IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 312 of 1999

WITH

TAX APPEAL No. 315 of 2009

TO

TAX APPEAL No. 331 of 2009

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ Sd/-

HONOURABLE MR.JUSTICE RAJESH H.SHUKLA Sd/-

==========

1.	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2.	To be referred to the Reporter or not ?	**YES**
3.	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4.	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	**NO**
5.	Whether it is to be circulated to the civil judge ?	**NO**

==========

DY. COMMISSIONER OF INCOME-TAX - Appellant

Versus

KHANDUBHAI V. DESAI (AOP) - Opponent

==========

Appearance :

MR M R BHATT, Senior Counsel with MRS MAUNA M BHATT for Appellant.
MR S N SOPARKAR, Senior Counsel with MRS SWATI SOPARKAR for Respondents.

==========

CORAM : HONOURABLE MR.JUSTICE K.A.PUJ
and
HONOURABLE MR.JUSTICE RAJESH H.SHUKLA

Date : 07/12/2009
COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The Revenue has filed these 18 Tax Appeals under Section 260A of the Income-tax Act, 1961 for the block Assessment Years 1988 89 to 1997 98. Tax Appeal No.312 of 1999 is filed by the Revenue against Khandubhai V. Desai (AOP) whereas Tax Appeal Nos.315 to 331 of 1999 are filed by the Revenue against 17 individuals allegedly constituting Khandubhai V. Desai (AOP).
2. In Tax Appeal No.312 of 1999, the Revenue has proposed to frame the following substantial question of law :-

Whether the Appellate Tribunal is right in law and on facts in deleting the undisclosed income of the Assessee computed at Rs.3,13,58,000/- under the provisions of Chapter XIV B of the Income Tax Act ?

3. In Tax Appeal Nos.315 to 331 of 1999, the Revenue has proposed to frame the following substantial question of law, which is common in all Tax Appeals :-

Whether the Appellate Tribunal is right in law and on facts in deleting the undisclosed income of the Assessee computed at Rs.18,44,588/- under the provisions of Chapter XIV B of the Income Tax Act ?

4. All these appeals were admitted by this Court on 28.12.1999 and following four substantial questions of law were re-framed by this Court, which are common in all the 18 Tax Appeals :-

1. Whether no material collected in the course of search or any block assessment proceedings under Section 158-BC of the Act can be used as evidence for framing assessment under Section 158-BD of the Act as held by the Tribunal ?

2. Whether undisclosed income of a person other than the person

with respect to whom search was made under Section 132 of the Act and unearthed pursuing such search can be assessed as per the procedure prescribed for regular assessment under the Act ?

3.

4. Whether, on the facts and circumstances of the case, the Tribunal is correct in law in holding that the income accruing to the assessee on sale of the subject land is not taxable as assessee's business income from adventure in the nature of trade ?

5.

6. Whether and to what extent the decision of the Tribunal is vitiated by any error on the above substantial questions of law or is otherwise perverse and unwarranted ?

5. Heard Mr. M.R. Bhatt, learned Senior Counsel with Mrs. Mauna M. Bhatt, learned Standing Counsel appearing for the Revenue and Mr. S.N. Soparkar, learned Senior Counsel with Mrs. Swati Soparkar, learned advocate appearing for the respondents in all these 18 Tax Appeals.

6. The brief facts giving rise to all these Tax Appeals are that search and seizure operation was carried out at the business and residential premises of one Shri Madhavji D. Patel on 04.07.1996. Assessment under Section 158BC of the Act was framed in that case on 30.07.1997.

During the course of search proceedings, certain Diaries / loose papers were seized from where it was felt evident by the Revenue that proceedings under Section 158BD of the Act were inevitable in the case of Shri Khandubhai V. Desai (AOP) and 17 individuals who are the owners of the land from whom the said Mr. Madhavji D. Patel had purchased land.

7. A satisfaction note was, therefore, recorded as required under the provisions of Section 158BD of the Act on 25.07.1997 before the assessment proceedings in the case of said Shri Madhavji D. Patel were finalized and consequently, notices under Section 158BD of the Act were issued to 18 assessees (17 individuals and the AOP consisting of 17 individuals). All these assessees were required to file return in the prescribed form pursuant to the said notice. No return was, however, filed by any of these assessees in response to the above notice. Instead of that, they preferred Special Civil Application before this Court challenging the said notice on the ground that the Deputy Commissioner of Income Tax, Special Range II, Surat did not have any jurisdiction to issue any such notice and further that Section 158BD of the Act was ultra vires the Constitution of India. The said petition was disposed of by this Court on 15.10.1999 and the judgment is reported in

the case of **Khandubhai Vasanji Desai and others V/s. Deputy Commissioner of Income-tax and another, [1999] 236 ITR 73 (Gujarat)**, wherein this Court held that the challenge against the provisions of Section 158BD on the ground that it treats equals i.e. the raided person and the other person whose undisclosed income is to be assessed, as unequals and thereby violates Article 14 of the Constitution of India is, therefore, baseless. The Court further held that Section 158 BD does not create invidious discrimination amongst similarly situated persons and, therefore, does not violate Article 14. Section 158 BD does not affect the fundamental right of the petitioners to carry on any profession, occupation, trade or business. It does not in any way regulate any profession, occupation, trade or business. A proper procedure has been provided for the purpose of computing undisclosed income and after giving an adequate opportunity to the assessee making an assessment of the undisclosed income of the block period in search cases. The challenge against the provision on the ground that it violates Article 19 or Article 21 of the Constitution is, therefore, misconceived.

8. Since this Court has not granted any stay against the proceedings initiated in the case of the assessees pursuant to the notice under Section 158BD of the Act, further notices under Section 142 (1) and

143 (2) were issued. The assessees thereafter asked for the copy of statement of Shri Madhavji D. Patel, complete copy of Annexure B-5, complete copy of seized Diary B-2, complete copy of the Diaries B-3 and B-6, copy of assessment order in the case of Madhavji D. Patel and copies of all other materials on which the Assessing Officer relied upon in the assessment order. In response to this, it is the case of the Revenue that all the relevant materials which were being used against the assessees were provided. On the basis of the satisfaction note as well as after considering the explanation tendered by the assessees, the Deputy Commissioner has framed the assessment under Section 158BD of the Act on 14.07.1998 taking the view therein that although the 17 members claimed per capita ownership in relation to the defined share in the land in equal proportion, yet, looking to the common interest involving common activity to earn profit, the entire income was liable to be assessed as AOP consisting of 17 persons. This was done on protective basis in case the contention of the assessees prevails that they were liable to be assessed as AOP instead of individuals. Simultaneously, individual assessments were also framed on substantive basis and the AOP was assessed at Rs.3,13,58,000/- whereas 17 individuals were assessed at their respective figures.

9. Being aggrieved by this orders passed by the Deputy Commissioner, all the 17 individuals and one AOP have filed appeals before the Income Tax Appellate Tribunal being I.T. Appeal Nos.66 to 83 of 1998. The assessees have raised three effective grounds before the Tribunal, which are as under :-

i. On the facts and circumstances of the case as well as law on the subject, the Assessing Officer has erred in taxing the sum of Rs.3.29 Lacs as total consideration received in cash and kind in the alleged transaction of sale of land as adventure in the nature of trade by 17 members of Society and determining total undisclosed income of Rs.3,13,58,000/- in the hands of 17 members on substantive basis and in the hands of AOP on protective basis after allowing the cost of land of Rs.15,42,000/-.

ii. Even otherwise, the Assessing Officer has erred in holding the sum of Rs.92 Lacs as received by 17 individuals in addition to 17 Flats and also erred in taking the sum of Rs. 2.37 Crores as value of 17 Flats for the purpose of determining the gain on transfer of land.

iii. Without prejudice, the Assessing Officer should have taxed the value of each Flat as reduced by cost of land as income from capital gain allowing the benefit of indexation cost of acquisition of land and deduction under Section 54F in the hands of each member and for this purpose, the Assessing Officer should have taken the value of land as initial investment made by member towards share and contribution and subsequent investment of Rs.1.21 Lacs. The Assessing Officer should have taxed the income of capital gain on normal assessment in the

Assessment Year 1997 98, as the alleged income from capital gain could not be assessed as undisclosed income under Section 158 (b) of the Act.

10. The Tribunal, after considering the rival submissions, facts and materials on record and in light of the statutory provisions as well as the decided case law on the subject, held that no cash has been paid by Shri Madhavji D. Patel for the purchase of land. The Tribunal further held that even assuming that assessees received the benefit of Rs.3.29 Crores for the value of land, it could be calculated that the value of each Flat would come to about Rs.19 Lacs. Shri Madhavji D. Patel sold certain Flats to new members at the rate of Rs.18.57 Lacs. It cannot be accepted that the Developer would sell the Flats at lesser price to the assessees as well as pay Rs.92 Lacs for the cost of land. The Tribunal, therefore, came to the conclusion that if the alleged payment of Rs.92 Lacs were added to Rs.2.37 Crores, the value of 17 Flats as alleged, the price of each Flat allotted to the members would be in the neighborhood of 19 Flats which was equal to the price of the Flats allotted to some of the other members having same benefit. The Tribunal also believed that Shri Madhavji D. Patel, probably to get the benefit of deduction from

the income had stated that Rs.92 Lacs had been paid in cash to the assessees. The Tribunal further observed that if Rs.92 Lacs had been paid by Shri Madhavji D. Patel to the assessees, the assessees would not be required to pay Rs.20.57 Lacs (Rs.1.21 Lacs X 17) to the Society. In this view of the matter, the Tribunal held that payment of Rs.92 Lacs in cash to the members is not an acceptable proposition.

11. The Tribunal has also considered one more issue while disposing of all these appeals and that is whether the value of the Flats could be considered in assessment under Chapter XIV B of the Act or under normal assessment. After referring to the decision of this Court in the case of **N.R. Paper Board Limited and others V/s. DCIT, [1998] 234 ITR 733**, the Tribunal observed in its order that it is not disputed that contribution to the Society for the Flats had been recorded in the balance-sheets of the assessees filed before the department. The acquisition of the Flats as well as the capital gains should, therefore, be considered in the regular assessment for the year 1997-98 when the Flats were allotted. The Tribunal, therefore, allowed all the appeals filed by the individuals. As far as appeal filed by the AOP is concerned, the Tribunal observed that from the facts and materials on record, it can hardly be said that the assessees had joined together for the purpose of

earning any income on the basis of which the status of AOP could be adopted. The 17 individuals are the members of the Co-operative Society and no assessment in the name of Co-operative Society has been made. The Tribunal further observed that the assessees had not carried out any activity as an adventure in the nature of trade and hence, the Tribunal cancelled the assessment made on AOP even on protective basis. Thus, all the 18 appeals were allowed by the Tribunal.

12. Mr. M. R. Bhatt, learned Senior Counsel appearing for the Revenue has submitted that the Tribunal has proceeded on altogether on erroneous premises. As far as assessment is concerned, he submitted that the satisfaction is recorded by the Assessing Officer. After decoding the noting in the seized material, the Assessing Officer noted that the sale consideration was Rs.3.29 Crores i.e. Rs. 2.37 Crores in kind i.e. by way of allotment of 17 Flats and Rs.92 Lacs in cash. Even as per the statement recorded under Section 131, notings were in crores of rupees. The statement in the case of Madhavji Patel and seized documents proved these facts. Even the answer given by Madhavji Patel with regard to Rs.92 Lacs asserts that the said amount was paid along with handing over of the Flats. The said Shri Madhavji Patel had claimed deduction of the amount of Rs.92 Lacs before the Settlement

Commission. The relevant incriminating material was given to the assessees. No request for cross-examining Shri Madhavji Patel was made by the assessees. The statement of Madhavji Patel was supplied to the assessees and assessees were confronted with the seized documents. Based on the evidence collected during the course of search, the Assessing Officer came to a categorical finding that area of each Flat was 2200 Sq. Ft. which was also verified upon site inspection. The Assessing Officer, therefore, held that the transaction in question was adventure in nature of trade, after referring to the motive / conduct of the assessees.

13. So far as the findings recorded by the Tribunal are concerned, Mr. Bhatt has submitted that for the first time, the issue of cross-examination of Madhavji D. Patel has crept in before the Tribunal. Aspect of prejudice, if any, was not discussed at all. The cross-examination was not claimed and hence, there was no denial of principles of natural justice. The Tribunal approached the matter in a wrong manner. The Tribunal, in the first instance, was required to refer to the provisions of Section 158 BC and 158 BD of the Act. In this process, the Tribunal accepted the self serving statement of the assessees that Madhavji D. Patel agreed to allot individual Flats upon payment of Rs.1.21 Lacs each whereas even the

document price was Rs.7 Lacs.

14. While considering the motive of the assessees, the Tribunal noted that the area was too small for construction and, therefore, the assessees gave permission for development to Madhavji D. Patel. He submitted that since the motive of the assessees was to convert the land into gain i.e. earning out of giving development permission, the same was taxable as adventure in the nature of trade in view of the decision of this Court in the case of **Commissioner of Income-Tax V/s. Smt. Minal Rameshchandra, [1987] 167 ITR 507 (Gujarat)** wherein it is held that where there was a purchase of land if there was no safety of the capital invested and if there was no certainty of regular return, it was difficult to say that such a transaction could be said to be in the nature of investment. On the other hand, risk, uncertainty, foresightedness to visualise the imponderables and capacity to overcome the unforeseen hurdles were the essential requisites for business activity. So would be the case with regard to a transaction which was an adventure in the nature of trade. Applying this taste, the Court took the view in the said decision that when the assessee purchased the land, she took the risk of clearing disputed and defective title. Moreover, there was no apparent purpose of earning income. Further, the previous owners who were a

group of 15 persons, had purchased the land for business purpose and in quick succession within a short period of about three weeks, the land was again sold to the assessee, her mother and brother. There was no evidence except the entry in the books of account of the assessee to show that the land was converted into stocking trade on March 31, 1970. Entries in the books of account were not contemporaneous. Judicial notice can also be taken of the fact that after the formation of the State of Gujarat, there had been a spurt in building activity in the City of Ahmedabad and land had ceased to be a commodity of investment and had become a commodity of trade and commerce. The Court, therefore, took the view that purchase and sale of land constitute an adventure in the nature of trade.

15. So far as the four questions re-framed by this Court are concerned, Mr. Bhatt has submitted that the Tribunal's decision is not in consonance with the law laid down by this Court in the case of N.R. Paper Board Limited and others (Supra). In the instant case, though the Tribunal has noted that evidence gathered subsequent to search can be utilised in finalizing the block proceedings, it has given a go-bye to the evidence available on record. With regard to Question No.2, he submitted that the decision of the Tribunal is against the ratio of this Court reported in

N.R. Paper Board Limited and others (Supra) wherein it is held that block assessment is a special procedure mandatorily required to be undertaken by the Assessing Officer after search proceedings under Section 132 of the Act. With regard to Question No.3, Mr. Bhatt submitted that the Tribunal ought to have noted that the motive was on the part of the assessees. From the materials available on record, the transaction in question is adventure in the nature of trade and the Tribunal has wrongly considered the same as capital gain. This finding of the Tribunal is contrary to the law laid down by this Court in the case of **Commissioner of Income-Tax V/s. Smt. Minal Rameshchandra** (Supra). The Tribunal should have held that such land was too small for residential construction, development rights were given to Madhavji Patel only with a view to earn the profits. Even a solitary incident / transaction would give a rise to the profit taxable in the nature of adventure. So far as the 4th question is concerned, Mr. Bhatt has submitted that the decision of the Tribunal on merits with regard to quantum of income / area is absolutely erroneous and unfounded. The Tribunal has completely ignored the income of Shri Madhavji Patel before the Settlement Commission. In this process, the Tribunal failed in not appreciating that Madhavji Patel got a deduction of Rs.3.29

Crores in his assessment towards payment for development permission whereas as per the version of the assessees, it has been allotted the Flats only for an amount of Rs.1.21 Lacs, which on the face of it is perverse. Considering all these submissions, Mr. Bhatt has strongly urged that all the Tax Appeals filed by the Revenue are required to be allowed and the order of the Tribunal in all these Appeals is required to be reversed.

16. Mr. S. N. Soparkar, learned Senior Counsel appearing for the assessees in all these appeals on the other hand, strongly supported the order of the Tribunal. He submitted that no question is framed by this Court with regard to the additional amount of Rs.92 Lacs said to have been paid to the assessees. He has, therefore, submitted that to make any argument on this issue is beyond the scope of appeal. The Court has not permitted to raise this question.

17. In support of this submission, he relied on the following decisions :-

i. In **Patnaik & Company Limited V/s. Commissioner of Income-tax, Orissa, [1986] 161 ITR 365 (SC)**, it is held that it is now well settled that the Appellate Tribunal is the final fact-finding authority under the Income-tax Act and that the Court has no jurisdiction to

go behind the statements of facts made by the Tribunal in its appellate order. The Court may do so only if there is no evidence to support the findings or the Appellate Tribunal has misdirected itself in law in arriving at the findings of fact. But even there, the Court cannot disturb the findings of fact given by the Appellate Tribunal unless a challenge is directed specifically by a question framed in a reference against the validity of the impugned findings of fact on the ground that there is no evidence to support them or they are the result of a misdirection in law.

ii. In **K. Ravindranathan Nair V/s. Commissioner of Income-Tax, [2001] 247 ITR 178 (S.C.)**, it is held that it is the Tribunal which is the final fact finding authority. A decision of the Tribunal on the facts can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on the facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law

that is before it. The only jurisdiction of the High Court in reference application is to answer the questions of law that are placed before it. It is only when a finding of the Tribunal of fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise.

18. There is no dispute about the fact that the material collected in the course of search or in block assessment proceedings under Section 158 BC of the Act can be used as evidence for making assessment under Section 158 BD of the Act. As a matter of fact, the Tribunal has never held contrary to it. However, on merits, the Tribunal found that the material so collected was not trust-worthy and reliable and hence, the Tribunal has not accepted the submissions of the Revenue on this issue.
19. Even with regard to question No.2, there is no dispute about the proposition that an undisclosed income of a person other than the person with respect to whom search was made under Section 132 of the Act and unearthed pursuant to such search can be assessed as per the procedure prescribed for regular assessment. He has, however, submitted that first of all, it is to be ascertained as to whether there was

any undisclosed income. The Tribunal, on facts, found that there was no undisclosed income earned by the assessees. He invited the Court's attention to the definition given under Section 158 BB (1) of the Act to the word 'undisclosed income'. Simply because Shri Madhavjibhai had stated something in his statement, it cannot be accepted as gospel truth. The said statement must be supported by some reliable or corroborative evidence. In support of this submission, he relied on the decision of this Court in the case of **Krishna Textiles V/s. Commissioner of Income-tax, [2008] 174 TAXMAN 372 (GUJARAT)**, the assessee has made purchases of lignite coal from the GMDC and demand drafts deposited in the account of the assessee as per account books of GMDC had not been accounted for by the assessee in its books of account. When the assessee was asked to explain the reasons for the said discrepancy and to prove the source of such demand drafts deposited in the said account, it had replied that such amount had not been sent by it. On those facts, the Assessing Officer had come to the conclusion that the explanation of the assessee was not satisfactory and since the GMDC was a Government undertaking, the credit entry found in the books of accounts of the GMDC was accepted to be true without making any further inquiry in the matter. The assessee's stand was that instead of

asking the assessee to prove the source of alleged income, the Assessing Officer could have inquired from the bank and could have collected further details to justify the addition made by him. The Assessing Officer was, however, of the view that onus to prove the source of income was on the assessee and hence, he had not made any further inquiry in the matter. It was sought to be justified on the ground that Section 8 read with Section 106 of the Indian Evidence Act, 1872 states that when a fact is substantially within the knowledge of any person, burden of proving that fact is upon him. The Commissioner (Appeals) as well as the Tribunal were also of the view that the burden was on the assessee to prove the source of the said demand drafts. This Court, however, following the decision of the Supreme Court in the case of Kishinchand Chellaram V/s. CIT [1980] 125 ITR 713 took the view that the burden was on the department to show that the amount of demand drafts found to be credited in the assessee's account in the books of the GMDC belonged to the assessee by bringing proper evidence on record and the assessee could not be expected to explain the source of income or to call responsible Officers of the GMDC or Bank to discharge the burden that laid upon the department. Hence, the Assessing Officer had failed to discharge his burden to prove that the

amount in question was the income of the assessee.

20. Mr. Soparkar has further submitted that pursuant to the order of the Tribunal, regular assessments were framed and capital gain was taxed in the hands of the individuals. However, the assessees have claimed the benefit under Section 54 F of the Act which the Assessing Officer has denied and the assessees succeeded before the Tribunal. Even appeals filed by the Revenue against the order of the Tribunal were dismissed by this Court on 14.07.2008. This Court held that the assessees were entitled to a benefit of Section 54 F of the Act and thereby exempted from tax on capital gain. Reliance placed by the Revenue on the decision of the Apex Court reported in 167 ITR 365 is wholly uncalled for as the facts were totally different. In the present case, it cannot be said that there was any motive to earn the profit. The land was inadequate and it was not possible for the assessees to construct separate tenements and hence, they entrusted the land to Shri Madhavji Patel for development who have constructed the Flats and allotted those Flats to the assessees. Thus, the Flats were allotted to them in lieu of relinquishing of their part of interest in the land. Hence, by no stretch of imagination, it can be said that the transaction was considered to be an adventure in the nature of trade. He has further

submitted that Question No.4 must be viewed in light of the previous three questions framed by this Court and considering the same, it cannot be said that the order passed by the Tribunal is perverse or it is without any application of mind. He has, therefore, submitted that the appeals filed by the Revenue deserve to be dismissed.

21. Having heard learned Counsels appearing for the parties and having gone through the order passed by the Tribunal in light of the statutory provisions and decided case law on the subject, we are of the view that the order passed by the Tribunal in all the appeals filed by individual assessees as well as association of persons, does not call for any interference by this Court and questions framed for determination and consideration of this Court are answered accordingly i.e. in favour of the assessees and against the revenue.

22. The Tribunal while dealing with the appeals filed by individual assessees has framed following three issues :-

i. The nature of income earned by the assessees whether can be treated as adventure in the nature of trade ?
ii. Quantum of income and
iii. Adoption of evidences found from the 3rd party to the assessees.

Though the Revenue has framed one question each in all these 18 Tax

Appeals, this Court has re-framed four questions as indicated earlier while admitting all these Tax Appeals, keeping in mind the provisions contained in Section 260A deals with Appeal to the High Court. Sub-section (1) says that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law. Sub-section (3) says that where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. Sub-section (4) says that the appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Proviso to Sub-section (4), however, states that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

23. Out of the four questions framed by this Court, the first two questions are in relation to issue No.2 and 3 and the third question is in relation to

issue No. 1. The 4th question is in relation to the entire order passed by the Tribunal whether the same was passed after considering the entire facts and evidence on record and after proper application of mind or whether the said order can be said to be perverse.

24. So far as the first question is concerned, there cannot be any dispute about the proposition that any material collected in the course of search or any block assessment proceedings under Section 158-BC of the Act can be used as evidence for framing assessment under Section 158-BD of the Act. As such, the Tribunal has not held otherwise. The only question which is to be decided is as to whether any such material is found during the course of search or even after considering such material or block assessment proceedings under Section 158-BC of the Act in relation to the assessees, while framing the assessment under Section 158-BD, whether such assessees can be held to be liable. Similarly, with regard to the second question also, there cannot be any dispute about the proposition that when any undisclosed income of a person other than the person with respect to whom search was made under Section 132 of the Act and unearthed pursuing to such search can be assessed as per the procedure prescribed for regular assessment under the Act. However, in the present case, the real question is

whether there was any undisclosed income of the assessees with respect to which search was made under Section 132 and the same was found during such proceedings. The Tribunal on facts found that there was no such undisclosed income. The Assessing Officer while framing assessments under Section 158BD of the Act was of the view that the assessees have obtained 17 Flats as well as Rs.92 Lacs as cash payment for the land. As against this, the contention of the assessees was that each assessee received only one Flat on payment of Rs.1.21 Lacs to Dhaval Co-operative Housing Society by virtue of development agreement with M/s. Dhruvin Enterprise and that the assessees had not received any amount in cash, much less, amount of Rs.92 Lacs as alleged by the Assessing Officer. The Tribunal, after considering the statement of Shri Madhavjibhai Patel recorded by the Assessing Officer under Section 131 of the Act and after considering the seized material, had come to the conclusion that no cash has been paid by Madhavjibhai Patel for the purpose of land. The Tribunal has examined this point even from a different angle and come to the conclusion that even if it is assumed that the assessees received the benefit of Rs.3.29 Crores for the value of land, it could be calculated that the value of each Flat would come to about Rs.19 Lacs. Shri Madhavjibhai Patel sold certain

Flats to new members at the rate of Rs.18,75,000/-. The Tribunal, therefore, observed that it would not be acceptable that the Developer would sell the Flats at lesser price to the assessees as well as pay Rs.92 Lacs for the cost of land. The Tribunal, therefore, further observed that if the alleged payment of Rs.92 Lacs was added to Rs.2.37 Crores, the value of 17 Flats as alleged, the price of each Flat allotted to the members would be in the vicinity of Rs.19 Lacs which was equal to the price of the Flats allotted to some of the other members having same benefit. The Tribunal also observed that the said Shri Madhavjibhai Patel had stated that Rs.92 Lacs had been paid in cash to the assessees only because he might have thought of getting benefit of deduction from the income. After this entire discussion, the Tribunal came to the conclusion that evidences are not enough to prove that Rs.92 Lacs had been paid in cash to the individual assessees for the land. Even after considering Paper No.19 of B-5, the Tribunal factually arrived at the conclusion that no statutory presumption can be drawn against the assessees in respect of the said paper and that on the basis of the said paper, it cannot be proved that the assessees had received Rs.92 Lacs individually or jointly. The Tribunal has, therefore, given clear-cut finding that these evidence cannot be taken as unbiased evidence to use

against the assessees, more so when the assessees were not given any opportunity to cross-examine the said Shri Madhavjibhai Patel. Even otherwise, there is no reason to call for any interference in the Tribunal's order in view of the decision of Apex Court in the case of **Manish Maheshwari V/s. Assistant Commissioner of Income-Tax and another, [2007] 289 ITR 341 (SC)**, it is held that before the provisions of Section 158BD of the Income-tax Act, 1961, are invoked against a person other than the person whose premises have been searched under Section 132 or documents and other assets have been requisitioned under Section 132A, the conditions precedent have to be satisfied. The Court, therefore, took the view that where the premises of a Director of a Company and his wife were searched under Section 132 of the I.T. Act, 1961 and a block assessment had to be done in relation to the Company, the Assessing Officer had to (i) record his satisfaction that any undisclosed income belonged to the Company, and (ii) hand over the books of account and other documents and assets seized to the Assessing Officer having jurisdiction against the Company. The Court further took the view that while dealing with a taxing provision, the principle of strict interpretation applies.

25. In the above background of the matter, the Tribunal has also considered

the issue as to whether the value of the Flats could be considered in assessment under Chapter XIV B of the I.T. Act, more particularly, under Section 158-BD or in normal assessment. The Tribunal after referring to the provisions contained in Section 158-BB (1) which defines undisclosed income, came to the conclusion that the materials collected from Shri Madhavjibhai Patel could not be used as evidence in assessees' case as out of the 17 assessees, many persons having taxable income have been filing their returns of income and they have shown their investment in Dhaval Co-operative Housing Society Limited in their balance-sheets and hence, it cannot be said that transactions representing wholly or partly any income or property which has not been or would not have been disclosed for the purpose of Income Tax Act. Based on these facts and submissions, the Tribunal arrived at the conclusion that the contribution to the Society for the Flats had been recorded in the balance-sheets of the assessees filed before the department and hence, the acquisition of Flats as well as capital gains should be considered in the regular assessment in light of the decision of this Court in the case of **N.R. Paper Board Limited and others** (supra) wherein it is held that Chapter XIV-B of the Income-tax Act, 1961, lays down a special procedure for assessment of

result of search. Under Section 158BB(1), read with Section 158BC of the Income-tax Act, 1961, what is assessed is the undisclosed income of the block period and not the total income or loss of the previous year required to be assessed in the normal regular assessment under Section 143 (3). This exercise under Section 143 (2) and (3) for regular assessment stands in contrast to the exercise of the Assessing Officer under Section 158BB read with Section 158BC (b), where he has to assess only the undisclosed income of the block period on the basis of the evidence found and material available as a result of the search conducted under Section 132 of the Act. Regular assessment is to assess the total income or loss of the previous year where a return is filed under Section 139 and the Assessing Officer considers it necessary or expedient under Section 143 (2) to ensure that the assessee had not understated the income or has not captured excessive loss or has not underpaid tax in any manner.

The Court further held that the powers of regular assessment are kept intact and so are all the appellate, revisional and other powers affecting such regular assessment and all the statutory consequences flowing from the exercise of such powers would fall alongside of this regular

assessment procedure devised for dealing with the undisclosed income as a result of search. It, therefore, follows that in the inquiry under Section 143 (3) for regular assessment which was pending when the block assessment was made, the Assessing Officer who comes across evidence and material which was not found or made available in the process of block assessment, cannot ignore the same and he will be duty bound to make the regular assessment taking into account such evidence and material gathered in the enquiry under Section 143 (3) to ensure that proper assessment of total income is made and tax determined on the basis of such assessment. The Tribunal has, therefore, rightly come to the conclusion that acquisition of Flats by the individual assessees should necessarily be considered within the scope of regular assessments.

26. So far as the third question as to whether income accruing to the assessees on sale of the subject land is taxable as assessees' business income from adventure in the nature of trade or it is taxable as capital gain, is concerned, it is the say of the assessees before the Tribunal that there was no intention of the individual assessees at the time of purchase of the land, to sell the same in future at a profit. The only object of all the individual assessees while becoming the member of the

Society was to have residential house on the land of the Society. The construction of house could not be made for want of permission under Section 20 (1) of the Urban Land Ceiling Act. They ultimately received Flats for residence which has proved that there was no intention on their part to transfer the land at profit. The Tribunal has also found as a matter of fact that after formation of the Society and purchase of the said land, the members found it difficult to construct their residential houses as the necessary permission under ULC Act was required to be obtained. They have waited from 1975 to 1995 when the land development agreement was entered into with Shri Madhavjibhai Patel. To facilitate construction, they had allowed their part of land to the Developer to construct the buildings and to give in return 17 Flats to them. Hence, the only purpose of allotting the land was to obtain 17 residential Flats for the purpose of which they have originally purchased the land. It is, therefore, obvious that the only object of the Society and the events beginning from the purchase of land and subsequent events do not establish anything to the effect that there was any intention on the part of the Society or any member to earn profit. What the members ultimately got was Flats for their residence. Hence, this transaction was not in the line of business of the assessees and is an

isolated or single instance of transaction. The revenue could not discharge the burden cast upon them to prove that the transaction in question was an adventure in the nature of trade. No evidence has been brought on record to show that any of the assessees was involved in land dealing and they had shifted their purpose of acquiring the land when the cooperative society had entered into development agreement with Shri Madhavjibhai Patel. The Tribunal has also found as a matter of fact that none of the assessees had transferred the land into stocking trade. Whatever benefits they had obtained out of the arrangement permitting the Developer to use the land for the residential houses of the members of the Society is only to get the benefit of constructing the residential houses for themselves. The Tribunal, therefore, held that the income cannot be treated as income from adventure in the nature of trade, but it can only be treated as income from long term capital gains.

27. As a matter of fact, pursuant to the order of the Tribunal, the Assessing Officer did frame the assessments treating the income derived by the assessees as income from capital gain and when the benefit claimed by the assessees under Section 54-F was denied, the matter has reached upto this Court by way of Tax Appeals and while disposing of all these Tax Appeals on 14.07.2008, this Court has held that since all the

assessees are entitled to exemption under Section 54-F of the Act and it is not pointed out to the Court as to whether any condition laid down under Section 54-F has been violated by the assessees and since the answer to the question proposed was very obvious, this Court had summarily dismissed the said Tax Appeals filed by the Revenue without framing any substantial question of law as proposed by the Revenue.

28. In the above view of the matter, we are of the view that the answer to the question No.3 is in the affirmative i.e. in favour of the assessee and against the Revenue and the Tribunal is absolutely right in holding that the income accruing to the assessee on sale of subject land is not taxable as assessee's business income from adventure in the nature of trade.

29. So far as the question No.4 is concerned, we are of the view that the Tribunal has considered the entire evidence and material on record in its proper perspective and no error was committed by the Tribunal in arriving at the conclusion that the income, if any, accrued to the assessees cannot be said to be income derived from adventure in the nature of trade. The findings arrived at by the Tribunal cannot be said to be perverse or unwarranted and Tribunal's order cannot be vitiated as

no error is committed by the Tribunal.

30. In view of the above judgment and order, an appeal filed by the Revenue in the case of Association of Person (AOP) also stands dismissed and questions framed therein are answered accordingly on the same line.

31. We, therefore, dismiss all these Tax Appeals after answering all the questions framed for our consideration, in favour of the assessee and against the revenue. Having regard to the facts and circumstances of the case, there should be no order as to costs. Sd/-

[K. A. PUJ, J.]

Sd/-

[RAJESH H. SHUKLA, J.]

Savariya