

Malhan Builders Vs. Dy. Cit

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Court : Delhi

Decided On : Aug-02-2004

Reported in : (2004)91TTJ(Del)920

Appeal No. : IT(SS)A No. 285/Del/2002; Block period 1 April 1989 to 27 July 1999
2 August 2004

Appellant : Malhan Builders

Respondent : Dy. Cit

Advocate for Pet/Ap. : Anil Jain,;for the assessed; R.A. Gupta,;for the Revenue.

Judgement :

ORDER

B.R. Jain, A.M.

These cross appeals arise from the order dated 26-6-2002, of the learned Commissioner (Appeals)-III, New Delhi, for the block period 1-4-1989, to 27-7-1999, setting out the grounds as under :

assessed's grounds :

'1. That, on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) -III has erred in confirming the action under section 132 of the Income Tax Act and consequential action and issue of notice under section

158BC of the Act by the learned assessing officer which are bad in law.

2. (a) That, on the facts and in the circumstances of the case the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 9,36,000 and Rs. 7,62,000, based on the valuation report of property No. B-42, Panchsheel Enclave, New Delhi, sold to Dr. Praveen Khilnani and Shri Amarjeet Singh, respectively.

(b) That, on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 5,95,000 (43.45 lakhs - 37.50 lakhs) and Rs. 7,24,000 (49.24 lakhs - 42 lakhs) based on the valuation report in respect of flats of property No. S-484, GK-II, New Delhi, sold to. Shri Sattar Malik and Shri Yasin Malik, respectively.

3. That, on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 14,30,349 being addition made by the learned assessing officer on account of investment in various bank FDRs and interest thereon during the assessment years 1990-91 to 1992-93.

4. That, on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. .15,00,000 for the assessment year 1995-96 being made by the learned assessing officer in exchange of property.

5. That on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 90, 000 made; for the assessment year 1995-96 on the basis of page No. 24 of Annex. A-28,

6. That, on the facts and in the circumstances of the case., the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 16,53,000 (11 lakhs + 4 lakhs + 1. 53 lakhs) for the assessment years 1999-2000 to 2000-01 made on account of undisclosed cash credit under section 68 of the Act, interest @ 3 per cent thereon.

7. That, on the facts and in the circumstances of the case the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 30,000 for the assessment year 2000-01 made on the basis of page No. 57 of Annex. A-5.

8. That, on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 2,50,000 under section 68 of the Act as unexplained cash credit on the basis of page No. 34 of Annex. A-5.

9. That, on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) has erred in confirming the addition of Rs. 3,45,526 for the assessment years 1996-97 to 2000-01 made on account of interest on the basis of page No. 37 and 38 of the Annex. A-18.

10. That, on the facts and in the circumstances of the case, the Hon'ble Commissioner (Appeals) has erred in confirming the addition of cash expenses of Rs. 15,28,648 for the assessment year 1992-93 under section 40A(3) of the Act.

11. That, on the facts and in the circumstances of the case the Hon'ble Commissioner (Appeals) has erred in not passing the order for adjustment of returned undisclosed income of Rs. 15 lakhs against the undisclosed income assessed and mentioned in the aforesaid grounds of appeal.

12. That, on the facts and in the circumstances of the case the Hon'ble Commissioner (Appeals) has erred in confirming the interest of Rs. 10,62,411 charged under section 158BFA(I) of the Act in the absence of passing the order for charging the interest in the interest of natural justice.

Revenue's grounds :

'1. On the facts and in the circumstances of the case, the learned Commissioner (Appeals) has erred in deleting the addition of Rs. 79,00,000. Doing so, she has ignored the contents of the papers Annex. A-9, p. 29, seized from the premises of Shri D.D. Malhan which speaks of receipts of 1.29 crores.

2. The Commissioner (Appeals) has erred in allowing the addition of Rs. 83,00,000 to Rs. 14.80 lakhs only. Doing so, she has ignored the facts of page No. 4 Annex. A-5.

3. The Commissioner (Appeals) erred in deleting the addition of Rs. 19 lakhs made on account of unaccounted receipt based on p. 41 of Annex. A-1, and none of the parties reconciled it.'

2. Ground No. 1 has not been pressed by the assessed. The same is dismissed as 'not pressed'.

3. In ground No. 2(a) the assessed has challenged the sustenance of addition of Rs. 9.36 lakhs and Rs. 7.26 lakhs based on the valuation report of the property bearing No. B-42; Panchsheel Enclave, New Delhi.

4. Briefly the facts are that the assessed purchased plot bearing No. B-42, Panchsheel Enclave, New Delhi, on 15-5-1994 at a cost of Rs. 1.55 crores. The area of the flat is stated to be 800 sq. yds. The assessed claims to have incurred a cost of Rs. 1.56 crores in construction of flats on this property. The purchase as well as cost of construction are duly recorded, in the regular books of account and the same stand accepted in regular assessment for the assessment year 1996-97. The assessed has constructed basement, two flats on ground floor, two flats on first floor, two flats on second floor and two flats on third floor. At the time of the search at the assessed's premises on 27-7-1999 only the part of the building was sol as under:

Rs.

(a) Sale of basement to Mr. Ravinder Nath & Sons

50 lakhs

(b) Sale of ground floor left side flat to Shri Praveen Khilnani

48 lakhs

(c) Sale of ground floor right side flat to Shri Paintal

28.50 lakhs

(d) Sale of 2nd floor. right side flat to Mr. Amarjeet Singh

45 lakhs

(e) Sale of 3rd floor left side flat to Mr. Rakesh Agarwal

9.80 lakhs

Total

1,80,80,000

The sale of flats at (a), (b) and (e) above have been accepted as genuine and the sale consideration disclosed has also been accepted. However, the department raised dispute in respect of sale of flat at sl. Nos. (c) and (d) above made to Shri Praveen Khilnani and Shri Amarjeet Singh. The assessing officer on his own referred the matter to the DVO who estimated the value of these flats at Rs. 57,36,600 and Rs. 52,62,600, respectively. The assessing officer did not accept the DVO's report and presumed that the sale consideration of the flat sold to Shri Praveen Khilnani is Rs. 1.22 crores while the sale price of the flat to Mr. Amarjeet.Singh was taken at Rs. 1.14 crores: on the basis of seized paper inventoried as Annex. A-1/7 and Annex. A-33/78 to 82, copies placed in the assessed's paper book. The difference in sale consideration has been treated as undisclosed income for the block period of the assessed. The learned Commissioner (Appeals) however based her conclusion on the basis of DVO's report and adopted the value of;Rs. 57,36,600 for the ground floor left side flat sold to Shri Praveen Khilnani and Rs. 52,62,600 of right side flat of the second floor sold to Shri Amarjit Singh as against the declared sale consideration of Rs. 48 lakhs and Rs. 145 lakhs, respectively, by the assessed. This has lead to sustenance of addition of Rs. 9,36,000 in respect of ground floor flat and Rs. 7,62,000 in respect of second floor flat. The assessed is in appeal for the addition so sustained.

5. The learned counsel for the assessed contends that the buyers of these flats have confirmed the sale consideration disclosed by the assessed which were received through cheques, the addition so made on the basis of seized documents placed at assessed's paper book p. 26 in respect of ground floor where certain jottings of gifts in the name of various persons as well as mention of advance cheques, etc. so made with a total of Rs. 1.22 crores to Dr. Praveen Khilnani was examined. As per his statement at assessed's paper book pp. 31 and 32, he has confirmed, the sale consideration at Rs. 48 lakhs. He also says that the advance given is with respect to some other property which he required for his nursing home, though the advance was given in the name of various persons connected with the partner of the assessed-firm. This property has an adverse location as it was situated near a nullah. The assessed was holding the property as 'stock-in-trade'. The seized document did not reveal that Rs. 1.22 crores is the sale consideration of this property. Author of this document was also not examined. Person in whose name the cheques were given were also not examined. Since the assessed was a trader, he cannot be expected to sell the property at a price expected by the assessing officer. The prudence of businessman as to how the business is to be conducted cannot be substituted by the opinion of revenue. Books of account have also not been rejected. The sale has also been recorded in the regular books of account and stood accepted in the regular returns. Due to adverse location of the plot being 'Sher Mukha' cannot be valued at a higher price than the actual sale consideration evidenced by record. The valuation report did not consider the adverse factors and was thus showing exorbitant prices. The assessed denied having received anything more than what was disclosed in the books. Under such circumstances it was contended that the learned Commissioner (Appeals) has erred in sustaining the addition which also is prayed to be deleted. Likewise there being no document found in respect of second floor flat and party having not been examined, there was no justification in the sustenance of additional the basis of mere estimate particularly when no adverse material was there in the possession of revenue to suggest that the sale consideration is more than what was disclosed by the assessed in the regular books of account.

6. On the other hand, the learned Departmental Representative contends that the document seized reveals that the sale consideration of flat sold to Mr. Khilnani was Rs. 1.22 crores, but the assessed disclosed the sale consideration at Rs. 48 lakhs only. The assessing officer was justified to draw inference on the basis of seized material that the sale consideration is Rs. 1.22 crores. This document stated that gifts for Rs. 52.50 lakhs have been given to various members and relatives of the partners of the assessed-firm. Cheques for advances and cash was also given. Certain blank cheques were also found and seized which were only towards the consideration of sale of flat to Shri Khilnani. The cheques were drawn in the name of minor children of promoters. This could not be amount of gift but a part of the sale consideration diverted to their accounts. Under such an event the assessing officer came to the conclusion that sale consideration of the flat is Rs. 1.22 crores as against the disclosed consideration of Rs. 48 lakhs: and thus he was justified in treating the difference of Rs. 74 lakhs as undisclosed income of assessment year 1997-98 forming, part of the block period by rejecting the departmental valuation report. Likewise, Shri Amarjit Singh, to whom the second floor flat was sold, could not be questioned but applying the same yardstick the sale price has been estimated at Rs. 1.14 crores as the assessed is found to have accepted NRI gifts from the account of Shri Amarjit Singh in January, 1997 to the extent of Rs. 40 lakhs and the documents were seized and inventoried in Annex. A-33. Those gifts were also held as sale proceeds of this property. The assessing officer considered that an amount of Rs. 69 lakhs is the undisclosed income on account of sale consideration received outside the books by assessed from Amarjit Singh and thus total addition made on account of these was aggregated to Rs. 1.43 crores. It was contended that there is no force in the arguments taken by the assessed and this ground needs to be rejected.

7. We have heard the parties with reference to material on record. During the course of search carried at the premises of the assessed on 27-7-1999 documents found seized revealed certain jottings and writings and also flat B-1 against Rs. 1.22 crores was written. The assessing officer presumed the sale consideration of Rs. 1.22 crores towards ground floor flat of property No. B-42, Panchsheel Enclave, New Delhi which was sold to Shri Khilnani as against the disclosed sale consideration of Rs. 48 lakhs by the assessed. This sale price was made a basis

of estimating the sale price of right side of second floor flat to Mr. Amarjit Singh at Rs. 1. 14 crores as against the disclosed sale consideration of Rs. 45 lakhs. The difference in these two values on account of both the flats was treated as undisclosed income of the block period on account of understatement of sale consideration. The learned Commissioner (Appeals) however found that the assessing officer has obtained an experts opinion of the department who valued the ground floor at Rs. 57,36,600 and the second floor flat at Rs. 52,62,600. In the absence of any positive material for receipt of actual sale consideration as assumed by the assessing officer she chose to uphold the sale consideration of left side flat of ground floor at Rs. 57,36,600 and right side flat of second floor at Rs. 52,62,600 and sustained the additions of Rs. 9,36,000 and Rs. 7,62,000, respectively. The relief so given by the learned Commissioner (Appeals) has not been objected by revenue in any of the ground raised in their appeal. However the assessed in ground 2(a) has challenged the sustenance of additional several reasons.

8. It is also an admitted fact that the sale consideration of these two flats stood disclosed in the regular books of account of the assessed and no incriminating document was found as a result of search to suggest that there has been any undisclosed income earned by the assessed in the sale transaction of these flats. The location of the property is stated to be near nullah and the flat being 'Sher Mukhi' speaks of adverse location and situation. The opinion of the departmental valuation was merely an estimate and could not be taken as evidence of receipt of actual sale consideration. Such. a report cannot be used as a conclusive evidence for receipt of sale consideration particularly when no material was found showing any amount received over and above what was disclosed by the assessed in his regular books of account. Books of accounts have also not been rejected by the assessing officer and the same has been made as a basis for completion of the assessment. The buyer of the property Shri Khilnani was also examined. He has confirmed the sale consideration at Rs. 48 lakhs only. In the absence of any adverse material in possession of the revenue, estimated value cannot be substituted with the actual sale consideration found recorded by the trader in his books of account as the assessed was a builder and dealing in construction and sale of properties. It shall not be out of place to say that the Revenue cannot

expect a trader/dealer to sell his goods at a price more than what was actually settled and received in the transaction. Further the actual sale consideration stood duly recorded in the regular books of account. De hors material, the estimated value could not have been taken for bringing to tax as undisclosed income of block period under the scheme of Chapter XIV-B of the Act. For the parity of reasons, the assessing officer did not have any positive material in his possession in respect of right side of second floor flat of the property and the valuation report of the flat located under the similar adverse circumstances and the actual sale consideration of which also stood recorded in the regular books of account could not have been substituted by the mere estimation in the scheme of Chapter XIV-B of the Act for treating the same as undisclosed income for the block period of the assessed. We, therefore, do not find any justification in the sustenance of addition by the learned Commissioner (Appeals) in respect of both these flats as undisclosed income for the block period taken on the basis of valuer's report. The same is therefore directed to be deleted.

9. In ground No. 2(b) of the assessed and in grounds 1 and 2 of revenue, the dispute relates to the addition in respect of property bearing No. S-484, GK-II, New Delhi.

10. Briefly, the facts are that the assessed constructed this property and cost of construction stood duly disclosed in the regular returns. The assessed has constructed flats at ground floor, 1st, 2nd and 3rd floors with a cost of Rs. 1.18 crores approximately. All these investments have been disclosed in the regular books of account. There is no dispute about the construction or purchase of plot made on 24-5-1995. At the time of search flats at 2nd and 3rd floors were not sold. The assessed has sold two flats constructed at first floor. One flat was sold to Mohd. Sattar Malik at a sale consideration of Rs. 42.50 lakhs. The other flat was sold to Mr. Yasin Malik, his brother at a consideration of Rs. 37.50 lakhs and both the brothers are independent owners in their own right. These sales were duly documented by agreement and the payment also stood recorded in the books of account. The aggregate sale consideration of these two flats evidenced by agreements amounted to Rs. 80 lakhs. As a result of search on assessed's premises, a letter written by one Mr. Vimal to Mr. Sattar Malik dated 18-6-1998

stated that an amount of Rs. 76 lakhs has been received. In this letter a DD of Rs. 40 lakhs was also demanded. The assessing officer, presumed that the sale consideration is much more than what was disclosed by the assessed in his books. He, therefore, referred the matter to the valuation cell. The departmental valuer, however, estimated the value of flat sold to Mr. Sattar Malik at Rs. 43.45 lakhs and flat sold to Mohd. Yasin at Rs. 49.24 lakhs as against the declared sale price of Rs. 37.60 lakhs and Rs. 42.50 lakhs, respectively. As regards flats at ground floor sold to Mr. Jagmohan Sahni and Manjeet Sahni at an aggregate price of Rs. 74 lakhs, value of these flats was estimated by the assessing officer on his own at Rs. 1.59 crores though no material was found as a result of search suggesting the sale consideration more than what was received and declared by assessed in his regular books of account. The assessing officer did not accept the estimated value placed by the DVO in his report and on his own estimated the value at Rs. 1.59 crores. The difference was treated as undisclosed income and the Explanation of the assessed that the amount of Rs. 40 lakhs was required for initiating sale of third floor flat stood rejected. Likewise the difference between the disclosed consideration and his own estimate at Rs. 1.59 crores in respect of ground floor flat was also treated as undisclosed income for the block period.

11. The learned Commissioner (Appeals) after considering the arguments advanced and material brought on record by assessed, came to the conclusion that the determination of sale consideration at Rs. 1.59 crores by assessing officer is unjustified inasmuch as the valuation cell itself has valued the portion being sold for Rs. 43.45 lakhs and Rs. 49.24 lakhs for the two flats of the first floor. She was not satisfied that the seized document gave rise to the sale consideration as taken by the assessing officer. She, however, chose to adopt the sale value on the basis of valuation report and sustained addition of Rs. 5.95 lakhs and 7.24 lakhs in respect of flats situated at first floor and likewise, as there were no documents found in search in respect of flats at ground floor, she rejected estimation made by assessing officer at Rs. 1.95 crores, more so when there was no reasonable basis with the assessing officer to estimate the fair market value at Rs. 1.59 crores as against declared value of Rs. 74 lakhs. However, looking into the element of passing unaccounted cash in such transaction of property dealing, she on her own estimated the sale price by enhancing 20 per cent of the amount disclosed by the

assessed and sustained addition at Rs. 14.80 lakhs. The revenue is in appeal in respect of relief given to assessed in respect of reduction in value for first floor as well as ground floor flats while the assessed has appealed against the sustenance of additional account of first floor flat and has raised the plea during the course on hearing in respect of addition of Rs. 14.80 lakhs in respect of ground floor flats sold which were based on mere estimation by the learned Commissioner (Appeals) which plea was allowed to be raised.

12. We have heard the parties with reference to material on record and precedents referred. The seized documents, copies placed at assessed's paper book have also been perused. The assessing officer during the course of assessment proceedings required the assessed to give Explanationn about the sale consideration. The assessed, however, brought a letter on record written by Shri Sattar Malik on 20-7-2001, which was addressed to the assessing officer himself and stating therein that the said Shri Sattar Malik had desired to purchase the third floor flat for Rs. 40 lakhs on property No. S-484, Greater Kailash Part 11, New Delhi, for which the communication from the assessed was received. He also confirmed that the said amount has not been paid. The assessing officer did not examine him nor did he bring any corroboratory evidence to show that the said demand of Rs. 40 lakhs raised by assessed was not towards the price being negotiated for third floor flat. The letter seized from the assessed was signed by one Mr. Vimal. The assessing officer did not examine him. No defect was found in the assessed's Explanationn that he had sold the first floor flats aggregating at Rs. 80 lakhs to the two brothers for which proper documents were executed and were available before the assessing officer. This document also did not state that the amount of Rs. 40 lakhs demanded was towards the flats of first floor sold to these two persons. , In the absence of any contrary material in possession of the assessing officer, it was not permissible to assume sale consideration at Rs. 1.59 crores in respect of first floor flat and likewise on the sale, for ground floor flats for which no document or paper was found from the assessed though the sale consideration actually received stood recorded in the regular books of account. The learned Commissioner (Appeals), thereforee, was justified in rejecting the sale consideration adopted by the assessing officer. Chapter XIV-B is a self-contained code. No addition de hors material can be made. In respect of ground floor flat the

search did not reveal any incriminating document. Even the valuation report was not obtained. Assessing officer or learned Commissioner (Appeals) herself are not the experts. The sale price cannot be substituted by the estimate of the IT authorities. The learned Commissioner (Appeals), therefore, was not justified in enhancing the sale consideration of ground floor flat by 20 per cent by substituting her own estimate which was against the provisions of law. The addition so sustained is, therefore, directed to be deleted. This stands fortified by the decision of Apex Court in the case of *Saraswati Industrial Syndicate Ltd. v. CIT (SC)*. The Rajasthan High Court in *CIT v. Rajendra Prasad Gupta* has also held that de hors material, addition cannot be made as undisclosed income. In the overall analysis irresistible view is that the addition of undisclosed income so made de hors material is directed to be deleted.

13. As regards the sustenance of addition in respect of first floor flats on the basis of DVO's report, such reports were the mere opinion. In the absence of any evidence found as a result of search that the assessed has received any amount towards sale consideration over and above the amount recorded in the books or entered in the documents of sale, such a report could not be made a basis for making addition for undisclosed income of the block period of the assessed. The assessed in this case had disclosed the entire sale consideration in his regular books of account. That being so and in the absence of any contrary material being in possession of the revenue, the difference between the estimate made by the DVO and the actual sale consideration evidenced by the agreement of sale and entries in books of account made in regular- course of business could not have been treated as undisclosed income for the block period. The same is, therefore, directed to be deleted. With the result the assessed's ground and plea stands allowed and ground Nos. 1 and 2 of revenue stand rejected.

14. Ground No. 3 in revenue's appeal relates to deletion of addition of Rs. 19 lakhs. The facts leading to this addition, are that the search revealed details entered on seized Annex. A-9/41 for an amount of Rs. 48 lakhs in the account of Dr. Setia. Certain payments were received in cash while others were received in cheques. The assessing officer examined Dr. Setia who confirmed aggregate payment of Rs. 48 lakhs: having been made to assessed. He however was not

able to give any datewise details at the time when his statement was recorded. The assessing officer therefore treated the cash payment of Rs. 19 lakhs as undisclosed income of the assessed. The learned Commissioner (Appeals) however, being satisfied with Dr. Setia, had confirmed payment of Rs. 48 lakhs and in case he could not give specific dates at the time of recording the statement, would not lead to the conclusion that the cash so received at Rs. 19 lakhs: remains unexplained. She therefore deleted the additional this account.

15. Having heard the parties and perused the seized document, we do not find any infirmity in the finding arrived at by the learned Commissioner (Appeals). Perusal of seized documents reveals that on different dates payments were made to assessed by cheques. Likewise, on different dates payments were also made through cash. The aggregate amount of payments at Rs. 48 lakhs stood confirmed by Dr. Setia when he was examined by assessing officer. The assessing officer himself accepted the payments in cheques as correct though they were received on different dates. But Dr. Setia was unable to specify the exact date of such payments which were made through cheques. Likewise, if Dr. Setia was not able to state the exact dates of making payments in cash but had confirmed the aggregate payment to the assessed, there was no reason to disbelieve his veracity about the payment which in fact was received by the assessed from Dr. Setia and the seized documents in itself spoke volumes about the factum of receipt. There being no contrary evidence in possession of revenue, assessed's Explanationn could not have been disbelieved. The learned Commissioner (Appeals), therefore, was justified in deleting the deletion for which no interference is called from the Tribunal. Ground 1 of revenue, therefore, stands rejected.

16. In assessed's appeal, ground 3 relates to the sustenance of addition of Rs. 14,30,349 which comprised of FDRs of Rs. 11,74,500 in the name of Shri Ram Saroop Dhawan for Rs. 2,99,760, Shri Arvind Kumar for Rs. 2,99,760 and Shri Ajay Kumar for Rs. 1 lakh, Shri Ganeshchand Rs. 2 lakhs and Shri Vinod Kumar Rs. 2.76 lakhs. Besides this, the assessing officer estimated interest earnings of Rs. 2,56,099 for the assessment years 1990-91 to 1992-93 being part of the block period. These additions are made by the assessing officer on the basis of seized

Annexs. A-4/23, A-7/43 and 44, copies of which are placed at assessed's paper book at pp. 130 to 133. All these persons were produced before the assessing officer. Their statements were recorded, copies placed at assessed's paper book 136 to 146 including copy of income-tax return and affidavit of Shri Ajay Kumar in whose name the FDR was there but he was not available at the relevant time for giving the statement. The assessing officer being of the view that all these FDRs have been made on the same date in the name of various persons and the record is on the same page and in the similar manner, he held that the same is investment of the assessed and treated it as undisclosed income of the block period. The learned Commissioner (Appeals) confirmed the action of the assessing officer.

17. We have heard the parties with reference to material on record. Relevant seized documents as well as statements of all these persons have been also perused. The copy of income-tax return and affidavit placed on record in respect of Shri Ajay Kumar has also been perused. The seized document revealed certain writing on the loose papers found from the premises of the assessed. All these persons had business dealings with the assessed. The assessed counsel stated that some proposal for bank, finance is made but the same did not mature. However all these persons are stated to be income-tax assessed and have confirmed that the FDRs on the seized papers were their own and the same stood disclosed in their respective returns. The direct evidence is on record of the assessing officer for owning the investment in the FD receipts aggregating to Rs. 11,74,500 by all these persons named hereinbefore. The search did not reveal any such incriminating documents which could suggest that the investment was that of the assessed and not of these persons. The assessed has discharged the onus that, lay upon him by bringing on record the direct evidence as referred herein before. In case the assessing officer disbelieved this evidence or veracity of all such claimants, heavy burden, lay upon revenue to prove that the investment was of the assessed. Revenue did not discharge the onus that lay upon them. Accordingly particularly when the FDRs were also not found from the possession of the assessed. The authorities below thereforee have 'erred in treating the investment in FDRs aggregating to Rs. 11,74,500 and interest thereon on estimated basis Rs. 2,56,099 as undisclosed income of the assessed for the block

period. The same is therefore directed to be deleted.

18. Ground No. 4 in assessed is appeal relates to sustenance of addition of Rs. 15 lakhs 'which the assessed contends was a proposal being prepared for exchange of property with the client as found jotted on loose paper, copy placed at assessed's paper book p. 146.

19. We have heard the parties with reference to material on record. The jottings reveal aggregate amount of Rs. 73 lakhs: comprised of entries of cash for Rs. 15 lakhs, cheque of Rs. 4 lakhs, Rs. 15 lakhs, Saket property Rs. 15 lakhs, registration Rs. 1 lakh and 'property at Saket Rs. 5.50 lakhs. The aggregate amount of Rs. 73 lakhs is balanced by the two other entries of Rs. 7 lakhs for Sainik Farms and flat of Rs. 66 lakhs. The assessing officer did not find any property at Saket or Sainik Farms in the name of assessed or any of its associates. The assessing officer also did not find any transaction having been done by assessed in respect of any such property. The cheque amount of Rs. 4 lakhs was also not found recorded in the books of the assessed or in any of the bank accounts despite carrying out extensive search at the business premises of the assessed and the residence of the partners. The assessing officer, however, treated the entry of Rs. 15 lakhs of cash as undisclosed income of the assessed by presuming that the amount has been received by the appellant. Six of these entries found written are not related to any transaction of the assessed. The entry of cash of Rs. 15 lakhs also cannot be held to be a transaction carried out by the assessed. The assessing officer did not find as to, who is the author of the document so found and seized by the appellant. His conclusion is also not corroborated with any evidence, direct or indirect. By taking a single entry from entire writings, various figures and treating the same as undisclosed income was an arbitrary act of the assessing officer as this documents did not give rise to any undisclosed income for the block period of the assessed. The addition so made is therefore directed to be deleted.

20. Ground No. 5 in assessed's appeal relates to sustenance of addition of Rs. 90,000 made for the assessment year 1995-96 on the basis of seized Annex. A-8/24, copy placed at assessed's paper book p. 147.

21. We have heard the parties with reference to the seized material placed on record. The assessed is found to have made the disclosure of Rs. 1,25,000 as undisclosed income for sale of garage at K-12, Rajouri Garden, New Delhi, in the return for block period filed by him as is evident from the impugned orders and written submissions placed at pp. 12 and 13 before the learned Commissioner (Appeals). The seized documents placed at assessed's paper book p. 147 reveal payments in cash and cheque aggregating to Rs. 90,000 on different dates with the remark of 'pay'. This document, however, cannot be related with the sale consideration of Rs. 1,25,000 surrendered by the assessed on the basis of seized document A-6/14 placed at assessed's paper book p. 148 for the reason that the document at this page reveals payment of Rs. 50,000 through two cheques while the document at p. 147 reveals payment of Rs. 10,000, Rs. 5,000, Rs. 10,000 and another payment of Rs. 20,000 by four different cheques of different dates. However the assessed's Explanationn that it surrendered the entire sale consideration and the amount of Rs. 90,000 was a cost incurred which was also undisclosed can be accepted as a reasonable Explanationn. The whole amount of Rs. 1,25,000 included the purchase consideration as well as the profit in sale and the same stood returned as undisclosed income for the block period. Thus, no separate, addition in respect of Rs. 90,000 was required to be made as undisclosed income of the block period. The same is, therefore, directed to be deleted.

22. In ground 6,, the assessed has agitated the sustenance of addition of Rs. 16.63 lakhs comprised of Rs. 11 lakhs, Rs. 4 lakhs and Rs. 1.53 lakhs on account of undisclosed cash credits and interest @ 3 per cent thereon.

23. As a result of search certain documents were seized from the assessed. Seized document's copy placed at assessed's paper book p. 150 reveals certain nothings. The assessing officer deciphered figures of 4.5 and 6 as figures in lakhs and treated the aggregate amount thereof for Rs. 15 lakhs as cash credit on which interest was also calculated, assessed's Explanationn that these amounts were received as advance towards the sale of third floor property No. B-42, Panchsheel Enclave was not accepted. In the said Explanationn the assessed also stated that as per proposal in case the flat is not given the assessed had to give interest. This

also was not accepted. All the entries of receipts and payments were duly recorded in the regular books of account. During the course of assessment the assessed filed a confirmed copy of accounts from all these persons. The amount of Rs. 4 lakhs stood repaid on 28-2-1999. Out of payment of Rs. 11 lakhs the flat was finally sold at an agreed price of Rs. 9.86 lakhs for which a separate agreement was executed and placed on record and the balance of Rs. 1,20,000 was also returned. Confirmation for this also was filed. The assessed thus contended that he has discharged his onus and entries were duly recorded in the books of account. The same could not have been treated as undisclosed income.

24. We have heard the parties with reference to material on record. The entries found written in the loose papers were corresponding to the entries made in the regular books of account. The creditors had confirmed the payment towards purchase of flat at B-42, third floor, Panchsheel Enclave, New Delhi, at an agreed price of Rs. 9,80,000 for which the agreement was also placed on record of the assessing officer Rs 4 lakhs and Rs. 1,20,000 stood received and confirmed copy of accounts were also filed. The assessed has thus discharged his onus of proving the identity, genuineness and nature of transaction which was on his trading account. Moreover, when the entries were duly recorded in regular books of account under such peculiar facts and circumstances the same could not be treated as undisclosed income. The addition so made is therefore directed to be deleted along with notional interest worked by the assessing officer as no proof of payment has been found.

25. Ground No. 7 in assessed's appeal relates to the sustenance of addition of Rs. 30,000 on the basis of seized Annex. A-5/57, a copy placed at assessed's paper book p. 1.59.

26. We have heard the parties with reference to material on record. The assessing officer noticed that the seized document revealed a payment of Rs. 30,000 which he presumed to have been made in cash but the assessed claimed that this was the payment by cheque. It appears that the assessing officer did not verify the fact from the books of account maintained by the assessed. For the procedural lapse on the part of the assessing officer, we set aside the addition and restore the

matter back to him for verification of facts and give a reasonable opportunity before coming to any conclusion in accordance with law.

27. Next ground relates to sustenance of addition of Rs. 2,50,000 made under section 68 of the Act on account of the seized Annex. A-5/34, copy placed at assessed's paper book p. 162.

28. We have heard the parties with reference to material on record and perused the seized documents. The assessed had claimed that advance of Rs. 2,50,000 was received from Shri Anurag Singh, resident of 81, Vasant Vihar, New Delhi, for purchase of 1/3rd portion of ground floor in property No. M-78, GK, New Delhi, for Rs. 9 lakhs. This receipt was in respect of return of money already received by the assessed and was duly recorded in the regular books of account as is borne out from the copy of the accounts placed at assessed's paper book p. 164. The payment made by the assessed could not be treated as a cash credit as this represented a return of money already received by him. The assessed has discharged the burden that lay upon him. Under such peculiar facts the amount of Rs. 2,50,000 repaid by assessed could not been treated as cash credit and undisclosed income for the block period. The addition made, thereforee, is directed to be deleted.

29. Next ground relates to the sustenance of addition of Rs. 3,45,526 made on account of interest on the basis of seized Annexs. A-18/37 and 38, copies placed at assessed's paper book pp. 165 and 166.

30. The assessing officer observed that in the said seized paper calculations of interest have been,made. The assessing officer presumed that the assessed has made payment of interest and the basis on which such interest has been calculated are written in these papers. However, he was satisfied about the genuineness of principal amount received and recorded in the books of the assessed for which no addition was made. The assessing officer being of the view that the assessed has paid interest outside the books, he treated the same as undisclosed income for the block period.

31. We have heard the parties with reference to material on record. Seized annexures, copies of which have also been placed at assessed's paper book, have been perused carefully. The principal amount on which calculation of interest have been made are also written on these loose papers. No additional account of such principal amount has been made by the assessing officer. This appears to be so because the assessing officer was satisfied about the identity and genuineness of the credits in respect of such entries which corresponded with the entries in the books of account of the assessed. No agreement for payment of interest has been found. Also, the revenue even after carrying out search, did not find that interest in fact has been paid to such creditors. Even after examination of such persons, the assessing officer was not able to find that the assessed made any cash payment to them. Under such circumstances when no payment was made, the assessing officer on the basis of surmises and conjectures alone could not have treated the calculations as actual payments in cash and undisclosed income of the block period. The same is therefore directed to be deleted.

32. Ground No. 10 relates to sustenance of addition of Rs. 15,28,648 for cash expenses as undisclosed income of assessment year 1992-93 by, invoking the provisions of section 40A(3) of the Act.

33. The assessing officer observed from the seized diary inventoried as Annex. A-10 that the assessed has incurred expenses in cash for supplying the material, etc. at its various sites in the assessment year 1992-93. The entries of these were duly recorded in the books of account of the assessed maintained in regular course of business and returns for that year also had been filed and claim accepted in the regular assessment. The assessing officer, however, reviewed these payments and disallowed the same by invoking the provisions of section 40A(3) of the Act.

34. The assessed's Explanation that the payments were recorded in the regular books of account and were duly accepted in regular assessment cannot be a subject-matter of block assessment under Chapter XIV-B of the Act as well as the assessed made such payments under exceptional circumstances in view of the nature of business where he is required to make payments at site when the

material is received at odd hours was rejected by the assessing officer. The learned Commissioner (Appeals) also did not accept the plea and confirmed the addition.

35. Having heard the parties with reference to material on record, it is evident that the expenditure was incurred in assessment year 1992-93 in cash 'and 'was duly recorded in the regular books of account as has also been accepted by assessing officer himself at internal p. 8 para 12 of his order. The assessed has regularly been assessed, to tax and assessment for that year had also been made. No disallowance was made on this account. No new fact or incriminating documents have come to the notice of the assessing officer Assessment of undisclosed income under Chapter XIV-B is not for reviewing of the assessments already made. The scope of assessment of undisclosed income is on the; basis of documents found and seized which gives rise to undisclosed income. The expenses were incurred in regular course of business for carrying out the business activities of construction of the assessed and income of which 'has already been brought to tax in earlier years in regular assessments. Under such peculiar facts the expenditure incurred in cash and claimed and allowed as expenditure in the regular assessment cannot partake, the character of undisclosed income by invoking the provisions of section 40A(3) of the Act. Addition so made, therefore, is directed to be deleted.

36. Ground No. 11 is in respect of adjustment of undisclosed income of Rs. 15 lakhs against the undisclosed income assessed by the assessing officer. This ground is stated to have not been adjudicated by the learned Commissioner (Appeals). We therefore remand this issue back to the learned Commissioner (Appeals) who shall hear the assessed and decide the ground so raised before her by providing opportunity to the assessed.

37. Last ground relates to charge of interest under section 158BFA(I) at Rs. 10, 64,400 for not making any specific order.

38. We have heard the parties with reference to material on record. The assessing officer did not pass any specific order for charge of interest under section 158BFA of the Act. Perusal of the order reveals that only the penalty proceedings under

section 158BFA have been initiated. We have perused mandatory provisions in this respect contained in section 158BFA(I) which deals with charging of interest of undisclosed income determined under clause (c) of section 158BC of the Act where the return is furnished after the expiry of period specified in the notice or is not furnished in compliance to the notice. Sub-section (2) of section 158BFA mandates levy of penalty on undisclosed income determined under clause (c) of section 158BC if it is more than the returned income. Since section 158BFA deals with levy of interest and levy of penalty under two different sub-sections and, the assessing officer initiated only, the penalty proceedings under section 158BFA, it is evident that no specific order for charge of interest as stated hereinabove has been made by the assessing officer. 'Since no specific order has been made, no demand on account of interest could be issued on that count. Such a view stands fortified by the decision in CIT v. Kishanlal (HUF) : [2002]258ITR359(Delhi) as also in CIT v. Insilco Ltd. : [2003]261ITR220(Delhi) . Accordingly, the interest so demanded from the assessed is directed to be deleted.

39. In the result, the assessed's appeal stands partly, allowed and that of revenue stands dismissed.