

Vishwanath Prasad Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Allahabad

Decided On : Aug-29-2002

Reported in : (2003)86ITD516(All.)

Judge : P Kalsian, B Saini

Appellant : Vishwanath Prasad

Respondent : Assistant Commissioner of

Judgement :

1. This appeal by the assessee is directed against the assessment order of the Assistant Commissioner of Income-tax, Central Circle-II, Varanasi dated 27-11-1997 for the block period from 1st April, 1986 to 3rd November, 1996 for the assessment year 1987-88 to 1997-98 passed under Sections 158BC and 158BA of the Income-tax Act.

2. The assessee has filed this appeal on as many as 22 grounds of appeal. However, during the course of the proceedings assessee filed the consized grounds of appeal as per Appellate Tribunal Rules. The consized grounds of appeal are reproduced for the sake of convenience, which are as under:-- 1. Because the block assessment order dated 27-11-1997 as has been made under the provisions of Chapter XIV-B of the Income-tax Act, 1961, is wholly illegal, as (i) no valid search or seizure operations can be said to have been carried out against the appellant assessee which is pre-requisite for applicability of the provisions of Chapter XIV-B. (ii) the provisions of Section 132(9A) had not been complied with

and the Assessing Officer had no jurisdiction to make the assessment, in view of non compliance of the mandatory provisions of the said section; (iii) no 'undisclosed income' was detected in course of search operations and the applicability of provisions of Chapter XIV are prima facie illegal.

(iv) the notice dated 9-10-1997 under section 158BC, in purduance of which assessment have been made, is invalid being vague non specific and not in accordance with the provisions of law.Sl. No. Asstt. Yr.

Rs. Particulars-----

(a) 1997-98 25,45,055 Alleged unexplained investment in Gold ornaments weighing 5090.110 gms. out(b) 1997-98 2,38,030 Alleged unexplained cash found during the(c) 1997-98 22,313 Alleged unexplained investment in silver(d) 1997-98 30,208 Alleged unexplained investment in silver coins.(e) 1997-98 39,433 Alleged unexplained investment in silver bricks.(f) 1997-98 20,611 Alleged unexplained investment in silver utensils.(g) 1997-98 5,000 Alleged unexplained investment deposits in the bank(h) 1997-98 1,02,300 Unexplained income of the assessee added-----

as have been made in the block assessment order dated 27-11-1997, fall within the definition of "Undisclosed Income" as given in section 158B(b) as contained in Chapter XIV-B of the Act and the same deserve to be deleted.

3. Because the entire process of receipt of old ornaments from customers for remaking as per order, handling over of the same to various Registered Karigars, receipt of the newly made ornaments from such registered Karigars, handing over of new ornaments to customers, labour charges paid to Karigars and labour charges realised from customers are duly documented by the related bills, vouchers, registers, entries in the stock register and cash book etc. which are also part of seizure carried out in the course of search operations and Id. Assessing Officer has erred and acted illegally in treating the same as 'undisclosed income'.

4.1 Because the entire stock of gold ornaments as had been found at the time of search stood entered in the books of account and other records 'regularly kept' by the appellant, (which are under seizure also) and provisions of Section 69 are not applicable in relation to the stock of gold ornaments weighing 5090.110 gms (for

which an addition of Rs. 25,45,055) has been made in the assessment).

4.2 Because in any case, the onus law on the Department to prove the applicability of Section 69 of the Act in the present case and such onus having not been undischarged, the addition of Rs. 25,45,055 is not maintainable.

(a) the summons sent to customers had been duly served upon them which goes to prove genuineness of the persons and their identity; (b) the duly sworn in affidavits of the customers were filed in each case (c) through their personal appearances before the Id. Assessing Officer and they had duly owned their respective ornaments.

the genuineness of transactions as, entered in the books of account could not have been disputed and the additions made are illegal.

6. Because, other additions as are listed from Sl. Nos. (b) to (f) in ground No. 2 above are not maintainable even on facts as the appellant had submitted detailed reconciliation in relation to each and every item, duly supported by the documentary and other evidences.

7. Because the addition of Rs. 5,000 on account of deposit in SB Account of Ashok Kumar HUF is prima facie illegal: (b) there existed any material which could go to show that the deposit in question had been made by the appellant-firm in the said account.

8.01 Because the Benarasi Saree Business was being carried on by Smt. Ambika Devi with the aid and assistance of her own funds even during the pre search period and there being no material to hold that the firm had carried this business, such income could not have been added to the income of the assessee.

8.02 Because the provisions of Chapter XIV-B cannot be invoked to assess the income already discussed in the hands of the other "person" in the absence of any incriminating material having been found during the course of search operations which may lend support to the contention of Id. Assessing Officer.

9. Because the assessment has been completed against all the principles of natural justice and the additions as comprised therein are liable to be deleted.

10. Because the order is bad both on facts and in law and is not maintainable.

During the course of argument, the Id. counsel for the assessee did not press ground No. 1 (ii), the same is, therefore, not taken into consideration, while deciding the appeal.

3. The brief facts as taken from the assessment order are that in pursuance of warrant of authorisation under Section 132(1) of the Income-tax Act the search and seizure operation was conducted on 3rd Nov., 1996 at the business premises of the assessee-firm M/s.

Vishwanath Pd. Ashok Kumar, Sarraf and residential premises of Ashok Kumar Sarraf and Ors. The two lockers were also searched. One of the lockers was found empty whereas in other one Ram Nami Jewellery valued at Rs. 16,112 was found. Thereafter, the Assessing Officer issued notice under Section 158BC on 7th July, 1997, which was served upon the assessee. Notice under Section 142(1) dated 8-10-1997 alongwith questionnaire dated 18th August, 1997 was issued and served upon the assessee. The assessee firm in compliance with the above notice filed return of income in Form No. 2B of 16th October, 1997 declaring total undisclosed income of the block as "nil", during the course of the search and seizure operation on 3-11-1996 in the business premises of the assessee and residential premises of Ashok Kumar various books of account, documents and valuables such as cash and jewellery were found.

The details of the main assets found and seized and found but not seized are as under :--

Sl.	No.	Items	Found	Seized
Remarks.-----1.				

Cash 3,34,550 1,89,880 From business premises.

(Rs. 1,89,880 + 18,150 Nil From residential premises2. (i) Gold 7140gms.

Nil From business jewellery (gross weight) premises. (ii) Gold 417 gms.

Nil From residential jewellery (gross weight) premises.

and stones3. Silver jewellery 63.245 Kgs.

From business & residential & coins & silver Nil premises.

coins 222----- After examining the written submissions filed by the assessee and scrutiny of the books of account, loose sheets etc. notice under Sections 143(2) and 142(1) dated 29th October, 1997 alongwith questionnaire were issued to the assessee-firm. In response to these notices, the assessee filed written submissions stating that part compliance of the notice dated 18th August, 1997 has already been made and further compliance is made of the notice and letter dated 29th October, 1997.

4. Through question No. 1 and questionnaire dated 18th August, 1997, the assessee had been asked to explain new gold jewellery weighing 5090.110 gms. recorded on the order book. The item No. 2 of Annexure 'A' of Panchnama prepared for the business premises on 3-11-1996 and order book was found and seized which reveals that out of gold jewellery weighing 7,137 Kgs, the following quantity of gold are appearing in the names of the following partners:-----S. No.

Name & address	Date of receipt	Weight of old ornaments	1	2	3
4-----1.					

Shri Gopal Dutt Dwivedi 3-4-1996 259.150 gms.

Chhoti Piari, Varanasi.2.

Shri Awadhesh Kumar 4-4-1996 482.580 gms.

Dwivedi, Varanasi.3.

Shri Kailash Singh 11-4-1996 458.00 gms.

Nariya, Varanasi.4.

Smt. Rani Devi Hirapura, 12-6-1996 32.180 gms.

Varanasi5.

Shri Kailash Chaubey 13-8-1996 229.450 gms.

Hirapura, Varanasi6.

Shri Ramesh Pandey 17-8-1996 308.150gms.

Gurudham, Varanasi.7.

Shri Mahendra Jaiswal 20-8-1996 293.450 gms.

Chowkaghat,

Varanasi.----- Similar transaction has also been shown in the names of the following persons as mentioned in item No. 15 of Annexure 'A' of the Panchnama dated 3-11-1996:-----S. No. Name & address Date of receipt Weight of old ornaments1 2 3 4----- VNS. 31-8-1996 466.300 gms.----- 5. The

assessee is stated to have filed affidavit of the persons who have deposited their old ornaments for remaking and the Assessing Officer also issued notice under Section 131 of the Income-tax Act and some of these persons appeared before the Assessing Officer and the Assessing Officer recorded the statement of few persons on random basis. The Assessing Officer also recorded statement of Ashok Kumar and asked him to explain how he was maintaining the books of account and how the entries were made in the books of account. The partner of the assessee-firm stated to have explained before the Assessing Officer procedure. However, the Assessing Officer was not satisfied with the explanation given by the persons who have given their old ornaments originally were available for remaking and thus, came to the conclusion that the gold weighing 5090.110 gms. was unaccounted stock of the assessee-firm and made the addition of Rs. 25,45,055.

6. During the search, Rs. 3,16,400 was found from the business premises of the firm. Ashok Kumar partner in the firm made statement at the time and surrendered Rs. 1,89,880, but this figure was not included subsequently in the return filed. The Assessing Officer after considering the explanation of the assessee came to the conclusion that in Kachi Rokar Rs. 56,520.10p. is available to the assessee as well as Rs. 50,000 withdrawn by Ashok Kumar on 26-10-1996 from the Bank. Thus, the Assessing Officer concluded that the assessee should be in possession of Rs. 1,06,520 only. The Assessing Officer further observed that the assessee has also failed to explain the cash amounting to Rs. 18,150 seized from the residential premises of Ashok Kumar and as such, held that unaccounted cash with the assessee firm as on the date of the search was Rs. 1,89,880 + Rs. 1,26,520 + Rs. 18,150 - Rs. 1,06,520 = Rs. 2,28,030 and made addition of this amount. Similarly, the Assessing Officer found silver ornaments silver coins, silver bricks and silver utensils in the premises of the assessee-firm and after considering the reply of the assessee made addition in a sum of Rs. 22,313, Rs. 30,208, Rs. 39,433 and Rs. 20,611 respectively on account of the above articles and treated the same as undisclosed investment. The Assessing Officer also during the course of the block assessment found that the Bank account in the statement of Ashok Kumar (HUF) in Oriental Bank of Commerce, Savings Bank Account No. 329. Since Ashok Kumar was partner in the firm and could not prove about the creation and activity of the HUF, therefore, a sum of Rs. 5,000 was added on account of unexplained deposit in the Bank account of Ashok Kumar (HUF) and treated the same as unexplained investment made by the assessee-firm. We may state here that all the above additions on account of undisclosed income and investment were made in the assessment year 1997-98 i.e., in between the previous year. The search was conducted on 3-11-1996, therefore, the previous year was to be ended on the end of March, 1997. The Assessing Officer also made addition of Rs. 1,02,300 in the assessment year 1996-97 and treated the same as unexplained income of the assessee added substantively shown by Smt. Ambika Devi as income from Sarees business. Accordingly, the Assessing Officer concluded that in the block period the assessee was having undisclosed income in a sum of Rs. 29,92,950.

7. The assessment order was challenged before us by the assessee on the grounds incorporated above. We have heard the Id. counsel for the assessee and the Id. D.R. and carefully considered the rival submissions. The Id. counsel for the assessee filed paper book (1) containing pages 1 to 160 during the course of the argument containing copy of the notice dated 7-7-1997 under Section 158BC, copy of the assessee's letter dated 15th July, 1997, copy of the acknowledgement of return for the block period, copy of the query letter dated 18-8-1997 issued by the Assessing Officer alongwith notice under Section 142(1)/158BC(b), copy of the assessee's letter dated 30-9-1997, copy of the assessee's letter dated 3-10-1997 alongwith the duly sworn affidavit of those customers, who have given the ornaments for re-making, copy of the assessee's letter dated 6-10-1997, alongwith duly sworn affidavit of eight customers, who have given the ornaments for remaking, copy of the notice dated 8-10-1997 under Section 142(1) of the Income-tax Act, copy of the assessee's letter dated 22-10-1997 alongwith record of personal appearance of various customers, who have already appeared before the Assessing Officer on 20-10-1997 on 21-10-1997 and 22-10-1997, copy of the assessee's letter dated 23-10-1997 containing the name and address of the customers, date of receipt of old ornaments, gross weight, receipt and delivery of the new ornaments and wages charged for these works, copy of the notice dated 29-10-1997 issued under Sections 142(1) and 143(2) alongwith query letter issued by the ACIT, Central Circle-II, Varanasi after the change of the jurisdiction, copy of the assessee's letter dated 6-11-1997, furnished in compliance of the Assessing Officer's notice dated 29-10-1997, copies of the reconciliation statement pertaining to cash and gold and silver ornaments on 3-11-1996, copy of the assessee's letter dated 8-11-1997, copy of the balance sheet alongwith the assessment orders from assessment year 1994-95 to 1997-98, copy of the comparative chart of the job work receipts for making/ repairing of ornaments, copies of the cheque of Rs. 50,000 encashed on 23 -10-1997, copy of the bill of ledger charges raised for job work, copies of the assessment orders of Smt. Ambika Devi. The Id. counsel for the assessee also filed supplementary paper book from pages 161 to 309 containing copy of the Panchnama dated 3-11-1996, copies of the relevant books of account and other documents where the old ornaments brought by the customers were entered into with reference to relevant annexures as Panchnama,

copies of the receipts/purchase vouchers of the old ornaments and their receipts, copy of the order book, copy of sale vouchers, copy of Karigar Bahi, copy of the bills issued by Karigars for job work. Copy of the stock register, copy of the cash book, copy of the ledger, copy of the affidavit of Kailash Singh, Advocate and copies of the assessment orders of the assessee and copy of the order for the block period in the case of Smt. Ambika Devi etc. The above paper books were supplied to the D.R. The assessee has given a certificate in both the paper books that all these documents were furnished before the Assessing Officer. The Id. D.R. did not dispute about the correctness of the certificate given by the assessee about filing of the papers before the Assessing Officer. The Id. D.R. disputed that the reconciliation statement filed at page 176 in the paper book was not available. Therefore, the fact remains that the papers as submitted in the paper book were available with the Assessing Officer. The Id. counsel for the assessee, besides relying upon the grounds of appeal argued that there was no warrant of search in the name of assessee-firm and as such the entire proceedings vitiated. The Id. counsel for the assessee relied upon the *Ajit Jain v. Union of India* [2000] 242 ITR 302 (Delhi). The Id. counsel for the assessee argued that notice under Section 158BC was issued in the name of the assessee and since there was no valid authorisation to search the premises of the assessee, therefore, the assessment is invalid. The Id. counsel for the assessee further argued that before issuing search warrant, the Director should have reason to believe under Section 132(1)(c) that any person is in possession of money, bullion & jewellery etc. However, in this case, since there was no warrant of authorisation, therefore, there is no question of having reason to believe that the assessee was having possession of money, bullion etc.

The Id. counsel has taken us to the definition of the person as provided under Section 2(31) of the Income-tax Act. The Id. counsel for the assessee further argued that since no valid notice has been served upon the assessee, therefore, the assessment is illegal. He has relied upon the judgment of the Hon'ble Supreme Court in the case of *ITO v. Ch. Atchiaiah* [1996] 218 ITR 239'. The Id. counsel for the assessee also relied upon the order dated 31-7-2001 of the Income-tax Appellate Tribunal, Lucknow Bench in the case of *Narendra Kumar Jain v. Dy. CIT* [2001] 119 Taxman 213 (Mag.).

8. On the other hand, the Id. D.R. argued that there was no illegality in the search warrant. It is argued that as according to search warrant, issued under Section 132(1), the residential premises of Ashok Kumar and business premises of the assessee-firm was searched though warrant of search was in the name of Ashok Kumar. The Id. D.R. was directed during the course of the argument to produce the original search warrant, which he has produced the same and we have perused the same. The search warrant was issued in the name of Ashok Kumar however, it was directed that the residential premises of Ashok Kumar and business premises of the firm M/s. Vishwanath Pd. Ashok Kumar be searched. Therefore, it is clear that there was no authorisation in the name of the assessee-firm and as such, there was no search warrant in the name of the assessee-firm. The Id. D.R. on the basis of the search warrant argued that though Section 158 BC is not applicable, but the Assessing Officer could proceed against the assessee firm under Section 158BD of the Income-tax Act. There is no need to have warrant of search in the name of the assessee. The Id. D.R. further argued that the entire chapter XIV-B is applicable. The Id. D.R. further argued that there was no dispute that incriminating documents were found at the time of search from the premises of the assessee-firm. The Id. D.R. relied upon the judgment of Allahabad High Court in *Digvijay Chemicals Ltd. v. Asstt. CIT* [2001] 248 ITR 381 and judgment of Madras High Court in *Sakthivel Bankers v. Asstt. CIT* [2002] 255 ITR 144. The Id counsel for the assessee in reply to the arguments of the Id. D.R. argued that the Id. D.R. admitted that there was no search warrant in the name of the assessee and as such search is not valid in the premises of the assessee-firm. He has argued that Ashok Kumar is individual. According to him, even in the search warrant, it is nowhere mentioned that Ashok Kumar was partner in the firm. He has argued that since there was no search warrant in the name of the assessee-firm and as admitted by the D.R., therefore, no legal order could be passed under Section 158BC. According to the Id. counsel for the assessee for proceeding under Section 158BD, the Assessing Officer should be satisfied that there was undisclosed income belonging to any other person other than the person searched under Section 132 and in this case no satisfaction has been recorded by the Assessing Officer in the order of the firm or in the order of Ashok Kumar. The Id. counsel for the assessee further argued that many correspondences were made

between the assessee and the Assessing Officer but Assessing Officer nowhere stated that he is proceeding against the assessee-firm under Section 158BD. The Id.counsel for the assessee further argued that even the same Assessing Officer in the case of Ashok Kumar in whose name search warrant was issued has not recorded anywhere in the assessment order that he was satisfied that the assessee-firm has undisclosed income. The Id.counsel for the assessee further argued that the case law relied upon by the Id. D.R. in Sakthivel Bankers's case (supra) has not decided the question about the satisfaction and as such the same is not applicable.

He has further argued that the Assessing Officer should mention in the notice that he was proceeding under Section 158BD. The Id. counsel for the assessee relied upon the order of the ITAT., Chandigarh Bench in the case of Ved Prakash Sanjay Kumar v. Asstt. CIT [2000] 66 TTJ (Chd.) 442. The order of the ITAT, Allahabad Bench in the matter of Dr. Ajay Kumar Agarwal v. Asstt. CIT [2001] 71 TTJ (All.) 445, the order of the Delhi Bench in the case of India Seed House & Asstt. C/r[2000] TTJ (Delhi) 241, (Third member case) and the order of the ITAT, Delhi Bench in the matter of ITO v. Ashok Kumar Agrawal [1990] 38 TTJ (Delhi), 189, order of the ITAT, Allahabad Bench in the matter of Ashok Kumar Jaiswal v. ITO [IT Appeal No. 448 of 1988 dated 17-7-1992]. However, the Id.counsel for the assessee during the course of the argument fairly conceded that in view of the statement of the Id. D.R. that there was no search warrant in name of the assessee-firm, the order in the case of Narendra Kumar Jain (supra) of Lucknow Bench may not be applicable.

The Id. D.R. however, argued that the Assessing Officer issued notice to all of them together after the search and as such the Assessing Officer was satisfied in proceeding under Section 158 BD. The Id. D.R.further argued that the Assessing Officer has legally proceeded against the other persons i.e., the assessee-firm according to law. The Id.D.R. further argued that there is no requirement under Section 158BD of the Income-tax Act for the Assessing Officer to record his satisfaction before issuing notice or in the assessment order. The Id. Counsel for the assessee on merits argued that all the gold ornaments are recorded in the books of account. According to him, even the Assessing Officer has mentioned at

page 4 of the order as well as in the questionnaire dated 18-8-1997 that from the seized record, it was revealed that the gold jewellery weighing 7.137 Kgs. was found to be mentioned against the name of 17 persons for which the Assessing Officer sought the detailed explanation. The Id. counsel for the assessee on the basis argued that the entire gold jewellery was recorded in the records seized by the Department and as such, there was no undisclosed income or investment available in the case of the assessee. The Id. counsel further argued that the assessee has maintained the register according to G.S. 12 which was maintained for more than earlier years under Gold Control Act and books of account and all the details are mentioned in the stock register. The Id. counsel for the assessee further argued that the purchases and sales vouchers are maintained along with, the vouchers of the job work of the re-making of the jewellery and all the items are found to have been mentioned in the record seized by the Department. He has further argued that in the regular proceedings for the assessment the Department has accepted income from job work in the earlier years also. He has further argued that stock register as well as cash book was seized which shows that all the entries are made of the gold jewellery found in the premises of the assessee. He has further argued that the payments to Karigars have been found to be entered in the records. He has taken us to page 176 of the paper book where all the details are mentioned. According to the Id. counsel for the assessee, labour charges have been entered into the same prior to the search. He has referred to PB's pages 254 to 262 which are the copies of the cash book in which all the payments have been mentioned before search. The Id. counsel for the assessee further argued that since all these entries are made in the books of account, therefore, proceedings under Section 158BC are not applicable. The Id. counsel for the assessee has taken us to pages 177 to 206 in the paper book which are the copies of the seized documents, which shows that all the sale purchase of jewellery taken for remaking have been entered into the record, which was seized by the Department. The Id. counsel for the assessee has also taken us to page 64 of the paper book, which is the reconciliation of the gold jewellery ornaments. The Id. counsel for the assessee has also taken us through various documents in the paper book to show that all the gold jewellery entered into the records prior to the search including the sale purchase etc. and comparative chart was submitted to

the satisfaction of the Assessing Officer. According to him, the proceeding of the search was in the mid of the year and regular return was filed subsequently and no difference or defect was found therein would go to show that the assessee has entered all the gold jewellery before search and as such, it was not a case of block assessment. The Id. counsel for the assessee further argued that the cash was entirely reconciled from the books and the copy of reconciliation statement is filed at pages 59 & 60 of the paper book and are supported by documentary evidence also. The Id. counsel for the assessee further argued that though Ashok Kumar gave his initial statement and surrendered the cash of Rs. 1,89,880, but he has retracted from his statement and explained that his earlier statement was wrong as he was away from the shop for the last many days and as such he was not aware of the exact cash available at the business premises of the assessee. He has retracted and proved by documentary evidence to the satisfaction of the Assessing Officer that the entire cash is re-conciled from the cash book and other vouchers of the sales and purchases. The Id. counsel for the assessee argued that the entire cash was reconciled and as such, the Assessing Officer has wrongly made addition in respect of the cash also. The Id. counsel for the assessee relied upon Asstt. CIT v. Mrs. Sushiladevi S. Agrawal[1994] 50 ITD 524 (Ahd.) and India Seed House's case (supra) as well as relied upon the judgment of Allahabad High Court in Dr. S.C. Gupta v. CIT[2001] 248 ITR 782. The Id. counsel for the assessee further argued that the silver ornaments and other items of silver have been duly reconciled from the records as well as supporting vouchers, but the Assessing Officer wrongly disbelieved the same. He has further argued that the assessee has shown all these vouchers in the regular assessment and the department has not disputed the same and as such, it cannot be believed that the assessee would not have shown the same details in the return of the income at the end of the previous year. The Id. counsel further argued that the addition on account of cash Rs. 5,000 of Ashok Kumar (HUF) is illegal and unwarranted under Section 158BC. The Id. counsel for the assessee further argued that the addition on substantive basis in respect of the income of Ambika Devi is illegal and cannot be added as it was not undisclosed income as contained under the definition of Chapter XIVB. The Id. counsel for the assessee further argued that each case has its own facts and relied upon CIT v. Sun Engg. Works (P.) Ltd. [1992] 198 ITR 297(SC).

9. On the other hand, the Id. D.R. argued that the inventory of the books of account seized, copy of which is filed at page 164 of the paper book shows that the books were not written upto 3-11-1996. He has further argued that the details mentioned at pages 177 to 206 in the paper book are purchase vouchers of the gold and these purchases have not been entered into the books of account maintained in the regular course of the business. The learned D.R. on a specific question asked by the Bench admitted that the purchases vouchers are not disputed. The Id. D.R. further argued that the order book was written from 3-4-1996 to 20-8-1996 and it has not recorded the source of purchases in the books and the D.R. further argued that all the new jewellery was found.

The learned Departmental representative relied upon *Fakir Mohmed Haji Hasan v. CIT* [2001] 247 ITR 290 (Guj.) *Dayachand v. CIT* [2001] 250 ITR 327, *CIT v. K.T.M.S. Mohammad* [1997] 228 ITR 113, and *Chuharmal v. CIT* [1988] 172 ITR 250 SC and *Dr. S.C. Gupta's case* (supra). The Id. D.R. further argued that no description of jewellery has been mentioned in the bills referred to above from pages 177 to 206. The learned D.R. further argued that the Assessing Officer has disbelieved all the persons who have given their old ornaments to the assessee for re-making and as such, the assessee has made up the theory after-thought. The Id. D.R. further argued that in the stock register the items given to the karigars have not been mentioned and no description is given. He has further stated that no earlier payment was shown to the karigars. The Id. D.R. further argued that the vouchers are after-thought to cover up the case of the assessee. The Id. D.R. further argued that the cash was surrendered in a sum of Rs. 1,89,880 in the initial statement of Ashok Kumar. The Id. D.R. further argued that the cash book was written upto 17-10-1996 and all the subsequent entries upto 3-11-1996 cannot be taken into consideration. The Id. D.R. further argued that no vouchers of various items of silver were produced to the satisfaction of the Assessing Officer and as such the Assessing Officer was justified in making the addition on that account.

The Id. D.R. further argued that no books of account were written in the regular course of business. He has relied upon *State Bank of Indian*. *CIT* [1986] 157 ITR 67 and *Sheraton Apparels v. Asstt. CIT* [2002] 256 ITR 20 (Bom.). The Id. D.R. further argued that the order of the I.T.A.T., Chandigarh Bench in the case of *Ved*

Prakash Sanjay Kumar (supra) is not applicable. The Id. D.R. further argued that there was sufficient material upon which notices were issued together and as such, the satisfaction of the Assessing Officer could be presumed. The Id. D.R. further argued that the onus was on the assessee to explain all the entries and discrepancies and as such the Department was justified in taking action against the assessee. The Id. counsel for the assessee in rejoinder argued that the Assessing Officer never invoked Section 158 BD and there is no whisper at all in any of the proceedings. The Id. counsel for the assessee argued that even in the Panchnama it was mentioned that the warrant was in the case of Shri Ashok Kumar and M/s. Vishwanath Prasad Ashok Kumar and as such, the Assessing Officer proceeded on the basis that such warrant was issued in the name of the assessee firm also, which was not however, a fact.

According to the Id. counsel for the assessee, therefore, the Assessing Officer did not satisfy himself as required under Section 158BD. Since the Assessing Officer proceeded on the assumption that the warrant was issued in the name of the assessee-firm also, therefore, the satisfaction as required under Section 158BD was not complied with. The Id. counsel for the assessee further argued that the Tax Act has to be read as a whole and to be interpreted strictly and no equity could follow. The Id. counsel further argued that since Id. D.R. argued that all the gold jewellery were purchased and the same were not given for remaking would go to show that it was not a case of undisclosed income/investment as the Id. D.R. admitted this fact. The Id. counsel for the assessee argued that the Assessing Officer has made the addition at page 18 of the assessment order in respect of the gold weighing 5090.110 gms. on account of unaccounted stock. However, the Id. D.R. admitted that it was accounted for as purchases therefore we feel that the appeal of the assessee is liable to be allowed. The Id. counsel for the assessee further argued that all the vouchers from pages 177 to 206 in the paper book were seized by the Search Party and the same were entered into the books of account as well as in the Karigar register. The Id. counsel for the assessee further argued that the order book, karigar bahi, cash book etc. were seized in which all the entries in respect of which additions have been made have been shown. The Id. counsel for the assessee further argued that all the entries are made in the stock register which was also seized by the Search Party. The Id. counsel for the

assessee further argued that burden of proof was on Deptt. under Section 158BD is to prove that the undisclosed income is discovered. However, all the items are found to have been mentioned in the record and as such, the assessee has discharged his onus of proof. On the other hand, the Assessing Officer has not brought any material on record to the contrary. The Id. counsel for the assessee lastly argued that the Id. D.R. cannot make out a case for the seizure under Section 158BD from Section 158BC. The Id. counsel for the assessee further argued that the satisfaction of the Assessing Officer should be somewhere borne out from the record about the undisclosed income of the assessee. He has argued that it should not be the satisfaction of the Search Party. The Id. counsel for the assessee further argued that originally the Assessing Officer Ward-4, Varanasi ,was having jurisdiction of the assessee but it was transferred to ACIT, Central Circle-I, Varanasi who issued the show-cause notice under Section 15 SBC and subsequently, further case was transferred to the ACIT, C.C.-II. Varanasi, as such, the Assessing Officer proceeded under the assumption that there was a search in the premises of the assessee and proceeded under Section 158BC without complying the requirement of Section 158BD. The Id. counsel for the assessee argued that the case law relied upon by the Id. D.R. are not applicable. The Id. counsel for the assessee explained that the record and stock register are maintained according to Gold Control Act, though it is not applicable at present. In case of job work only the quantity is mentioned in the bills but in the case of purchases, the value and quantity are recorded. The Id. counsel for the assessee on that basis argued that all the vouchers are maintained on this pattern, which were also seized by the Department. The Id. counsel for the assessee prayed that the assessment order may be set aside and quashed.

10. We have bestowed our careful consideration. The entire arguments of both the representatives of the parties raises preliminary issue and issues on merits.

11. The preliminary issues raised is whether the Assessing Officer has recorded his satisfaction as required under Section 158BD of the Income-tax Act before proceeding to make assessment in respect of Block Period under chapter XIV-B of the Income-tax Act. Before proceeding to decide the merits of the appeal, we feel it appropriate to decide the above preliminary issue first.

12. Chapter XIV-B inserted by Finance Act, 1995 w.e.f. 1st July, 1995 provides special procedure for assessments in search cases. Section 158BC of the Income-tax Act provides special procedure for block assessment. Where any search has been conducted under Section 132 of the Income-tax Act or books of account other documents or assets are requisitioned under Section 132A of the Income-tax Act in the case of any person, the Assessing Officer shall serve a notice to such person requiring him to furnish within such time, not being less than 15 days and thereafter after providing opportunity and serving a notice shall pass the assessment order in respect of seized incriminating material recovered during the course of the search operation. However, another provision under Section 158BD of the Income-tax Act provides procedure for the assessment in respect of undisclosed income of any person other than the person searched. It provides that 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 of the Income-tax Act or whose books of account or other documents or assets was 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 against such other person and the provisions of Chapter XIV-B shall be applicable. The distinction between these two provisions under chapter XIV-B would be that for Section 158BC of the Income-tax Act there should be a search and consequent to the search there was recovery and seizure of incriminating material and the Assessing Officer after following the procedure prescribed shall pass the assessment order. However, in case of the assessment under Section 158BD of the Income-tax Act, search party shall have to hand over the seized material revealing undisclosed income to the Assessing Officer having jurisdiction over the person in whose case search has been made.

If the Assessing Officer having seized record with him and after satisfying himself from the seized record that there is any material revealing undisclosed income belonging to any other person other than the person with respect to whom search was made under Section 132 or books of account or documents requisitioned under Section 132A, then to hand over the seized material and the documents to the Assessing Officer having jurisdiction over such other person and then that

Assessing Officer having jurisdiction over such other person shall proceed against such other person under Section 158BD to determine the undisclosed income by following the procedure provided. Therefore, the crux of the difference between these two provisions under Chapter XIVB is that for assessment under Section 158BC, the Assessing Officer is not required to record his satisfaction before proceeding to determine the undisclosed income in respect of block period. However, in the case of Section 158BD, the Assessing Officer who had been handed over the seized material, documents and assets etc. by the search party will have to satisfy himself that any undisclosed income belongs to any person other than the person searched under Section 132 or whose books of account or documents were requisitioned under Section 132A of the Income-tax Act. Therefore, though it is not provided under the Act what satisfaction is to be recorded by the Assessing Officer but the Act clearly provides that before proceedings under Section 158BD the Assessing Officer who received the seized material and documents from the search party, shall have to be satisfied that any undisclosed income belongs to any person other than the person searched. The difference is created in these two provisions of law under the same chapter XIVB that it should be the objective satisfaction of the Assessing Officer and that satisfaction of the Assessing Officer has to be on the material found during the search and the Assessing Officer will have to identify that such seized material which reveals the undisclosed income of other person other than the person in whose case search has been made under Section 132(1). In case under Section 158BC the search is to be conducted on the basis of warrant of authorisation, which is issued by the different authorities like Director General or Director under Section 132 in consequence of information in their possession and after recording the reasons to believe that any person would not produce the books of account or documents, unless search is conducted. Therefore, in cases of search under Section 132 in which assessment under Section 158BC is to be made the Department was having information and that prior to issue of warrant of authorisation, the Department would also be having reasons to believe that the person in whose respect warrant of such authorisation has been issued would not be producing the books of account and other documents. However, in case of 158BD, such information which necessitates search under Section 132(1) of

Income-tax Act are not available with the Department, therefore, it appears that the legislature in order to provide safeguard and avoid unnecessary harassment to the citizens has directed that after recovery of the alleged incriminating evidence against such other person other than the person searched, the Assessing Officer will have to satisfy himself from the material that undisclosed income belongs to such other person. Therefore, satisfaction of the Assessing Officer under Section 158BD should not be treated as mere formality but it should be the positive satisfaction that the seized material reveals undisclosed income in case of other person. The tax law has to be interpreted strictly and has to be given meaning. The above noted distinction in both the provisions under Chapter XIVB is therefore, material and has to be complied with by the IT Authorities before proceeding under Section 158BD. Hon'ble Allahabad High Court in the matter of Digvijay Chemicals Ltd. (supra) has dealt with this issue and referred to the requirement of satisfaction by the Assessing Officer. "It is mentioned in this judgment that there was sufficient satisfaction by the DCIT, Amritsar for handing over the books of account and documents to the Assessing Officer of the appellant and this matter has been dealt with in para 22 of the Tribunal's Order, where it has been held that the DCIT of Income-tax, Amritsar was satisfied that the undisclosed income mentioned in the seized document pertains to the appellant." Therefore, it is necessary before proceeding under Section 158BD that the Assessing Officer having seized material should be satisfied that any undisclosed income belongs to any person other than the person searched.

13. The Hon'ble Madras High Court in the matter of Sakthivel Bankers (supra) has held :-- It has been rightly found by the Tribunal that the notices issued by the Assessing Officer, to whom the records of the persons against whom notices had been issued, had been transferred, were perfectly valid and the application of the provisions of Chapter XIVB was equally valid in their cases as well.

However, with great respect, to the aforesaid judgment, the point of satisfaction has not been decided in this authority. Only validity of the notices were questioned.

14. The Income-tax Appellate Tribunal, Chandigarh Bench in the matter of Ved Prakash Sanjay Kumar (supra), while dealing with the similar questions involved in this appeal as well as the question in case where the Assessing Officer is the same in the case of the person searched and such other person has held in the head note :-- Search and seizure-Block assessment-proceedings under Section 158BD--Before proceeding against B under Chapter XIV-B on the basis of search made on A where the Assessing Officer conducting search and in possession of material seized is the same in the case of B, the Assessing Officer has to arrive at a positive and objective satisfaction on cogent material to be recorded in black and white, that the material seized in search of A disclose undisclosed income of B--In this case, on the basis of search at the residential premises of partners of assessee-firm, proceeding for block assessment were initiated against assessee-firm without recording the requisite satisfaction under Section 158BD--Proceedings were therefore, void and ab initio. We feel that even if the arguments of the Id. D.R. that satisfaction is not required to be recorded in writing, are accepted, yet some positive satisfaction on the part of the Assessing Officer is enjoined by the provisions of Section 158BD. We feel that such satisfaction cannot be subjective satisfaction of the Assessing Officer and that it has to be an objective satisfaction, which has to be based on the material found during the search of 'A'. This leads to the logical conclusion that the basis of satisfaction of Assessing Officer has to be the material found during the search and unless such material is identified and brought on record and is in some way jotted down on the file of the Assessing Officer, such satisfaction cannot be correctly reached, leave aside the argument whether it is required to be recorded or not.

Thus, we hold that satisfaction by Assessing Officer under Section 158BD has to be reached in some positive way, in black and white and on the basis of material found during search, which discloses that some undisclosed income belongs to the assessee. We may refer here to the decision of the Tribunal, Nagpur Bench, in the case of Smt.

Jatan Bai Baid v. Asstt. CIT[1998] 96 Taxman 24 (Nag.), wherein it was held that in the absence of any positive satisfaction by the Assessing Officer of undisclosed income of assessee and in the absence of any reference to Section 158BD in the

notice issued, the impugned notice was invalid.

In view of the foregoing it is clear that satisfaction of the Assessing Officer has to be evidenced by recording or by proving on the file, with reference to the material and facts, that undisclosed income in consequence of any search belongs to the assessee. The "Other person" mentioned in Section 158BD comes into the picture only by virtue of such satisfaction of the Assessing Officer on the basis of material showing undisclosed income of such other person and it is only after such satisfaction and transmission of relevant material that the other Assessing Officer has to take action and proceed to issue notice under Section 158BC. Thus, the powers of the Assessing Officer under Section 158BD cannot be invoked in a light and arbitrary manner and without complying with basic pre-requisites specified in Section 158BD. We feel that the object underlying the provisions of Section 158BD is not to give unbridled power to the Assessing Officer to proceed against any person without reaching satisfaction in an objective manner based on the cogent material/documents seized at the time of search. The satisfaction of the Assessing Officer is not a mere formality but it should be positive satisfaction that the seized material pertains to the other person and reveals undisclosed income of that other person. We feel that the provisions of Section 158BD, incorporated in Chapter XIV-B dealing with special procedure for assessment of search cases, have to be construed strictly, as the same provide a launching pad for the Assessing Officer to assume jurisdiction and proceed against a person other than the searched person, so as to rope him within the provisions of Chapter XIV-B. We feel that the Assessing Officer has to make himself sure of the correctness of the seized documents by proper examination and unless the Assessing Officer is fully satisfied that such documents by proper examination and unless the Assessing Officer is fully satisfied that such documents disclose undisclosed income of another person, he shall not proceed against such other person on the basis of such documents and that too without bringing them on record.

We hold that the notice issued by him straight away to the assessee-firm under Section 158BC is void ab initio. We feel that the said provisions have been incorporated in the Act for being followed in the spirit in which they have been enacted and any violation thereof by the Assessing Officer leads to illegality which

is fatal to the assessment proceedings and this illegality cannot be remedied by restoring the matter to the file of the Assessing Officer. Accordingly, we quash the assessment framed in this case without following the due process of the law as contemplated under the provisions of Section 158BD. Since the contentions of the Id. counsel have been accepted on legal grounds, we do not propose to deal with the other grounds raised in the appeal.

15. Chapter XIV-B in the Income-tax Act has nowhere provided how the satisfaction is to be recorded. The Income-tax Act has provided under Section 147 that the satisfaction has to be recorded in writing by the Assessing Officer before proceeding for re-assessment. Though such record of satisfaction has nowhere mentioned under Chapter XIVB, yet the legislature has made this distinction in both the provisions under Sections 158BC and 158BD and directed that before proceeding under Section 158BD, the Assessing Officer who has been handed over the record of the seized material by the Search Party will have to indicate in any form whatsoever about his satisfaction that undisclosed income belongs to such other person other than the person with respect to whom search was made under Section 132. The Panchnama was prepared by the Search party in which in column No. (A), it was mentioned by the Search party that the warrant was in the case of Shri Ashok Kumar and M/s.

Vishwanath Prasad and Ashok Kumar i.e., the assessee-firm. In order to verify in whose name search warrant was issued, we have called for the search warrant, which was produced by the Id. D.R. and we have perused the same and came to know that there was no authorisation in the case of the assessee-firm. However, it was mentioned that the authorisation was issued under Section 132 in the name of Shri Ashok Kumar only with directions to search the residential premises of Ashok Kumar and business premises of M/s. Vishwanath Pd. Ashok Kumar. Since there was no valid authorisation in the name of the assessee-firm, therefore, the provisions of Section 158BC would not be applicable to the case of the assessee. The Hon'ble Delhi High Court in the matter of Ajit Jain (supra) has held :-- Search and seizure-Block assessment-condition precedent for block assessment valid search--Search can be made only in case of information which results in reason to believe that person in possession of money or other asset will not disclose it for

income-tax purposes-Intimation simpliciter by CBI that cash was found in the possession of individual--Individual having a reasonable explanation for such possession--No "information" for purposes of Section 132--Search based on such information and consequent block assessment were not valid -Income-tax Act, Sections 132, 158BC. The mere fact that the petitioner was in possession of the said amount could not straight away lead to the inference that it was his undisclosed income.

The Assessing Officer in the case of the assessee has also mentioned in the opening of the impugned assessment order that:-- In pursuance of warrant of authorisation under Section 132(1) of the Income-tax Act, the search and seizure operation was conducted on 3-11-1996 at the business premises of the assessee-firm and residential premises of Ashok Kumar and Ors.

It appears from the above facts and circumstances that the search party as well as the Assessing Officer have proceeded against the assessee firm under Section 158BC of the Income-tax Act under the assumption that valid authorisation under Section 132 to search the premises of the assessee was also issued in the name of the assessee-firm, which is factually incorrect. Since there was no authorisation under Section 132 in the case of the assessee-firm, therefore, the search if any, consequent to that would be illegal. Though legally for proceeding under Section 158BD of the Income-tax Act, the Assessing Officer will have to proceed in accordance with the procedure prescribed under Section 158BC but the authorities below must have mentioned somewhere that it was a case under Section 158BD. The Income-tax Appellate Tribunal, Bangalore Bench, in the matter of Microland v. Asstt.

CIT[1998] 67 ITD 446 has held : All the papers on record were merely in the name of "P". Therefore, as there was no valid search in the case of the assessee the assessment made under Section 158BC was invalid and void in law.

There was again no indication anywhere that the assessment had been made under Section 158BD. The appeal filed by the assessee is allowed. The Department as such cannot give surprise to the assessee at the appellate stage by mentioning that there was no authorisation of search in the name of the

assessee-firm. The satisfaction has to be arrived at by the initial Assessing Officer before proceeding under Section 158BD. It is undisputed that the Assessing Officer in the case of the assessee-firm was ITO., ward-4, Varanasi. This fact is mentioned in the Panchnama also, but later on the case was transferred to ACIT, Central Circle, I, Varanasi. In April, 1997, the ACIT (Central Circle), Varanasi issued show-cause notice dated 7-7-1997 under Section 158BC(a) to the assessee-firm but later on the record was again transferred to ACIT, C.C.-II, Varanasi some time in the month of October, 1997. It appears that the authorities below have proceeded against the assessee firm under Section 158BC instead of proceeding under Section 158BD read with Section 158BC, therefore, the authorities below have not cared to mention anywhere that the Assessing Officer was satisfied that any undisclosed income belongs to such other person other than the person who is searched under Section 132 of the Income-tax Act. It is undisputed fact that the search material was never handed over to the ITO, Ward-4, Varanasi who was having jurisdiction over the assessee-firm. Therefore, there is no question of his satisfaction at all as required under Section 158BD of the Income-tax Act.

16. We have perused the original assessment record, in which ACIT, C.C.-I, Varanasi on 7-7-1997 issued notice under Section 158BC(a) against the assessee-firm and no satisfaction as required under Section 158BD is found to have been mentioned. Similarly, in the block assessment order of Shri Ashok Kumar dated 27-11 -1997, the same Assessing Officer, ACIT, CC-II, Varanasi has nowhere mentioned about this satisfaction about undisclosed income of other person that the person searched under Section 132 of the Income-tax Act, rather similarly, the Assessing Officer mentioned about the search in pursuance of the warrant of authorisation under Section 132 as is recorded by the Assessing Officer in the case of the assessee-firm. The Id. D.R. tried to make out an altogether new case for the Department at the appellate stage under Section 158BD, but the arguments of the Id.D.R. are not substantiated from the record. The Assessing Officer has not complied with the statutory provisions of Section 158BD in this case, which resulted into illegalities committed by him. It is nowhere clear from the assessment record, Panchnama or the assessment record whether the Assessing Officer at all has proceeded under Section 158BD. Therefore, there is no question

of his recording satisfaction as required under Section 158BD. Keeping in view the above discussion and the authorities referred to above, the entire assessment order is vitiated due to non-compliance of the provisions of the law. We decide the preliminary issue in favour of the assessee and against the Department.

17. As a result, we set aside and quash the assessment order. Though in view of the above finding, we need not decide the issues on merits of the case, since some important questions are involved, therefore, we decide the remaining issues on merits also.

18. Chapter XIVB starts with Section 45 8B and it has provided the definition of 'Block Period' and 'Undisclosed Income'. The definition of undisclosed income is relevant in this case which is reproduced below:-- (b) "Undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act.

19. Chapter XIVB consists of Sections 158B to 158BH, which was inserted in the Income-tax Act with effect from 1-7-1995. We have taken certain aims and objects of inserting this Chapter under the Income-tax Act from the text book 'Income-tax' Authored by D.M. Harish. It is stated in this book.

The justification for inserting this Chapter was explained by the Finance Minister Dr. Manmohan Singh in his Budget Speech for 1995-96 in the following words:-- The searches conducted by the Income-tax Department are an important means of unearthing black money. However, undisclosed income has to be related to the different year in which income was earned and such assessments are unduly delayed. In order to make the procedure more effective, I am proposing a new scheme under which undisclosed income detected as a result of search shall be assessed separately at flat rate of 60%.

20. Section 158B(&), which is reproduced above, shows that briefly the following conditions must be satisfied, to treat income as 'undisclosed income' i.e., (1) It must be in the form of money, bullion, jewellery other valuable articles or things or should constitute income or property based on any entry in the books of account of transaction.

(2) It should be clear that the assets or entry in the books represents income or property which have not been disclosed or would not have been disclosed for the purpose of this Act.

21. Section 158BA provides for assessment of undisclosed income as a result of search and Section 158BA(3) provides that "where assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in Sub-clause (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under Sub-section (1) of Section 139 for any previous year has not expired and such income or transaction relates to such income are recorded on or before the date of search or requisition in the books of account or other document maintained in the normal course relating to such previous year, the said income shall not be included in the block period". Sub-Section (3), therefore, takes care of special situation. There could be a situation where part of the income contained in the block period relates to the assessment for which the previous year has not ended or on which date of filing of the return has not expired. The same is the case before us as the search was conducted on 3-11-1996 in between the previous year and the previous year has not ended. The assessee, therefore, could claim that income or property found in the search is not undisclosed as the last date for disclosing the same has not yet passed by filing a return. The assessee also could claim that the evidence recovered would not fall in the definition of undisclosed income or that the same have been disclosed or would be disclosed. The claim of the assessee could be accepted if the assessee shows that the income or the transactions relating to such income are recorded in the books of account or documents maintained in the normal course of business on or before the search.

22. Circular No. 717 dated 14th August, 1995 is issued by the CBDT on the subject of Finance Act, 1995 - explanatory notes on provisions relating to direct taxes. Clause 39.3 of this circular provides salient features of the scheme provided under Chapter XIV-B. The relevant clause is reproduced from this circular: Where the previous year has not ended or the date of filing the return of income under Section 139(1) for any previous year has not expired, the income determined on the basis of transactions recorded on or before the date of the search in the books of account or other documents maintained in the normal course relating to previous year shall be reduced.

23. Thus, the requirement of Section 158BA(3) that the said income shall not be included in the block period are that:-- (1) where assessee proves to the satisfaction of the Assessing Officer that any part of income referred to in Sub-section (1) of Section 139 relates for any previous year has not expired.

(2) such income or transaction relating to such income are recorded on or before the search.

(3) and such recording are in the books of account or other documents maintained in the normal course relating to such previous year.

Though block assessment period in the present appeal starts from the assessment years 1987-88, to 1997-98, yet the entire additions are made in the assessment year 1997-98, except of Rs. 1,02,300 in the assessment year 1996-97 in respect of unexplained income added substantively in the hands of the assessee of Smt. Ambika Devi. There is no dispute that first requirement is satisfied as search was conducted on 3-11-1996 and the previous year has not expired. Let us examine whether it is a case of undisclosed income or the assessee is entitled to the benefit of Section 158BA(3) of the Income-tax Act.

24. The Assessing Officer 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 replied 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 Assessing Officer and was examined under Section 131. The Assessing Officer recorded the statement of some of these customers on random basis under Section 131 of the Income-tax Act. All the customers affirmed their dealings with the assessee and also affirmed that they had hand over their jewellerys for remaking to the assessee against the receipts. The Assessing Officer 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, Roka Bahi, Ledger, 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 Assessing Officer did not believe the affidavits and statement of the customers as he found discrepancy in their statements. The Assessing Officer 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 Assessing Officer noticed that the aforesaid persons have made incoherent statements and also did not know English. The Assessing Officer 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 Assessing Officer.

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 Assessing Officer at page 4 of the assessment order himself mentioned that gold jewellery weighing 5090.1 10 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 Assessing Officer 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 Assessing Officer 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 22-10-1997 to prove the dealings 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 Manjul had already appeared before the Assessing Officer and was examined under Section 131 by the Assessing Officer. The Assessing Officer also admitted to have examined eight persons out of these 17 parties on random basis under Section 131 of the Income-tax Act. All these customers have admitted their dealings with the assessee in their affidavits as well as in their statements under Section 131 of the Income-tax Act. The Assessing Officer 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 Assessing Officer. The Assessing Officer 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 158BC 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 158BC 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 Assessing Officer acted beyond his jurisdiction. The reasons given by the Assessing Officer 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 Assessing Officer 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 Assessing Officer 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 under Section 158B(b) of the Income-tax Act. The case of the assessee is squarely covered by Section 158BA(3) of the Income-tax Act and the CBDT Circular No. 717 (supra) and as such, the said income cannot be included in the block period.

25. The Income-tax Appellate Tribunal, Delhi Bench (Third Member) in the matter of India Seed House (supra) has decided:-- However, the assessee is able to prove from a seized paper itself that it was making purchases on credit and was making payments from realisation of sales and such paper cannot be ignored. Thus, there was no justification for making any addition on estimate basis.

The ITAT, Allahabad 'B' Bench in the case of Ashok Kumar Jaiswal (supra) has decided the matter having dealing with karigars and has held :-- The Department cannot capitalise merely by saying that the karigars were not available at the given address when their identity expressly stated by accepting other transactions with them. On a consideration of totality of facts and circumstances of the case, we hold that there is no justification whatsoever to treat the balance in the accounts of the karigars which go to make the aggregate of 33.937 kgs. of silver ornaments in the case of Ashok Kumar and 64.139 Kgs. in the case of M/s. Benaras Alankar Mandir as having not been proved.

The addition was accordingly deleted. The judgment of Madras High Court in the case of K.T.M.S. Mahamood(suprd) is distinguishable as in this case, the

assessee has failed to prove that the cash does not belong to him.

26. The Id. D.R. also relied upon Chuhamal's case (supra), in which also the assessee failed to discharge their burden and on the basis of Section 110 of the Evidence Act, the case was decided against the assessee. The petition of the assessee was dismissed. The facts are clearly distinguishable. The Id. D.R. also relied upon the judgment of Allahabad High Court in the matter of Pushkar Narain, Sarraf v.CIT[1990] 183 ITR 388. This case is also distinguishable on facts. The Id. D.R. also relied upon State Bank of India's case (supra), in which it was held that the entries of the books of account is not determinative of the question whether the assessee has earned profit or not. This case is also distinguishable on facts and is not applicable.

The Id. D.R. also relied upon Sheraton Apparels 'case (supra) which is with regard to penalty, maintenance of the books of account and is not applicable as distinguishable on facts. We have already held that the assessee has been able to prove that all the entries are made in the books of account and documents maintained in the ordinary course of the business relating to the previous year, therefore, the case of the assessee would not fall within the definition of "undisclosed income".

Even otherwise, these authorities are not in respect of block assessment and as such, the authorities referred to above by the Id.D.R. are not applicable to this case. The Id. counsel for the assessee also relied upon Daya Chand's case (supra) and Ch. Atchaiah's case (supra) & Sun Engg. Works (P.) Ltd. 's case (supra), but these cases are not applicable to the block assessment and are not applicable.

Keeping in view the above discussion, the issue is decided in favour of the assessee and against the Department.

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

Assessing Officer found mentioning of reconciliation of the cash on 3-11-1996 and as per pukki rokar Annexure 'A' written upto 17-10-1996, cash balance of Rs. 57,960 was found. In the kachi rokar written from 17-10-1996 to 25-10-1996.

The balance of Rs. 56,520.10 was found. The assessee has given in-flow and out-flow of cash from 16-10-1996 till 2-11-1996, i.e. prior to the search. The Assessing Officer 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 26-10-1996 from District Cooperative Bank by Ashok Kumar, partner. The Assessing Officer accordingly found that the assessee was having Rs. 3,34,550 and out of which Rs. 1,06,520 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 3-11-1996 at pages 59 & 60 in the paper book. The Assessing Officer has accepted the details of the cash available upto 24-10-1996 in a sum of Rs. 56,520.10p. A further sum of Rs. 50,000 was believed to have been withdrawn on 26-10-1996.

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 -1996 and on the same date, cash sale of silver in a sum of Rs. 4,508.50p. 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. In 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 Assessing Officer believed that only gold weighing 5090.110 ms. was to be explained, though the entries in the stock register were found of 7134.780 gms. of gold ornaments. The remaining items were the gold ornaments sold on 1-11-1996 and 2-11-1996, which is reconciled from the cash reconciliation. If the Department has accepted the sales on 1-11-1996 and 2-11-1996 of gold ornaments then the cash available out of these sales should also have been believed by the Department. The only objection of the Assessing Officer 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 reconciliation and given the details from where cash came into but the Assessing Officer 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 statement on 3-11-1996, 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 (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 IT AT, Ahmedabad Bench in Mrs. Sushila Devi S. Agrawal (suprd) 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 (suprd) has held:-- Where the cash recovered from the assessee's possession did in fact belong to his brother as evidenced by confirmation of the affidavits of the lending parties, ITO was not justified in treating the amount as income from undisclosed sources of the assessee.

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 3-11-1996 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 1-11-1996 and 2-11-1996.

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 initial¹ statement as well as from the explanation given in the reconciliation before the Assessing Officer. The Assessing Officer 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 Assessing Officer found that silver ornaments weighing 8.212.9 kgs. as unexplained at the time of search. The assessee claimed to have made purchase, on 2-11-1996 in the quantity of 8050.000 and sales of 77.000 on 22-10-1996 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 Assessing Officer 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 Assessing Officer 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 1-11-1996 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 Assessing Officer 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 Assessing Officer failed to make any enquiry with regard to this purchase. Nothing is mentioned in the assessment order whether the Assessing Officer 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 Assessing Officer. No reasons were given by the Assessing Officer 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 Assessing Officer 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 Assessing Officer, therefore, the Assessing Officer 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 Assessing Officer 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 Assessing Officer has disbelieved as no evidence of loan was found at the time of search. The assessee has filed all the details before the Assessing Officer. 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 Assessing Officer 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 Assessing Officer, no addition could be made in the hands of the assessee on account of unexplained investment in the silver items. The entire additions are liable to be deleted, which we accordingly do so. This issue is also decided in favour of the assessee and against the Department.

30. The Assessing Officer 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 20-8-1996 in the Bank account in the name of Ashok Kumar (HUF) in Oriental Bank of Commerce. The Assessing Officer did not find any evidence that this amount belongs to the assessee-firm. The Assessing Officer 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 Assessing Officer 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 Assessing Officer 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 Assessing Officer 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.

Unexplained income of the assessee added substantively shown by Smt.

Ambika Devi - assessee from Saree business:-- 31. The Assessing Officer 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 Assessing Officer 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 Assessing Officer. 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 Assessing Officer 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 under Section 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 Assessing Officer 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.

32. The parties have referred to certain other judgments which we have mentioned in order but, in view of above findings the same are not discussed. Even otherwise, same are clearly distinguishable on facts.

No other point is argued or pressed by the parties.

(i) Notice under Section 158BC dated 7-7-1997 and resultant proceedings are illegal and void.

(ii) No 'Undisclosed Income' detected in this case. The case of the assessee falls under Section 158BA(3) and CBDT Circular No. 717 dated 14-8-1995 (supra).

Keeping in view the above discussion, the findings on all issues, C.B.D.T. Circular and the authorities referred to above, we set aside and quash the impugned assessment order dated 27-11-1997 on preliminary issues as well as on merits.

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