

RESERVED.

CIVIL MISC. WRIT PETITION NO. 51 (Tax) OF 2004.
Vishwanath Prasad Ashok Kumar Sarraf, Varanasi v. C.I.T., Kanpur
& others.

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Hon'ble Rajes Kumar, J.
Hon'ble S.C. Nigam, J.

(Delivered by Hon'ble Rajes Kumar, J.)

By means of the present writ petition the petition is challenging the validity of the notices dated 20.3.2003 issued under Section 148 of the Income Tax Act (called the 'Act' for short) for the assessment years 1996-97 and 1997-98.

The brief facts giving rise to the present writ petition are that the petitioner is a partnership firm, having its place of business at Varanasi, and engaged in the business of gold and silver ornaments. Apart from trading business the petitioner was also doing the job work. For the assessment year 1996-97 the petitioner filed the return on 22.8.1996. The return was initially processed under Section 143(1) (a) and, later on, the case was picked up for scrutiny in view of the search operation made under Section 132(1) of the Act, which was carried on at the premises on 3.11.1996. On examination of the books of account and other records the regular assessment order was passed on 15.2.1999. For the assessment year 1997-98 the return was filed on 9.10.1997. The said return was also originally processed under Section 143(1)(a) of the Act and thereafter the case was picked up for scrutiny and, later on, regular assessment order was passed under Section 143(3) on 29.12.1999 after scrutiny of the books of account and other documents.

On the basis of various seized documents, bullion, jewellery etc., the block assessment was made on 27.11.1997 under Section 158-BC of the Act for the period commencing from 1.4.1987 to 3.11.1996 relevant to the assessment years 1987-88 to 1997-98 (part) and undisclosed income was determined at Rs. 29,92,950/- for

the assessment year 1996-97 and 1997-98 (part). Against the block assessment order dated 27.11.1997 the petitioner preferred an appeal before the Income Tax Appellate Tribunal (called the 'Tribunal' for brevity). The Tribunal, vide order dated 29.8.2002, allowed the appeal. According to learned counsel for the petitioner, the order of the Tribunal has become final, inasmuch as no appeal has been filed against the said order.

Now, the assessing authority has issued the impugned two notices, both dated 20.3.2003, under Section 148 of the Act for the assessment years 1996-97 and 1997-98 with the view to reopen the case on the ground that there is an escaped assessment. At the instance of the petitioner the reasons recorded for initiation of proceedings have been provided to the petitioner for both the years, which reads as under :

“Assessment year 1996-1997

Reason of reopen assessment u/s 147

Smt. Ambika Devi in her return for A.Y. 96-97 has shown income of Rs. 1,02,300/- from sari business. No proper evidence found that she was caring on the sari business in that year. Thus, declaring income in her hand is diversion of income of firm M/s Vishwanath Prasad Ashok Kumar Sarraf, in which family member of assessee were partner i.e. her husband, her father in law and her son. The concern was only income earning unit of the family, so income shown from sari business is virtually not her income and thus not acceptable, in the case of Smt. Ambika Devi. Same has to be taxed as the income of M/s Vishwanath Prasad Ashok Kumar Sarraf in A.Y. 96-97 from the jewellery business in which the concern was dealing being only business unit and income earning business of the family.

The above amount was treated as unexplained income in Block Assessment proceedings for period from 87-88 to 97-98. The Hon'ble ITAT vide its order no. ITA No. 1574 Alld. of 1997 dated August 29, 2002 has held that such amounts are not assessable in block proceeding as they are not undisclosed income under section 158BA(3).

Regular assessment of this firm i.e. M/s Vishwanath Prasad Ashok Kumar Sarraf for A.Y. 96-97 was completed on 15.2.99. In this assessment the above mentioned amount were not considered as these amounts already brought to tax in the proceeding of block year, now vide order dated 29.8.2002 the Hon'ble ITAT has held that these amount are not to be assessed in the block, thus, these amounts are escaping assessment all together.

In view of the above fact I have reason to believe that the income of Rs. 1,02,300/- chargeable to tax in the firm M/s Vishwanath Prasad Ashok

Kumar Sarraf has escaped assessment and to assess the same the assessment has to be reopened u/s 147 of the I.T. Act, 1961.

The approval accorded by Hon'ble CIT(Central), Kanpur vide his satisfaction dated 17.3.2003 as per letter dated 17.3.2003.

Dated: 20.3.2003

Sd/-
(K.K.UPADHYAY)
Asstt. Commissioner of Income Tax,
Central Circle-II,
VARANASI"

“Assessment year 1997-1998

Reason of reopen assessment u/s 147

The return of income for A.Y. 97-98 showing income at Nil was filed on 9.10.97. The assessment was completed u/s 143(3) on the income of Rs. 1,35,000/- vide order dated 29.12.1999.

The order book was found during the course of search proceedings at the business premises on 3.11.96, revealed that total of 5090.110 grams gold ornaments appearing in the name of total 17 persons details of which is as under:

S.NO.	Name and address of the assessee	Date of receipt of old ornaments	Weight
<u>1</u>	<u>2</u>	<u>3</u>	<u>4</u>
1.	Sri Gopal Dutt Dwivedi Chhoti piari, Varanasi.	3.4.96	259.150 gms
2.	Sri Awadhesh Kumar Dwivedi, Varanasi.	4.4.96	482.580 gms
3.	Shri Kailash Singh, Nariya, Varanasi.	11.4.96	458.000 gms
4.	Smt. Rani Devi, Hirapura, Varanasi.	12.6.96	032.180 gms
5.	Sri Kailash chaubey, Hirapura, Varanasi.	13.8.96	229.450 gms
6.	Shri Ramesh Pandey, Gurudham, Varanasi.	17.8.96	308.150 gms
7.	Shri Mahendra Jaiswal, Chowkaghat, Varanasi.	20.8.96	293.450 gms.
8.	Shri Govind Dhamnagar, Varanasi.	30.9.96	105.950 gms.
9.	Shri Lalji, Hukulganj, Varanasi.	26.9.96	105.950 gms.
10.	Shri Vishwanath Seth, Lahoritola, Varanasi.	24.9.96	148.150 gms.

11.	Shri Chhotey Lal, Panchganga Ghat, Varanasi	23.9.96	154.400 gms.
12.	Sri Ram Lalit Singh, Gilat Bazar, Varanasi.	29.9.96	296.500 gms.
13.	Shri Umesh Singh, Gilat Bazar, Varanasi.	20.9.96	428.000 gms.
14.	Shri Satish Kumar Sharma, Resham Katra, Varanasi	10.9.96	466.800 gms.
15.	Smt. Rani Devi, C/o Shiv Kumar, Govindpura, Varanasi	8.9.96	362.500 gms.
16.	Sri Ganesh Prasad Manjul, Palika Colony, Sheopur, Varanasi	2.9.96	482.800 gms.
17.	Sri Vinod Seth, Panchkoshi, Ashapur, Varanasi	31.8.96	466.300 gms.
Total			----- 5090.110 gms. -----

In the books of account seized from the premises of the assessee having no details of payments to the above persons and address of these persons were also incomplete. In the order book and purchase invoice the weight of the gold have been shown in the above names where as the stock found in the premises was in the shape of new manufactured new jewellery. There was no evidence that the stock found was connected with the deposit of gold by the sol called above customers. It is beyond imagination that any customer will leave his/her ornaments for more than 7 months from the date of delivery gold/old ornaments. In the post search enquires letter from some addresses returned back with remarks "not known" for example in the case of Sri Kailash Dubey, Vinod Seth, Smt. Rani Devi, Sri Kailash Singh and in other cases the statements of the persons were having many ambiguity and non coherence. In this connection statement of the partner of the firm Sri Ashok Kumar is also ambiguous and deviate from the facts. For example, in his statement in respect making the entries in the books of account he stated step by step procedure which leave many facts unanswered.

In view of the above facts the entry found recorded in order book for 5090.110 grams of gold ornaments not explained satisfactorily by the assessee in post search enquiries so the total value worked out at Rs.500/- per gram for 5090.110 grams comes to Rs. 25,45,055/- which is nothing but undisclosed investment in purchase of gold ornaments and entry in the order book is unexplained purchases in the form of stock is liable to be added u/s 69 of the I.T. Act.

2. During the course of search proceedings cash amounting to Rs. 3,16,400/- was found from the business premises of the assessee and Rs. 18,150/- found from the residential premises. Out of these only Rs. 1,06,520/- explained leaving Rs. 2,28,030/- unexplained, so the amount of Rs. 2,28,030/- is unexplained cash found lying with the assessee which is not properly explained in post-search enquiries so it is liable to be treated income of the assessee in A.U.97-98. The assessee has not shown this

amount in his return for A.Y. 97-98.

3. Silver attencils of Rs.22,313/- silver coins of Rs.30,208/-, silver bricks of Rs.39,433/-, silver attencile of Rs.20,611/- and deposit in bank account of Sri Ashok Kumar, HUF amounting to Rs.5,000/- are not explained properly in post search enquiry so investment in the purchase of above items is unexplained investment u/s 69 of the I.T.Act and liable to be treated the income of the assessee for A.Y.97-98. The total amount comes to Rs.1,17,565/-.

4. All the above amounts were treated as unexplained income in Block Assessment proceedings for period from 87-88 to 97-98. The Hon'ble ITAT vide its order no. ITA No. 1574 Alld. of 1997 dated August 29, 2002 has held that such amounts are not assessable in block proceeding as they are not undisclosed income under section 158BA(3).

5. Regular assessment of this firm i.e. M/s Vishwanath Prasad Ashok Kumar Sarraf for A.Y. 97-98 was completed on 29.12.99. In this assessment the above mentioned amount were not considered as these amounts already brought to tax in the proceeding of block year, now vide order dated 29.8.2002 the Hon'ble ITAT has held that these amount are not to be assessed in the block, thus, these amounts are escaping assessment all together.

In view of above facts and discussion I have reason to believe that total amount of (24,45,055 + 2,28,030 + 1,17,565) Rs.28,90,650/- as stated above has escaped assessment and to assess the same the case has to be reopened u/s 147 of the I.T.Act, 1961.

The approval accorded by Hon'ble CIT (Central), Kanpur vide his satisfaction dated 17.3.2003 as per letter dated 17.3.2003.

Dated 20.03.03

Sd/-
(K.K.UPADHYAY)
Asstt. Commissioner of Income Tax
Central Circle-II,
VARANASI

Learned counsel for the petitioner submitted that the income, which are alleged to have been escaped to assessment in the relevant years, have been considered in detail in the block assessment order and the same have been assessed as undisclosed income, but in appeal such additions have been deleted by the Tribunal on the ground that they do not relate to undisclosed income of the petitioner. The relevant paragraph of the Tribunal's order reads as follows :

1996-97

"31. The A.O. made the addition of Rs. 1,02,300/- in the Block assessment year 1996-97 on substantive basis in the hands of the assessee. This income was shown by Smt. Ambika Devi in her return in the assessment year 1996-97 as income from Saree business. The AO

disbelieved and made the addition on substantive basis in the hands of the assessee-firm and on protective basis in the hands of Smt. Ambika Devi. We are unable to agree with the view of the AO. Once Smt. Ambika Devi had shown income from Saree business in her return for the assessment year 1996-97, prior to the search, the same cannot be termed as "undisclosed income". We are repeating again that for undisclosed income, the AO will have to establish that the assessee would not show the same income in his hands for the purpose of this Act. However, in this case, Smt. Ambika Devi has already shown the same income in her hands prior to the search in the assessment year 1996-97. The search party did not find any evidence during the search that the assessee-firm was doing the business of sarees. In the earlier assessment year 1996-97 u/s. 143(3), the department accepted the business activity of the assessee-firm to be manufacturing sales, purchases, silver and gold ornaments etc. Even in the regular assessment in 1997-98, the same business activity was accepted, more so the AO in the Block assessment order also at page 2 has mentioned that;

"The assessee is a partnership firm consisting of three partners. It is engaged in the business of purchase and sale of bullion, silver ornaments and gold ornaments."

The Department has therefore, never established that the assessee was having income from saree business. No show cause notice or query was issued to the assessee-firm in the block assessment about the protective assessment in the hands of Smt. Ambika Devi. The entire addition is illegal and without any basis and is liable to be set aside. The same cannot be termed as "Undisclosed Income" in the block assessment. The addition made on this issue is accordingly deleted."

1997-98

"24. The A.O. has dealt with this issue and issued questionnaire dated 18th August, 1997 whereby the assessee has been asked to explain gold jewellery weighing 5090.110 gms. recorded on the order book. It was stated that these gold articles were found mentioned against the names of 17 customers, which is incorporated in this order also. The assessee relied the same. The assessee initially filed 14 affidavits of these customers and for one customer, Shri Kailash Singh, Advocate, affidavit was filed on 22.10.1997. The remaining two affidavits were not filed as the gold articles were already returned to Smt. Rani Devi and other customer, Ganesh Prasad Manjul appeared before the AO and was examined under section 131. The AO recorded the statement of some of these customers on random basis u/s 131 of the Income-tax Act. All the customers affirmed their dealings with the assessee and also affirmed that they had handed over their jewellery for re-making to the assessee against the receipts. The AO also recorded the statement of Ashok Kumar, partner in the assessee-firm during the course of the assessment proceedings, in which Ashok Kumar has explained to have maintained the books of account in the ordinary course of the business and the same contained like Roznamcha, Rokar Bahi, Ladger, Karigar Bahi, order book, stock register for gold ornaments, sales-tax register, gold purchase voucher and sale vouchers, silver jewellery, purchase voucher and silver purchase vouchers. Shri Ashok Kumar, partner, also narrated the procedure for making entries in the books of account in his statement. However, the AO did not believe the affidavits and statement of the customers as he found discrepancy in their statements. The AO also did not believe the statement of Ashok Kumar as he found discrepancies in the statement of Ashok Kumar, therefore, made the addition of value of 5090.110 gms. of the

jewellery @ Rs.500/- per grams in a sum of Rs. 25,45,055/- and treated the same as unaccounted stock of the assessee. The AO noticed that the aforesaid persons have made incoherent statements and also did not know English. The AO also objected to their dealings as the ornaments were kept for long time and while delivery was not taken at the earliest and that the customers have not specified special occasions for re-making of their gold jewellery and also signature did not tally with the receipts. The Id. D.R. strongly supported the finding of the AO. However, the Id. counsel for assessee objected to the same on the grounds which we have already incorporated above. We are not in agreement with the contention of the Id. D.R. The AO at page 4 of the assessment order himself mentioned that gold jewellery weighing 5090.110 gms are recorded on the order book. The same is also recorded in item No. 2 of the Annexure 'A' of the Panchnama prepared at the time of search. The AO himself admitted that the different gold jewellery of different weights have been found recorded against the names of 17 parties. The details have already been given above in this order. We fail to understand, the moment the AO mentioned this fact in the assessment order that the gold jewellery is found mentioned in the records of the assessee and the books of account prior to the date of the search, how the same can be treated as undisclosed income. All the details of 17 parties who have handed over their gold ornaments for remaking were found mentioned in the records, which were seized by the Search party. The assessee has filed 14 affidavits of the different customers at the initial stage and also filed one more affidavit of Shri Kailash Singh, Advocate on 22.10.97 to prove the dealing with these customers. The remaining two affidavits could not be filed as the articles belonging to Smt. Rani Devi were already returned on 18.10.1996 i.e. prior to the search. The details are mentioned in the paper book at page 176 and the same tallies in the weight also. Another customer, Shri Ganesh Prasad Nanjul had already appeared before the AO and was examined u/s. 131 by the AO. The AO also admitted to have examined eight persons out of these 17 parties on random basis u/s. 131 of the Income-tax Act. The AO himself did not examine all the 17 parties, therefore, his objection that Smt. Rani Devi was not produced is of no relevance. All the bills executed between these customers were available at the time of search and seized by the Search party and found part of the Panchnama prepared by the Search Party. The stock register, cash book, karigar Bahi, G-12 register etc. were seized and also found mentioning the dealings of these customers with the assessee. All these records were seized by the search party. The assessee was maintaining the registers of the customers giving their articles for re-making as per Gold Control Act, which was previously applicable. All these details of the customers were recorded in the books of account and documents seized by the Search Party. The Id. D.R. argued that the nature of the transaction was different. However, it is admitted that the same are purchase vouchers entered in the books of account. His only objection is that the same are not the dealings for the purpose of re-making of the gold jewellery. It is not a case made out by the AO. The A.O. made the addition as he found discrepancy in the statement of the witness and Ashok Kumar. The Id. D.R. admitted all vouchers pertaining to 17 customers have been entered into the records and documents which were seized by the Search party. Everything is disclosed in the books of account and documents maintained by the assessee in the normal course relating to the previous year. The same can never be termed as undisclosed income. The stock register as seized under the search operation found mentioning of the details of gold jewellery given to 11 karigars of 5090.110 gms. in respect of 17 customers. All vouchers of karigars were available and seized also. The payments to karigars entered in the books of account. In the regular assessment proceedings also, the same is assessed. In the earlier year

also, the same job work is shown and accepted by the department. The details are specifically mentioned in the paper book at page 176 showing the job work and dealings with the karigars prior to the search on 3.11.1996. All the details are entered into the records of the assessee. The aims and object of Chapter XIV-B was to un-earth the block money. Since the assessee has shown every dealing with the customers and further dealing with the karigars in its record prior to the search, therefore, it is unbelievable that any undisclosed income was discovered during the search operation. The very purpose of the Chapter XIV-B is frustrated in this case in view of the entries made in the books of account and other records of the assessee, which were also seized and scrutinised by the Department. We have already indicated that search was made prior to the expiry of the previous year and the assessee has shown all the details in the regular assessment also, therefore, no presumption could be drawn against the assessee that the assessee would not disclose the dealings with the customers and karigars in its return for the purpose of the Income-tax Act. The scope of section 158 BC is to assess undisclosed income not recorded in the books or documents maintained in the ordinary course of business relating to previous year. Since all the entries were found to have been mentioned, therefore, it was beyond the scope of section 158 BC to take out discrepancy in the statement of the customers to make addition by way of undisclosed income which might be the subject matter of regular assessment. The AO acted beyond his jurisdiction. The reasons given by the AO to disbelieve the statement of the customers and Shri Ashok Kumar, partner of the assessee-firm are highly imaginary and without any supportive evidence or material. The discrepancies as stated by AO are not vital and material to reject the Explanation of assessee. The assessee has been able to prove that the gold jewellery entered in the books of account or other documents maintained in the normal course relating to the previous year. The AO has tried to make out a case of undisclosed income on presumption and discrepancies only but he has failed to satisfy the requirement of the definition of the undisclosed income as provided u/s. 158 B(b) of the Income-tax Act. The case of the assessee is squarely covered by section 158 BA(3) of the Income-tax Act and the C.B.D.T. Circular No. 717(supra) and as such, the said income cannot be included in the block period.”

“27. During the search and seizure operation, Rs. 3,16,400/- was found from the business premises of the assessee. In the initial statement of Shri Ashok Kumar recorded on date of the search i.e. 3.11.1996, he has surrendered Rs. 1,89,880/- voluntarily, but he did not include the same in the return filed subsequently. The AO found mentioning of reconciliation of the cash on 3.11.1996 and as per pukki rokar Annexure 'A' written upto 17.10.96, cash balance of Rs. 57,960/- was found. In the kachi rokar written from 17.10.96 to 25.10.96. The balance of Rs. 56,520.10 was found. The assessee has given in-flow and out-flow of cash from 16.10.96 till 2.11.96, i.e. prior to the search. The AO rejected the inflow and out flow of the cash as explained by the assessee as the same was not supported by any documentary evidence, except of Rs. 50,000/- withdrawn on 26.10.96 from District Cooperative Bank by Ashok Kumar, partner. The AO accordingly found that the assessee was having Rs. 3,34,550/- and out of which Rs. 106,520/- was reduced which was mentioned in the kachi rokar and withdrawal from the bank and treated Rs. 2,28,030/- as unexplained cash in the assessment year 1997-98 till the date of the search. The Id. counsel for the assessee has filed copy of the reconciliation of the cash till 3.11.96 at pages 59 & 60 in the paper book. The AO has accepted the details of the cash available upto 24.10.96 in a sum of Rs. 56,520.10p. A further sum of Rs. 50,000/- was believed to have been withdrawn on 26.10.96. Thereafter in the cash reconciliation

the assessee has shown cash sale of gold ornaments (150.300 gms) in a sum of Rs. 82,316/- on 1.11.96 and on the same date, cash sale of silver in a sum of Rs. 4,508.50 p. On that date, some petty cash was also recovered from M/s. Roopanjali Swarn Kala Kendra against sale and trade tax. Certain expenses are also shown. The account on 2.11.1996 cash sale of gold ornaments (161.130 gms) in a sum of Rs. 83,787.60p. is shown. The remaining small details are also mentioned with regard to the petty sales and cash recovered from M/s. Roopanjali Swarn Kala Kendra. The major items are the sales of gold ornaments in a sum of Rs. 82,316/- and Rs. 83,787.60p. The AO believed that only gold weighing 5090.110 gms. was to be explained, though the entires in the stock register were found of 7,134,780 gms. of gold ornaments. The remaining items were the gold ornaments sold on 1.11.96 and 2.11.96, which is reconciled from the cash reconcilliation. If the Department has accepted the sales of Rs. 11.96 and 2.11.96 of gold ornaments then the cash available out of these sales should also have been believed by the Department. The only objection of the AO had been that the cash in flow and out flow are not supported by documentary evidence is itself contradictory from the above facts. The assessee has given all the details of the reconcilliation and given the details from where cash came into but the AO has failed to make out any investigation on this issue and rejected the case of the assessee without assigning any reasons. The argument of the Id. D.R. had been that Ashok Kumar partner has surrendered cash of Rs. 1,89,880 at the time of statementon 3.11.96, therefore, the same cannot be reconciled now. The Id. D.R. argued that the same statement would be the basis of addition in the hands of the assessee in the block period. The Id. D.R. relied upon the judgment of Allahabad High Court in the case of dr. S.C. Gupta reported in 248 ITR-782 (supra), in which it was held :-

“Held, that a statement made voluntarily by the assessee could form the basis of assessment. The mere fact that the assessee retracted the statement could not make the statement unacceptable. The burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income. This burden was not even attempted to be discharged. The order of the Tribunal was based on facts and no question of law arose from it.”

There is no dispute about the legal proposition that the statement made voluntarily could form the basis of the assessment. However, the Hon'ble High Court further held that the burden lay on the assessee to establish that the admission made in the statement at the time of survey was wrong and in fact there was no additional income. The I.T.A.T., Ahmedabad Bench in 50 ITD-524 in the matter of Mrs. Sushila Devi S. Agrawal has held:-

“Section 132 of the Income-tax Act,1961 - searches and seizures-whether where assessee has retracted from statement given on search day, Assessing Officer is justified in drawing adverse inference-Held, no.” “

“28. The Income-tax Appellate Tribunal, Delhi Bench in the case of Ashok Kumar Agrawal reported in 38 TTJ-Del-189 hs held:-

“Where the cash recovered from the assessee's possession did in fact belong to his brother as evidenced by confirmation of the aaffidavits of the lending parties, ITO was not justified in treating the amount as income from undisclosed sources of the assessee.”

It was further held:-

“Suspicion, though a ground for scrutiny of evidence cannot be made the foundation of decision. Conjecture is not a substitute for legal proof. Suspicion, however, strong, cannot take the place of proof.”

Though Ashok Kumar, partner of the assessee-firm has surrendered cash of Rs.1,89,880/- in his initial statement on 3.11.96 but in the same statement, Ashok Kumar partner has specifically stated that he was not sitting in the shop for the last ten days and therefore, he is not aware of the cash details. We have already stated above that though Ashok Kumar has surrendered cash of Rs.1,89,880/- but subsequently, Ashok Kumar had been able to explain the inflow and out flow of cash. The major difference was of the sales made on 1.11.96 and 2.11.96. Ashok Kumar has explained that he was not sitting in the shop for the last ten days, therefore, his retraction from the earlier statement was quite normal and supported by evidences of the sales which were admitted by the Department. The assessee has been able to explain the discrepancy in the cash from the reconciliation, which is supported by the documents and as such in our considered view, no addition could be made on the basis of statement of Ashok Kumar by which he has surrendered cash of Rs.1,89,880/-. The assessee has been able to prove the reasons for retractions from the earlier statement, which is also found supported from the explanation given by Ashok Kumar in his initial statement as well as from the explanation given in the reconciliation before the AO. The AO has also made addition of Rs.18,150/- in respect of unaccounted cash recovered and seized from the residential premises of Ashok Kumar. The Department itself has admitted that Rs.18,150/- was recovered from the residential premises of Ashok Kumar, as such, the same cannot be connected with the transaction of the business activity of the assessee-firm and as such cannot be made the basis for making addition in the hands of the assessee-firm. The recovery from the residence of Ashok Kumar cannot be treated as undisclosed income of the assessee. As a result, we find that the entire addition in respect of the unexplained cash deserves to be deleted, which we do accordingly and delete the addition. This issue is also decided in favour of the assessee and against the Department.”

“Un-explained investment in silver ornaments, silver coins, silver brick and silver utensils :-

29. The A.O. found that silver ornaments weighing 8.212.9 Kgs. as unexplained at the time of search. The assessee claimed to have made purchases on 2.11.1996 in the quantity of 8050.000 and sales of 77.000 on 22.10.96 vide bill No.144. The assessee has tried to explain the difference by this explanation. The details are mentioned at page 61 in the paper book. However, the AO did not agree as no purchase bill was found at the time of search. Similar is the case in the case of silver coins as the assessee has explained the difference by making purchases on 2.11.1996 from M/s. Vikas Jewellers in the quantity of 390 coins, 20 coins purchased on 1.11.1996 and as such, the same was fully reconciled. However, the AO disbelieved as no purchase voucher was found at the time of search and no payment was made and no supporting evidence was found available. Similarly, addition was made in respect of silver brick in a sum of Rs.39,433/- as no evidence of silver brick taken on loan on 1.11.96 from Smt. Radha Devi was found. Lastly, the addition of Rs.20,611/- was made in respect of silver ornaments as no supportive evidence was found. The AO made the addition as no evidence to the so-called loan was found at the time of search. As far as silver ornaments are

concerned, purchase bill is a document. The AO failed to make any enquiry with regard to this purchase. Nothing is mentioned in the assessment order whether the AO has made any enquiry from any of the dealers from whom the purchases are made by the assessee. The details of the bill were produced before the AO. No reasons were given by the AO that the assessee would not disclose some purchases in the return for the purpose of Income-tax Act which is a condition precedent to treat the same as undisclosed income. Once the bill is produced, such presumption should not have been drawn by the AO against the assessee. The assessee has shown the purchases in the regular assessment and no defect was found by the department. The assessment is framed after the end of previous year i.e. the end of the March, 1997 at the time everything was available with the AO, therefore, the AO should have made enquiry into the evidences filed by the assessee instead of rejecting the explanation of the assessee summarily. Similarly, for silver coins bill was produced, details were furnished before the AO but he did not make any enquiry about the purchases, rather he has disbelieved the purchases as no payment was made. There is no bar to purchase the goods on credit. As far as silver brick and silver utensils are concerned, the AO has disbelieved as no evidence of loan was found at the time of search. The assessee has filed all the details before the AO. We have already taken up this point at the stage of the decision in respect of gold jewellery and we were of the view that according to section 158BA(3), if the transaction relates to such income recorded on or before the date of the search in the books of account or documents maintained in the normal course relating to such previous year then such income cannot be included in the block period. It was a case when search was conducted before the end of the previous year. The assessee has produced all the bills of purchases and furnished the details of the loans in respect of silver brick and utensils, but the AO has not made any enquiry into the matter and disbelieved the same as no voucher was found at the time of search. The definition of undisclosed income has not been satisfied in this case. On the other hand, the assessee has been able to explain the above items from the reconciliation which is supported by various bills and details. In the absence of any enquiry by the AO, no addition could be made in the hands of the assessee on account of unexplained investment in the silver items. The entire additions available to be deleted, which we accordingly do so. This issue is also decided in favour of the assessee and against the Department.”

“Un-explained deposit in the Bank Account of
Ashok Kumar (HUF):-

30. The AO made addition of Rs.5,000/- in the hands of the assessee, though it was found to have been deposited on different dates on 13.8.1996, 14.8.1996 and 20.8.96 in the Bank account in the name of Ashok Kumar (HUF) in Oriental Bank of Commerce. The AO did not find any evidence that this amount belongs to the assessee-firm. The A.O. on the same reasons did not make addition in respect of the Bank Account of Smt. Vimla Devi and Gajendra Kumar. In the case of these persons, the Bank Pass Book was found at the time of search in the business premises of the assessee in respect of Smt. Vimla Devi and Gajendra Kumar. The assessee explained that the Bank Account did not belong to the assessee-firm and as such, the AO did not take any adverse view against the assessee and did not make any addition in the hands of the assessee firm. On the same reasons, the AO should have believed the statements of the assessee. In the case of Ashok Kumar (HUF), it is very clear that the account did not belong to the assessee firm. No evidence is found that the assessee-firm has deposited this amount in the account of Ashok Kumar

(HUF). Admittedly, this account in the name of Ashok Kumar (HUF) did not belong to the assessee-firm, therefore, the AO himself contradicted by his own observation from the observation made in the case of Smt. Vimla Devi and Gajendra Kumar. The entire addition is made without any basis and is liable to be deleted. We accordingly delete the addition in the hands of the assessee-firm. This issue is also decided in favour of the assessee against the Department.”

Heard Sri S.K. Garg, learned counsel for the petitioner and Sri Shambhu Chopra, learned Standing Counsel.

Learned counsel for the petitioner submitted that action can be taken under Section 147 of the Act after expiry of four years from the end of the relevant assessment years only in case if the income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 of the Act or in response to a notice issued under sub-section (1) of section 142 of the Act or Section 148 of the Act or to disclose fully and truly all material facts necessary for his assessment for that assessment year as contemplated under the first proviso to Section 147 of the Act. He submitted that in the present case the notices have been issued after expiry of four years from the end of the relevant assessment years. Therefore, the assessing authority ought to have recorded the finding in the reason recorded that there was failure on the part of the assessee to make a return under Section 139 of the Act or in response to a notice issued under sub-section (1) of Section 142 or Section 148 of the Act or to disclose fully and truly all material facts necessary for his assessment, but no such finding has been recorded. He further submitted that no such case has been made out by the respondent and, therefore, the action taken under Section 147 of the Act is barred and wholly illegal. In support of the contention, he relied upon the decision of the Madras High Court in the case of ***Fenner (India) Ltd. v. Deputy Commissioner of Income-Tax*** reported in (2000) 241 ITR 672. He further submitted that the amount which has been said to be the escaped income in the reason recorded have been considered in detail in the block assessment order dated 27.11.1997. The assessing authority has treated the said amount as undisclosed

income. However, in appeal, the Tribunal has held that these amounts are not the undisclosed income of the assessee. He submitted that once for the said amount has been held as not undisclosed income of the assessee then for the purpose of Section 147 of Act the said amount cannot be treated as the escaped income, inasmuch as those amounts have already duly considered and held to be undisclosed income.

Sri Shambhu Chopra, Standing Counsel, submitted that the amount, which are said to be escaped income in the reason recorded, have not been assessed to tax either in the original proceeding or in the block assessment and, therefore, the said income have been escaped to be assessed. Therefore, the initiation of proceeding under Section 148 read with Section 147 of the Act are legally correct. He, however, could not able to explain that what material facts, which the petitioner ought to have disclosed in the return or in the original proceeding, have not been disclosed believing that there was escaped assessment.

Having heard learned counsel for the parties, we have given our anxious consideration to the rival submissions and perused the documents on record. Section 147 of the Act reads as follows :-

“147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year;

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and

has escaped assessment.

Explanation 1. - Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2. - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :-

- (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;
- (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;
- (c) where an assessment has been made, but -
 - (i) income chargeable to tax has been underassessed; or
 - (ii) such income has been assessed at too low a rate; or
 - (iii) such income has been made the subject of excessive relief under this Act; or
 - (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3. - For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

For the assessment year 1996-97, four years expired on 31.3.2001 and for the assessment year 1997-98, four years expired on 31.3.2002. The notices under Section 148 of the Act were issued on 20.3.2003, i.e. after expiry of four years. The notices under Section 148 of the Act could be issued beyond the period of four years from the end of the relevant assessment year only in case where the income chargeable to tax has escaped assessment by reasons of failure on the part of the assessee to make a return under

Section 139 of the Act or in response to a notice issued under sub-section (1) of Section 142 or Section 148 of the Act, or to disclose fully and truly all material facts necessary for his assessment. In the present case neither any finding in this regard has been recorded in the reasons recorded nor any such case has been made out. Therefore, on the facts and circumstances, we are of the view that the initiation of proceeding under section 148 read with Section 147 of the Act for the assessment years 1996-97 and 1997-98 were barred.

In the case of ***Fenner (India) Ltd.*** (*supra*) the Madras High Court has held that in case where the initiation of proceeding is beyond the period of four years from the end of the assessment year, the assessing authority must necessarily record not only his reasonable belief that the income has escaped assessment, but also the default or failure committed by the assessee and failure to do so would vitiate the notice and the entire proceeding.

Further, under Section 147 of the Act the assessing authority can assess or re-assess only that income which has escaped assessment, inasmuch as for taking the action there must be a reason to believe that such income has escaped assessment which comes to his notice subsequently. In the instant case the amounts, which are alleged as an escaped income, have been duly considered in the block assessment. In the block assessment such amounts have been assessed to tax as undisclosed income. In appeal, the Tribunal has held that such amounts are not undisclosed income. Once the Tribunal has arrived to the conclusion that the alleged amounts are not the undisclosed income, it cannot be treated as the escaped income, chargeable to tax, under the provision of Section 147 of the Act. It is not open to the assessing authority to circumvent the order of the Tribunal and to take a different view. The order of the Tribunal is binding on the assessing authority. Moreover, once the alleged amount has been considered in the block assessment, it cannot be treated as the escaped income, chargeable to tax.

For the aforesaid discussions, we are of the view that initiation

of proceeding under Section 147 read with Section 148 of the Act for the assessment years 1996-97 and 1997-98 are barred, erroneous and bad in law. The writ petition is, accordingly, allowed. The impugned notices dated 20.3.2003, issued under Section 148 of the Act for the assessment years 1996-97 and 1997-98 and the proceeding in pursuance thereof, are hereby quashed.

Dated : 5.4.2010.
PG.