

INCOME TAX APPELLATE TRIBUNAL, DELHI

ITA No. 2259/Del/2002 – Asstt. Yr: 1997-98

Kapil Dev Vs. JCIT Spl. Range

ORDER

PER R.P. TOLANI, J.M:

This is assessee's appeal against CIT(A)'s order dated 22-3-2002 relating to A.Y. 1997-98. Revised ground of appeal is as under:

“On the facts and in the circumstances of the case and in law the CIT(A) erred in sustaining the addition of Rs. 83,00,000/-made by the Assessing Officer on protective basis in respect of income from alleged undisclosed sources on the basis of the credit entries supposedly in the name of the appellant found mentioned in the seized note books/ diaries of one Shri Ramnik Chawda treating the same as unexplained deposits of the assessee. In so doing the authorities below completely ignored the submissions made by the appellant and the facts presented in support of his plea.”

2. Vide application dated 13-12-2011, the assessee has prayed for admission of following additional grounds:

“1. On the facts and in the circumstances of the case and in law the authorities below erred in considering the item arising out of the search proceedings of the third party in the normal assessment of the appellant and that the relevant material having been fretted out during search u/s 132 of the act such could only bear consideration u/s 158BD of the Act and not having been done so renders the addition ab initio illegal and void.

2. On the facts and in the circumstances of the case and in law the authorities erred in adding gift of Rs. 2,00,000/-as income. The addition being erroneous and uncalled for must be deleted.”

3. Apropos additional grounds, ld. counsel for the assessee contends that these are purely legal in nature and require no verification of fresh facts. Reliance is placed on Hon'ble Supreme Court judgment in the case of NTPC; 229 ITR 383, for their admission.

4. Ld. DR opposes the admission of additional grounds and contends that the assessee has raised the additional grounds after nine years without giving any plausible reasons for delay.

5. Ld. counsel for the assessee, in reply, contends that the first legal additional ground in question goes to the root of issue about the assessability of this amount u/s 143(3). A legal ground, which challenges the validity of assessability can be raised at any time during the appellate proceedings, as held by Hon'ble Supreme Court in the case of NTPC (supra). The

judgment does not prescribe any time frame for raising such legal ground, which goes to the root of the proceedings. In view of Hon'ble Supreme Court judgment, ITAT may be pleased to admit this additional ground.

5.1. Apropos second ground, it is pleaded that the same was raised before CIT(A) also, but has not been decided by CIT(A). Assessee inadvertently failed to raise this ground in the memo of appeal before ITAT.

6. We have heard rival contentions and gone through the relevant material available on record. Addl. Ground no. 1, as raised by the assessee, is purely legal in nature and goes to the root about assessability of the impugned amount, based on search material, u/s 143(3). The same is purely legal in nature and does not require verification of new facts or material. Respectfully following Hon'ble Supreme Court judgment in the case of NTPC (supra), we admit the same.

6.1. Apropos ground no. 2, the same requires verification of facts. Besides from the letter dated 15-3-2002, filed on the paper book, it clearly emerges that the assessee had accepted this addition before AO. This being so, assessee cannot be said to be aggrieved on this ground. In view thereof, we do not admit additional ground no. 2. Thus, we admit additional ground no. 1 of the assessee and reject the admission of addl. ground no. 2.

7. Reverting back to the facts of the case: The assessee is a famous cricketer and derives income from activities of cricketing profession modeling, consultancy and other sources. Assessee filed his return of income on 31-10-1997. During the course of assessment proceedings, AO received information from DIT (Inv.), New Delhi, indicating that during the search operations carried out u/s 158 BC in the premises of one Shri Ramnik Chawda of Mumbai, some documents, concerning the assessee were seized. Consequently, AO issued a letter to assessee and after considering his explanation, confirmed the addition of Rs. 83 lacs, by following observations:

“An information was received from DIT Investigation, New Delhi that a search was conducted at the residence of Sh. Ramnik Chawda at Bombay. In one of the diaries seized from the premises of Sh. Ramnik Chawda detailed accounts of the receipts from Sh. Kapil Dev were entered. During the course of search the statement of Sh. Ramnik Chawda was recorded and he stated on oath that he received a sum of Rs. 83,00,000/- a cash from Sh. Kapil Dev during the financial year 96-97, besides a sum of Rs. 50 lacs by cheque/ draft. In respect of the amount of Rs. 83 lacs received from Sh. Kapil Dev, Sh. Ramnik Chawda stated on 6-10-97 that this amount was paid by Sh. Kapil Dev as his share of joint venture investment. He stated that two cheques of Rs. 25 lacs each were also received by him which were shown to be as loans received from M/s Dev Yogi Developers wherein Sh. Kapil Dev is a partner. The statement of Sh. Kapil Dev was recorded by the ADIT Investigation, Delhi wherein he denied the payment of any cash to Sh. Ramnik Chawda. He, however, agreed that he paid Rs. 50 lacs to M/s Dev Yogi Developers. Sh. Kapil Dev denied that he was aware of any such firm known as Shastri Ji Construction. Vide this office letter dated 10-03-2000 addressed to Sh. Kapil Dev he was required to explain the following:

'During the year under consideration, you are a partner with the firm M/s Dev Yogi Developers. As per the return of income filed by you, you have shown investment of Rs. 50 lacs in the said firm. However, an information has been received from DIT(Inv.), Bombay that during the course of search at the residence of Sh. Ramnik Chawda at 204, Kashi Bhawan, Dixit Road, Ville Parle, Bombay on 4/5th Sept. 1997, certain incriminating diaries/ note books have been found and seized. The same indicate that you have entered into an agreement for partnership with Sh. Ramnik Chawda and Mrs. Meena Chawda in the firm M/s Dev Yogi Developers on 27th November 1996. The partnership has been made effective from Ist day of Sept. 1996. The seized diary shows the amounts received in cash and cheques under the name Sh. Kapil Dev. Sh. Ramnik Chawda, during the course of interrogation has stated that the amounts represent the receipts from Sh. Kapil DevNikhanj. He has further stated that he received total amounts of Rs.

1.33 crores from you during the Financial year 1996-97 as under:

Date	Amount in lacs	Mode of payment
19th August	3	cash
21st Aug.	5	cash
3 Sept.	8	cash
30 Aug.	2	cash
30 Aug.	25	cheque
28 Oct.	5	cash

6 Nov. 1 cash 7 Nov. 1 cash 16 Nov. 1 cash 20

Nov. 15 cash 22 Nov. 10 cash 5 Nov. 25 Draft 23

Nov. 25 cash 26 Nov. 4 cash 5 Dec. 3 cash

You are requested to produce evidence of the aforesaid investments made by you. Summons u/s 131 of the I.T. Act for your personal attendance is enclosed.” Shri Kapil Dev could not appear personally as he was away from Delhi on national duty as coach of the Indian National Cricket Team. His AR furnished the information that Shri Kapil Dev as a partner in M/s Dev Yogi Developers invested Rs. 50 lacs. However, he has subsequently withdrawn from the partnership and has no association with the said Sh. Ramnik Chawda as on date. Again vide his letter dated 23-03-2000 he reiterated that being uncomfortable in the partnership of Sh. Ramnik Chawda, Shri Kapil Dev decided to withdraw from there and Dev Yogi Developers issued two cheques of Rs. 25 lacs each dated 20-04-97 towards the investment made by him. The details of the cheques are as under:

30-04-97 084056 State Bank of Hyderabad 25 lacs

-do-084057 State Bank of Mumbai 25 lacs

Unfortunately the cheques bounced twice and the same remain unpaid as on date. It has been stated that these developments took place in the month of April, 1997 and Sh. Ramnik Chawda was searched in the month of September, 1997. The AR of the assessee has stated that since the assessee has already withdrawn from the partnership and was not having any dealing whatsoever with the said person, he has not paid any amount beyond Rs. 50 lacs. The contention of the assessee has been carefully considered but the same does not carry any weight in view of the fact that Sh. Ramnik Chawda has noted down the receipts from various persons on different pages and drafts sent by the assessee are entered on the dates mentioned therein then why not the amounts paid in cash and entered on the same page on different dates, be not treated as the investment of the assessee. Since Sh. Kapil Dev has not been able to explain the source of this investment, a sum of Rs. 83 lacs is treated as his investment from undisclosed sources. It may however, be stated that these cash credits have also been added in the block asstt. Of Sh. Ramnik Chawda on substantive basis the addition in the hands of the assessee is being made on

protective basis.”

7.1. Aggrieved, assessee preferred first appeal on the issue in question. Assessee made following submissions:

(i) Name of the appellant appears only in a diary/note book of Sh. Ramnik Chawda and no corroborative evidence for the authenticity of such entry was found from any other material seized at the time of search on Sh. Chawda or from his books in support of his claim of having received such monies from the appellant.

(ii) The addition on substantive basis made in the hands of Sh. Ramnik Chawda for unexplained cash credits appearing in his diary/ note book has not been deleted from his assessment and so cannot continue to be taxed in the hands of the appellant as well as Sh. Ramnik Chawda. This is in keeping with the words of the Id. CIT(A) as stated in clause 5 of his order – “... If addition is deleted in the case of Sh. Ramnik Chawda, the same will be included in the income of the appellant...”

(iii) The addition made by the AO in the hands of the appellant in respect of some cash receipts appearing in the books of Sh. Ramnik Chawda, should have been taxable only in the hands of Sh. Ramnik Chawda u/s 68 and no question for making the assessment on protective basis should have arisen. U/s 68, the onus is on the person in whose books cash credits are found, to prove that the credits are not his income and in case of unsatisfactory explanations, additions should be made in his hands itself.

(iv) The appellant is not responsible for entries in the books of the said Sh. Ramnik Chawda which are uncorroborated by any evidence and which have no corresponding entries in the books of the appellant.

(v) Such addition on account of unexplained investment made by the CIT(A) cannot be upheld as there is no corroborative evidence entries of such investment in the books of M/s Dev Yogi Developers for such supposed investments by the appellant.

(vi) Despite a search being carried out on the appellant himself, no evidence/ material contradicting the appellant statement made at the time of summons u/s 131 and before the ADIT (Inv.), Delhi was found.

7.2. CIT(A), however, confirmed the addition made by AO with following observations:

“I have carefully considered the above submissions of the appellant and examined the facts and circumstances of the case. The appellant has not brought any new material before me to rebut the argument of the AO that if the cheque payments recorded in the accounts of the appellant are treated as genuine, then why the cash deposits which appear in the same account on the same page and during the same period should not be treated as genuine. The appellant cannot treat a part of the document as correct and reject the other part as bogus. After all it is not denied that the appellant had entered into business transactions with Ramnik Chawda. If he made investments of Rs. 50 lakhs by cheques then it can be legitimately inferred that he made the cash investment of Rs. 83 lakhs also. As regards ld. counsel’s plea that no evidence of these investment was found during the course of search at the appellant’s premise, I do not find any merit in the plea. Ramnik Chawdas search in 1997 and the appellant was search in 2000. After a time gap of four years, it cannot be expected that the appellant would be preserving the evidence about these transactions with Sh. Chawda which he had already disowned. The question as to why Sh. Ramnik should be making some correct and some false entries in his diary against the name of the appellant, who is a celebrity and if he has really done so, why the appellant has not taken any legal action for falsely implicating his name, remains unanswered. Thus, the appellant has failed to give a satisfactory explanation about the source of his investment of Rs. 83,00,000/-. Under the circumstances, the investment is deemed to be the income of the appellant for the year under consideration. The addition made by the AO on protective basis is confirmed. If the addition is deleted in the case of Sh. Ramnik, the same will be included in the income of the appellant on substantive basis. This ground of appeal is

dismissed.”

8. Aggrieved, assessee is before us.

9. Ld. counsel for the assessee firstly adverts to the additional ground on the validity of protective addition of Rs. 83 lacs during assessment u/s 143(3), relying on purported information received by DIT(Inv.), Delhi, in respect of block assessment made on Shri Ramnik Chawda (“RC”) consequent to search in the premises on 4/5 Sept. 1997 u/s 158BC by DCIT (Inv.), Mumbai. One relevant sub-para of the block assessment order, passed to DCIT (Inv.) Cir. 22(1), Mumbai, in the case of ‘RC’, is referred [(page 5 – end of para 6):

“It has already been stated in foregoing paras that different entries showing cash receipts from different persons received in different seized books match with each other. So far as the cheque payment to the assessee, which are recorded along with cash payments in the seized books they are accepted as genuine and correct by S/Shri Barad, Kapil Dev, Nattoobhai etc. It is also amply clear from cash book A-2 as to how the cash received from different parties was utilized by the assessee. Considering all the above circumstances, it can reasonably concluded that seized books represent true state of affairs of the assessee and also explains the source of cash paid to different persons. However, Shri Barad, Kapil Dev, Papad and Nattoobhai denied of any cash payment to the assessee. Thus, the cash allegedly received from these persons and from others including those, whose identity could not be established has to be assessed as unaccounted income in the hands of the assessee on substantive basis, since these credits are found in the books of the assessee which are considered as regular books of accounts maintained by the assessee.”

9.1. The provisions of assessment procedure consequent to search carried out u/s 132 of the I.T. Act, 1961 were amended w.e.f. after 1-7-1995 and they under went a major legislative change in procedure and items of assessability by Chapter XIV-B inserted as “Special Procedure for assessment of search cases”. The relevant provisions of Chapter XIV-B incorporated on the statute book w.e.f. 1-7-1995, are as under:

Assessment of undisclosed income as a result of search. “158BA(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 persons, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in section 113, as income of the block period irrespective of the previous year or years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

[Explanation – For the removal of doubts, it is hereby declared that –

(a) The assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

(b) The total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

(c) The income assessed in this Chapter shall not be included in the regular assessment of any previous year included in the block period.]

.....

158BD. Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned under section 132A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed under section 158BC against such other person and the provisions of this Chapter shall apply accordingly.

9.2. Thus, after 1-7-1995, if some material is found during the course of search proceeding u/s 132 of the I.T. Act, carried on 'X' indicating that it reflects undisclosed income of another person 'Y', in that eventuality the Income-tax Act now prescribes a mandatory procedure. In these circumstances, the AO of the searched person 'X' (RC) was under statutory obligation to record a satisfaction that the seized material reflects undisclosed income and hand over such material to the Y's AO (assessee) , who in turn could have issued notice u/s 158BD on the assessee and the assessments for a block of six years could have been framed in the hands of assessee qua the incriminating material seized from the said 'RC' u/s 158BD. In assessee's case, neither there is satisfaction recorded by the AO of 'RC' nor the assessee's AO has adopted the prescribed mandatory procedure for issuance of notice u/s 158BD and framed the assessment U/s 158-BD thereon. Thus, the addition in respect of seized material could have been made only by following the mandatory procedure of sec. 158BD in the hands of the assessee and not by way of proceedings undertaken u/s 143(3).

9.3. Ld. counsel referred to the assessment order u/s 158BC dated 30-9-1999 passed in the case of RC, placed on page 4 of the paper book. The person, from whom the alleged incriminating material was seized has been assessed by way of a block assessment u/s 158BC. The consequent addition emerging from this search material in the hands of a third party i.e. assessee was mandatarily to be completed u/s 158BD. This specific procedure of block assessment proceedings is enacted on the statute book with a clear non-obstinate clause of sec. 158BA(1):

“158BA(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.”

9.4. Ld. counsel thus pleads that RC's AO, Mumbai has clearly referred to and considered the impugned search material and made this very addition in RC's block assessment order. In these

circumstances, this addition, which is based on a search material, could have been considered only by way of block assessment u/s 158BC and not u/s 143(3). Reliance is placed on the following judicial pronouncements for the proposition that when a special procedure of assessment is prescribed, the same is to be mandatorily followed.

(i) CIT Vs. Ravi Kant Jain (2001) 250 ITR 141. (Del;.)

“Block assessment under Chapter XIV-B of the Income-tax Act, 1961, is not intended to be a substitute for regular assessment. Its scope and ambit is limited 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 of requisition of books of accounts or documents and such other materials or information as are available with the Assessing Officer. Evidence found as a result of search is clearly relatable to sections 132 and 132A.

(ii) CIT Vs. Dr. M.K.E. Menon (2001) 248 ITR 310 (Bom.)

“In conclusion we would also like to mention that Chapter XIV-B lays down a special procedure for assessment of search cases and provides for assessment of undisclosed income as a result of search. Under section 158BB read with section 158BC, 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 under regular assessment vide section 143(3). This exercise under section 143(3) for regular assessment stands on a different footing in contrast to the exercise undertaken by the Assessing Officer under Chapter XIV-B where the Assessing Officer has to assess only the undisclosed income. Therefore, the scope of regular assessment is quite different from the scope of assessment under Chapter XIV-B. The regular assessment is to ensure that the assessee had not understated the income or has not computed excessive loss or has not underpaid the tax in any manner whereas what is assessed under Chapter XIV-B is only the undisclosed income for the block period and not the income or loss of the previous year which is only done in normal regular assessment under section 143(3). In a large number of cases we find that the above distinction is not kept in mind by the Assessing Officer. It is for this reason that we have spelt out the difference between the regular assessment and the block assessment under Chapter XIV

B of the Incometax Act.”

(iii) N.R. Paper & Board Ltd. & others Vs. DCIT (1998) 234 ITR 733 (Guj.)

“Chapter XIV-B of the Income-tax Act, 1961, lays down a special procedure for assessment of search cases and provides for assessment of undisclosed income as a 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 evidenced found and material available as a result of search conducted under section 132 of the Act. The 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 computed excessive loss or has not underpaid tax in any manner.

(iv) Manish Maheshwari Vs. ACIT & Another (2007) 289 ITR 341 (SC).

9.5. Thus the AO, Mumbai in the case of 'RC' having referred to and relied on this material, in case it reflected assessee's undisclosed income he should have handed over the material to assessee's AO by way of statutory mandate u/s 158BD and thereafter block assessment was to be framed in conformity with the procedure prescribed u/s 158BD.

9.6. The Department has glossed over this statutory mandate and adopted an untenable procedure of assessing the alleged discovery of income based on a search u/s 132, which deserves to be quashed.

9.7. RC's AO has rather recorded a finding, that seized material represented undisclosed income of RC's unexplained cash credits and further gave a finding that the assessee has denied it during his block assessment proceedings. He has not given any indication to frame a protective assessment in the hands of assessee. Thus, the addition u/s 143(3) made by AO in respect of very same search material, duly considered u/s 158-BC, is contrary to law and deserves to be quashed.

9.8. Ld. counsel further contends that there is no provision for protective assessment in search assessment proceedings. It is so because the assessment is based on the search where the physical evidence is found and the additions cannot be made beyond the search material. The AO has to give a finding of fact that the alleged income reflected by search material belongs to the searched person or any other person and proceed accordingly u/s 158BC or 158BD. These being special provisions of assessment, based on recovery of positive physical evidence, law does not permit AO to deviate therefrom and inferences cannot be drawn and protective assessment cannot be made either in block assessment or regular assessment.

9.9. On merits, ld. counsel for the assessee contends that:

(i) The search was conducted in the premises of 'RC' and the additions have been made in his hands u/s 158BC by his AO. Instead of following the statutory procedure, based on special provisions prescribed by the Act, assessee's AO has made a protective assessment based on untenable inferences. The CIT(A) being an appellate authority ought to have decided the issue about assessability in one hand. Instead of upholding the AO's order and giving a surprising direction that in case the additions are upheld in the hands of Shri Ramnik Chawda the same may be deleted in assessee's case, CIT(A) has failed to exercise his jurisdiction. The appellate authority has to decide to whom the income belongs and not to carry forward the protective finding. Reliance is placed on Hon'ble Allahabad High Court judgment in the case of Smt. Hemlata Agarwal Vs. CIT (1967) 64 ITR 428 (All.) to this effect.

(ii) Therefore, the assessee's fate cannot be mechanically linked with a third party proceedings, which are not in control of the assessee.

(iii) The assessee retired from the said firm M/s Dev Yogi Developers w.e.f. 20-4-1997, his capital of Rs. 50 lacs purportedly returned by Shri Ramnik Chawda by two cheques. The uncomfortable relations between them are revealed by the fact that cheques issued by 'RC' bounced and assessee is yet to receive the capital itself. The search took place in the premises of 'RC' on 4/5 Sept. 1997 i.e. subsequent to the assessee's withdrawal from the said firm. Diary found from the premises of 'RC' was maintained by him in his own hand-writing and added in his block assessment u/s 158BC. It is evident from the record that relationship between 'RC' and assessee had turned sour, therefore, a post retirement statement given by 'RC' estranged partner, cannot bind the assessee without any corroborative evidence. The assessee cannot be held answerable or responsible for entries in the books of Shri Ramnik Chawda, more so when very same additions are made in his block assessment.

(iv) The assessee's premises were subsequently searched independently and no material in respect of alleged cash entries in RC's diary, what-so-ever were found from the assessee's premises. Thus, except Shri Ramnik Chawda's so called own diary, not a shred of evidence has been found either from the assessee's premises or from the premises of Shri Ramnik Chawda, which could corroborate that the assessee in any way made alleged cash payments to 'RC'.

(v) The statutory presumption u/s 132(4A) cannot be raised against assessee as it arises only against 'RC' consequent to search in his premises. The same, at best, u/s 132(4A) can be raised against RC and not the assessee.

(vi) CIT(A) in para 5 has confirmed the addition by drawing following inferences:

(a) if the assessee made investment of Rs. 50 lacs by cheque, it can legitimately be inferred that he also made cash investment of Rs. 83 lacs.

(b) Shri Kapil Dev (assessee) has not taken any legal action against Shri Ramnik Chawda for implicating his name qua the additions. .

(c) In the circumstances, the investment is deemed to be income of the assessee on protective basis.

9.10. Ld. counsel thus contends that the addition is only based on assumptions that –

i) as the assessee made payment through cheque, therefore, he would have made the cash payments also;

ii) because legal action is not taken by assessee against 'RC', therefore, a presumption arose that the income belonged to the assessee; and

iii) the addition is made on deemed basis as protective addition without elaborating the surrounding circumstances.

9.11. Ld. counsel vehemently argues that the entire premise of addition is unjustified, arbitrary and without any corroborative evidence, as:

a. There cannot be a valid presumption that because assessee gave cheques for payment of capital, therefore, cash payments will also be there.

b. The assessee instead of entering disputes with 'RC' rather withdrew from firm and did not choose to take legal action as assessee was a celebrity and adverse media publicity would have harmed his stature. Besides, assessee was capable of defending himself in income-tax proceedings.

c. Law does not permit jettisoning the mandatory procedure of block assessment and conveniently making untenable additions in regular assessment u/s 143(3).

9.12. Diary has been seized not during the continuity of the partnership firm M/s Dev Yogi Developers but after assessee's withdrawal of participating from the said firm. The diary has been written by 'RC', his AO has preferred to make this addition by way of block assessment in his hands. No addition is contemplated by AO in the hands of the said partnership firm M/s Dev Yogi Developers or assessee. If assessee had given any cash amount to partnership firm, then the firm should have acquired some assets or maintained some record. The impugned protective addition based on assumptions, presumptions, surmises and conjectures and against the procedure prescribed by law, deserves to be deleted.

10. Ld. DR, on the other hand, contends that provisions of Chapter XIV-B do not prohibit the use of material found during the course of search of any other person in regular assessment. If the AO independently comes in possession of some material indicating that it pertained to other person, the same can be used in his assessment. In this case, AO came in possession of material from DIT (Inv.), Delhi, provided by Investigation Wing. The material came through non searching officer i.e. ADI (Inv.), Delhi, and not from the AO of the 'RC'. This being a material evidence can be validly used by the AO in regular assessment proceedings which were alive and going on in the case of assessee. In the case of Shri Ramnik Chawda the assessment was completed on 30-9-1999 whereas in the case of the assessee the same has been completed on 30-3-2002.

10.1. On merits, it is pleaded that during the course of assessment proceedings, assessee was confronted with the statements of 'RC' i.e. material proposed by the AO to be relied on.

Assessee, except denying it did not ask for cross-examination of Shri Ramnik Chawda. This proves the case of the revenue that the cash entries recorded along with cheques in the books of Shri Ramnik Chawda belonged to assessee. Assessee has accepted having business connection with Shri Ramnik Chawda and both were partners in the firm. Shri Ramnik Chawda gave the statement in the capacity of partner of the firm and had a legal capacity to bind the firm.

Therefore, it cannot be held to be statement of a third party. Orders of lower authorities are relied on.

11. We have heard rival contentions and gone through the entire material available on record. Coming to the assessee's additional ground, challenging the impugned addition in respect of searched material u/s 143(3), following points emerge:

(i) In the RC's assessment order passed u/s 158BC dated 30-9-1999, there is reference to the search material at various places. During the course of his block assessment proceedings, assessee was called on by DIT(Inv.), Mumbai to explain the diary maintained by 'RC'. The assessee explained that the diary was not in his handwriting; he had no concern with this paper and his association with M/s Dev Yogi Developers was only in respect of two amounts

(a) Rs. 25 lacs by cheque dated 30-8-1996; and

(b) Rs. 25 lacs by DD dated 5-11-1997.

(ii) He had not given any cash amount to 'RC', their relations soured and he withdrew from the firm M/s Dev Yogi Developers; his capital was purported to be returned by two cheques, which also bounced. Thus, assessee cleared his position before AO entrusted with RC's block assessment.

(iii) On his explanation, RC's AO in block assessment proceedings u/s 158BC was satisfied and the addition was made in the hands of RC. Thus the DIT(Inv.) Mumbai has had no satisfaction that impugned diary represented undisclosed income of the assessee and therefore, no reference was made by him to AO, Delhi for initiating block assessment proceedings u/s 158BD in the case of assessee.

(iv) The impugned diary being a seized material was examined in the RC's block assessment and cash credits were added as undisclosed income in the hands of RC. The examination of seized diary and addition in the hands of 'RC' is not disputed by the department. The assessee was heard during the course of 158BC proceedings of RC.

11.1. The main question which thus arises before us is – if it all the seized material represented undisclosed income of the assessee, whether the procedure prescribed by sec. 158BD was to be mandatorily followed and having failed to do so, whether the material could be used by AO in regular assessment u/s 143(3), by going beyond – i) Chapter XIV-B; and ii) findings given by DCIT(Inv.), Mumbai. .

11.2. The legislature w.e.f. 1-7-1995 enacted a special procedure for assessment of undisclosed income on the basis of seized material found during the course of search. Procedure was devised firstly to impose a tax of 60% as against the regular rate of tax and secondly to enable the AO to make block assessment in respect of 6 years in substitution of the regular assessment proceedings. Chapter XIV-B is named as "Special Procedure for assessment of undisclosed income as a result of search". Section 158BA(1) is preceded by non-obstinate clause

“notwithstanding anything contained in any provisions of this Act”. A plain reading of these provisions reveals that in case the AO having jurisdiction on the searched person finds that some seized material indicates undisclosed income of any other person, in that case he should forward a reference u/s 158BD after recording a proper satisfaction and before completion of block assessment. Thereafter the other person’s AO is required to proceed according to sec. 158BD read with sec. 158BC. With this over-riding provision on the statute, in our considered view, the addition, if at all could have been considered in the hands of assessee u/s 158BD and not regular assessment u/s 143(3). The procedure prescribed is mandatory, besides it is explicit from the block assessment order of RC that his AO, did not carry a satisfaction that the diary in any way represented undisclosed income of the assessee. It has been observed in RC’s block assessment that Kapil Dev has denied the cash entries in diary and therefore after considering the evidence, facts and circumstances, the addition was made in the hands of RC. Thus, three important factors emerge from the block assessment order of RC:

(i) Assessee’s explanation was considered during block assessment proceedings and it was held that the seized material represented undisclosed income of RC and not the assessee.

(ii) No indication is given that the cash entries in diary may also amount to Kapil Dev’s income.

(iii) No satisfaction u/s 158BD was communicated to the assessee’s AO.

11.3. In view of these observations, we are inclined to hold that if the department proposed to make an assessment based on searched material, then the course available to it was to proceed as per the provisions of Chapter XIV-B i.e. sec. 158BD read with sec. 158BC of the Act and not u/s 143(3).

11.4. Hon’ble Delhi High Court in the case of R.K. Jain (supra) has observed that in case of search material, the same is to be assessed by way of block assessment under Chapter XIV-B. Similar view is echoed by Hon’ble Bombay High Court in the case of Dr. M.K. E. Menon and by Hon’ble Gujarat High Court in N.R. Paper & Board Ltd. & others (supra). A similar view has been upheld by Hon’ble Supreme Court in the case of Manish Maheshwari (supra). In view of above, we are of the view that the impugned addition of Rs. 83 lacs cannot be made in the hands of the assessee on protective basis by taking recourse to sec. 143(3). Thus, the additional ground of the assessee is allowed.

11.5. The appeal is very old, filed way back in 2002. Therefore, we would like to decide the merits of the addition. It emerges from record that:

(i) Assessee’s stand was examined in the course of block assessment of RC, there also he denied having any connection with the diaries cash entries made in the handwriting of RC.

(ii) During the course of search in RC’s premises and in subsequent search of the assessee’s premises, no corroborative incriminating evidence was found to suggest such cash payments or assets of said firm M/s Dev Yogi Developers.

(iii) Lower authorities have solely relied on various uncorroborated evidence including the fact that in the diary two cheque entries match with assessee's record in respect of his capital contribution in the firm M/s Dev Yogi Developers, therefore, it is to be inferred that all the cash entries mentioned in RC's seized diary belonged to the assessee. Had the paper been in the handwriting of assessee, this presumption could have some relevance, but with stark reality of the diary being written in the hand of 'RC' and found in his premises during the course of search; in our view, such inferences are shaky and have no legs to stand except creating a suspicion.

(iv) The statutory presumption u/s 132(4A) has been raised against RC and addition confirmed in his hands by block assessment u/s 158BD.

(v) The assessee had withdrawn from the firm M/s Dev Yogi Developers in April 1997 and RC was search on 4/5 Sept. 1997. Assessee on all forums contended that he was not comfortable with the partnership, which is corroborated by the fact that cheques issued by RC bounced. On measures of preponderance of probabilities also the statement of RC which is not even believed by his AO, cannot implicate the assessee without there being a corroborative evidence. **There cannot be a protective assessment on the basis of above assumptions and facts with a bald direction that if the addition is not made in the hands of RC, the same should be added in the hands of the assessee.**

(vi) On framing of protective assessment u/s 143(3) also the argument of ld. counsel merits credence. The special provisions of the Act prescribe an assessment based on searched material itself and vests power in AO to initiate proceedings u/s 158BD read with sec. 158BC in the hands of other persons. Thus, the AO has to record satisfaction either to the effect that the seized material belonged to the searched person or the other person.

11.6. In the light of foregoings, we delete the addition of Rs. 83 lacs on merits also.

11.7. About the addition of Rs. 2 lacs, we have denied to admit the additional ground and confirm the addition as mentioned above.

12. In view of these facts, the assessee's appeal is partly allowed.

Order pronounced in open court on 22-03-2012.