IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 10.03.2016

+ ITA 8/2004

COMMISSIONER OF INCOME TAX .....Appellant

versus

HARJEEV AGGARWAL ....Respondent

Advocates who appeared in this case:

For the Appellant : Mr Raghvendra Singh, Junior Standing Counsel.

For the Respondent : Mr Salil Aggarwal with Mr Prakash Kumar.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The Revenue has filed this appeal under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act') impugning an order dated 23rd June, 2003 (hereafter 'the impugned order') passed by Income Tax Appellate Tribunal (hereafter 'the ITAT') in IT(SS) No.68/Del/2002 filed by the Assessee. This appeal was directed against an order dated 13th February, 2002 passed by the Commissioner of Income Tax (Appeals) [hereafter 'the CIT(A)'] in an appeal preferred by the Assessee against the assessment order dated 27th February, 2001 passed by the Assessing

Officer (hereafter 'the AO') for the Block Period 1st April, 1988 to 25th February, 1999.

2. The controversy involved in the present appeal relates to an addition of Rs.74 lacs made by the AO as undisclosed income of the Assessee. Admittedly, the said payment of Rs.74 lacs was made in cash for purchasing a property. The ITAT, in its order, has held that the AO had not made out any valid case for treating the investment as the undisclosed income of the Assessee for the block period. The ITAT further held that the addition on account of unexplained income, if any, had to be considered in the regular assessment on the basis of books of accounts and the return filed by the Assessee and there was no justification for considering the investment in the block assessment under Chapter XIV-B of the Act. This is contested by the Revenue.

3. By an order dated 19th February, 2007 the following substantial questions of law were framed for consideration:-

> "1. Whether the Income Tax Appellate Tribunal was correct in law in deleting the addition of Rs.74 lacs paid by the Assessee in cash for the purchase of property bearing No.C-104, Naraina Vihar, Delhi?
>
> 2. Whether the Income Tax Appellate Tribunal was correct in law in holding that the provisions of Section

158 BB of the Income Tax Act, 1961 were not applicable to the facts of the case?

3. Whether the Income Tax Appellate Tribunal was correct in law in holding that the genuineness of the investment made for the purchase of property bearing No.C-104, Naraina Vihar, Delhi was to be considered in the hands of the Assessee, Smt. Anita Aggarwal and Harjeev Aggarwal and Sons, HUF?"

4. Briefly stated, the facts relating to the present case are as under:-

4.1 A search was conducted on 01.02.1999 on the premises of one Mr Arvind Seth, a Non-resident Indian, pursuant to a specific information received from the investigation wing that the property bearing No. C 104, Naraina Vihar, Delhi owned by Mr Arvind Seth, was being sold for Rs.86 lacs out of which only Rs.12 lacs were paid by cheque and the balance was payable in cash. The said search resulted in recovery of Rs.42.50 lacs and US $30000 from Mr Arvind Seth of N-29, Green Park, New Delhi. A copy of the agreement to sell and a receipt confirming part payment of the sale consideration were also found and seized. Mr Arvind Seth admitted, in his statement recorded during the search, that he had received total consideration of Rs.86 lacs out of which Rs.12 lacs was by way of cheque and the balance Rs.74 lacs was in cash. He also stated in his statement that although he has signed the receipt for the full amount,

Rs.20 lacs was still to be received by him from Mr Harjeev Aggarwal, the Assessee herein.

4.2 Since it was claimed that the amount of Rs.20 lacs was yet to be received and that the registration of the property was yet to be completed, a search was carried out on 02.02.1999 at the premises C-108, Naraina Vihar, Delhi - the residence of Mr Harjeev Aggarwal.

4.3 During the search, the Income Tax Authorities seized certain books of accounts of the Assessee including a diary (referred to as 'Annexure 8'), which contained a record of certain unaccounted sales and purchases made by the Assessee. Although Rs.1,00,600/- cash was also found, the same was stated to belong to the mother of the Assessee and was not seized.

4.4 In his statement during the search, the Assessee admitted that he entered into a deal for purchase with Mr Arvind Seth for a sum of Rs.86 lacs. Out of the aforesaid sum, Rs. 14 lacs was paid in cash and 2 cheques each of Rs.50,000/- were given to Mr J K Gulati, the attorney holder of Mr Arvind Seth, on 08.07.1998; Rs.20 lacs in cash was given to Mr Arvind Seth on 28.01.1999; and Rs.39 lacs in cash was paid to Mr Arvind Seth on 28.01.1999. Mr Harjeev Aggarwal also handed over 6 cheques

amounting to Rs.12 lacs to Mr Arvind Seth on 28.01.1999 and then received a signed receipt for the entire sum of Rs.86 lacs which was signed by Mr Arvind Seth. Mr JK Gulati and Mr Kamal Seth (brother of Mr Arvind Seth) signed the receipt as witnesses. The examination of the Assessee, during the course of the search, was interrupted and remained incomplete as the Assessee felt unwell.

4.5 A few days later, on 05.02.1999, the Assessee filed his submission, *inter alia*, providing the explanation as to the sources of the cash payments made for purchase of the property in question. He submitted that the property was agreed to be purchased jointly in the names of Mr Harjeev Aggarwal, Mrs Anita Aggarwal (his wife) and Harjeev Aggarwal & Sons HUF (hereafter 'the HUF') for a sum of Rs.86 lacs from Mr Arvind Seth out of which Rs.74 lacs was paid in cash and Rs.12 lacs was yet to be paid. He further stated that out of Rs.74 lacs, Rs.14 lacs was paid out of cash in hand accumulated over a period of time in their personal as well as the firm's account and the balance amount of Rs.60 lacs was paid out of sale proceeds of unaccounted stock sold in cash in the market.

4.6 The Assessee was again examined under Section 131 of the Act on 24.02.1999, and he affirmed the submission furnished by him on 05.02.1999 in the following words:

> "As I have submitted in my submission dated 5.2.99 the amount of Rs.60 lacs as I have already submitted. It represents unaccounted money belonging to me And I shall pay tax on it at the appropriate time."

4.7 Thereafter, the Assessee sent a letter dated 16.04.1999, now stating that the amount paid by him was from tax reflected sources, borrowing and advances against future commitments. The authorised representative of the Assessee also furnished a letter dated 28.06.1999, explaining the sources of the funds as subsequently claimed by the Assessee.

4.8 During the block assessment proceedings, the Assessee was again required to explain the source of investment of Rs.74 lacs. The Assessee replied by explaining that an amount of Rs.45 lacs was received in cash from M/s Penguin Chits Pvt ltd, M/s Parmeshwar Chits Pvt Ltd and M/s Jai & Associates as earnest money; the sources of funds were now explained as under:

(a) It was claimed that the Assessee paid a sum of Rs.37.35 lacs out of which Rs.32.9 lacs were paid in cash which comprised of

Rs.20 lacs received from M/s Penguin Chits Pvt Ltd and Rs.12.9 lacs were withdrawn from the business conducted by the Assessee in the name of M/s Machine Tools & Hardware Stores;

(b) Rs. 29 Lacs was stated to have been paid by Mrs Anita Aggarwal, wife of the Assessee, out of which Rs. 25.15 lacs was paid in cash. The cash payments included Rs. 15 lacs received as earnest money from M/s Parmeshwar Chits Pvt. Ltd; and

(c) Rs.19.65 lacs was stated to be paid by the HUF which included 15.95 lacs in cash. The cash payment included Rs. 10 lacs stated to have been received from Jai & Associates and the balance cash was stated to be from "tax reflected sources".

5. The AO examined the returns filed by the Assessee for the block period and noticed that the income declared by the Assessee for the relevant AYs was barely above the threshold taxable limit. He, therefore, concluded that it was not possible for the Assessee to have purchased the property on the basis of his declared sources. The AO disbelieved the Assessee's claim that bulk of the cash payments were made from

advances received from M/s Penguin Chits Pvt. Ltd., M/s Parmeshwar Chits Pvt. Ltd. and M/s Jai & Associates. The AO reasoned that the property in question was not yet registered in the name of the Assessee, his wife and the HUF and consequently it was not plausible that other entities would pay large amounts in cash as earnest money for purchase of the said property from the Assessee. Accordingly, the AO taxed the entire amount paid for purchase of the property in question - Rs.86 lacs as undisclosed income of the Assessee. The AO also assessed Rs.89,400/- being the amount of profit calculated on the transactions recorded in the diary seized during the search, as the Assessee's undisclosed income. In addition, the cash of Rs.1,00,600/- found at the residence of the Assessee - which was claimed by the Assessee as belonging to his mother and was not seized during the search - was also included as the Assessee's undisclosed income.

6. The Assessee appealed against the block assessment order before the CIT(A), who before deciding the appeal, sought a remand report from the AO. After considering the contentions advanced by the Assessee as well as the remand report, the CIT(A) upheld the addition of Rs.74 lacs but deleted the addition of Rs.12 lacs which were paid by the Assessee by way of cheques since these cheques were not en-cashed.

7. Aggrieved by this appellate order, both the Assessee as well as the revenue filed appeals before the ITAT. The Assessee challenged the addition of Rs.74 lacs while the revenue challenged the deletion of Rs.12 lacs. The ITAT deleted the addition of Rs.74 lacs holding that the Assessing Officer did not make out any valid case for treating the investment as the undisclosed income of the Assessee for the block assessment. The ITAT further held that even if there is any doubt about the genuineness of the investments, the same would have to be decided in the regular assessment proceedings of the persons concerned - that is, Mr Harjeev Aggarwal, Mrs Anita Aggarwal and the HUF - who had made the investment.

8. The ITAT upheld the deletion of Rs.12 lacs holding that the cheques were not encashed in the instant case and therefore, CIT(A) had rightly deleted the addition.

9. Accordingly, the ITAT by a common order dated 23rd June 2003 dismissed the Revenue's appeal while allowing the Assessee's appeal. It is only against the order of the ITAT allowing the Assessee's appeal that the Revenue is in appeal before us.

Submissions

10. Mr Raghvendra Singh, Junior Standing Counsel appearing for the Revenue contended that the ITAT had grossly erred in holding that the cash payment of Rs. 74 lacs could not be taxed as undisclosed income of the Assessee under a block assessment made under Section 158BC of the Act. He submitted that after the search, Mr Harjeev Aggarwal had voluntarily made a statement that an amount of Rs.60 lacs was paid out of sale proceeds of unaccounted stock sold in cash in the market. He further pointed out that admittedly, the Assessee had not maintained any books of accounts and, thus, the question of cash paid by the Assessee being accounted for or representing disclosed income did not arise.

10.1 Mr Raghvendra next referred to the definition in Section 158B(b) of the Act for the meaning of the expression 'undisclosed income'. He contended that undisclosed income would not only include income that was not disclosed but also the income which would not have been disclosed for the purposes of the Act. He submitted that in the present case, the fact that large payments were made in cash clearly evidenced the Assessee's intention to not disclose the same. Further, on being confronted during the search, the Assessee had within three days thereafter, clearly, admitted that the Rs.60 lacs of cash was unaccounted

money and there would have been no occasion for the Assessee to have done so if the search was not conducted in his premises.

10.2 Mr Raghvendra next referred to the provisions of Section 158BB(1) of the Act and contended that in terms of that provision, undisclosed income of a block period is required to be computed on the basis of the evidence found as a result of search as well as other information as is available with the AO. He argued that in the present case, the conditions under Section 158BB(1) for taxing the payments in question were duly fulfilled; first of all, for the reason that the Assessee was examined under Section 132(4) of the Act and by virtue of the said provision, his statement could be used in evidence in any proceedings under the Act; and secondly, the search conducted on the premises of Mr Arvind Seth had unearthed various incriminating documents that evidenced cash payments from the Assessee. Thus, a block assessment could be made in the case of the Assessee based on such incriminating material.

10.3 Mr Singh further submitted that the Assessee, in his statement recorded on 24th February, 1999, had reiterated his admission that Rs.60 lacs represented unaccounted money on which the Assessee would pay the requisite tax. He submitted that in this view the Assessee's subsequent

assertion that he and his wife had borrowed funds from three independent entities against back to back sale arrangements was clearly an afterthought and the ITAT had erred in not rejecting the same.

11. Mr Salil Aggarwal, learned counsel for the Assessee submitted that the Income Tax Authorities had not found any incriminating material during the search conducted at the premises of the Assessee, which would be relevant for making the addition of Rs.74 lacs under a block assessment. He, emphatically, submitted that statements recorded under Section 132(4) of the Act could not be construed as evidence for the purposes of Section 158BB(1) of the Act. He further submitted that ITAT had examined the factual matrix and had accepted that the payments made by M/s Penguin Chits Pvt. Ltd., M/s Parmeshwar Chits Pvt. Ltd. and M/s Jai & Associates Pvt. Ltd. were genuine. The Revenue had not contested the said finding as being perverse and thus, the said finding could not be disturbed.

11.1 Mr Aggarwal further contended that Rs.74 lacs could not be added as undisclosed income of the Assessee because the said transactions were admitted in the first instance and were subsequently also disclosed in the balance sheet filed by the Assessee, Mrs Anita Aggarwal - wife of the Assessee, and the HUF. He referred to the decision of this Court in ***CIT***

v. Ravi Kant Jain: **(2001) 250 ITR 141 (Del)** in support of his contention that a block assessment could not be made in respect of income/transactions that were duly disclosed in the books. He further submitted that the returns filed by Assessee, his wife and the HUF were duly accepted by the AO under Section 143(1) of the Act and, therefore, the transactions could not be made a subject matter of block assessment.

Reasoning and Conclusion

12. The first and foremost issue to be addressed is whether there was any incriminating material on the basis of which the cash payments made for purchase of property could be taxed as undisclosed income.

13. Chapter XIV B of the Act - as the title of the said chapter also indicates - contains a special procedure for assessment of search cases. It is well established that the special procedure as provided under the said chapter is triggered only in cases where undisclosed income is unearthed during a search initiated under Section 132 of the Act or where any books of accounts, other documents or assets are requisitioned under Section 132A of the Act. The explanation to Section 158BA(2) of the Act clarifies that the assessments made under Chapter XIV B of the Act are in addition to the regular assessment in respect of each previous year

included in the block period and are only in respect of undisclosed income which are not included in the regular assessments.

14. At the outset, it is necessary to refer to Section 158B(b) of the Act, which defines " undisclosed income"; the said clause reads as under:

> "(b) undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act or any expense, deduction or allowance claimed under this Act which is found to be false"

15. As is apparent from the plain language of the above definition, "undisclosed income" includes not only the income that is not disclosed but also which would not be disclosed. Section 158BB of the Act provides for computation of undisclosed income. The opening words of the said section are relevant and read 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,-"

16. At this stage, it is relevant to refer to the decision of the Supreme Court in ***CIT v. Hotel Blue Moon:*** **(2010) 321 ITR 362 (SC)**, wherein the Supreme Court had observed as under:-

> "12. Chapter XIV-B provides for an assessment of the undisclosed income unearthed as a result of search without affecting the regular assessment made or to be made. Search is the *sine qua non* for the Block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. 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. It is not intended to be 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 accounts or documents and such other materials or information as are available with the assessing officer. Therefore, the income assessable in Block assessment under Chapter XIV-B is the income not disclosed but found and determined as the result of search under Section 132 or requisitioned under Section 132A of the Act."

17. Thus, plainly, a block assessment under Chapter XIV-B of the Act is for bringing to tax undisclosed income which is computed on the basis of evidence found as a result of search and/or other information as is available with the AO which is relatable to such evidence.

18. In ***CIT v. Harkaran Dass Ved Pal*: (2011) 336 ITR 8 (Del),** this Court expressed the aforesaid view in the following words:-

> "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 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. 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 158BC."

19. In view of the settled legal position, the first and foremost issue to be addressed is whether a statement recorded under Section 132 (4) of the Act would by itself be sufficient to assess the income, as disclosed by the

Assessee in its statement, under the Provisions of Chapter XIV-B of the Act.

20. In our view, a plain reading of Section 158BB(1) of the Act does not contemplate computing of undisclosed income solely on the basis of a statement recorded during the search. The words "evidence found as a result of search" would not take within its sweep statements recorded during search and seizure operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the explanation to Section 132(4) of the Act. However, such statements on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a block assessment merely because any admission was made by the Assessee during search operation.

21. A plain reading of Section 132 (4) of the Act indicates that the authorized officer is empowered to examine on oath any person who is found in possession or control of any books of accounts, documents, money, bullion, jewellery or any other valuable article or thing. The explanation to Section 132 (4), which was inserted by the Direct Tax

Laws (Amendment) Act, 1987 w.e.f. 1st April, 1989, further clarifies that a person may be examined not only in respect of the books of accounts or other documents found as a result of search but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Act. However, as stated earlier, a statement on oath can only be recorded of a person who is found in possession of books of accounts, documents, assets, etc. Plainly, the intention of the Parliament is to permit such examination only where the books of accounts, documents and assets possessed by a person are relevant for the purposes of the investigation being undertaken. Now, if the provisions of Section 132(4) of the Act are read in the context of Section 158BB(1) read with Section 158B(b) of the Act, it is at once clear that a statement recorded under Section 132(4) of the Act can be used in evidence for making a block assessment only if the said statement is made in the context of other evidence or material discovered during the search. A statement of a person, which is not relatable to any incriminating document or material found during search and seizure operation cannot, by itself, trigger a block assessment. The undisclosed income of an Assessee has to be computed on the basis of evidence and material found during search. The statement recorded under Section 132(4) of the Act may also be used for making the assessment, but only to the extent it is relatable to the

incriminating evidence/material unearthed or found during search. In other words, there must be a nexus between the statement recorded and the evidence/material found during search in order to for an assessment to be based on the statement recorded.

22. In ***CIT v. Sri Ramdas Motor Transport Ltd.*****: (1999) 238 ITR 177 (AP)**, a Division Bench of Andhra Pradesh High Court, reading the provision of Section 132(4) of the Act in the context of discovering undisclosed income, explained that in cases where no unaccounted documents or incriminating material is found, the powers under Section 132(4) of the Act cannot be invoked. The relevant passage from the aforesaid judgment is quoted below:

> "A plain reading of sub-section (4) shows that the authorised officer during the course of raid is empowered to examine any person if he is found to be in possession or control of any undisclosed books of account, documents, money or other valuable articles or things, elicit information from such person with regard to such account books or money which are in his possession and can record a statement to that effect. Under this provision, such statements can be used in evidence in any subsequent proceeding initiated against such per son under the Act. Thus, the question of examining any person by the authorised officer arises only when he found such person to be in possession of any undisclosed money or books of account. But, in this case, it is admitted by the Revenue that on the dates of search, the Department was not able to find any unaccounted money, unaccounted bullion nor any other valuable articles or things, nor any unaccounted documents nor any such incriminating material

> either from the premises of the company or from the residential houses of the managing director and other directors. In such a case, when the managing director or any other persons were found to be not in possession of any incriminating material, the question of examining them by the authorised officer during the course of search and recording any statement from them by invoking the powers under section 132(4) of the Act, does not arise. Therefore, the statement of the managing director of the assessee, recorded patently under section 132(4) of the Act, does not have any evidentiary value. This provision embedded in sub-section (4) is obviously based on the well established rule of evidence that mere confessional statement without there being any documentary proof shall not be used in evidence against the person who made such statement. The finding of the Tribunal was based on the above well settled principle."

23. It is also necessary to mention that the aforesaid interpretation of Section 132(4) of the Act must be read with the explanation to Section 132(4) of the Act which expressly provides that the scope of examination under Section 132(4) of the Act is not limited only to the books of accounts or other assets or material found during the search. However, in the context of Section 158BB(1) of the Act which expressly restricts the computation of undisclosed income to the evidence found during search, the statement recorded under Section 132(4) of the Act can form a basis for a block assessment only if such statement relates to any incriminating evidence of undisclosed income unearthed during search and cannot be the sole basis for making a block assessment.

24. If the Revenue's contention that the block assessment can be framed only on the basis of a statement recorded under Section 132(4) is accepted, it would result in ignoring an important check on the power of the AO and would expose assessees to arbitrary assessments based only on the statements, which we are conscious are sometimes extracted by exerting undue influence or by coercion. Sometimes statements are recorded by officers in circumstances which can most charitably be described as oppressive and in most such cases, are subsequently retracted. Therefore, it is necessary to ensure that such statements, which are retracted subsequently, do not form the sole basis for computing undisclosed income of an assessee.

25. In ***Commissioner of Income Tax v. Naresh Kumar Aggarwal*****: (2014) 3699 ITR 171 (T & AP),** a Division Bench of Telangana and Andhra Pradesh High Court held that a statement recorded under Section 132(4) of the Act which is retracted cannot constitute a basis for an order under Section 158BC of the Act. The relevant extract from the said judgement is quoted below:

> "17. The circumstances under which a statement is recorded from an assessee, in the course of search and seizure, are not difficult to imagine. He is virtually put under pressure and is denied of access to external advice or opportunity to think independently. A battalion of officers, who hardly feel any

limits on their power, pounce upon the assessee, as though he is a hardcore criminal. The nature of steps, taken during the course of search are sometimes frightening. Locks are broken, seats of sofas are mercilessly cut and opened. Every possible item is forcibly dissected. Even the pillows are not spared and their acts are backed by the powers of an investigating officer under section 94 of the Code of Criminal Procedure by operation of sub-section (13) of section 132 of the Act. The objective may be genuine, and the exercise may be legal. However, the freedom of a citizen that transcends, even the Constitution cannot be treated as non- existent."

"18. It is not without reason that Parliament insisted that the recording of statement must be in relation to the seized and recovered material, which is in the form of documents, cash, gold, etc. It is, obviously to know the source thereof, on the spot. Beyond that, it is not a limited licence, to an authority, to script the financial obituary of an assessee."

"19. At the cost of repetition, we observe that if the statement made during the course of search remains the same, it can constitute the basis for proceeding further under the Act even if there is no other material. If, on the other hand, the statement is retracted, the Assessing Officer has to establish his own case. The statement that too, which is retracted from the assessee cannot constitute the basis for an order under section 158BC of the Act."

26. It is next to be examined whether the Assessee's communication dated 5th February, 1999 and his statement recorded under Section 131 of the Act is the sole basis for making the block assessment or whether the AO had other incriminating material which would justify assessing Rs.74 lacs as undisclosed income under Section 158BC of the Act.

27. A perusal of the assessment order indicates that on 2nd February 1999, a diary containing certain notings of purchases and sales that were not recorded in the books of accounts was also unearthed during search conducted on the Assessee. The Assessee had himself declared that Rs.89,400/- was the profit in respect of unaccounted sales and purchases that were recorded in that diary. It is further relevant to note that the Assessee carried on business as a sole proprietor of a concern named M/s Machine Tools and Hardware Store. During the search, certain books of account were also seized. The Assessee had on 5th February, 1999, immediately after the search stated that Rs.60 lacs paid for purchase of the property in question was paid out of unaccounted stocks sold in cash. Subsequently, in his statement recorded on 24th February, 1999, the Assessee once again reiterated his stand that Rs.60 lacs represented unaccounted money belonging to him.

28. Concededly, the payments made in cash were not reflected in the books of accounts maintained by the Assessee including those seized during the search. Mr Aggarwal during his course of arguments contended that books of accounts were confined only to the Assessee's business and the Assessee did not maintain any other accounts. He sought to contend that the present transactions were not related to the business of

the Assessee and, therefore, were not required to be recorded in the books maintained by him. He, however, could not dispute that by virtue of Section 44AA(2) of the Act, the Assessee was required to maintain such books of accounts so as to enable the AO to compute his income in accordance with the Act. Thus, clearly, the Assessee was required to record the amount paid in cash in his records. Although, the Assessee has retracted his statement that the same was unaccounted money, he nonetheless maintains that Rs.37.35 lacs was paid by him which included Rs.32.9 lacs in cash which included Rs.12.9 lacs withdrawn from his proprietorship concern. Since it is undisputed that (a) cash was paid by the Assessee; and (b) that the same was not recorded in the books of account seized at the material time, it cannot be accepted that the Revenue did not have incriminating material regarding generation of unaccounted money. The diary found which recorded undisclosed sales and purchases as well as the books of accounts which did not record payment of cash (which was admittedly paid) at the time of search does indicate that the Revenue had found incriminating evidence. The statement made by the Assessee was also relatable to the records found during the search.

29. At this stage, it is also necessary to refer to sub-sections (1) and (3) of Section 158BA of the Act which read as under:-

> "(1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 1995 a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter."
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> "(3) Where the assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period."

30. A plain reading of sub-section (3) of Section 158BA of the Act indicates that the Assessee can prove to the satisfaction of the AO that the income under sub-section (1) of Section 158BA (undisclosed income) relates to the previous year that has not expired – that is, the year in which search is conducted - and such income or transactions are recorded

in the books of accounts and other documents maintained in the normal course before the date of the search.

31. Concededly, in the present case, the Assessee has been unable to show that the transactions in question were recorded in the books of accounts and records maintained in the normal course prior to the date of the search. On the contrary, Mr Aggarwal had argued that the Assessee is not obliged to maintain any books and, therefore, the question of keeping a record of the transactions for purchase of the property did not arise. In our view, the aforesaid contention is wholly without merit and it is not open to the Assessee to now claim that the payments made were not undisclosed income as the time for filing the return for the previous year had not expired and the transactions in question would be reflected in the returns to be filed subsequently.

32. In the present case, the ITAT notes that the transaction in question has been duly disclosed in the returns filed by the Assessee, his wife and the HUF. However, admittedly, the said returns have not been subjected to any scrutiny. The intimation under Section 143(1) of the Act, thus, cannot be construed as assessments made by the AO.

33. The explanation with regard to the sources of the cash paid by the Assessee is a clear afterthought. The Assessee claims that the said cash was provided by three entities against back to back arrangement for sale of the property. However, it is not disputed that at the material time, the Assessee did not produce any document which would support this stand that the cash paid for purchase of the property in question was obtained from three independent entities. The records produced by the three companies also indicate that amounts paid to the Assessee was stated to be paid in cash and not through banking channels. Further the cash paid by the M/s Penguin Chits Limited, M/s Parmeshwar Chits Private Limited were also not drawn from banks but are stated to be from the cash deposited with them. There is no explanation whatsoever as to why such large payments were made in cash. In case of M/s Jai and Associates, the cash is stated to be paid from withdrawals from a bank. However, it is relevant to note that various amounts of cash were withdrawn by M/s Jai and Associates on various dates and there is no explanation why such cash was withdrawn in various tranches. The AO had also examined the returns furnished by the Assessee for various years which were barely above the threshold of the taxable limit. And, after taking into account the relevant material, the AO had concluded that the cash paid by the Assessee was undisclosed income. The ITAT has

accepted that since the cash has been duly accounted for and disclosed in the returns filed by the Assessee subsequently, the same cannot be considered as undisclosed income. The ITAT has further proceeded on the basis that since there was no allegation of any nexus between the Assessee and the three entities, M/s Penguin Chits Pvt. Ltd., M/s Parmeshwar Chits Pvt. Ltd. and M/s Jai & Associates, who were stated to have provided the cash, the AO could not treat the cash provided by the said entities as undisclosed income of the Assessee. The ITAT was of the view that if the genuineness of deposits made as disclosed by the said entities could not be verified, the same would have to be taxed in those entities.

34. In our view, the ITAT has erred in not examining or not interpreting the scope of 'undisclosed income' as defined under Section 158B(b) of the Act. By virtue of Section 158B of the Act, 'undisclosed income' not only includes income or property which has not been disclosed but also income which would not have been disclosed for the purposes of the Act. The Supreme Court in the case of ***Assistant Commissioner of Income Tax v. AR Enterprises*****: (2013) 350 ITR 489 (SC)** has explained that the undisclosed income also includes the category of income that would not have been disclosed and thus, contemplates a

question as to the likelihood of disclosure which must be gauged from the surrounding facts and circumstances of the case. The relevant observations of the Supreme Court are reproduced as under:-

> "18. The genesis of the issue before us lies within the folds of this section. 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 XIV-B. 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."

35. In the aforesaid view, the ITAT was required to address a question whether there was any likelihood that the cash payments would be disclosed. In our view, the ITAT failed to address itself to that question. In the present case, the surrounding facts and circumstances of the case are telling. First of all, the payments have been made in cash and there is no explanation as to why such large payments were required to be made in cash. Secondly, such cash payments were not recorded by the Assessee in its books or any record maintained by it at the time of search. Thirdly, the Assessee had admitted – by a letter sent immediately after the search as well as in a statement recorded under section 131 of the Act – that the source of Rs.60 lacs cash payments was sale of unaccounted stock. Fourthly, the fact that the Assessee carried on transactions outside his books of accounts is also not disputed. The additions made by the AO with regard to unaccounted transactions recorded in the diary have been sustained and the Assessee has not appealed against the decision of the ITAT in that respect. Fifthly, although the Assessee now claimed that there were back to back agreements with three unrelated entities for sale of the property in question, no such documents were produced at the material time. There is also no explanation as to why such documents could not have been produced at the relevant time.

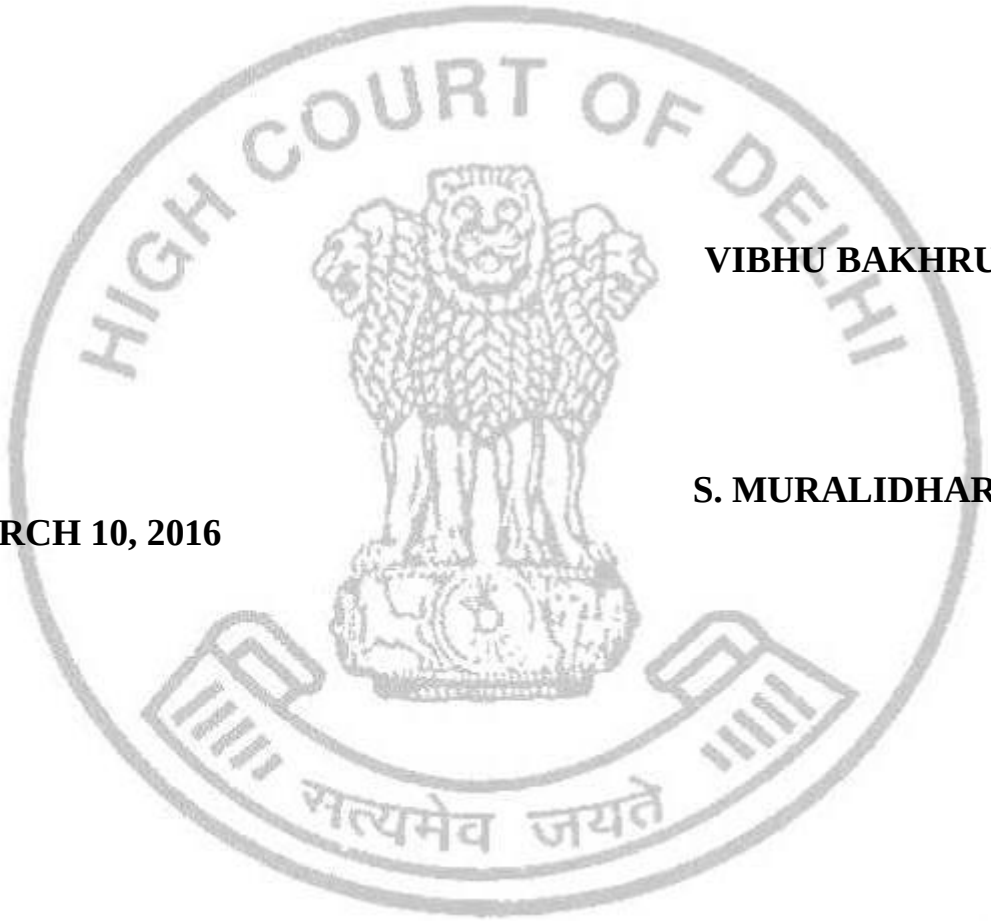
36. As noticed earlier, there was a clear admission on the part of the Assessee that the payment of Rs.60 lacs were from the sale of undisclosed stock. The statement was reiterated again after the search on 24th February, 1999 and it is difficult to contemplate that the letter dated 5th February, 1999 and the statement recorded on 24th February, 1999, which were much after the search, were not made voluntarily and of free will. In our view, the only inescapable conclusion that can be drawn from the surrounding facts is that the Assessee would not have disclosed the cash payments admittedly made by the Assessee and such payments were his undisclosed income.

37. The Assessee had subsequently claimed that he had paid a sum of Rs.12.9 lacs in cash which was withdrawn from his proprietorship concern. He further explained that a sum of Rs.4 lacs had been withdrawn from the bank accounts on 26th November, 1998 and 7th December, 1998. The balance amount was paid out of the sales made in cash. The AO had disbelieved the aforesaid explanation as the withdrawals from the bank was much prior to the date of payment to Sh. Arvind Seth and there was no explanation for withdrawing cash in tranches and keeping the funds idle. In respect of the sales made in cash, the enquiries made by the AO revealed that cash sales of Rs.6,16,586/-

were booked in January 1999 in addition to receipts of Rs.2,10,854/- described as 'sales realisation'. On enquiries, the AO found that the Assessee had failed to prove the said sales as there was no evidence of availability of stocks for sale and no purchases had been shown for making such sales. Further considering that the returns filed by the Assessee for the block period returned income only in the range of Rs.18,210/- in the year 1989 to Rs.77,440/- in the year 1999-2000, the withdrawals claimed by the Assessee were rightly disbelieved by the AO. Similarly, the claim that the Assessee's wife had contributed Rs. 10.15 lacs in cash was also not accepted as no source for such cash could be identified. The AO noted that the Assessee's wife had shown a capital of Rs.5,57,420/-. For AY 1998-99, she had claimed to have received Rs.60,000/- as salary and Rs.32,550/- as petty gifts. During the AY 1999-2000, the Assessee's wife claimed to have income from other sources amounting to Rs.9,05,000/-. The source of such income was not disclosed and it was the Assessee's case that source of such money was not required to be disclosed. In absence of any satisfactory explanation as to the source of Rs.14 lacs which was admittedly paid by the Assessee, the same would also be liable to be taxed in his hands.

38. In view of the above, the questions of law are answered in the negative, that is, in favour of the Revenue and against the Assessee.

39. The appeal is allowed and the impugned order dated 23rd June, 2003 passed by the ITAT in IT(SS) No.68/Del/2002 is set aside. In the circumstances, the parties are left to bear their own costs.



VIBHU BAKHRU, J

S. MURALIDHAR, J

MARCH 10, 2016
RK