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

Reserved on: 19.01.2017
Pronounced on: 03.03.2017

\+ **ITA 119/2004**

COMMR.OF INCOME TAX, DELHI (CENTRAL-I)..... Appellant

versus

PINAKI MISRA ..... Respondent

\+ **ITA 423/2004**

COMMISSIONER OF INCOME TAX ..... Appellant

versus

SANGEETA MISRA ..... Respondent

Through : Sh. Dileep Shivpuri, Sr. Standing Counsel with Sh. Sanjay Kumar, Jr. Standing Counsel and Sh. Vikrant. A. Maheshwari, Advocate, for appellants.

Sh. Akhil Sibal with Ms. Rashmi Chopra, Advocates, for respondents.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. These appeals concern common questions of law. The question of law framed for decision by this court is:

> *Whether the ITAT was correct in law in deleting the additions made by the Assessing Officer (hereinafter also referred to as "AO") on the ground that the AO has no jurisdiction to pass the order under section 158BC of the Income Tax Act, 1961 (hereinafter also referred to as the "Act").*

FACTS IN BRIEF:

2. A search and seizure operation under Section 132 of the Act was

conducted at the residence of Shri Pinaki Misra, the Assessee (in ITA 119/2004) in November 1996. During the course of the search, various documents etc. were found and seized. Thereafter, notice under section 158BC was issued to the Assessee on 7.03.1997 to file his return of income for the block period. The return was filed on 25.04.1997 declaring an undisclosed income of ₹ 27,65,528/-. The block assessment proceedings were carried out, after which various documents were taken into account. Based on these, the Assessee was asked to reply to several queries, which the Assessee complied with and furnished the relevant replies to the Assessing Officer (AO). After considering these, the assessment order for the block period was completed and assessment made at ₹2,68,80,387/-. Additions made in the order included the amounts of ₹1,72,000/- and ₹2,50,000/- on account of loan, ₹75,00,000/- on foreign trips, ₹9,50,000/- on account of professional receipts, ₹10,80,000/- on account of household expenses and an addition of ₹90,00,000/- on account of unexplained gifts received. The AO further made an addition of ₹5,00,000/- as undisclosed sources for the assessment year 1992-93 on account of alleged estimated income from M/s Triad Associates assuming it to be the proprietorship concern of Sangeeta Misra; and an addition of ₹6,00,000/- allegedly on account of difference in professional receipts and cash in hand.

3. In ITA 423/2004, an addition of ₹38,71,507/- was made in respect of a gift to Sangeeta Misra, (the wife of the Assessee in ITA 119/2004, Pinaki Misra), from one Shri R. K. Jatia, a resident of Japan. This gift was in the form of a cheque drawn on Marine Midland Bank, New York for a sum of US$ 1,50,000/- and the same was received by the Assessee's wife in Hong Kong through her attorney Shri N. B. S. Mani. Another addition was made,

of an amount of ₹25,00,000/-, on account of foreign travel expenses incurred by Ms. Sangeeta Misra. Additionally, on the basis of estimate of income for several years and expenses, the AO added various amounts. The assessees were aggrieved and approached the Income Tax Appellate Tribunal (ITAT).

The ITAT's Order dated 08.06.2001

4. Aggrieved by the assessment order passed for the block period, both assessees, preferred appeals before the ITAT, New Delhi. A two-member bench of the ITAT, New Delhi, heard the appeal relating to Mr. Pinaki Misra and announced an order on 8.06.2001. The Assessee had submitted that there was no recovery of cash and jewellery during the search and the jewellery found (valued at around ₹2 lakhs) was normal, and that the AO was not entitled to reopen any past assessment which had already been completed in the guise of a block assessment; citing a number of reported judgments which dealt with what "undisclosed income" is and what could not be included within such definition. Reference in this connection was made to section 158B(b) and 158BA(3) of the Act. The further submission was to the effect that both the proceedings (for regular assessment and block assessment) could run parallel, i.e., regular assessment under section 143(3) as also the block assessment which contained a specific number of years that comprised the "block period". Likewise, the additions towards ₹1,72,000/- under Section 68 of the Act for the assessment year 1987-88, and of ₹2,50,000/- for an unrecorded loan taken by the Assessee from one Shri S.K. Chakraborty were assailed on the ground that this was gone into during the relevant assessment year by the AO. The ITAT held that the addition of ₹1,72,000/- was not called for, as the amount had been duly explained in the course of the original assessment proceedings and on the same set of facts;

the ITAT held likewise even in the block assessment. Therefore, it deleted the addition of ₹2,50,000/-, holding that the same was made on insufficient and invalid grounds and in violation of relevant provisions of law. The ITAT had also deleted the additions to the tune of ₹9,90,000/-, made on account of household expenses for various assessment years comprising the block period, on its findings that the addition was disproportionately high, and based on estimates, and not facts.

5. With regard to the foreign trips alleged to have been incurred out of undisclosed sources, the AO concluded that the 22 foreign trips had been funded outside the books of account and since the Assessee had not furnished any details, the AO accordingly proceeded to estimate the expenditure on tickets at ₹50,00,000/- and thereon added a sum of ₹25,00,000/- towards expenditure on local conveyance, boarding and lodging etc. i.e., coming to a total of ₹75,00,000/-. The ITAT held that the AO did not make any detailed enquiries to ascertain the cost of the tickets for the various assessment years and directed the AO to re-compute the addition on account of foreign travel expenses in the various assessment years falling in the block period with a further verification to be made in respect of the actual number of days spent abroad by the Assessee during the said block period.

6. In relation to the aggregate addition of ₹18,38,209/- on account of expenses alleged to have been incurred outside the books of account on maintenance etc., the AO stated that the Assessee had shown nominal expenditure on the cars maintained in the various assessment years falling within the block period and it was noticed that the Assessee was maintaining more than one car whose numbers varied/increased from year to year. It was

also observed that the Assessee owned imported cars, with high costs on maintenance, staffing, insurance etc. The Assessee contended that the addition was made on assumptions and presumptions, and assessments already completed accepting the car expenses cannot be reviewed since the scope of block assessment under Chapter XIV-B of the Act is limited to items of undisclosed income. The ITAT went on to hold that the estimates made by the AO were unrealistic, and the yearly calculation for each year in the block period was ad hoc and arbitrary. Another addition of ₹28,76,000/- made on account of "suppressed rent" pertaining to property No.145 Jor Bagh, New Delhi, the ITAT held that the Revenue was unable to establish the addition in law or on facts. The other addition, made in the Assessee's hands, for two gifts of ₹45,00,000/- each, from one Shri Jhanwar Lal Kothari, who affirmed by an affidavit dated 30.04.1994, that they were made out of natural love and affection and on account of his longstanding friendship with the Assessee's family, the AO had asked the Assessee to furnish a copy of the account from where the remittance of US$3,05,000 from DSS Singapore, that constituted the aforementioned gifts, had come. The Assessee was also asked to show cause as to why the sum of ₹90,00,000/- was not to be treated as his income. In response to the show cause notice, the Assessee replied that the gifts were received out of the NRE account of Shri Kothari and the gifts, therefore, did not attract the provisions [section 5(1)(iib)] of the Gift Tax Act, 1958, and they rose out of natural love and affection. The ITAT held that the addition was made purely on surmises and conjectures, and the details of the gifts had been disclosed for the assessment year 1994-95, could not be held as an undisclosed item on the part of the Assessee and thus, not falling for consideration under Chapter-

XIV-B of the Act.

7. The other ground deals with an addition of ₹10,00,000/- alleged to be an undisclosed professional fee received by the Assessee from M/s. Dhanraj Mills Pvt. Ltd. The main submission on behalf of the Assessee was to the effect that the letter of Shri T.B. Ruia (Director of the said company) dated 15.09.1997 was never confronted to the Assessee and there was nothing on record to suggest that on 20.06.1991 when the sum of ₹10,00,000/- was received, it was not an interest free loan. The counsel for the Revenue strongly supported the order passed by the AO. The ITAT set aside the order passed by the AO and restored the matter once again to his file asking him to confront the letter of Shri T. B. Ruia dated 15.09.1997 to the Assessee allowing him an opportunity to rebut the same.

8. The next set of grounds for disposal pertained to the addition on account of professional receipts in the assessment years 1994-95 to 1997-98. The arguments of the Assessee were twofold, namely, that there was no material found during the course of the search which would show that the professional receipts had been earned and suppressed; and secondly, the additions were based on the past history overlooking the fact that in the assessment year 1994-95 to 1996-97 the Assessee had disclosed professional receipts to the tune of ₹3,65,000/-, ₹3,25,000/- and ₹ 4,10,000 respectively. It was, therefore, urged that the aggregate addition of ₹9,50,000/-be deleted. As against this, the counsel for the Revenue strongly supported the order passed by the AO relying heavily on the fact that the Assessee had not produced his books of account in spite of numerous opportunities allowed and as such, provisions of section 145(2) of the Act were attracted, and the addition was justified. The ITAT went on to hold that there is substantial

merit in the arguments advanced on behalf of the Assessee, and allowed the Assessee a relief of ₹ 7,50,000/-.

9. Due to a difference of opinion between the Accountant Member and the Judicial Member, the case was referred to the President of the ITAT, New Delhi as a Third Member under section 255(4) on 19.06.2001. The points of reference were:

> *"1 Whether, on the facts and circumstances of the case and in law an addition of Rs. 2,50,000/- in respect of Shri S. K. Chakraborty was to be deleted as has been done by the Vice President or the matter was required to be restored back to the AO for a decision de novo as is the view expressed by the Judicial Member.*
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> *2. (a) Whether on the facts and circumstances of the case and in law the view expressed by the V.P. to hold that an estimate of Rs. 10 lacs towards the cost of tickets for foreign travel was fair and reasonable as against Rs. 50 lacs estimated by the AO and the view of the J.M. being to the effect that the matter was required to be reconsidered by the AO after ascertaining the position of the assessment made in the hands of Shri Chandra Swami and related cases.*
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> *(b) Whether the view taken by the V.P. to hold that the daily expenses on the various foreign trips be taken at Rs. 2,500 as against Rs. 10,000 estimated by the AO and the matter being subsequently restored back to the file of the AO for necessary verification regarding the number of days was the correct view or the decision of the J.M. to hold that necessary verification be undertaken subject to the decision being taken in the case of Shri Chandra Swamy & other was the correct view.*
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> *3. Whether on the facts and circumstances of the case and in law the view of the V.P. to hold that addition to the extent of Rs. 2 lacs out of the addition of Rs. 9.50 lacs made by the AO on account of professional receipts was to be sustained or the*

decision of the J.M. to hold that the matter required verification and re-adjudication on the part of the AO was the correct one.

4. Whether on the facts and circumstances of the case and in law the view of the V.P. to hold that the addition of Rs. 28,76,000 made by the AO towards 'suppressed rent' was required to be deleted on the decision of the J.M. to restore the matter back to the file of the AO with the direction to re-decide the same after ascertaining the fate of the block assessment in the case of M/s. Jupiter Estates was the correct one.

5. Whether on the facts and circumstances of the case and in law the view of the V.P. to hold that no addition could be made on account of the two gifts aggregating Rs. 90 lacs received from one Shri Jhanwar Lal Kothari was right or the view taken by the J.M. to uphold the addition was the correct one."

10. In the view expressed by the third member, the issue of jurisdiction was underlined:

"5. The scope and ambit of block assessment under Chapter - XIV-B of the I. T. Act 1961 is a basic and fundamental issue giving jurisdiction to the AO. The issue has come up before the Hon'ble Delhi High Court in the case of CIT Vs. Ravi kant Jain (2001) 250 ITR 141 and it was held that block assessment under Chapter -XIV-B of the I. T. Act 1961 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 such other material or information as are available with the AO. Evidence found as a result of search is clearly relatable to Sec. 132 and 132A of the Act. Similarly the Hon'ble Calcutta High Court in the case of Bhagwati Prasad Kedia Vs. CIT(2001) 248 ITR 562 held that the explanation to Section 158 BA of the I. T. Act, 1961 makes it

clear that the Legislature thought it fit to make a distinction between the block assessment and the regular assessment. In the case of regular assessment, the AO is free to examine the veracity of the return as well as the claim made by the assessee, whereas the undisclosed income is taxed by way of block assessment as a result of search and seizure. The logic behind the two different modes of assessment is that concealment of income and claiming deduction or exemption in respect of a disclosed income cannot be treated at par. The former is an offense which goes to the root of the matter and the other is on the basis of the causes shown by the assessee where the AO is free to accept the justification shown or reject the same. In doing so, the Hon'ble Calcutta High Court followed its earlier decision in the case of CIT Vs. Shaw Wallace And Co. Ltd. (2001) 248 ITR 81. The Hon'ble Rajasthan High Court also had an occasion to consider this issue in the case of CIT Vs. Rajendra Prasad Gupta (2001) 248 ITR 35."

11. The third member, therefore, by order dated 05.04.2002 returned back the matter to the Original Bench for deciding the issue of jurisdiction and then the points of reference on the basis of findings to be arrived at by the Bench. On 26.03.2013, the Bench made its determination and held as follows:

"It is possible that in view of the other evidences found indicating unexplained expenses, such affidavit or receipts showing receipts of money by gifts or otherwise may be relatable to such unexplained expenses. Therefore sec. 158BC empowers and the Assessing Officer to make inquiries even about such evidences which are filed with the Income Tax Department and which were not earlier scrutinized, if this is relatable to other evidences found during the search. The word used is 'relatable' and not related'. A thing may be considered prima-facie relatable to other thing, and on further scrutiny it may be found that it is not related. Therefore, the scope of 'relatable' is much wider than that of 'related'. It cannot be said

that the word 'found' mentioned in the section means that the evidence must have been found for the first time during search. No such limitation is provided in the section and 'on the basis of evidence found has to included all evidences found or filed earlier with the Department. Section 158BC has been amended w.e.f. 1-7-95 to include the clause "relatable to such evidence". Even before the amendment the Assessing Officer had the power to compute undisclosed income on the basis of materials or information available with him. The use of the word 'are' only means that the materials or information are those which are available with him at the time of passing he block assessment order and not necessarily those found earlier during the search. This is a procedural section and its retrospectively has to be upheld. As regards the first point of reference the division bench has specifically considered the point of jurisdiction and therefore it cannot be reviewed."

12. The President of the ITAT then passed the final order under section 255(4) of the Act on 22.04.2003, and the matter was referred back to the Bench for decision according to the majority opinion. In these circumstances, the ITAT, by its impugned order dated 05-06-2003, allowed the Assessee's appeal. In the second appeal, i.e ITA 423/2004, the assessee is the wife of the other assessee (appellant in ITA 119/2004). In this appeal, the ITAT followed its decision in the husband/assessee's case, as many heads of income were common and allowed the assessee's appeal.

Arguments

13. It was argued that the ITAT erred in law in reviewing its own order and concluding that the order passed by the AO was beyond his jurisdiction. It is argued that the ITAT erred in law in not deciding the additions on merits and it merely allowed the appeal on the question of jurisdiction. The Revenue's counsel submits that during the assessment proceedings for the

block period, the Assessee did not object to the validity of the proceedings on all the issues and on the contrary the Assessee had acquiesced to the proceedings and filed various replies and documents.

14. Counsel for the Revenue submits that undisclosed income has to be computed in accordance with the provision of the Act and thus, should be completed on the basis of evidence found as a result of search or requisition of books of accounts or other documents; such material or information being available with the AO and being relatable to such evidence. Therefore, he contended that it would be an error to interpret this to mean that the undisclosed income must be computed only on the basis of the evidence found as a result of search and in exclusion of the application of the other sections of the Act and consideration of other material or information.

15. It is submitted that the finding of the ITAT that the order on the five points referred to, which were remitted to the decision of the AO, in the earlier order, is plainly erroneous. In this regard, it is submitted by counsel for the Revenue that when, in the first instance, two members differed on various issues and referred the matter for decision to a third member, it was not open to him, on such reference, to require a decision on the question of jurisdiction. In other words, the order referring to the five points conferred limited scope of inquiry into those matters and not on the issue of jurisdiction, in regard to which the two differing members did not entertain any doubt. In proceeding then to decide and pronounce upon the question of scope of provisions relating to block assessment, the Bench, in its order dated 05.04.2003, in effect reviewed its previous determination. This was sought to be pointed out to the ITAT, by the Revenue, but without avail. After the remit for decision on merits, in these circumstances, the order

allowing the Assessee's appeals partly was erroneous.

16. Counsel for the Revenue also urged that the issues relating to foreign travel expenses and those towards stay as well as expenses were decided wrongly. It was submitted that these were added due to the statements made by Chandraswamy, who admitted that the Assessee, Mr. Pinaki Misra, had accompanied him on several occasions. Furthermore, the additions made on account of undisclosed income reflected in household expenditure as well as suppressed rent, were warranted in law. Counsel submitted that the explanation provided in regard to the two gifts received by the Assessee's minor sons, of ₹45,00,000/- was unconvincing and the AO acted within jurisdiction to bring them to tax for the relevant years.

17. In regard to ITA 423/2004, it was contended that the 15 additions made pertained to estimated professional receipts which the AO decided had not been disclosed, for several years; value of unreported investment in purchase of shares and jewelry and also the gift received from Mr. Jatia, as in the Assessee's husband (Pinaki Misra's) case. It was argued that these additions were justified because they were scrutinized during block assessments for the relevant years and it could be said that they related to material discerned after the search and seizure proceedings. Learned counsel argued that the ITAT failed to see that the Revenue was bound to consider the vacillating statement of the alleged donor, Shri Kothari and his unreliability because on the one hand, he denied making gifts whereas later he retracted the statement. Reliance was placed on *Commissioner of Income Tax v ShailendraMahto*372 ITR 257. It was also submitted that broadly, the rule of evidence to be followed is that of preponderance of probabilities, which was overlooked by the ITAT, erroneously. For this, support was

derived from the ruling in *Commissioner of Income Tax v Durga Prasad More* (1971) 82 ITR 540 where it was held that *"the law does not prescribe any quantitative test to find out whether the onus in a particular case has been discharged or not. It all depends on the facts and circumstances of each case. In some cases, the onus may be heavy whereas in others, it may be nominal. There is nothing rigid about it."*

18. The main submission of the Assessee's counsel is that there was a fundamental difference between a block assessment and a regular assessment and the scope of the former was limited to the material found/unearthed during the course of search and further, addition on account of undisclosed income could not be made by drawing any assumptions. Counsel highlights Section 158BB(1) of the Act to emphasize how the computation of the undisclosed income in a block assessment on the basis of post search enquiries mandatorily needs to be relatable to evidence found specifically from such search, and cannot rest solely on presumption and surmises of the AO.

19. It was submitted that in both cases, additions were made upon a fresh assessment or redetermination of all the issues. Not only did the income added not relate to any materials, documents or other thing recovered or seized during the search, the AO went out of his way to make fresh inquiries from unrelated sources. Even such inquiries were not warranted or did not emanate from any statement recorded during the search. Therefore, the additions- in respect of the gifts received and the sources of income disclosed or expenditure incurred, which had been subjected to previous assessments could not have been validly made.

20. Counsel further highlighted that there cannot be any controversy about

the Tribunal's power to decide whether the Revenue could re-assess the previous year's returns as that was a matter of law. It was submitted that though five questions were referred for decision, the member who was asked to decide them noticed that the issue of jurisdiction, which went into the root of the matter, was unaddressed. As a member of the Tribunal it was his duty to point this to the other two who had differed with each other on five specific points. If at that stage, the Revenue felt aggrieved, it should have approached this court. That it chose to abide by the ruling of the two members when that specific point was urged meant that the Revenue is now precluded for arguing on that issue.

21. Learned counsel relied on the decision of the Supreme Court, reported as *The Assistant Commissioner of Income Tax, Chennai v. A.R. Enterprises* (2013 (2) AD (S.C.) 21) for the proposition that in the absence of any material seized for any block assessment, or material relatable to something seized, the Revenue could not validly revisit its views in the original assessment. It was submitted that this proposition has been validated and iterated in numerous rulings and the impugned order merely followed that principle. Therefore, the question of law deserves to be answered in favour of the assessees.

Analysis and Findings

22. On the question of law presently before the court, the primary consideration is whether the AO had the jurisdiction to make the additions to the assessment under section 158BC of the Act. To analyze this, it is necessary to address the grounds of each such addition made, and assess if the AO had jurisdiction in conducting the block assessment within the meaning of section 158BC, or if this was indeed not within the purview of

the AO's jurisdiction. Section 158BC reads as follows:

> "*Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then, –*
>
> *(a) the Assessing Officer shall –*
>
> *(i) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995 but before the 1st day of January, 1997 serve a notice to such person requiring him to furnish within such time not being less than fifteen days;*
>
> *(ii) in respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1st day of January, 1997 serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days,*
>
> *as may be specified in the notice a return in the prescribed form1 and verified in the same manner as a return under clause (i) of sub-section (1) of section 142, setting forth his total income including the undisclosed income for the block period:*
>
> *Provided that no notice under section 148 is required to be issued for the purpose of proceeding under this Chapter:*
>
> *Provided further that a person who has furnished a return under this clause shall not be entitled to file a revised return;*
>
> *(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 2[, section 144 and section 145] shall, so far as may be, apply;*

> *(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;*
>
> *(d) the assets seized under section 132 or requisitioned under section 132A shall be dealt with in accordance with the provisions of section 132B.*"

23. The Gujarat High Court had, in an earlier decision, in *N.R. Paper & Board Ltd. v. DCIT* (1998) 234 ITR 733 (Guj) ruled that block assessments and regular assessments deal with different purposes. The aim and objective of block assessments is the assessment of undisclosed income of the block period *as a result of search*. The objective of a regular or normal assessment is to determine the true total income or loss of the previous year on the basis of the return under section 139 and other documents and decide the Assessee's tax liability.

24. The structure and pattern of Chapter XIV-B as originally enacted w.e.f. 1st July, 1995 and as modified/changed through amendments, from time to time (in the relevant provisions), continues to retain its purpose, in that, a block assessment pertaining to a number of years remains distinct from an assessment under Section 143(3) pertaining to a single assessment year. Further, the amendment to section 158B(b) has enlarged the meaning of the term "undisclosed income" by including therein "any expenses, deduction or allowance claimed under this Act, which is found to be false". However, this cannot be construed to mean that whatever has been left out in a regular assessment can be reassessed or re-examined with reference to those provisions which are relatable to an assessment u/s 143(3). This is evident from *A.R. Enterprises* (supra),where the court held as follows:

"*... Sections 158BD and 158BC, along with the rest of Chapter XIV-B, find application only in the event of discovery of "undisclosed income" of an Assessee. Undisclosed income is defined by Section 158B as that income "which has not been or would not have been disclosed for the purposes of this Act". The legislature has chosen to define "undisclosed income" in terms of income not disclosed, without providing any definition of "disclosure" of income in the first place.* ***We are of the view that the only way of disclosing income, on the part of an Assessee, is through filing of a return, as stipulated in the Act, and therefore an "undisclosed income" signifies income not stated in the return filed. Keeping that in mind, it seems that the legislature has clearly carved out two scenarios for income to be deemed as undisclosed: (i) where the income has clearly not been disclosed and (ii) where the income would not have been disclosed.*** *If a situation is covered by any one of the two, income would be undisclosed in the eyes of the Act and hence subject to the machinery provisions of Chapter XIVB. The second category, viz. where income would not have been disclosed, contemplates the likelihood of disclosure; it is a presumption of the intention of the Assessee since in concluding that an Assessee would or would not have disclosed income, one is ipso facto making a statement with respect to whether or not the Assessee possessed the intention to do the same. To gauge this, however, reliance must be placed on the surrounding facts and circumstances of the case.*"

25. A block assessment is to be carried out on the basis of the material found during the course of search and not as a result of other documents or material, which come to the possession of the AO subsequent to the conclusion of the search operation unless and until such material has a relationship or connection with certain material or evidence found during the course of search. It was highlighted in *CIT v. Ravi Kant Jain* (250 ITR 141-

Delhi) how the 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. The scope and ambit of a block assessment is limited to materials unearthed during search and 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 such other materials or information as are available with the AO. The Bombay High Court in the case of *CIT v. Vinod Danchand Ghodawat* (247 ITR 448 (Bom.) also held, similarly that where the assessee had made disclosure in their wealth tax return, which was accepted by the Department, additions made by the Department on the ground of undisclosed income was erroneous.

26. A larger, five member bench of the Supreme Court reiterated the distinctness of the procedure between normal assessments and block assessments, with specific reference to the charging section (of the Income tax), the reference to "previous year" as the income for which tax is levied and the special procedure for assessment of undisclosed income relatable to materials seized during a search, in *Commissioner of Income Tax v Vatika Township* [2014] 367 ITR 466 (SC) in the following terms:

> *"Undisclosed income referred to in Chapter XIVB is not relateable to the previous year. On the contrary, it is for the block period which may be 6 years or 10 years, as the case may be. Consequently, as already mentioned, while analyzing the scheme of Chapter XIVB, such Chapter is a complete code in respect of assessments of 'undisclosed income'. Not only it defines what is undisclosed income, it also lays down the block period for which undisclosed income can be taxed. Further, it also lays down the procedure for taxing that income. It is very pertinent to note at this stage that for this purpose, specific provision in the form of Section 158BA (2) is inserted making it*

a charging section. Thus, a diagnostic of Chapter XIVB of the Act leads to irresistible conclusion that it contains all the provisions starting from charging section till the completion of assessment, by prescribing special procedure in relation thereto, making it a complete Code by itself. Looking it from this angle, the character and nature of 'undisclosed income' referred to in Chapter XIVB becomes quite distinct from 'total income' referred to in Section 5. It is of some significance to observe that when a separate charging section is introduced specifically, to assess the undisclosed income, notwithstanding a provision in the nature of Section 4 already on the statute book, this move of the legislature has to be assigned some reason, otherwise, there was no necessity to make a provision in the form of 158BA (2). It could only be that for assessing undisclosed income, charging provision is 158BA (2) alone."

27. This court is also of the opinion that the proper approach, commended through the decision in *Shailendra Mahto* (supra) by the Revenue, is inapt. Where the law is clear that unless material extraneous to the returns and document are seized or discerned as relatable to statements made, etc. additions could not have been made, having regard to the state of law applicable to the facts of the case. Furthermore, *Durga Prasad More* (supra) undoubtedly propounds an important principle of law relating to evidence. Its application however is wherever there is material that can validly be used to complete an assessment (in this case a block assessment). Again, as in the case of *Shailendra Mahto,* that authority has no applicability for this case.

28. As far as the question regarding the jurisdiction of the third member to doubt the reassessment on the basis that income to be added was not an issue is concerned, this court is of the opinion that such an objection should not be articulated this day and age. It is axiomatic a clichéd proposition of law that a statutory authority conferred with quasi judicial powers has undoubted

jurisdiction to (a) decide issues concerning its jurisdiction in a particular matter and (b) to apply the correct legal principles. Indeed, to say that a tribunal cannot decide a foundational issue, because of a perceived procedural issue would expose the legal system to insurmountable barriers- the foremost of them being that the litigant would be driven to superior courts each time the issue crops up in the competent tribunal. Hardly any authority is required for this, but *dicta* abound on the subject (Ref. *Smt Ujjambai v. State of UP* AIR 1962 SC 1621; *Hari Vishnu Kamath v. Ahmad Ishaque and Ors.* AIR 1955 SC 233; *T.C. Basappa v. T. Nagappa and Another* AIR 1954 SC 215). Furthermore, there is statutory authority in the form of Section 254 (1) and (2) of the Income Tax Act read with Section 255 (4), which provides thus:

> *"Section 255(1)***************
> ********
> *(4) if the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it."*

In the present case, when the third member noticed what he considered to be a lack of clarity about the block proceeding and the Revenue's ability to add income in the absence of any seized material, he was duty bound to refer that point for decision, which he did. The subsequent clarification by the Bench, and later final decision, therefore, cannot be faulted.

29. This court now proposes to discuss the specific issues, which were referred or restored to the AO, having regard to the final order made by the ITAT. It is apparent that in Mr. Pinaki Misra's case, out of the18 heads of addition, 11 were restored for further inquiry and orders, of AO, on remand. The ITAT itself had deleted substantial income relating to three heads in the case of Mr. Misra. In the circumstances, the court proposes to discuss only the heads of income that were specifically addressed during arguments of counsel for the parties.

30. This court, therefore, would deal with the specific amounts brought to tax by the AO, but deleted by the ITAT. The first of these are addition of the amounts of ₹1,72,000/- and of ₹2,50,000/- in respect of Shri S.K. Chakraborty, (in Pinaki Misra's case) and the addition of ₹ 5,00,000/- made to the income of Sangeeta Misra, for the alleged income earned from Triad Associates. The AO made an addition of ₹1,72,000/- being the amount standing to the credit of Shri S.K. Chakraborty but the same was reflected in Mr. Misra's balance sheet, his bank account, duly supported by the confirmation of Shri S.K. Chakraborty; and an original amount was accepted in the original proceedings u/s 143(3) according to the assessment order for Assessment Year (hereinafter also referred to as "AY") 1989-90 dated 11.09.1990. In parallel, the AO made an addition of ₹5,00,000/- for the AY 1992-93 on account of alleged estimated income incurred from M/s Triad Associates by the Assessee's wife. Further, Shri Chakraborty had confirmed on behalf of the ESPI Industrial Corporation on 23.11.1989 certifying that a sum of ₹2,50,000/- was receivable from the Assessee. As such, the AO had made a further addition of ₹ 2,50,000/- on the ground that the said amount

given by Shri Chakraborty was not recorded by the Assessee in his books of account. On the point of jurisdiction regarding the addition of ₹2,50,000/-, the AO did not come across any material during the course of search and as is clear from the assessment order, the addition of ₹ 2,50,000/- was made on the basis of the statement made subsequent to the search and which even otherwise, was not presented to the assessee for rebuttal. The assessee did not make it during the search; it was disclosed and gone into during the regular assessment.Thus, this addition is based on a confirmation that was sought after the search, and hence, could not form part of the undisclosed income for the block period.

31. The amounts were already disclosed in the regular assessment of the assessee in 1989-90, and similarly even in the case Sangeeta Misra, and are thus, outside the purview of the definition of "undisclosed income". Thus, the AO has no jurisdiction to make the aforementioned additions under section 158BC of the Act. Thus, the addition of ₹1,72,000/- by the AO has been made devoid of jurisdiction, since the same was already disclosed, and had not been unearthed during the search undertaken for the block assessment.

32. The next item of the addition of ₹50,00,000/- made by the AO on account of foreign travelling expenses. The court notices at the outset, that this was on the basis of the AO's *ad-hoc* estimate of daily expenditure incurred by Shri Pinaki Misra vis-à-vis the foreign visits @ ₹2,500/- per day, and addition of ₹25,00,000/- on account of foreign travel expenses of Ms. Sangeeta Misra. The material on the record- filed during the regular assessment was that by his letter dated 16.12.1997 Shri Misra submitted that he was an advisor of Shri Chandraswamy since 1984, and had undertaken 22

foreign trips along with him to advise on legal matters, though he had not recorded any professional receipts from Shri Chandraswamy. A statement of Shri Chandraswamy had been recorded, where he disclosed that the assessee had accompanied him. The addition was made primarily on the basis of the assessee's old passport, which was requisitioned from the passport office and which showed the numerous foreign trips undertaken by the assessee during the block period. This was done when the assessee was required to furnish copies of his passport, and he stated that he had surrendered his old passport to the issuing authority for issue of a fresh diplomatic passport. The foreign travels evidenced by the expired passport were by virtue of the requisition from the passport office, and not from the search. At the same time, the assessee's computation of expenditure on tickets (₹3,66,000/-) is on the lower side as against the figure of ₹50,00,000/- as worked out for by the Revenue. What is apparent is that the AO omitted the statement of Chandraswamy that the assessee's expenses were borne by his devotee. Yet, whether the requisition of the passport from the passport office falls squarely within section 158BC, requires examination. The additions made on the foreign trips incurred by Ms. Sangeeta Misra are also to be examined in the same light.

33. In *Mahesh Bhatt v. Asstt. Commissioner of Income Tax* (2004)87 TTJ (Mumbai) 734 the court highlighted how the Income Tax Act provides additions or disallowances in a block assessment have to be based on evidences found at the time of search and not merely on the basis of presumptions and assumptions by taking inference from the set of material available on record. It was similarly held in *Sunder Agencies v DCIT* (1997) 63 ITD 245 (Mum) that the scheme of Chapter XIV-B does not empower to

the Revenue to presume or draw assumptions in regard to the undisclosed income. The AO can only proceed on the basis of material detected at the time of search and the evidence gathered under section 132(4) only, and not otherwise. If seen in this light, the estimates of costs on the foreign travels of the assessee and his wife were not made during the course of the search pertaining to the block assessment, but through surmises based on the details found in the passports of the two assessees after requisitioning them from the passport office. Thus, the inference of escaped income is based upon materials gathered from extraneous sources and not from search. Section 158BB (subsequent to amendment by the Finance Act, 2002 w.e.f. 01.07.1995) states how the undisclosed income of the block period needs to be computed 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 AO and relatable to such evidence on the basis of evidence. In *Assistant Commissioner of Income Tax and Anr. v. Hotel Blue Moon* (2010) 229 CTR (SC) 219 held that block assessments are not intended to substitute regular assessment and its scope and ambit is limited in that sense to materials unearthed during search. Similarly, it was highlighted in *Commissioner of Income Tax v. R.M.L. Mehrotra* (2010) 230 CTR (All) 288, an assessment based on search alone that does not attribute material evidence found therein or other information available with the AO relating to such materials cannot constitute block assessment. In the light of the above analysis, it is held that the additions made on account of the foreign trips made by the assessees fell outside the jurisdiction of the AO under section 158BC. They were correctly deleted by the ITAT.

34. The additions of ₹9,50,000/- (in the case of Mr. Pinaki Misra and

₹6,00,000/- made (in the case of Ms. Sangeeta Misra) by the AO on account of professional receipts are to be now examined. The two grounds on which these additions were made and that too on estimate basis, were the non-production of books of account and the 23 foreign trips made by Mr. Misra allegedly for the professional services rendered to Shri Chadraswamy. In respect of assessment years 1994-95 to 1996-97, ₹2,50,000/- each was added whereas the figures for AY. 1997-1998 was ₹2,00,000/- i.e. totaling ₹9,50,000/-, and an aggregate of ₹6,00,000/- in case of Sangeeta Misra, allegedly on account of difference in professional receipts and cash in hand. However, there does not seem to be any observation on the assessee's arguments that no incriminating material had been found at the time of search pertaining to the suppression of professional receipts. The counsel for the Revenue, however, in the course of the present proceedings was unable to pinpoint any material, which had been found during the course of the search *vis-a-vis* the point at issue, thereby, the aforesaid figures arrived at cannot be brought to tax as "undisclosed income" in the block assessment, within the meaning of section 158BB(1). Therefore, in the absence of any material found during the course of search, the post search enquiries made by the AO would become futile since this would only be relevant for a regular assessment u/s 143(3) and not in respect of a block assessment.

35. The next item is addition of ₹28,70,000/- made by the AO towards suppressed rent. The search took place on 01.11.1996. Further, the property in question i.e. 145, Jor Bagh, New Delhi is owned by a company named M/s. Jupiter Estates Pvt. Ltd. and the assessee along with his family were residing in this property since June, 1989. The tenancy was formally recognized by means of a lease deed between the parties dated 01.06.1989

entered into by the assessee and the said company. Additionally, the Assessee (Mr. Misra) had also made a security deposit and extended an interest free loan to the company of an aggregate amount of ₹58,00,000. What can be observed from the assessment order, is that the addition was made on a presumption that the rent charged (at the rate of ₹2500/- per month) was less than the fixed rent. However, this exercise of the AO ought to have been carried out within the meaning of regular assessment under section 143(3). When all material relating to the so called "suppressed rent" was available with the AO, in the first instance when the assessment for the relevant year was completed and no addition was made, the exercise by the AO, in deducing that the assessee must have earned some income (based on the expenditure estimated for his foreign travel and the estimate of his professional income) which was the suppressed rent, and determined, is twice removed from reality. The error in this kind of assessment was compounded, given that no material relating to such "suppressed rent" was discerned during the search or from the seized materials. Thus, this assessment falls outside the jurisdiction of the AO, since the block assessment conducted is not based on relatable evidence as required under section 158BB(1), but on presumptions made by the AO, as was highlighted in *R.M.L. Mehrotra* (supra), how an assessment based on search alone that does not attribute material evidence found therein or other information available with the AO relating to such materials cannot constitute block assessment.

36. This brings the discussion to two gifts aggregating ₹90,00,000/- received by the assessee (Mr. Misra) from Shri Jhanwar Lal Kothari, and the gift to the Assessee's wife of an amount of ₹38,71,507/- by Shri R.K. Jatia.

In the AY 1993-93, Mr. Misra received two NRI gifts aggregating ₹90,00,000/-from Shri J. L. Kothari to purchase a company by the name of White Lilly Estates Pvt. Ltd. which owns a property at 202- Golf Links, New Delhi. By his reply-dated 02.08.1997 (to a show cause notice) Mr. Misra contended that the said gifts were received out of NRE account of Shri Jhanwar Lal Kothari and accordingly they did not attract the provisions of the Gift Tax Act, 1958. He also furnished copies of the affidavit of Shri Kothari dated 30.04.1994 and the gift deed where it was stated that the gifts have been made out of natural love and affection. He also furnished copy of NRE account No. 5010009008 maintained with Sanwa Bank Ltd. in the name of Shri J.L. Kothari from where these gifts have been made. These gifts were duly reflected in this bank account. The assessee (Mr. Misra) also furnished a copy of the letter from Nakomthon Bank dated 26.05.1994 which stated that Shri Kothari was their valued customer and the bank provided credit facilities in the form of over draft, short term loan upto a moderate 7 figures in Baht. The assessment order shows that the addition was made entirely on the basis of the post search enquiries, and as a matter of record, the Assessee had disclosed the gifts in his return for AY 1994-95. Similarly, the gift to Ms. Sangeeta Misra was scrutinized previously in an assessment under section 143(3) of the Act, the receipt of the gift was duly disclosed in the return for AY 1992-93 and the gift had been accepted on scrutiny of the documents and evidence. As such, since the gifts have already been disclosed to the Revenue prior to the search, they cannot form part of the block assessment within the meaning of section 158BB(1), and cannot be thus, brought to tax as "undisclosed income", as was reiterated in *Hotel Blue Moon* (supra) which held that the scope of block assessment is limited to

material found during the search, and thereby, cannot include material already revealed. This was similarly highlighted in *CIT v. Jupiter Builders P. Ltd.* ((2006) 287 ITR 287 (Del)) and *Commissioner of Income Tax v. Shri Vishal Aggarwal* (2006 (283) ITR326(Del)) that where an income and assets are disclosed in the books of account and no incriminating material is found during search and seizure, addition in the block assessment is not valid. Therefore, the gifts received by the assessees from Jhanwar Lal Kothari, as well as the gift from Shri R. K. Jatia fell outside the purview of block assessment, and the AO has no jurisdiction to bring to tax the said sums.

37. In the light of the foregoing discussion and conclusions, the question of law framed in these appeals has to be and is answered in favour of the assessees and against the Revenue. The appeals fail and are, therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

MARCH 03, 2017