

IT(SS)A. No. 259/Mum/2006
Block Period ending 4.8.2000

M/s ROYAL PALMS (INDIA) LTD
SURVEY NO 169, NEAR UNIT NO 26,
AAREY MILK COLONY, GOREGAON(E)
MUMBAI
PAN NO: AABCR9424R

Vs

THE ACIT, 9(3), MUMBAI

S V Mehrotra, AM and Asha Vijayaraghavan, JM

Dated : August 13, 2009

Appellant Rep by: Shri Haresh P Shah
Respondent Rep by: Shri S D Srivastava

Income Tax - Sec 158BD - Assessee is engaged in the business of Real Estate Developments, Hotels, Golf Course, Developing and marketing of commercial & residential properties - on the basis of information received from the DCIT, notice u/s 158BD served on the assessee - The total undisclosed income determined – Assessee contends before the CIT(A) that the initiation of proceedings u/s. 158BD is not legal as the same is initiated without recording requisite satisfaction as required under law - CIT(A) dismisses the assessee Appeal - Held, since the satisfaction has not been recorded in accordance with law, the proceedings are bad in law and, accordingly, the assessment is annulled. Assessee's appeal allowed.

ORDER

Per: S V Mehrotra:

The appeal filed by the assessee is directed against the order dated 10.8.2006 of Learned CIT(A)-IX, Mumbai for the block period ending 4.8.2000.

2. Facts in brief are that the assessee company registered under the Companies Act, 1956, in the relevant block period ending 4.8.2000, was engaged in the business of Real Estate Developments, Hotels, Gold Course, Developing and marketing of commercial & residential properties, etc. In the assessment order, it is stated that on the basis of information received from the DCIT, Range 8(3), Mumbai vide letter No. DIT 8(3)/Intimation/158BD/2003 dated 25.6.2003, notice under section 158BD dated 22.1.2004 was served on the assessee requiring it to submit the return of undisclosed income in Form No.2B for the block period ending on 4.8.2000 within 30 days from the date of service of notice. The total undisclosed income was determined at Rs.80,55,120/- as under:

i)	By way of cash for the sale of Moroccan property	Rs.58,50,000
ii)	By way of TSL bugs adjustment	5,00,000
iii)	By way of security bills adjustment	Rs.17,05,117
		Rs.80,55,117
	Rounded Off	Rs.80,55,120

2. Before Ld CIT(A), the assessee assailed the initiation of proceedings u/s. 158BD on the ground that the same were initiated without recording requisite satisfaction as required under law. It was further submitted that the basis of satisfaction of the AO has to be the material, which is the basic ingredients of section 158BD, found during the search and unless such material was identified and brought on record, such satisfaction cannot be correctly reached. Further, it was submitted that the AO erred in not disclosing the entire facts and details how the conditions of section 158BD r.w.s 132A were fulfilled. After considering the information sent by the DCIT, Range 8(3) vide his letter dated 25.6.2003, reproduced at page 2 of his order, Ld CIT(A) held that the AO was very much in the possession of information as well as documents seized in the search operation in another group namely Tops Securities conducted on 4.8.2000. Ld CIT (A) relying on the decision of the Hon'ble Allahabad High Court in the case of *Digvijay Chemicals Ld Vs. ACIT, 248 ITR 381 (All)*, wherein, it was held that to invoke section 158BD, it is not necessary that the satisfaction must be reduced in writing, and there is no requirement of offering opportunity hearing to a party before recording the satisfaction u/s. 158BD and further relying on the decision of the Hon'ble Gujarat High court in the case of *Khandubhai Desai Vs. DCIT, 236 ITR 73 (Guj)*, wherein, it was held that the material available to come to the conclusion that the conditions of section 132(1) are satisfied, is entirely different than the material for the satisfaction of the AO for proceedings against other persons as stipulated u/s. 158BD; the requirements of both the sections are entirely different, upheld the action of the AO, holding that it was incorrect to say that the AO has not satisfied himself before initiating proceedings u/s. 158BD. Ld CIT(A) also decided the issue on merits against the assessee and dismissed the assessee's appeal. Being aggrieved with the order of Ld CIT(A), the assessee is in appeal before us.

3. Ld Counsel for the assessee referred to the information received from DCIT Range 8(3) vide letter dated 25.6.2003, which is reproduced at pages 1-2 of PB and pointed out that search seizure action was carried out in the case of Tops group on 4.8.2000 and order u/s. 158BC. was passed in that group of cases on 30.9.2002 u/s. 158BC. He further submitted that notice u/s. 158BD was issued on 22.01.2004 on the basis of letter of DCIT dt. 25.6.2003. Ld Counsel submitted that the above relevant dates clearly show that information was received much after completion of proceedings u/s. 158BC. He referred to the decision of the ITAT Delhi (SB) in the case of *Manoj Aggarwal Vs. DCIT, 113 ITD 377 (Del)(SB) = (2008-TIOL-347-ITAT-DEL-SB)* contained in the PB, wherein, it is held that if no satisfaction is recorded before the date of block assessment u/s. 158BC then the same is belated. Ld Counsel submitted that in the present case, there is no satisfaction as such also, which is evident from the notice u/s. 158BD dt. 22.1.2004 contained at page 182 of PB. He also referred to the decision of in the case of *Manoj Aggarwal (supra)*, wherein, it has been held as under:

"In order to ascertain whether in the course of the assessment proceeding in the case of 'M' under section 158BC, there was any finding of any undisclosed income in the case of the assessee; even then, there was no finding that any part of the undisclosed income belonged to the assessee or any reference to any material therein indicating the same. In the circumstances, the satisfaction note dated 19.12.2002 was not the one contemplated in section 158BD and further that even if it was assumed to be in terms of the said section, it did not even remotely show that there was undisclosed income belonging to the assessee calling for the assumption of jurisdiction under section 158BD. In the circumstances, the said note of satisfaction was non-established in law and further section 158BD proceedings pursuant thereto were invalid and void *ab-initio* on this ground also."

Ld counsel for the assessee relied on the decision of the Hon'ble Supreme Court in the case of *Manish Maheswari Vs. ACIT, 289 ITR 341 (SC) = (2007-TIOL-24-SC-IT)*, wherein, it was held that in the absence of any satisfaction, proceedings u/s. 158BD cannot be sustained.

4. Ld CIT DR Shri SD Srivastava vehemently submitted that the decision of the ITAT Special Bench in the case of Manoj Aggarwal (supra) is not applicable in Mumbai jurisdiction in view of the decision of the Hon'ble Bombay High Court in the case of *Shirish Madhukar Dalvi Vs. ACIT, 287 ITR 242 (Bom)* = [\(2006-TIOL-218-HC-MUM-IT\)](#), wherein, it was held that Sections 158BD & 158BC are procedural. Ld CITDR submitted that in the case of Manoj Aggarwal (supra), the Special Bench has held as under:

"Assessing Officer assessing the other persons in respect of whom the AO assessing the person searched gives a finding that the undisclosed income unearthed as a result of search belongs to the said person and such a finding is given, the provisions of section 158BD come into operation. This, therefore, involves assumption of jurisdiction and cannot be constructed as a procedural matter. In the absence of a finding in the behalf, there is no jurisdiction to the other Assessing Officer at all to proceed further in the matter. As the time limit set in the section 158BE applies to such findings, it is only logical that the said time limit automatically applies for invoking the provisions of section 158BC and 158BD are inter-linked, inter-twined and both form part and parcel of the same chapter."

Ld CIT DR submitted that the above findings of the Special Bench in the case of Manoj Aggarwal (supra), proceeded on the premise that section 158BC and 158BD are substantive provisions whereas in the case of Shirish Madhukar Dalvi (supra), the Hon'ble Bombay High Court has held that section 158BC and 158BD are procedural sections. Therefore, ratio laid down by the Special Bench in the case of Manoj Aggarwal (supra) is not applicable. Ld CIT DR further submitted that since it is a procedural sections, as is also evident from the heading of section 158BC and 158BD, any non-compliance of the procedure would only result in an irregularity which is curable at the stage when it crept in.

5. Ld CIT DR submitted that the findings of the Special Bench that the provisions of section 158BD are inextricably interlinked and inter-twined with section 158BC and they are like Siamese twins, cannot stand and, therefore, limitation u/s. 158BE for completion of proceedings u/s. 158BD have separately been given which is to be reckoned from the end of the month in which, the notice u/s. 158BD was served on such other person. It cannot be linked with culmination of proceedings u/s. 158BC.

6. Ld CIT DR heavily relied on the decision of the Hon'ble Gujarat High Court in the case of *Khandubhai Vasanji Desai Vs. DCIT, 236 ITR 73 (Guj)* to submit that the issue regarding limitation in respect of proceedings u/s. 158BD will arise only after it comes to the notice of the AO passing order in the case of person searched that any undisclosed income belongs to other person and that is why separate limitation has been prescribed which is fully justified keeping in view the object of making assessment of undisclosed income of such other person. Ld DR submitted that since no limitation has been prescribed u/s. 158BD for initiating proceedings, therefore, the same cannot be read in the section.

7. Ld CIT DR further submitted that it is not correct to say that no satisfaction had been recorded by the AO. In this regard, he referred to the letter dated 25.6.2003 of DCIT, which is reproduced hereunder:

No. DCIT 8(3)/Intimation/158BD/2003-04.

Office of the
Dy. Commission of
Income Tax, Range 8(3),
R. No.278A,
Aayakar Bhavan, M K Road,
Mumbai-400020

Dated : 25.06.2003.

The DCIT/ACIT
Range 9(1), Mumbai

Sir,

Sub: - Intimation u/s. 158BD of the IT Act, 1961 in the case of M/s. Amir Parks & Amusement Pvt. Ltd, whose jurisdiction falls in your charge-reg.

Ref: - Search & seizure action u/s. 132 of the IT Act, 1961 in the case of TOPs Group.

A search & seizure action u/s. 132 of the IT Act, 1961 was carried out in the case of Tops Group on 4.8.2000.

During the course of search various documents were seized from the officer premises of the assessee situated at 5, Sujata Building, Juhu Tara Road, Juhu, Mumbai. From Annexure-1 of page-4 it was found that cash was paid by assessee for acquiring two pent house at Rs.58,50,000/-, page -10 of Annexure-1 also indicates the cash payment of Rs.58,50,000/-. This cash was paid to M/s. Amir Park & Amusement Pvt Ltd.

Mr. Sanjeev Kotion, employee of assessee in his statement also accepted that was paid for acquiring the property, Managing Director of the company Mr. Rahul Nanda on account this cash payment, Rs.58.50 lakh offered to tax for block period, subsequently it was retracted by filing the affidavit.

During the assessment proceeding considering the content of page-10 of Annexure-A-1, total addition on this account was made amounting to Rs.1,04,32,300/-.

The Ld. CIT(A) confirmed the addition of Rs.58,50,000. During the block assessment proceeding M/s. Amirparks & Amusement Pvt Ltd asked for this cash payment by M/s Top Detective by issuing the letter u/s. 133(6), but they have not responded.

In the above facts, you may take steps to initiated action u/s. 158BD of the IT Act, 1961.

Yours faithfully,
Sd/-
(R K Vishwakarma)
Dy. Commissioner of Income tax,
Range 8(3), Mumbai

With reference to above intimation, Id DR submitted that the word "may" in the last sentence implies "shall" and it is only by way of addressing the authorities that the word 'may' has been used.

9. Thus, in sum & substance, Id CIT DR submitted that :-

- a) satisfaction had duly been recorded by the AO.
- b) satisfaction recorded after the culmination of proceedings in case of person searched was in accordance with law.

c) in any view of the matter, even if there was delay in recording the satisfaction that was not fatal to the assessment per se and being procedural was curable at the stage it crept in.

d) separate limitation being prescribed for completion for assessment u/s. 158 BC and 158BD fortifies his claim.

10. Ld Counsel for the assessee, in the rejoinder, relied on the decision of the Hon'ble Gujarat High Court in the case of *Priya Blue Industries P. Ltd. Vs. JCIT, 251 ITR 615 (Guj)*, wherein, it was, *inter alia*, held that the proceedings u/s. 158BD against a person, other than person raided, are part of the proceedings which commence with search u/s. 132 and culminate in proceedings under chapter XIVB of the IT Act.

11. We have considered the rival submission and perused the record of the case. The points for consideration are (i) whether ingredients of section 158BD regarding recording of satisfaction are fulfilled or not (ii) whether satisfaction, if recorded, was required to be recorded before culmination of proceedings u/s. 158BC in the case of a person searched and if not so recorded then whether in view of the decision of the Bombay High Court, this was merely an irregularity and, therefore, did not vitiate the proceedings. As far as the first aspect is concerned, we are of the opinion that keeping in view of the contents of letter dated 25.6.2003, it cannot be said that no satisfaction was recorded by the AO. We are in agreement with the Id DR that term "may" used in the said letter would not in any manner mitigate the requirements of satisfaction being recorded.

12. Now, the second issue is whether satisfaction was required to be recorded before culmination of proceedings u/s. 158BC in the case of person searched or it could be recorded at any time thereafter.

13. The submission of Id DR is that the Hon'ble Bombay High Court in the case of Shirish Madhukar Dalvi (supra) has held that 158BC and 158BD are procedural sections and, therefore, satisfaction could be recorded at any time but, in any view of the matter, it is only an irregularity and would not vitiate the proceedings. Therefore, the moot point for consideration is whether in view of the decision of the Hon'ble Bombay High Court in the case of Shirish Madhukar Dalvi (supra), the decision of the ITAT Special Bench in the case of Manoj Aggarwal (supra) is applicable or not and what is the effect of the decision of the Hon'ble Bombay High Court on the said decision.

14. Before we decide whether non recording of satisfaction or recording of satisfaction after the culmination of proceedings u/s. 158BC in the case of person searched, would result into irregularity or nullity, we may refer to various legal authorities on the issue regarding irregularity and nullity.

15. The Hon'ble Gujarat High Court in the case of *CIT Vs. Sumantbhai C Munshaw, 128 ITR 124 (Guj)* at page 152 observed as under:

"Having noticed the relevant provisions of law, let us at this stage ascertain the true meaning which the words 'nullity', 'illegality' and 'irregularity' bear in the eye of law. A nullity results from an error which is incurable and, therefore, fatal to the proceedings. An illegality occurs when there is a breach of some provision of law and on irregularity, which is usually, amendable, occurs when some error of procedure is committed in the course of a proceedings (See *Chaube Jagdish Prasad Vs. Ganga Prasad Chaturvedi, AIR 1959 SC 492*). When there is a contravention of some provision of law, the question often arises whether the act done in the breach of such provisions is perforce a nullity. If the provision is only directory, an act done in contravention thereof is manifestly not a nullity. However, if the provision is couched in a mandatory form, *prima facie*, it would be a nullity. Every act done in breach of a mandatory provision, however, is not necessarily a nullity. In *Dhirendra Nath Gorai Vs. Sudhir Chandra Ghosh, AIR 1964 SC 1300*, the

following passage from the decision in *Ashuthos Sikdar Vs. Behari Lal Kirtania (1907) ILR 35 Cal 61 (FB)* was cited with approval to bring about the distinction between a nullity and an irregularity (p. 1304 of AIR 1964 sc).

"...no hard and fast line can be drawn between a nullity and an irregularity' but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated.'

What is a workable test to distinguish a nullity from an irregularity? The following passage from the decision in *Holmes Vs. Russel (1841) 9 Dow 1487*, which provides the clue, was cited with approval in *Dhirendra Nath, AIR 1964 SC 1300 at p.1304*.

" 'It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the arty can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity.'"

A waiver, as observed in *Dhirendra Nath AIR 1964 SC 1300*, is an intentional relinquishment of a known right. But can an objection as to jurisdiction be waived? Jurisdiction ordinarily means the authority to act in the matter and not the power to do or order an act (see *Anowar Vs. Ajoy Kumar Mukherjee, AIR 1965 SC 1651*). There cannot be a waiver of an objection to jurisdiction, for, consent cannot given jurisdiction where there is none. In *Dhirendra Nath, AIR 1964 SC 1300*, the following observations were made in this context (p. 1305).

"Where the court acts without inherent jurisdiction, a party affected cannot be waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waives. But a mandatory provision can only be waived if it is not conceived in the public interest, but in the interest of the party that waives it."

16. The ITAT Special Bench in the case of Manoj Agarwal (supra) has held that non recording of satisfaction in accordance with law is a jurisdictional error and, therefore, it has to be examined whether in the light of decision of the Hon'ble Bombay High Court in the case of Shirish Madhukar Dalvi case (supra) the mandatory requirement of recording of satisfaction in accordance with law could be waived or not?

17. The submission of Id CIT DR is that after the decision of the Hon'ble High Court in the case of Shirish Madhukar Dalvi (supra), satisfaction could be recorded at any time and it was not necessary that the same should have been recorded prior to culmination of proceedings in the case of person searched u/s. 158BC. Thus, it is submitted that, in any view of the matter, it being only procedural irregularity, the proceedings would not vitiate.

18. In order to find out. answer to this complex issue, we have to refer to the decision of the Hon'ble Supreme Court in the case of Manish Maheswari (supra), wherein, it was held that the AO, in case of person searched, had to record his satisfaction that any undisclosed income belonged to such person and further to handover the books of account and other documents and assets seized to the AO having jurisdiction against such other person. The Hon'ble Supreme court at page 349 has observed as under:

"A large number of decisions of various High Courts have been cited at the Bar. We would, at the outset, refer to a decision of the Gujarat High Court in *Khandubhai Vasanji Desai Vs DCIT (1999) 236 ITR 73*. Therein, it was clearly held:

"This provisions indicates that where the AO who is seized of the matter and has jurisdiction over the person other than the person with respect of whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned under section 132A, he shall proceed against such other person as per the provisions of Chapter XIV-B, which would mean that on such satisfaction being reached that any undisclosed income belongs to such other person, he must proceed to serve a notice to such other person as per the provisions of section 158BC of the Act. If the AO who is seized of the matter against the raided person reaches such satisfaction that any undisclosed income belongs to such other person over whom he has no jurisdiction, then, in that event, he has to transmit the material to the AO having jurisdiction over such other person and in such cases the AO who has jurisdiction will proceed against such other person by issuing the requisite notice contemplated by section 158BC of the Act."

From the above, it is evident that the Hon'ble Supreme Court has upheld the findings of various High courts, wherein, it has been held that on satisfaction of the AO being reached that any undisclosed income belongs to other person, then he has to proceed to serve a notice to such other person as per the provisions of section 158BC of the Act.

19. The Hon'ble Supreme Court has affirmed the findings of various High Courts. Therefore, we will now refer to the various observations from the High Court decision referred to in the decision of the Hon'ble Supreme Court.

20. In the case of Khandubhai VasANJI Desai (supra), constitutional validity of section 158 BD was challenged and the pleading in this regard was that since there was no time prescribed in the Act for issuance of notice to the 'other person' referred to in section 158BD of the Act, it was not for the court to read any time limit for issuance of such notice. It was submitted that virtually the time limit stood lifted in case of such last authorization for search or requisition was executed operated to the benefit of the person who was searched. Thus, it was pleaded that the 'other person' was discriminated against the person searched.

21. It was, *inter alia*, submitted at page 81 that the fact that undisclosed income belongs to some other person may come to light when the assessment proceedings against raided person are commenced. Such other person to whom the undisclosed income belongs also stands on the same footing as the raided person to whom a part of the undisclosed income belongs. However, the commencement of the point of limitation in case of such other persons could not be the same as was provided for the raided persons and by the very nature of things the time limit was made to commence in such cases from the date of receipt of the notice by such other person. It was further argued that there was no warrant for any assumption that the notice to such other person could be issued at any time. It was submitted that there were sufficient indications in the provisions of section 132 as well as Chapter XIVB to show that such notice was required to be issued soon after the AO was satisfied that any undisclosed income belonged to such other person. If any notice is unduly delayed, that would be a lapse in executing the provisions of the Act for which the statutory provision cannot be struck down.

22. The Gujarat High Court after detailed discussion of the statutory provisions has observed at pages 95, 96 & 97 as under:

"Page-95- It at any stage he is satisfied that any undisclosed income belongs to some other person, then, he must forthwith issue similar notice to such other person also. If, however, the fact that any undisclosed income belongs to the other person transpires during the proceedings against the raided person, then, on reaching the requisite satisfaction that any such undisclosed income belongs to the other person, he must proceed to service similar notice to that other person requiring him to file the return in form No.2B. If any of

such other persons is not within his jurisdiction, then he has to transmit the relevant material to the AO having jurisdiction over such other person who in turn will issue a notice under section 158 BC to him for filing the return for the block assessment of the undisclosed income belonging to such other person."

Page-96- It is only when the AO is satisfied that any undisclosed income belongs to any other person that the occasion to proceed against such other person for the block assessment of the undisclosed year belonging to him can arise. Necessarily, therefore, a different starting point of commencement of limitation for making the assessment of the block period in case of such other person was required to be fixed and the obvious starting point was the serving of the notice to such person after the requisite satisfaction was reached by the AO that any undisclosed income belonged to such other person. Once the satisfaction under section 158 BD is reached by the AO, there would be no valid reason for him to delay the issuance of the notice which ought to be issued soon after the satisfaction is reached and if the AO is different, he ought to immediately transmit the relevant material to the AO, having jurisdiction to enable him to proceed against such other person by issuing notice under section 158 BC requiring him to file return. "(emphasis supplied)

Page-97- The AO, once he reaches requisite satisfaction, is bound to act swiftly to proceed against such other person as soon as may be in reasonable time. The speed and dispatch with which he should act is writ large on the connected provisions of section 132 (9A) of the Act under which the authorized officer who has no jurisdiction over the person referred to in clause (a), (b) or (c) of sub-section (1) of section 132 has to hand over the books of account, documents and assets seized to the Income tax officer having jurisdiction over such person within 15 days of such seizure and the AO is required to serve a notice to such person under section 158BC requiring him to furnish a return in the prescribed form No.2B and to complete the block assessment in one year from the end of the month in which the last authorization for search or requisition was executed. Thus, the apprehension that a notice can be issued under section 158BD read with section 158BC by the AO in the case of such "other person" at any time is ill-founded. There is no lifting of the limitation period for making the assessment order which is one year and the starting point of limitation in cases falling under section 158BD by the very nature of things can be fixed only after the AO is satisfied that any undisclosed income belongs to such other person and in cases where the AO is different after the relevant material is transmitted to him."

23. From the above observations of the Hon'ble High Court, it is evident that immediately after arriving at requisite satisfaction regarding undisclosed income belonging to other person, the AO has to act swiftly and handover requisite material to other AO having jurisdiction over such other person. This satisfaction can be arrived at in the course of assessment proceedings. Once the AO has arrived at the requisite satisfaction, he cannot delay the proceedings u/s. 158BD, and, therefore, impliedly when AO, seized of the assessment in case of person raided, comes to the conclusion on the basis of scrutiny of material seized that income belongs to another person then he has to put the machinery into action immediately as provided u/s. 158BD. Thus, the foundation for putting into action the machinery provided u/s. 158BD in action is satisfaction of the AO in case of person raided. The Hon'ble Gujarat High Court as noted above, has observed that AO is not required to wait till the culmination of the proceedings u/s. 158 BC and, therefore, to plead that even after the completion of proceedings u/s. 158BC, the AO could record his satisfaction and transfer the material to the AO having jurisdiction would be contrary to the very premise on which the decision of the Hon'ble Gujarat High Court was rendered. This decision has been confirmed by the Hon'ble Supreme Court and, therefore, it cannot be pleaded that notice u/s. 158BD can be issued at any time as Per the whims and fancies of the AO. He is required by law to act swiftly on acquiring requisite satisfaction. It is payment

to note that the Hon'ble Supreme Court annulled the assessment on account of absence of satisfaction. Had recording of satisfaction was considered as procedural irregularity. Hon'ble Supreme Court would have restored the matter to the AO and not annulled the proceedings.

24. The Hon'ble Supreme Court has also affirmed the decision of the Hon'ble Gujarat High Court in the case of *Priya Blue Industries Ltd., 251 ITR 615*. In this case, it was held as under:

"Initiation of proceedings under section 158 BD of the IT Act, 1961 against another person is not a separate and independent proceeding for which a separate jurisdictional fact has to be established. The proceedings under section 158 BD against a person other than the person raided are part of the proceedings which commence with search under section 132 and culminate in proceedings under Chapter XIVB of the Act. If at any stage, the AO is satisfied that any undisclosed income belonged to some other person, similar notice is to be issued to such person also. The absence of an averment by the AO about satisfaction arrived at by the AO of the person raided would not vitiate the notice issued under section 158 BD to the "other person". The issuance of notice under section 158 BD to a person other than the person raided need not to wait till the completion of the proceedings under section 158 BC against such person.'

25. Thus, the findings of the ITAT Special Bench in the case of Manoj Aggarwal (supra), that the proceedings u/s. 158 BD are part of the proceedings which commenced with the search u/s. 132 stand confirmed by the decision of the Hon'ble Gujarat High Court.

26. Now let us examine the effect of the Hon'ble Bombay High Court decision in the case of Shirish Madhukar Dalvi (supra). In this case, the facts were that search and seizure operation was conducted at the residential premises of the assessee between June 11, 1998 to July 15, 1998. The AO issued notice dated 6.7.98 calling upon the assessee to file return for the block period but without mentioning the section in which it was issued, or the block period covered or the time within which return was to be filed. By notice dated 1.7.1998, the AO called for a return for the block period 1987-88 to 1997-98 within 45 days. The assessee, in response to the second notice sought extension of time and, ultimately, filed his return for the block period i.e. A.Y.s 1989-90 to 1999-2000 on 2.11.98. The AO passed assessment order u/s. 158 BC r.w.s. 143(3) of the Act. The assessee preferred an appeal challenging the validity of assessment order contending that the AO passed the order without serving proper notice u/s. 158 BC (a) which was without jurisdiction. Ld CIT(A) as well as the Tribunal upheld the notice in terms of Section 292B. The Hon'ble Bombay High Court held that the notice dated 6.7.98 suffered from only technical defects and it was protected by section 292 B of the Act. Thus, the case before the Hon'ble Bombay High Court was regarding technical defects in the notice but there was no issue regarding recording of satisfaction which primarily confers jurisdiction for initiation of proceedings. The pre-condition for acquiring valid jurisdiction cannot be termed as procedural requirement. The very foundation on which the entire edifice rests has to be there. It cannot be brought into existence subsequently. Thus, once recording of satisfaction is not there as per law, this cannot be cured by restoring the matter to the AO. It is well settled law that the observations made in a judgment are required to be read in the context in which they are made. It is not permissible to read them in isolation or out of context. A stray sentence cannot be allowed to be put into service to draw a meaning which was never meant by author himself.

27. As we have noted earlier, the requirement of recording satisfaction before culmination of proceedings in the case of a person searched is held to be Writ large in section 158 BD by the Hon'ble Gujarat High Court in the case of Priya Blue Industries P. Ltd (supra) itself as confirmed by the Hon'ble Supreme in Manish Maheswari (supra) cannot be lost sight of, while considering the

decision of the Hon'ble Bombay High Court. The Hon'ble Supreme Court annulled the proceedings on account of non-recording of satisfaction which implies that it is a jurisdictional issue and cannot be waived with the consent of parties. Thus the ratio of the decision of the Special Bench in the case of Manoj Aggarwal (supra) in regard to recording of satisfaction before the culmination of proceedings u/s. 158 BC in no way stands reversed by the Hon'ble Bombay High Court. However, even if for argument sake, in view of Bombay High Court decision, if recording of satisfaction is also taken as a procedural aspect then it has to be examined whether the procedure for recording of satisfaction had duly been complied with or not. If irregularity is such that it cannot be cured then the same would vitiate the proceedings. In this regard, we may also refer to the decision of the Hon'ble Allahabad High Court in the case of *Dr. Shashi kant Garg Vs. CIT, 285 ITR 158 (All)*, wherein, it is held that if legislature requires a particular Act to be done in a particular manner then such act has to be done in that manner only. It has been observed as under:-

"Having analysed the various provisions of the Act defining jurisdiction of the various authorities and the powers, the procedure to be adopted and the limitations imposed upon such authorities for making assessment or reassessment, we are of the further opinion that if under the provisions of the Act an authority is required to exercise powers or to do an act in a particular manner, then that power has to be exercised and the act has to be performed in that manner alone and not in any other manner. The apex Court in the case of *Dhanajaya Reddy Vs. State of Karnataka (2001) 4 SCC 9 CIT Vs. Anjum M H Ghaswala 2001) 251 ITR 1 (SC) = (2002-TIOL-73-SC-IT)*; (2002) 12 SCC 633, *Mehasana district Central Co-operative Bank Ltd Vs. State of Gujarat (2004) 118 Comp Cas 507 (SC): (2004) 2 SCC 463* and *Ram Phal Kundu Vs. Sharma (2004) 2 SCC 759*, has held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The apex court in the case of *Ram Phal Kundu (2004) 2 SCC 759* has held as follows (page 772)"

'The rule laid down *Taylor Vs. Taylor (1875) 1 Ch 426*, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, was adopted for the first time in India by the judicial committee of the *Privy Council in Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253 (2)*. The question for consideration was whether the oral evidence of a magistrate regarding the confession made by an accused, which had not been recorded in accordance with the statutory provisions viz; section 164, Cr PC would be admissible. Then First Class Magistrate made rough notes of the confessional statements of the accused which he made on the spot and thereafter he prepared a memo from the rough notes which was put in evidence. The magistrate also gave oral evidence of the confession made to him by the accused. The procedure of recording confession in accordance with section 164 Cr. PC had not been followed. It was held that section 164 Cr. PC having made specific provision for recording of the confession, oral evidence of the magistrate and the memorandum made by him could not be taken into consideration and had to be rejected. In *State of UP Vs. Singhara Singh, AIR 1964 SC 358*, a Second Class Magistrate not specifically empowered, had recorded confessional statement of the accused under section 164 Cr. PC the said confession being inadmissible, the prosecution sought to prove the same by the oral evidence of the magistrate, who deposed about the statement given by the accused. Relying upon the rule laid down in *Taylor Vs. Taylor (1876) 1 Ch 426* and *Nazir Ahmad Vs. King Emperor, AIR 1936 PC 253 (2)*, it was held that section 164 Cr. PC which conferred on a magistrate the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him. This principle has been approved by this court in a series of a decisions and the latest being by a Constitution Bench in *CIT Vs. Anjum M H Ghaswala (2002) 1 SCC Para 27) = (2002-TIOL-73-SC-IT)*."

Therefore, even if recording of satisfaction was procedural, still the procedure should have been strictly followed in line with the letter and spirit of legislature.

28. Now coming to the issue regarding no limitation being provided for initiation of proceedings u/s. 158 BD, Ld CIT DR has relied on the decision of the Hon'ble Gujarat High Court in the case of Khandubhai VasANJI Desai and others (supra) to point out that separate limitation has been prescribed u/s. 158 BE for completing proceedings u/s. 158BC and 158 BD. He pointed out that though proceedings u/s. 158 BC are required to be completed within two years from the end of the month in which last of the authorizations for search was executed, limitation u/s. 158 BD is with reference to issuance of notice. If we examine the various provisions of the income Tax Act, with reference to which, limitation has been provided we find that in some sections, limitation has been provided for initiation as well as for completion of proceedings, whereas for some sections, the limitation has been prescribed for culmination proceedings. In this regard, we may refer to section 147 wherein, limitation has been provided for initiation as well for completion of proceedings. However, in section 158BD r.w.s. 158BE, no limitation has been prescribed in section for initiation of proceedings. Ld DR submitted that since no limitation has been provided the same cannot be read is devoid of any merit because the limitation per se stands embedded in the section as it is linked with the recording of satisfaction which has to be prior to the culmination of proceedings in the case of person searched u/s. 158BC. Such limitation is very much implied in the section itself because initiation of proceedings is linked to the satisfaction which implies that the initiation has to be done immediately on acquiring satisfaction and this is logically possible only in the course of proceedings in the case of person raided and not after the culmination proceedings. This has impliedly been, in our opinion, logical conclusion of decision of the Hon'ble Supreme Court in the case of Manish Maheswar case (supra). In view of above discussion, we are of the opinion that the decision in the case of Manoj Agarwal (supra) stands modified only to the extent that the decision in the case of Manoj Agarwal (supra) stand modified only to the extent that the provisions of section 158BC and 158 BD are procedural in view of the decision of the Hon'ble Bombay High Court in the case of Shirish Madhukar Dalvi (supra) and, therefore, merely on account of technical defects notice cannot be invalidated but the recording of satisfaction has to be prior to the culmination of proceedings u/s. 158 BC in the case of person searched and such defect cannot be cured being the very foundation for proper assumption of jurisdiction by the AO issuing notice u/s. 158 BD.

29. In view of above discussion, we hold that since the satisfaction has not been recorded in accordance with law, therefore, the proceedings are bad in law and, accordingly, the assessment is annulled. As we have annulled the assessment we do not consider it necessary to go into the merits of the case.

30. In the result, appeal filed by the assessee stand allowed.

(Pronounced on 13.8.2009.)

(Paras are numbered as per the original text: **Editor**)