitute to regular assessment and its scope and ambit is limited in that sense to materials unearthed during the search. As pointed out in *Ravi Kant Jain (supra)*, the assessment for the block period can only be done on



of accounts or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence. It is, therefore, clear that the undisclosed income, which is to be determined under Chapter XIV-B, has to be determined on the basis of evidence discovered during the search. It is obvious that where the computation of undisclosed income is based on material other than what was found in the course of the search, the same could not be treated as undisclosed income determined under clause (c) of Section 158 BC.

21. Going back to Section 158 BFA (2), the Assessing Officer has been empowered to impose penalty on a person when the undisclosed income determined under clause (c) of Section 158 BC, is in excess of the undisclosed income returned by such person in pursuance to a notice under Section 158 BD/ 158 BC. In other words, a pre-condition for the imposition of penalty under Section 158 BFA (2) is that there must be a determination of the undisclosed income by the Assessing Officer under clause (c) of Section 158 BC of the said Act. If this is not satisfied, then there would be no question of imposing any penalty.

22. In the present case, we find that the computation of



“undisclosed income determined by the Assessing Officer under clause (c) of Section 158 BC”. The Tribunal has already returned a finding that there is no evidence found as a result of search, which suggests that the transactions for the whole year of 1999-2000 required any investment in the first instance. The Tribunal has also found as a fact that no amount was found to have been invested by the assessee in the first instance for the transactions of the whole year. The Tribunal also found that even the estimate of 1% net profit was mere guesswork. On the basis of these facts it is apparent that the undisclosed income has been computed merely on the basis of the surrender made by the assessee in the course of the block assessment proceedings. *De hors* the surrender, there is no evidence which could have been said to have been found as a result of the search and, therefore, the ‘computation’ of undisclosed income by the Assessing Officer in the block assessment proceedings cannot be construed as a ‘determination’ of undisclosed income contemplated under Section 158 BC (c) or 158 BB. Thus, even *de hors* the question of applicability of the decision in *Sir Shadilal Sugar and General Mills Ltd (supra)* and without considering the provisions of Section 271 (1) (c) of the said Act or the effect of the insertion of the Explanation therein, when there is a bonafide surrender and the undisclosed income is computed merely on the basis of such surrender, no penalty would be imposable under Section 158 BFA (2)



undisclosed income by the assessee under clause (c) of Section 158 BC which is the requirement for imposition of penalty. The sum and substance of all this is that, had there been no surrender, the Assessing Officer could not have determined the undisclosed income inasmuch as the Tribunal has returned a finding of fact that there is no evidence relatable to the search on the basis of which such undisclosed income could have been determined.

23. In view of the foregoing discussion, question (a) is answered in the affirmative. In other words, the Tribunal was correct in law in cancelling the penalty imposed by the Assessing Officer under Section 158 BFA (2) of the said Act. However, with regard to question (b) we note that the Tribunal was concerned with concealment and/ or furnishing of inaccurate particulars of income, which is an expression occurring in Section 271 (1) (c) of the said Act but not in Section 158 BFA (2). The consideration of the question of concealment of income or furnishing inaccurate particulars of income was not a relevant consideration in the facts of the present case. To that extent, the Tribunal had misconstrued the scope of the penalty provisions applicable in the present case. We have already noted that because the assessee had surrendered the amount bonafide and for the purposes of buying peace and avoiding protracted litigation, it did not follow that



in Section 158 BC (c) or 158 BB (1) of the said Act. Once this is recognized, there is no question of imposing a penalty under Section 158 BFA (2) of the said Act. So, though we hold that the Tribunal was not required to consider the question of concealment of income and/ or furnishing of inaccurate particulars of income, the Tribunal was correct in arriving at the conclusion in the earlier part of its decision as noted above that there was no evidence relatable to the search *de hors* the surrender made by the assessee and, therefore, the penalty which had been imposed by the Assessing Officer under Section 158 BFA (2) was liable to be cancelled. This question is answered accordingly.

24. In view of the answer to question (a) above, the appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

November 12, 2008
SR