

Sukh Ram Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-27-2006

Reported in : (2006)99ITD417(Delhi)

Judge : R Easwar, Vice, P Jagtap

Appellant : Sukh Ram

Respondent : Assistant Commissioner of

Judgement :

1. This appeal by the assessee is directed against the order of Assistant Commissioner of Income-tax, Central Circle-2, New Delhi (Assessing Officer), dated 26-8-1997 passed under Section 158BC for the block period comprising of assessment years 1987-88 to 1997-98 and a further period up to 16-8-1996.

2. The assessee in the present case is an individual deriving income mainly from agriculture. He is also involved in active politics from the State of Himachal Pradesh and occupied the public offices in different capacities including that of State Minister of Communication, Government of India. A search and seizure operation was conducted by the Central Bureau of Investigation (CBI) at the residential premises of the assessee situated at Mandi and Delhi on 16-8-1996 which commenced early in the morning. Later on, authorized officers of the Income-tax Department also joined the CBI with a warrant of authorization issued under Section 132(1) apparently on the basis of information received from the CBI about the substantial cash found in the residential premises of the assessee and

conducted the search and seizure operation under Section 132. During the course of search conducted at the residence of the assessee at Mandi and Delhi by the CBI and Income-tax Department, substantial cash as well as other valuables were found besides some incriminating documents showing undisclosed investments/expenses made by the assessee. The cash found from Delhi residence of the assessee was seized by the Income-tax Department whereas the cash found at Mandi residence and initially seized by the CBI was subsequently requisitioned by the Income-tax Department on the next day under Section 132A. Out of the incriminating documents found at the residential premises of the assessee, some of the documents were seized by the Income-tax Department whereas most of the documents were seized by the CBI. The copies of these documents seized by the CBI were subsequently handed over to the Income-tax Department. At the time of search, the assessee was out of country on a tour to USA and UK along with his wife. His daughter Smt. Ritu Sharma, however, was present at his residence situated at 12, Safdarjung Lane, New Delhi. After his return from abroad, the assessee was arrested and put in Tihar Jail, New Delhi. His statement was recorded by ADIT(Inv.) initially on 9-10-1996 in the room of Superintendent, Tihar Jail, Delhi and again on 30-10-1996, 1-11-1996 and 4-11-1996. Thereafter, a notice under Section 158BC was issued by the Assessing Officer which was served on the assessee on 9-1-1997 requiring him to file his return of income in the prescribed Form No. 2B. The same, however, remained uncomplished by the assessee. Even there was no response from the assessee to the notices issued by the Assessing Officer subsequently on 25-3-1997 and 16-6-1997. Finally, a notice under Section 158BC was issued by the Assessing Officer on 11-8-1997 along with a notice under Section 142(1) intimating the assessee about the additions proposed to be made to his undisclosed income and requiring him to file a reply latest by 19-8-1997. In response to the said notice, a return of income for the block period was filed by the assessee on 14-8-1997 declaring a negative undisclosed income of Rs. 2,38,799. Along with the said return, two letters were also filed by the assessee containing his reply to the various queries raised by the Assessing Officer in his letters issued earlier. After taking into consideration the material found during the course of search and explanation offered by the assessee in his written replies as well as in the

statements recorded during the course of post-search enquiries, the assessment was completed by the Assessing Officer for the block period under Section 158BC assessing the total undisclosed income of the assessee at Rs. 55,13,73,381 making the following additions on account of unexplained cash as well as unexplained investments/expenses:--I. Unexplained cash found under Section 69 A 3,61,80,414II. Unexplained deposits in bank account under Section 68 16,96,871III. Unexplained investments in immovable properties : (a) D-42, Kaushambhi 29,90,000 (b) Nav Sansad Vihar 1,80,104 Interest income on initial deposits 14,900 (c) Orchard, Surath, Mandi 74,012 32,59,016 recorded in seized documents under Section 69 48,86,40,368 V. Libel Suit Receipts and legal expenses 32,37,500VI. Furniture fittings, etc.

25,00,000VII. House Hold expenses 1,50,00,000VIII. Foreign travel /Medical expenses 15,00,000IX. Undisclosed investments/income in Dairy farm 15,00,000
Gross total income for the block period : 55,35,14,169
Less : Income already disclosed in the regular returns filed before the date of search 21,40,788
55,13,73,381 Aggrieved by the aforesaid order of the Assessing Officer passed under Section 158BC, the assessee is in appeal before us.

3. In this appeal, as many as 24 grounds were originally raised by the assessee. However, the same having been found to be lengthy as well as of repetitive and argumentative nature, the learned Counsel for the assessee has filed the revised grounds in the condensed form which are totally 15 in number. Out of these 15 grounds, ground Nos. 1 & 2 project the grievance of the assessee about the adequate opportunity having been not provided by the Assessing Officer of being heard before making the assessment under Section 158BC which allegedly resulted in violation of the principles of natural justice. Since these issues relating to violation of the principles of nature justice will be considered by us, wherever called for, simultaneously while considering and deciding the other grounds on merits, ground Nos. 1 & 2 are not being decided separately.

4. Ground Nos. 3(z), 4,5,6 & 7 relate to a common issue of the total additions of Rs. 48,86,40,368 made by the Assessing Officer to the undisclosed income of the assessee on account of unexplained receipts/deposits/investments found recorded

in the seized diaries.

5. During the course of search, certain diaries/note pads were seized by the CBI from the residential premises of the assessee situated at Mandi and Delhi. Copies of the said diaries were subsequently forwarded by the CBI to the Revenue Secretary who, in turn, handed over the same to the Income-tax Department. One of such diaries for calendar year 1988 identified as document No. 02/M-159/96 contained figures pertaining to the financial years 1990-91 to 1993-94. In his statement recorded on oath by the ADIT after the search, the assessee admitted of having written the said diary in his own handwriting. He also identified some of the names of persons written in the said diary in abbreviated form explaining that the said persons were the servants working in his orchard and the amounts written against their names were paid mainly in connection with the said orchard as well as dairy activities. He also made an attempt to explain the other entries appearing in the said diary to some extent. However, as regards the nature of transactions represented by most of such entries found recorded in the said diary, he expressed his inability to explain the same on the pretext that he was not in a position to remember the same.

At the same time, he insisted that the figures appearing in the said dairy should be taken as they are since the same represented the actual amounts paid or received. The assessee, however, could not give the elaborate details of dairy activities pursued by him as required by the Assessing Officer. He also expressed his inability to give any details of income earned by him from the business of dairy or even of the investment made by him in the dairy till then. He also agreed that no dairy income was disclosed by him in the return of income filed till then. Despite specific opportunities, he also failed to give any details regarding the whereabouts of his employees whose names were stated to be appearing in the diary in abbreviated form to facilitate their identification as well as examination by the Assessing Officer.

The Assessing Officer, therefore, did not accept the explanation of the assessee on the face of it and proceeded to examine and analyze the entries found recorded in the relevant seized diary on his own.

6. In his written reply dated 14-8-1997 filed before the Assessing Officer, it was stated by the assessee that the aforesaid diary as well as the other diaries found during the course of search are mere general scrap books used to make odd jottings concerning the orchard activities, petitions from people, information given by PA, briefings for meetings, lectures, etc., and the same did not contain reference to any financial activities. It was also stated by the assessee in the said letter that it would, therefore, not be possible for him to remember and explain the nature of these jottings or to connect them to any activity or person. On the basis of his own examination and analysis of each and every entry appearing in the relevant seized diary as well as the further enquiries made after the search, the Assessing Officer found this explanation of the assessee to be evasive since, according to him, the entries found recorded in the diaries were not mere jottings or scribbling for many reasons. Firstly, Shri C.K. Khemka had admitted and confirmed certain receipts of money from the assessee as recorded in that very diary. Secondly, his name recorded in the code as "C.K." was also confirmed by him along with the figures written against them. Thirdly, several deposits as recorded in the said diary were also found to be traceable to the bank accounts of the family members of the assessee and their concerns. Moreover, none of the denials made by the assessee as regards the nature of entries found recorded in the diary could be substantiated by him on evidence before the Assessing Officer despite sufficient opportunity.

7. The Assessing Officer, therefore, rejected the explanation offered by the assessee as regards the nature of transactions/ entries found recorded in the said diary and ascertained such nature on the basis of analysis of each and every entry appearing in the said diary with reference to the narration contained therein as well as his own examination and enquiries conducted in the matter. Accordingly, he found that the total receipts amounting to Rs. 4,66,70,698 were recorded in the said diary and the assessee having failed to explain the same, he treated the said amount as the undisclosed income of the assessee representing unexplained receipts. Similarly, he held that the other entries found recorded in the said diary represented the unexplained investment/deposits made by the assessee to the tune of Rs. 9,48,53,000 which were liable to be taxed in his hands in the block assessment. In arriving at these figures of the unexplained

investment/receipts/deposits, the Assessing Officer deciphered the figures found recorded in the relevant seized diary in abbreviated or decimal forms having regard to the letters appearing against the respective figures such as 'C', 'L' as well as the totals taken on the corresponding pages of the diary. In this regard, he heavily relied on the statement of Shri C.K. Khemka who had not only admitted of having received the amounts from the assessee as interest bearing loans as appearing in the seized diary against his name written in abbreviated form as 'CK', but also deposited with the CBI subsequently an amount of Rs. 1.05 crores out of the balance claimed to be payable by him to the assessee. Thus, a total addition of Rs. 14,15,23,698 was made by the Assessing Officer to the undisclosed income of the assessee on the basis of entries found recorded in the diary seized by the CBI and identified as document No. 02/M-159/96.

8. Similarly, the Assessing Officer also proceeded to analyse and examine the other documents seized by the CBI representing diaries/note pads and on such analysis/examination, he came to a conclusion that the name found mentioned in the abbreviated form in other diary as 'N', 'NAT', and 'NATA' was the name of Shri Mahender Nahata, Managing Director of M/s. Himachal Futuristic Ltd., a company which had executed telecom contracts worth several crores of rupees during the tenure of the assessee as Minister of Telecommunication. In his examination on oath recorded by the Assessing Officer, Shri Mahender Nahata, however, denied of having any connection with the said entries appearing in the diary. He also categorically stated that he never approached the assessee for any extra official favour and that any amount was ever paid by him to the assessee. Similarly, Shri Prakash Jain, Chairman of M/s. National Telecommunication of India (NATALCO) examined by the Assessing Officer in this regard also denied of having any relation with the entries in the diary in his sworn statement. Even Shri J.K.Jain who was identified by the Assessing Officer as the person whose name appeared in the diary in abbreviated form as "JK" flatly denied in his statement recorded by the Assessing Officer of having any relation with the entries appearing in the seized diary. This categorical denial of the concerned persons stated to be identified with the names appearing in the seized diaries in the abbreviated form, however, was not found to be reliable by the Assessing Officer and relying on his own analysis, examination and interpretation of the entries found recorded in the relevant seized

diaries, he proceeded to hold that the entries found recorded in the relevant seized diary were the actual financial transactions of the assessee representing his undisclosed income/unaccounted investments for the block period. Accordingly, a total addition of Rs. 48,86,40,368 was made by the Assessing Officer to the undisclosed income of the assessee on account of unexplained investment/receipts/deposits on the basis of the relevant seized documents representing diaries/note pads as given below :-- 9. The learned Counsel for the assessee at the outset submitted before us that all the aforesaid documents representing diaries/ note pads on the basis of which the substantial addition of about Rs. 48.86 crores was made by the Assessing Officer, were neither found during the course of search conducted by the Income Tax Department nor the same were requisitioned by them under Section 132A. He submitted that the said documents actually were found and seized by the CBI from the residential premises of the assessee and the same came to the possession of the Income Tax Department through the Revenue Secretary to whom the copies of the said documents were forwarded by the Director of CBI. He invited our attention to a copy of the letter forwarded by the Director of CBI to the Revenue Secretary placed on record to support and substantiate his contention that the said documents were handed over by the Director of CBI to the Revenue Secretary who, in turn, handed over the same to the Income Tax Department without there being any requisition issued under Section 132A. He contended that the said documents thus were neither found as a result of search conducted by the Income Tax Department under Section 132(1) nor the same were requisitioned by the Income-tax Department under Section 132A and therefore, no addition on the basis of the said documents could be made to the undisclosed income of the assessee for the block period as per the provisions of Sub-section (1) of Section 158BB.10. The learned Counsel for the assessee further submitted that only the cash of Rs. 2.45 crores was found and seized by the Income Tax Department from Delhi house of the assessee whereas only one bundle of twelve loose sheets was found and seized from the Mandi House. He pointed out that none of these twelve documents seized by the Income Tax Department during the search operation from the Mandi House of the assessee was relied upon by the Assessing Officer for the purpose of assessing the undisclosed income of the assessee for the block

period and thus, there was nothing that could be said to be an evidence found or seized during the course of search by the Income Tax Department for the purpose of block assessment as per Section 158BB(1) except the cash found and seized from Delhi house. His contention, therefore, was that the entire addition made by the Assessing Officer on the basis of the relevant documents representing five diaries/note books, which were neither found as a result of search conducted under Section 132(1) nor requisitioned under Section 132A, was not sustainable in law in view of the specific provisions contained in Sub-section (1) of Section 158BB. He contended that the said provisions are substantive provisions providing specifically the mode of computation of undisclosed income of the block period only on the basis of evidence found as a result of search or requisition of books of account or other documents. He submitted that the Panchnamas prepared by the Income Tax Department clearly show that the aforesaid diaries were not found by the Income Tax Department and there being nothing on record to show that the copies of the said diaries were requisitioned by the Income Tax Department under Section 132A, the same could not be used as evidence against the assessee for the purpose of computing his undisclosed income for the block period.

11. The learned DR, on the other hand, admitted that the diaries in question were seized from the residence of the assessee by the CBI and copies thereof were forwarded by them to the Department through the Revenue Secretary without there being any authorization issued under Section 132A. He, however, contended that the said diaries could still be used as evidence for the purpose of computing the undisclosed income of the assessee for the block period going by the inclusive definition of the expression "undisclosed income" given in Section 158B(b) which is quite wide. He also relied on the amendment made in Sub-section (1) of Section 158BB by the Finance Act, 2002 with retrospective effect from 1-7-1995 to contend that even 'such other material or information as are available with the Assessing Officer and relatable to the evidence found as a result of search' can also be used as evidence for computing the undisclosed income of the assessee for the block period.

He contended that even though this amendment has been made after the completion of assessment in the present case, the same having been made

applicable with retrospective effect from 1-7-1995, can be applied to all the pending assessment proceedings. Relying on the decision of Hon'ble Gujarat High Court in the case of CIT v. Mayur Foundation , he submitted that the Tribunal can take note of such retrospective amendment while disposing off the appeal filed against the assessment order since the appellate proceedings are considered as extension of the assessment proceedings. He also placed reliance on the decision of Hon'ble Kerala High Court in the case of CIT v. M.C. Jacob in support of this contention. He contended that as a result of this amendment, the Assessing Officer can take into consideration the post-search enquiries as well as result thereof for computing the undisclosed income of the assessee for the block period and since this amendment made with retrospective effect is declaratory in nature, the Tribunal can take note of the same since the assessment has still not become final and is still pending in appeal before the Tribunal.

12. The learned DR submitted that drawing a panchnama is not a statutory requirement and the same, therefore, cannot be considered as a conclusive evidence to establish what exactly was found during the course of search or not. He submitted that search is a physical act performed with a specific purpose and since the documents/material found by the CBI including the diaries were lying in the search premises, the same were also subject to the search operation of the Department under Section 132. He pointed out that simultaneous search operation was conducted by both the sides i.e. Income Tax Department and CBI at the premises of the assessee from 4.30 pm on 16-8-1996 to 3.30 am on 17-8-1996 and thus the act of finding the evidence was physically performed simultaneously by the CBI as well as by the Income-tax Department. He contended that the departmental officers thus must have found the diaries during the course of search in all probabilities and since the same were to be seized by the CBI, they were not taken into consideration in the panchnama prepared by the Income Tax Department. He submitted that the expression used in the statute is "as a result of search" and not "during the course of search" which widens the scope in terms of period as well as in other practical terms. He reiterated that panchnama is not a conclusive proof to establish what exactly was found during the course of search and if there is other evidence or there are circumstances to show that the diaries were found as a result of search conducted by the department under Section 132,

the panchnama becomes irrelevant.

13. The learned DR further contended that the said diaries were very much available when the officers of the Income Tax Department conducted their search at the residential premises of the assessee and it, therefore, cannot be said that the said diaries were not found by them just because the same came to be finally seized by the CBI. He contended that, in any case, the cash was admittedly found and seized by the Income Tax Department from the residential premises of the assessee and the said diaries having substantial entries of cash were certainly relatable to the evidence found as a result of search under Section 132(1) in the form of cash. The learned DR also contended that the whole purpose of action under Section 132(1) or of issue of authorization under Section 132A is to unearth the undisclosed money and this very purpose should not be allowed to be defeated by adopting a strict and literal interpretation of the relevant provisions especially when the relevant evidence i.e. the diaries seized by the CBI was received by the Department Officially through the office of the Revenue Secretary.

14. In the rejoinder, the learned Counsel for the assessee submitted that the procedure prescribed under Chapter XIV-B is specially for the purpose of assessing the undisclosed income as a result of search and seizure operation and if there is no seizure, search is meaningless and Chapter XIV cannot be invoked. He submitted that such search has to be by the Income Tax authorities and the operation of similar nature by any other authority is of no relevance. He submitted that no doubt the material gathered by the other authorities can also be used as evidence against the assessee provided the same is obtained by issuing requisition under Section 132A. Referring to the provisions of Section 158BB(1), he submitted that the same are substantive as well as procedural in nature and as specifically provided therein, only the evidence found as a result of search or requisition of books of account or other documents could form the basis for computation of undisclosed income of the assessee for the block period. As regards the reliance placed by the assessee on the amendment made subsequently by the Finance Act, 2002 in the said provisions with retrospective effect from 1-7-1995, he contended that application of such amended provisions, which were not in the statute at the time of completion of assessment, would

certainly cause discrimination and the same, therefore, cannot be taken into consideration at this stage by the Tribunal.

15. The learned Counsel for the assessee also submitted that the said diaries, in any case, cannot be said to be relatable to the cash found and seized by the Income Tax Department because no entry in the said diaries was directly relatable to such cash and no such attempt was made even by the Assessing Officer to relate any of the entries in the diaries to the cash found and seized. According to him, the very fact that no set off was given by the Assessing Officer while making the addition on account of diary against the cash found and seized fortifies that there was no relation between the entries in the diary and cash found. He further submitted that the entire additions were made by the Assessing Officer on the basis of entries in the diary under Section 69 which clearly means that the said entries were treated by him as representing other investments and not cash. He contended that the said diaries thus, by no means, can be said to be relatable to the cash found and seized by the Income Tax Department. He also pointed out that the cash found during the course of search was treated as income of the assessee for the year during which it was found whereas the entries in the diary were admittedly related to the earlier period.

He contended that the term "relatable" used in the amended provisions of Section 158BB(1) is very restrictive contrary to the term "relevant" which is quite wide. According to him, unless and until there is a direct relation or nexus, any material or information cannot be said to be relatable to the evidence found as a result of search and it is for the Assessing Officer to establish such direct relation or nexus. He contended that no such nexus has been established by the Assessing Officer between the diaries and the cash found and in the absence of the same, it cannot be contended now by the learned DR that the diaries were relatable to the cash found and seized during the course of search.

16. The learned Counsel for the assessee further submitted that Rule 112 of the Income Tax Rules lays down procedure for recovery of evidence/documents found during the course of search and keeping in view the said Rule as well as the provisions of Section 132(13), panchnama cannot be ignored. He submitted that

the panchnama, in fact, records the events occurred during the course of search operation and when a remark "nil" was clearly indicated against the entry in the said panchnama about the books of account, document etc. found and not seized, the same was sufficient to show that except the loose documents of twelve Nos. seized by the Income Tax Department, no other document was found or seized by them from the residential premises of the assessee during the course of their search under Section 132. He pointed out that the jewellery found during the course of search from the residential premises of the assessee was seized by the CBI, but the same was specifically indicated as found but not seized by the department in the panchnama. He contended that the material found but not seized by the Income-tax Department thus was specifically mentioned in the panchnama and since the diaries in question were not mentioned as such in the panchnama, it was sufficient to show that the same were not found by the Income-tax Department. He contended that search provisions directly affect the privacy of the citizen and the same are to be strictly construed. According to him, there is no scope for presumptions, assumptions and probabilities and, therefore, the contentions raised by the learned DR on the basis of preponderance of probabilities cannot be accepted. In support of his contention, the learned Counsel for the assessee relied on the decision of Hon'ble Supreme Court in the case of CIT v. Tarsem Kumar 17. We have considered the rival submissions in the light of material available on record. It is by now well settled that the assessment made under Chapter XIV-B is in addition to the regular assessment and such special assessment needs to be restricted to compute the undisclosed income based on the evidence found as a result of search or requisition of books of account etc. and such other material or information as are available with the Assessing Officer and reliable to such evidence.

The combined reading of the provisions of Sections 158B(b), 158BA and 158BB shows that the Assessing Officer has to prove, on the basis of evidence found as a result of search and such other material or information as are available with him and reliable to such evidence, that assessee had the undisclosed income chargeable to tax in the block assessment. Section 158BB contains the provisions relating to the computation of undisclosed income of the block period and as provided in Sub-section (1) of the said section, the undisclosed income of the

block period shall be the aggregate of the total income of the previous years falling within the block period computed in accordance with the provisions of the Act on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence. As held by the Hon'ble Delhi High Court in the case of CIT v. Ravi Kant Jain [2001] 250 ITR 141 : 117 Taxman 28, special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income which has been detected as a result of search and its scope and ambit is limited in that sense to materials unearthed during search. Explaining further, Hon'ble Delhi High Court has observed that assessment for block period can only be done on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer and relatable to the evidence found as a result of search. Hon'ble Delhi High Court further clarified that such evidence found as a result of search should be clearly relatable to Section 132 or Section 132 A.18. Having regard to the scope and ambit of block assessment under Chapter XIV-B as spelt out in the relevant provisions and further explained in the various judicial pronouncements including the decision of Hon'ble Delhi High Court in the case of Ravi Kant Jain (supra), it would be pertinent to consider and decide as to whether the diaries in question can be considered as the evidence found as a result of search or requisition of books of account or other documents or such other materials or information as are available with the Assessing Officer and relatable to such evidence.

19. In the letter dated 3-5-2005 addressed to the CIT-DR, the CIT, Delhi-XI has stated in paragraph 2 that the diaries in question were seized by the CBI and these were not requisitioned under Section 132A. It has also been stated by him that the then CBI Director had sent the photocopies of the said diaries to the Revenue Secretary vide his D.O. letter dated 28-9-1996 and the information so received was used by the Assessing Officer for determination of undisclosed income of the assessee. It is thus an admitted position that the diaries in question were not requisitioned by the Department under Section 132A inasmuch as no such requisition admittedly was issued in the context of the said diaries.

20. During the course of the search, the said diaries were seized by the CBI and this undisputed position is also evident from their search list giving details of property seized by Police Officers acting under the provision of Section 103 or 165 of the Criminal Procedure Code. A copy of the said list placed on record before us also shows that the same was signed and sealed by the CBI Officers alone without there being any signature of the Income Tax officials. It is also observed that the following note was given in the said search note prepared by the CBI:-- Total cash of Rs. 2,45,28,844 was found during the search and as such the income-tax authorities were informed. Shri Amitabh Shukla, ADIT (Inv.), Unit-V(3), E-2, ARA Centre, Jhandewalan Extension, New Delhi alongwith his team arrived at the premises 4.30 PM on 16-8-1996 and started their formalities for seizing the cash. They have prepared separate recovery memo for recovery/seizure of the cash copy of which is enclosed herewith.

21. As is evident from the aforesaid observation recorded by the CBI in their search list, the involvement of the Income Tax Department in the search and seizure operation initiated by CBI was mainly for the purpose of seizing the cash and there is nothing at least in the said search list prepared by them to show that the diaries in question were also found by the Income Tax officials during the course of their search conducted at the residential premises of the assessee under Section 132.

22. Before us, the learned DR has contended that the diaries in question were very much lying in the premises of the assessee when the officials of the Income Tax Department commenced their operation under Section 132 and therefore, the said diaries must have been found by them also going by the preponderance of probability. We, however, find it difficult to accept this contention of the learned DR because if the same is accepted, anything and everything which was lying at the premises searched under Section 132 would be deemed to have been found during the course of search. In our opinion, there cannot be such a presumption because a search operation to find out the evidence is essentially a physical act and the same has to be performed specifically. There is no scope for assumptions and presumptions nor anything can be implied in the matter of ascertaining the findings of a search operation. Such findings cannot be ascertained on the basis of

preponderance of probabilities especially when all the events occurring during the search operations are recorded in a document called as 'panchnama' and the results of search can very well be ascertained from the entries recorded in the panchnama.

23. The contention raised by the learned DR in this regard is that the panchnama has no legal sanctity in the absence of any specific provisions contained in the statute in this regard and the same, therefore, cannot be considered as conclusive in the matter of ascertaining the findings of the search. In this regard, a useful reference can be made to the provisions contained in Clause (a) of Explanation 2 to Section 158BE(2) which are reproduced below:-- Explanation 2.--For the removal of doubts, it is hereby declared that the authorization referred to in Sub-section (1) shall be deemed to have been executed,-- (a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorization has been issued; 24. As is evident from the aforesaid provisions, the panchnama is not only recognized in the statute, but a lot of importance is assigned to it by treating the conclusion of search as recorded in the last panchnama drawn as a deemed execution of search warrant for the purpose of determining the time limit available to complete the block assessment. Moreover, Rule 112 of the Income Tax Rules, 1961 prescribes a manner and method in which a search and seizure operation is to be conducted as well as the recording of events and preparation of documents during the course of such operation. It appears that all these requirements of Rule 112 have been incorporated in the panchnama going by the contents of the standard form used for this purpose. In these circumstances, we find the objection raised by the learned DR regarding the legal sanctity of the panchnama to be unsustainable. In our opinion, the panchnama, on the other hand, assumes a vital significance to examine and ascertain the manner and method in which the search and seizure operation under Section 132 is conducted as well as the outcome of the said operation.

25. In the present case, search and seizure operation under Section 132 was conducted by the department at the residence of the assessee situated at Mandi as well as Delhi and the panchnamas were also duly drawn on conclusion of the

said operations. Copies of the said panchnamas are placed on record before us by the assessee as well as by the Revenue and a perusal of the panchnama drawn in respect of search and seizure operation conducted at the residential premises of the assessee at Mandi shows that only one bundle of loose papers containing twelve pages was found and seized by the department as per Annexure-A. It is important to note here that in the said panchnama, entries were made by the search team against the columns describing the evidence/material found but not seized. In this regard, Annexure-2 and Annexure-3 were prepared by them giving details of list of valuables including jewellery found during the course of search which had not been seized by them and a reference of these Annexures was made against the entry relating to other valuable articles or things found but not seized. However, against the entry relating to books of account and documents found but not seized, a remark 'NIL' was specifically given clearly indicating that there were no books of account or documents which had been found by the search team but not seized. Similarly, in the panchnama prepared at the Delhi residence of the assessee, 'NIL' entry was made against the column relating the books of account and documents found but not seized whereas in respect of other valuable articles or things found but not seized, a specific reference was made to Annexures 2 and 3 giving details of jewellery found in the said premises. Thus, as per the entries found recorded in the relevant panchnamas, neither any books of account nor any documents were found or seized by the Income Tax officials during the course of search under Section 132 except a bundle of loose papers containing twelve pages and this position has not been disputed by the learned DR before us.

26. Before us, the learned DR has submitted that even if it is assumed that the diaries in question were neither found nor seized by the Income Tax Department in the search under Section 132, the said evidence having been obtained officially from the CBI through the Revenue Secretary, it can be used against the assessee for the purpose of computing undisclosed income of the assessee going by the inclusive definition given in Section 158B(b) which has a wide scope and ambit.

In this regard, the case of CIT v. Shamlal Balram Gurbani [2001] 249 ITR 501 (Bom.) : 118 Taxman 835 can usefully be referred to. In the said case, a search

was conducted at the residential premises of the assessee on 25-3-1996. A notice under Section 158BC was issued for the block period 1-4-1985 to 25-3-1996. It was found that the assessee had not filed his returns of income for assessment years 1993-94, 1994-95 and 1995-96. Hence, the Assessing Officer treated the income of these three years as the undisclosed income of the assessee for the block period relying, inter alia, on the provisions of Section 158B(b). The Tribunal came to the conclusion that the findings of the Assessing Officer regarding undisclosed income were not based on any material found in the search operations and therefore, there was no reason for treating the said income as undisclosed income for the purpose of Chapter XIV-B. On Revenue's appeal, the Hon'ble Bombay High Court observed that they do not find any reason to interfere with the finding of facts recorded by the Tribunal. The Third Member decision of Mumbai Bench of ITAT in the case of Morarjee Gokuldas Spg. & Wvg. Co. Ltd. v. Dy. CIT [2005] 95 ITD 1 is also directly on this point wherein it was held that it is not a correct position of law that while completing an order under Section 158BC, the Assessing Officer can make assessment of the entire undisclosed income that comes to his notice during the course of proceedings under Section 158BC. He can make assessment of only that undisclosed income which has a direct nexus with the search proceedings in the case of the assessee. It was further held by the Tribunal that there are two elements to be satisfied so as to be treated as undisclosed income for the purposes of Chapter XIV-B i.e., the factum of nondisclosure should be existing, and the said non-disclosure on the part of the assessee should have been blown out as a result of search or requisition of books etc. In the case of Essem In tra-Port Services (P.) Ltd. v. Asstt. CIT [2000] 72 ITD 228 (Hyd.), similar contention as raised by the DR before us was raised on behalf of the Revenue and it was held by the Hyderabad Bench of ITAT that even though "undisclosed income" is defined in an "inclusiv" manner, the scope and extent of the term "undisclosed income" for the purposes of Chapter XIV-B is contingent upon the fact that the undisclosed income should borne out of material/ evidence found as a result of search or requisition of books of account etc. Keeping in view the ratio of these judicial pronouncements, we find the arguments raised by the learned DR in this context to be devoid of any merits.

27. Another contention raised by the learned DR before us is on the basis of the expression "as a result of search" used in the statute. He has contended that this specific expression used in the statute as against the expression "during the course of search" clearly spells out the intention of the Legislature to give wide meaning and scope for evidence to be used for the purpose of computing the undisclosed income of the assessee. In this regard, it is observed that the word "result" is used to denote the effect or outcome of some action, process, design etc. as per the definition given in the Law Lexicon of P. Ramanatha Aiyer. The expression "evidence found as a result of search" thus denotes the evidence that is gathered or obtained as the effect or outcome of search action. It clearly means that there should be a cause-effect relationship between the search action and the evidence found inasmuch as the finding of evidence should be the effect of search action which should be the cause resulting in the outcome in the form of evidence. It is, therefore, necessary to find out whether such cause-effect relationship can be established in the present case.

28. As already observed, there was nothing either in the panchnamas prepared by the Income-tax authorities or in the search note prepared by the CBI to even indicate or suggest that the diaries in question were found by the Income Tax Department during the course of search under Section 132. The said diaries, in fact, were handed over by the Director of CBI to the Revenue Secretary under his D.O. letter No.37/NP/DCIB/96 dated 26-9-1996 which reads as follows :-- I am enclosing herewith photocopies of Sukh Ram's diaries with the request that Income Tax, Enforcement Directorate and Customs may also give helping hand in the investigation. We spoke about it.

29. As is evident from the contents of the aforesaid letter, there is nothing to show that the photocopies of the relevant diaries were forwarded by the CBI Director to the Revenue Secretary due to the effect or as the outcome of the action by the Income Tax Department under Section 132. As a matter of fact, there is not even any reference to such action in the said letter. It is also pertinent to note that the said photocopies were forwarded by the CBI Director to the Revenue Secretary with a request that Income Tax, Enforcement Directorate and Customs may also give helping hand in the investigation. The investigation so referred to was the

investigation being done by the CBI and the help was sought from the concerned three Government departments including Income Tax as well as Enforcement Directorate and Customs. It is worthwhile to note here that there is nothing to show that there was any search by the Enforcement Directorate or the Customs authorities. However, still the photocopies of the relevant diaries were sought to be made available to them to give helping hand to the CBI in their investigation which again goes to show that the photocopies of diaries forwarded by the CBI Director to the Revenue Secretary had nothing to do with the action of the Income Tax Department under Section 132. On the other hand, it appears that the said copies would have been got by the Income Tax Department even otherwise in the normal course irrespective of their action under Section 132. Another aspect which is relevant to take note of in this context is that the search and seizure operation was conducted by the Income Tax Department as well as CBI at the residential premises of the assessee on 16-8-1996 and if at all the diaries in question had been found by the Income Tax Department also, efforts would have been made by them to obtain the copies thereof, which represented important evidence, for the purpose of computation of undisclosed income of the assessee. However, there is nothing on record to show that any attempt whatsoever was made by the Income Tax Department to obtain the said evidence by issuance of authorisation under Section 132A or by any other method till 26-9-1996 when the same was received by them from Revenue Secretary at the instance of the CBI Director and that too for the purpose of giving helping hand to the CBI in their investigation.

Having regard to all these facts and circumstances of the case, it is difficult to say that there was any cause-effect relationship between the copies of the diaries coming to the possession of the Income Tax Department and their search operation under Section 132 and the said evidence, therefore, cannot be considered as found as a result of search even if wide meaning is given to the expression "as a result of search" used in the statute as sought by the learned DR.30. Before us, heavy reliance has been placed by the learned DR on the amendment made in Section 158BB(1) by the Finance Act, 2002 with retrospective effect from 1-7-1995 to contend that even the other material or information as are available with the Assessing Officer and relatable to the evidence found as a result of search also can be used as evidence for computing

the undisclosed income of the assessee for the block period. It is true that these provisions amended with retrospective effect are required to be taken into consideration by us in the present appellate proceedings which are extension of the assessment proceedings keeping in view the decision of Hon'ble Bombay High Court in the case of CIT v. Mrs. Kamla S. Asrani wherein it was held that when the law is amended with retrospective effect, the court, when it decides any proceedings, has to apply such retrospectively amended law as if it were in force at all material times. The question, however, is whether the diaries in question were relatable to any evidence found as a result of search under Section 132 or requisition of books of account etc. under Section 132A. In this regard, it is observed that the loose sheets containing twelve pages only were seized by the Income Tax Department from the residential premises of the assessee at Mandi besides cash of Rs. 2.45 crores seized from Delhi house. Further, cash of Rs. 1.16 crores seized by the CBI from Mandi House of the assessee was subsequently requisitioned by the Department under Section 132A. In addition to this seizure and requisition, some valuables such as jewellery, furniture items etc.

were found but not seized by the Income Tax Department as mentioned in the panchnamas as well as annexures to the said panchnamas. As pointed out by the learned Counsel for the assessee before us, the aforesaid loose sheets containing twelve pages seized by the Income Tax Department were not at all used as evidence for the computation of undisclosed income of the assessee and this position, which is also evident from the assessment order has not been disputed by the learned DR. Even no attempt whatsoever was made by the Assessing Officer to establish any nexus to relate the diaries in question with the said loose sheets seized during the course of search or even with the valuables stated to be found in the residential premises of the assessee but not seized. Before us, the learned DR has also not been able to point out any relation between the diaries in question with the seized documents or the valuables found during the course of search but not seized. He, however, has submitted that the said diaries were found to have contained entries relating to substantial payments and receipts of cash and the same, therefore, were relatable to the cash seized from the residence of the assessee under Section 132 as well as cash requisitioned from CBI under Section 132A.31. After considering all the facts of the case as well as

the material available on record, we, however, find it difficult to agree with this contention of the learned DR. First of all, no attempt whatsoever was made by the Assessing Officer to establish any relation, either direct or indirect, between any of the entries found recorded in the diaries and the cash found and seized/requisitioned in the assessee's case.

Secondly, the entire investment alleged to have been made by the assessee on the basis of entries found recorded in the diaries in question was separately added by the Assessing Officer to the undisclosed income of the assessee treating the same as unexplained in addition to the addition made on account of cash found during the course of search. If at all there was any relation between the entries found to be made in the said diaries and the cash found during the course of search, the Assessing Officer ought to have adjusted the same while making the addition under Section 69. Having not done the same, the inference which can be drawn is that there was no such relation at least noticed by the Assessing Officer. Moreover, the addition on account of alleged unexplained investment/expenses on the basis of entries in the diary was made by the Assessing Officer under Section 69 whereas the addition on account of unexplained cash found during the course of search was separately made under Section 69A. It is also pertinent to note here that the entries found recorded in the relevant seized diaries were for the period from 1990 to 1994 whereas the cash was found during the course of search on 16-8-1996 ie., after a period of more than two years which again goes to show that the entries found recorded in the said diaries had no relation with the cash found during the course of search. Having regard to all these facts and circumstances arising from the material on record, it is difficult to say that the diaries in question in any way were relatable to the cash found during the course of search and the same, therefore, cannot be used as the basis for computing the undisclosed income of the assessee even going by the provisions of Section 158BB(1) as amended by Finance (No. 2) Act, 2002 with retrospective effect from 1-7-1995.

32. As such, considering all the facts of the case as arising from the material on record discussed above, we are of the view that the diaries in question could not be considered as the evidence found as a result of search under Section 132 or requisition under Section 132A nor the same could be said to be relatable to any

evidence found as a result of search or requisition of books of account in terms of Section 158BB(1).

In that view of the matter, we hold that the same cannot be used as the basis to compute the undisclosed income of the assessee for the block period under Chapter XIV-B. The entire addition made by the Assessing Officer on the basis of the said diaries amounting to Rs. 48.86 crores thus is not sustainable in law and deleting the same, we allow the relevant grounds raised by the assessee in this regard.

33. Before us, detailed arguments have also been advanced by the learned representatives of both the sides on the issues relating to the addition made by the Assessing Officer on the basis of entries found recorded in the relevant seized diaries on merits. However, keeping in view our decision on the preliminary issue rendered above holding that the said diaries could not be used as evidence for the purpose of computing undisclosed income of the assessee and thereby deleting the entire additions made on the basis of the said diaries, we do not deem it necessary or expedient to consider and decide the issues relating to the said additions on merits since the same have been rendered only of academic nature.

34. Ground No. 8 relates to the addition of Rs. 3,61,80,414 made by the Assessing Officer under Section 69A on account of unexplained cash found during the course of search from the residence of the assessee.

35. During the course of search, a cash of Rs. 2,45,28,844 (Rs. 2.45 crores) and Rs. 1,16,15,570 (Rs. 1.16 crores) was found from the residence of the assessee situated at Delhi and Mandi respectively. At the time of search, the assessee was out of country on a tour to USA and UK alongwith his wife. His daughter Smt. Ritu Sharma, however, was present at his residence situated at 12, Safdarjung Lane, New Delhi. In her statement recorded during the course of search under Section 132(5), Smt. Ritu Sharma, daughter of the assessee pleaded complete ignorance about the cash found from the residence of the assessee under lock and key which, in fact, was recovered only after breaking open the said locks. She, however, confirmed that nobody had come to the house after the assessee left on 4-8-1996 for USA/UK to deliver any cash.

After his return from abroad, the assessee was arrested and put in Tihar Jail, New Delhi. In the room of Jail Superintendent, his statement was recorded on 9-10-1996 wherein he stated that the cash found from his residence was not available when he and his wife left India for visit to USA and UK. However, in another statement recorded subsequently on 30-10-1996, 1-11-1996 and 4-11-1996, he retracted the statement given on 9-10-1996 stating that the same having been given by him in a perplexed state of mind should not be taken cognizance of. In the said statement, he admitted the possession of the cash found from his residence and stated that the same was belonging to Congress (I) Party. He, however, declined to give any more details submitting that he will reveal the same only before the Court of Law. During the course of assessment proceedings, the assessee again denied possession as well as ownership of the cash found from his residence vide his letter dated 18-8-1997 filed before the Assessing Officer . He stated that the said cash having not been found from his possession and control, he could not explain the nature and source thereof. After the statement of the assessee recorded on 30-10-1996, 1-11-1996 and 4-11-1996 wherein he had stated that the cash found from his residence was belonging to Congress (I) Party, the statements of Shri Sitaram Kesri and Shri Ahmed Patel, President and Treasurer respectively of Congress (I) Party were also recorded by ADIT (Inv.). In the said statements, both the deponents categorically denied of having given any money on behalf of the Congress (I) Party to the assessee. The copies of these statements were also made available to the assessee by the ADIT. Taking into consideration all the facts of the case as well as the different stand taken by the assessee at different stages and keeping in view the presumption available to be drawn against the assessee under Section 132(4A), the Assessing Officer came to a conclusion that the assessee has not been able to explain the cash found from his possession and treating the same as unexplained, he made the addition of Rs. 3,61,80,414 to the undisclosed income of the assessee under Section 69A.36. The learned Counsel for the assessee submitted before us that the cash found from the residence of the assessee situated at New Delhi and Mandi was explained by him as belonging to the Congress Party. He submitted that this explanation of the assessee, however, was not accepted by the Assessing Officer relying on the statements of Shri Sitaram Kesri and Shri Ahmed Patel recorded by ADIT(Inv.)

wherein the said two deponents had denied that any cash belonging to the Congress Party was kept with the assessee. He contended that these statements of Shri Sitaram Kesri and Shri Ahmed Patel were recorded by the ADIT (Inv.) behind the back of the assessee and since no opportunity was given to him to cross-examine the said witnesses, their testimony is not admissible as evidence for using the same against the assessee.

37. The learned Counsel for the assessee pointed out from the relevant document placed in his paper book that the cash of Rs. 1.16 crores found and seized by the CBI from the Mandi House of the assessee was requisitioned by the Income Tax Department only on 17-8-1996. In this regard, he contended that the said date i.e., 17-8-1996 clearly falls outside the block period ending on 16-8-1996 as taken by the Assessing Officer in his order under Section 158BC and therefore, the addition on account of the said cash treating the same as unexplained could not be made in the impugned assessment since the date of requisition of the said cash i.e., 17-8-1996 was not covered in the block period. He also contended that all the additions including the addition on account of alleged unexplained cash have been made by the Assessing Officer in the block assessment without a specific reference to a particular assessment year and the additions so made are, therefore, not sustainable on this count also.

38. The learned Counsel for the assessee also invited our attention to the provisions of Sub-section (1) of Section 158BB and submitted that the undisclosed income of the assessee for the block period is required to be computed on the basis of evidence found as a result of search or requisition of books of account or documents. In this regard, his contention was that only the books of account or documents requisitioned by the Department under Section 132A are allowed to be used as basis for computing the undisclosed income of the assessee for the block period and therefore, the cash requisitioned by the Income Tax Department from the CBI as found from the Mandi House of the assessee could not be made basis for computing the undisclosed income of the assessee. He contended that the addition made by the Assessing Officer on account of said cash requisitioned from the CBI treating the same as unexplained was outside the ambit of block assessment going by the specific provisions contained in Sub-section (1) of

Section 158BB, He also contended that the evidence which can be formed basis for computing the undisclosed income of the assessee for the block period as envisaged in Section 158BB(1) is the one found as a result of search conducted by the Income Tax Department under Section 132(1) and not that of any other authority including CBI. He also contended that requisition of documentary evidence alone is contemplated under Section 132A and not the cash and if at all the cash is requisitioned under the said provision, the same cannot be used as basis for computing the undisclosed income for the block period as per the specific provisions contained in Section 158BB(1).

39. Referring to a copy of the charge-sheet prepared by the CBI in assessee's case on 9-6-1997 placed on record, he pointed out that the main allegation of the CBI against the assessee was that the assessee in his capacity as public servant during the period from 20-6-1991 to 16-8-1996 had amassed huge assets/investments abusing his official position as a public servant. He submitted that the assessee thus was alleged to be in possession of the assets disproportionate to his known sources of income and the unknown source of such investment was alleged to be illegal gratification or bribe taken by the assessee by abusing his official capacity as a public servant. He submitted that there being nothing found during the course of search or even brought on record by the Assessing Officer during the course of assessment proceedings to show that the assessee had any other source of income from which the investment found to be made by him during the course of search including the cash could have been made, the only reasonable inference which can be drawn going by the charge-sheet of the CBI that the said investment including cash was made by the assessee from the amount accepted as bribe or illegal gratification. He contended that if this allegation is to be accepted, the entire investment including cash representing income of the assessee from bribe or illegal gratification would be liable for confiscation leaving the assessee with no income from this source. He also contended that the Government has an overriding title over the assets of the assessee including cash found during the course of search if the same are held to be made out of bribe/illegal gratification and since the loss on account of such confiscation is deductible against the income from bribe, there will be no income left with the assessee which can be taxed as his undisclosed income in the block

assessment.

40. The learned DR, on the other hand, submitted that a different stand was taken by the assessee in the matter of cash found from his residential premises situated at Mandi and New Delhi at different stages and the averments made by him in this regard, therefore, were not reliable as held by the Hon'ble Calcutta High Court in the case of *Amal Kumar Chakraborty v. CIT* [1994] 207 ITR 376 : [1995] 78 Taxman 302. He submitted that as per one of such stands taken by the assessee, the said cash was stated to belonging to Congress Party, He contended that this explanation of the assessee was found to be unacceptable on the basis of statement of Shri Sitaram Kesri and Shri Ahmed Patel, President and Treasurer respectively of the Congress (I) Party recorded by the ADIT wherein they had denied any involvement of their Party in cash found from the residence of the assessee. He submitted that the addition on account of unexplained cash found from the residence of the assessee was not made by the Assessing Officer on the basis of the said statements of Shri Sitaram Kesri and Shri Ahmed Patel and the said two deponents thus could not be said to be the witnesses of the department.

He contended that the onus, therefore, was not on the department to make the said deponents available to the assessee for cross-examination and there was no such requirement in law. He pointed out that the copies of the statements of the said deponents recorded by ADIT (Inv.) nevertheless were handed over by him to the assessee as specifically mentioned in the assessment order.

41. The learned DR further submitted that the cash was found from the residential premises of the assessee and having accepted the possession of the said cash in his statement recorded on oath, the onus was clearly on the assessee to explain satisfactorily the source of the said cash and substantiate such explanation by producing the supporting evidence. He submitted that there was, however, a failure on the part of the assessee to discharge this onus lay on him and the said cash, therefore, was rightly treated as unexplained by the Assessing Officer.

He contended that the presumption available to be drawn against the assessee under Section 132(4A) is strongest in respect of cash as held by Hon'ble Supreme Court in the case of *Chuharmal v. CIT* and the assessee having failed to explain

the cash found from his possession, the addition made by the Assessing Officer invoking the provisions of Section 69A read with Section 132A was fully justified. In support of this contention, he also cited the decision of Hon'ble Madras High Court in the case of CIT v. K.T.M.S. Mohamood . Reliance was also placed by him on the decision of Hon'ble Bombay High Court in the case of Gordhandas Hargovandas v. CIT wherein relevance and significance of Section 69A was elaborately discussed. He also pointed out that the cash found during the course of search was stated to be belonging to the Congress (I) Party by the assessee only before the ADIT (Inv.) and no such stand taken by him before the Assessing Officer. He contended that the assessee thus was clearly failed to explain satisfactorily the cash found in his possession during the course of search and the addition made by the Assessing Officer treating the said cash as unexplained by invoking the provisions of Section 69A read with Section 132(4A) was fully justified.

42. As regards the contention of the learned Counsel for the assessee that the cash found at the Mandi residence of the assessee having been requisitioned by the Income Tax Department from the CBI only on 17-8-1996, the same was outside the block period ending on 16-8-1996, he pointed out from the copy of warrant of requisition under Section 132 A as well as panchnama placed on record that although the cash was requisitioned by the Income Tax Department from the CBI on 17-8-1996, the same was found and seized by the CBI on 16-8-1996 itself from the residential house of the assessee. He contended that for the purpose of making addition under Section 69A, the date on which the assessee was found to be the owner of the said cash is relevant and not the date of requisition thereof. He submitted that since the cash was found and seized from the possession of the assessee on 16-8-1996 itself and the Assessing Officer was well aware of the said date, the provisions of section 69A were liable to be invoked with reference to that date on which the assessee was found to be the owner of the said cash. He contended that the addition made on this count treating the said cash as unexplained was thus falling within the block period ending on 16-8-1996 and there was no infirmity as alleged by the learned Counsel for the assessee. He also invited our attention to the definition of the 'block period' given in Section 158B(a) and contended that if at all there is any mistake in the block period taken by the

Assessing Officer for the purpose of assessment under Section 158BC, the Tribunal can rectify such mistake by taking the block period as per law after considering the exact date of search which is to be taken as the last date of the block period. Relying on the decision of Hon'ble Supreme Court in the case of CIT v. J.H. Gotla , he contended that workable interpretation of the statutory provisions is to be adopted. He also contended that any mistake in adopting the block period on the part of the Assessing Officer is a procedural irregularity which can be corrected by the Tribunal. He further contended that similarly the addition of cash made by the Assessing Officer in the block assessment without specifying the relevant assessment year is only procedural error which can be corrected by the Tribunal keeping in view the provisions of Section 69A which clearly specifies that addition on account of unexplained cash has to be made in the year in which the assessee was found to be owner thereof.

43. As regards the contention of the learned Counsel for the assessee that the source of cash found during the course of search being bribe/illegal gratification received by the assessee as alleged by the CBI, the same is liable to be confiscated by the Government leaving the assessee with no income on this count, he contended that the addition on account of cash is made by the Assessing Officer under Section 69A treating the said cash as unexplained due to failure of the assessee to explain the source thereof. He submitted that the source of the said cash thus has been treated as unexplained and the addition is made under Section 69A without any reference whatsoever to the allegations made by the CBI in their charge-sheet. His contention, therefore, was that the assessee cannot claim any deduction against the said addition made under Section 69A and in any case, there being nothing brought on record by the assessee to show that the cash has been finally confiscated by the Government in the block period, no such deduction even otherwise could be allowed to the assessee.

44. In the rejoinder, the learned Counsel for the assessee sub-mitted that the block period having already been determined by the Assessing Officer, the same cannot be changed subsequently as contended by the learned DR. He also submitted that there was no other source of income in the hands of the assessee from which he could have earned the substantial cash found during the course of search and

therefore, the only way by which the assessee could have amassed such wealth was bribe or illegal gratification. He contended that if the cash is held to be earned by the assessee from such income from bribe/illegal gratification, the corresponding deduction on account of loss of the said cash by confiscation has to be allowed since the Government has an overriding title on such cash representing income of the assessee from bribe/illegal gratification.

45. We have considered the rival submissions and also perused the relevant material on record to which our attention was drawn during the course of hearing. It is observed that cash of Rs. 2.45 crores and Rs. 1.16 crores was found from the residence of the assessee situated at New Delhi and Mandi respectively during the course of search conducted simultaneously by the Income Tax Department under Section 132 and by the CBI. The cash of Rs. 2.45 crores found from Delhi house of the assessee was seized by the Income Tax Department whereas the cash of Rs. 1.16 crores found in the Mandi House was initially seized by the CBI which was subsequently requisitioned by the Income Tax Department under Section 132A. At the time of search, the assessee alongwith his wife was out of country on a tour to USA/ UK and his daughter Mrs. Ritu Sharma was present at his Delhi house. She pleaded a complete ignorance about the cash as well as other valuables found from the house of the assessee after breaking open the locks. After his return from USA/UK to India, the assessee was arrested and put in Tihar Jail. His statement was recorded on 9-10-1996 in the room of the Superintendent of Tihar Jail and in the said statement, he denied of having any knowledge about the cash found from his residence stating that such cash was not available in his house when he left India for a visit to USA/UK. In his subsequent statement recorded on 30-10-1996, 1-11-1996 and 4-11-1996, the assessee, however, went back on this stand taken in the earlier statement stating that the same was wrongly made by him in a perplexed state of mind. In this statement, he accepted the possession of the cash found from his residence and also made an attempt to explain the same by stating that it was belonging to his political party i.e., Congress (I). We will deal with this explanation of the assessee later on at the appropriate stage. It is, however, suffice to note here that the possession of cash found from his residence at New Delhi and Mandi was accepted by the assessee in his statement recorded on oath on in very clear terms and there was no

retraction of the said statement by the assessee. During the course of assessment proceedings, it was, however, pleaded by the assessee in the letter filed before the Assessing Officer that the cash in question was not found from his control and possession and the same being not owned by him, he could be called upon to explain the same nor the same could be added in his hands. This simple averment made by the assessee, however, was not sufficient to retract the statement made by him on oath successfully in the absence of any evidence to support and substantiate the same.

Moreover, such averment made by the assessee was not reliable in view of the different stand taken by him at different stage as held by Hon'ble Calcutta High Court in the case of Amal Kumar Chakraborty (supra). It is also pertinent to note here that the said statement was recorded on four different dates and that too after a lapse of sufficient time from the date of search followed by arrest of the assessee and there being nothing on record to show or even suggest/indicate that the said statement was recorded under coercion or pressure, it can reasonably be held that the cash in question found from his residence during the course of search was in the control and possession of by the assessee as accepted by him. Even the learned Counsel for the assessee has not disputed this position by raising any specific/material contention at the time of hearing before us.

46. Having held that the cash was found in the control and possession of the assessee during the course of search conducted at his residential premises, it follows that the presumption under Section 132(4A) was available to be drawn against him about the ownership of the said cash and the onus was on him to explain the source thereof.

Before we proceed to consider this aspect as to whether this onus was rightly discharged by the assessee and whether the provisions of Section 69A read with Section 132(4A) were properly invoked by the Assessing Officer, it would be proper to first deal with the various legal contentions raised by the learned Counsel for the assessee before us challenging the addition of the said cash in the hands of the assessee.

47. First of all, the learned Counsel for the assessee has contended that there was no source of income found during the course of search or even thereafter from which the assessee could have earned the cash found from his residence. He has contended that the only source from which the said cash could have been earned by the assessee was the amount received by him as bribe or illegal gratification as alleged even by the CBI in their charge sheet. His contention in this regard is that the said cash found from the residence of the assessee thus represented bribe/illegal gratification received by the assessee and if this source is accepted, no income from this source could be assessed in the hands of the assessee because the said cash would be liable for confiscation by the Government having overriding title thereon leaving the assessee with no income from the source of bribe/illegal gratification. In this regard, we may observe that the cash found from the residence of the assessee was never considered or even alleged to be the income of the assessee from bribe/illegal gratification by the Assessing Officer. It was not even the assessee's case at any stage that the source of the said cash was the amount received by him as bribe/illegal gratification and no such attempt whatsoever was made by him to explain the said cash found from his residence. It is no doubt true that the allegation levelled by the CBI against the assessee, as is apparent from their charge sheet, was about the disproportionate wealth amassed by him by corrupt and illegal means or by otherwise abusing his official position as a public servant. However, it is also true that the case of the Revenue against the assessee was never based on such allegation as is evident from the order of the Assessing Officer as well as the submissions made by the learned DR before us. As a matter of fact, addition in respect of the said cash was made by the Assessing Officer under Section 69A treating the same as unexplained since there was a failure on the part of the assessee to explain the source thereof. In these circumstances, the plea put-forth by the learned Counsel for the assessee for treating the said cash as the income of the assessee from bribe/illegal gratification and for allowing deduction on account of possible confiscation by the Government is far-fetched which cannot be accepted. The decision of Hon'ble Gujarat High Court in the case of Fakir Mohmed Haji Hasan v.CIT supports this view wherein it was held that the value of unexplained gold seized from the assessee having been added to his income under Section 69A and not under any specific head of

income, the trading loss on account of its confiscation could not be allowed from such deemed income. Explaining further, Hon'ble Gujarat High Court observed that the corresponding deductions, which are applicable to the incomes under various heads, will not be attracted in case of deemed incomes which are covered under the provisions of Sections 69, 69A, 69B and 69C.⁴⁸ As regards the contention of the learned Counsel for the assessee that the said cash representing bribe/illegal gratification received by the assessee was liable to be confiscated by the Government having an overriding title on the said cash, we may observe that the true test for the applicability of the rule of diversion of income by an overriding title is whether such obligation is in the nature of a charge on the source i.e. the profit earning apparatus itself and only in such cases where the source of earning income is charged with an overriding title, the same can be considered as diversion of income by overriding title. This aspect has been elaborately explained by the Hon'ble Supreme Court in the case of CIT v. Sitaldas Tirathdas as follows :-- In our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income.

Obligations, no doubt, there are in every case, but it is the nature of the obligation, which is the decisive fact. There is a difference between an amount, which a person is obliged to apply out of his income and an amount, which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible, but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequences, in law, does not follow. It is the first kind of payment, which can truly be excused, and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable.

49. In the present case, the diversion is sought to be claimed by overriding title in respect of income stated to be earned from bribe/illegal gratification and since this source itself is illegal, the doctrine of diversion of the said income by an overriding

title involving legal obligation cannot be applied at all. This is so because there cannot be such obligation on the recipient of such income to divert the same to any third party before it reaches his hands and the confiscation of the amount of such income will always be an event occurring after receipt of such income by the assessee and that too to the extent of availability at the relevant time subject to allegation of bribe/illegal gratification being proved in the Court of Law. The contention of the learned Counsel for the assessee based on the rule of diversion of income by overriding title, therefore, cannot be accepted in the facts of the present case and even his claim for deduction on account of possible loss due to confiscation of the cash also cannot be accepted for the reasons discussed above. Moreover, Explanation to Section 37(1) inserted by the Finance (No. 2) Act, 1998 with retrospective effect from 1-4-1962 completely debars any allowance or deduction on account of any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law. This view gets support from the latest decision of Hon'ble Madhya Pradesh High Court in the case of CIT v. Dr. T.A. Quershi[2005] 146 Taxman 251 wherein it has been held that loss from seizure of heroin possessed by a doctor in contravention of the provisions of Narcotic Drugs and Psychotropic Substances Act could not be allowed as business expenditure in view of Explanation to Section 37.

50. The other contention raised by the learned Counsel for the assessee, which is twofold, relates specifically to the cash of Rs. 1.16 crores found from the Mandi house of the assessee which was initially seized by the CBI and then subsequently handed over to the Income Tax Department as per requisition made under Section 132A. His first objection in this regard is that the cash seized by the CBI from assessee's Mandi house was requisitioned by the Income Tax Department on 17-8-1996 and since the said date was beyond the block period ending on 16-8-1996, addition could not be made in respect of the said cash treating it as unexplained under Section 69A in the assessment completed by the Assessing Officer under Section 158BC for the block period ending on 16-8-1996. However, as rightly pointed out by the learned DR from the relevant documentary evidence, the said cash was found and seized from the Mandi residence of the assessee by the CBI on 16-8-1996 itself and the assessee thus was found to be the owner of the said cash on that date itself notwithstanding the date on which the

said cash was handed over by the CBI to the Income Tax Department as per the requisition made under Section 132 A. The said cash was added by the Assessing Officer to the total income of the assessee under Section 69A read with Section 132(4A) and since the assessee was found to be the owner of the said cash during the course of search on 16-8-1996 itself of which the Assessing Officer was fully aware, the addition under Section 69A was required to be made with reference to the said date z.e., 16-8-1996. We therefore have no hesitation to hold that the said addition made by the Assessing Officer was squarely covered in the block period ending on 16-8-1996. Even the presumption available to be drawn against the assessee under Section 132(4A) supports this view whereby any money found in, the possession or control of any person in the course of a search is presumed to belong to such person and if the assessee fails to rebut the said presumption satisfactorily and successfully, he is treated as owner of such cash and such ownership relates back to the date when the said cash was found in his possession or control.

51. The learned Counsel for the assessee has also contended before us that the cash found from the Mandi house of the assessee was seized by the CBI and not by the Income Tax Department. He has submitted that the cash so seized was subsequently requisitioned by the Income Tax Department under Section 132A which was not permissible going by the provisions contained in Sub-section (1) of Section 158BB which specifically provide that only the evidence found as a result of search conducted by the Income Tax Department or requisition of books of account or other documents would alone be the basis of computing the undisclosed income of the assessee for the block period alongwith such other material or information as are available with the Assessing Officer and relatable to such evidence. He has contended that the cash requisitioned by the Department from CBI thus could not be the basis for computing the undisclosed income of the assessee for the block period as provided in Section 158BB(1) and the addition made on the basis of such cash was outside the scope of block assessment made under Chapter XIV-B.52. To appreciate the contention of the learned Counsel for the assessee on this issue, it would be relevant to refer to the provisions of Sub-section (1) of Section 158BB which are reproduced below:-- 158BB. (1) The undisclosed income of the block period shall be the aggregate of the total income

of the previous years falling within the block period computed, [in accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence], as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined, 53. A perusal of the aforesaid provisions no doubt shows that the cash or any other asset requisitioned by the Income Tax Department under Section 132A is not specified as evidence on the basis of which undisclosed income of the assessee has to be computed for the block period. However, the other relevant provisions of Sections 158BC, 158BA and 132A relating to the block assessment do specifically refer to the assets requisitioned under Section 132 A as is evident from the said provisions which are reproduced below for the benefit of this order :-- 158BC. Where any search has been conducted under Section 132 or books of account, other documents or assets are requisitioned under Section 132A, in the case of any person, then,-- 158BA. (1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 1995 a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

"132A, (1) Where the [Director General or Director] or the [Chief Commissioner or Commissioner], in consequence of information in his possession, has reason to believe that-- (c) any assets represent either wholly or partly income or property which has not been, or would not have been, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act by any person from whose possession or control such assets have been taken into custody by any officer or authority under any other law for the time being in force, then, the [Director General or Director] or the [Chief Commissioner or Commissioner] may authorise any [Joint Director], [Joint Commissioner], [Assistant Director [or Deputy Director]], [Assistant Commissioner [or Deputy Commissioner] or Income-tax Officer] (hereafter in this section and in Sub-section (2) of Section 278D referred to as the requisitioning officer) to require the officer or authority referred to in Clause (a) or

Clause (b) or Clause (c), as the case may be, to deliver such books of account, other documents or assets to the requisitioning officer.

(2) On a requisition being made under Sub-section (1), the officer or authority referred to in Clause (a) or Clause (b) or Clause (c), as the case may be, of that Sub-section shall deliver the books of account, other documents or assets to the requisitioning officer either forthwith or when such officer or authority is of the opinion that it is no longer necessary to retain the same in his or its custody.

(3) Where any books of account, other documents or assets have been delivered to the requisitioning officer, the provisions of Sub-sections (4A) to (14) (both inclusive) of Section 132 and Section 132B shall, so far as may be, apply as if such books of account, other documents or assets had been seized under Sub-section (1) of Section 132 by the requisitioning officer from the custody of the person referred to in Clause (a) or Clause (b) or Clause (c), as the case may be, of Sub-section (1) of this section and as if for the words "the authorised officer" occurring in any of the aforesaid Sub-sections (4A) to (14), the words "the requisitioning officer" were substituted.].

54. Keeping in view the reference made to the assets requisitioned under Section 132A in the aforesaid provisions, which are charging in nature, it appears that the omission of such assets in the provisions contained in Sub-section (1) of Section 158BB which are computation provisions, is inadvertent and since such inadvertent omission is giving rise to absurd results, we have to adopt the reasonable interpretation which is workable as held by Hon'ble Supreme Court in the case of J.H. Gotla (supra). Moreover, as per the provisions contained in Sub-section (3) of Section 132A, the assets requisitioned under Section 132A are treated as assets seized under Section 132(1) for the purpose of the provisions of Sub-sections (4A) to (14) of Section 132 as well as for Section 132B. This deeming fiction created in Section 132A(3) treats the assets requisitioned under Section 132A as assets seized under Section 132(1) and since this deeming fiction has to be extended to its logical end, the assets requisitioned under Section 132A could reasonably be treated as evidence found as a result of search conducted under Section 132(1) which could be a basis for computing the

undisclosed income of the assessee for the block period as envisaged in Section 158BB(1). We are, therefore, of the considered opinion that the assets requisitioned under Section 132A could very well be used as evidence for computing the undisclosed income of the assessee under Chapter XIV-B for the block period and the contention of the learned Counsel for the assessee in this regard relying on the omission to specifically mention such assets as evidence to form the basis of computing the undisclosed income in Section 158BB(1) is untenable and cannot be accepted.

55. This leaves us with only one aspect of this issue relating to the addition made on account of cash found during the course of search under Section 69A and that is whether the addition so made by the Assessing Officer was justified on merits or not. As already observed, the cash was found from the residential premises of the assessee situated at New Delhi and Mandi during the course of search. The possession of the said cash although was denied by the assessee initially, he accepted the same subsequently in his statement recorded on oath and as already held by us, nothing was brought on record by the assessee either before the Assessing Officer or even before us to retract his statement made on this issue successfully and satisfactorily. The said cash thus was found in the control and possession of the assessee during the course of search and the presumption under Section 132(4A) was available to be drawn against the assessee that he was the owner of the said cash. No doubt the said presumption is a rebuttable presumption, but the onus to rebut the same satisfactorily and successfully was on the assessee. Moreover, as held by Hon'ble Madhya Pradesh High Court in the case of *Ashok Kumar v. CIT*, the presumption is one of the strongest in case of cash found from the possession of a person since cash is one of the properties of which title is transferable by mere delivery of possession and the onus therefore is still greater on the assessee to offer cogent explanation in respect of the said cash to rebut such presumption.

56. In the present case, it appears from the record that the only attempt made by the assessee to explain the said cash was by stating that the same belonged to Congress (I) Party. Nothing, however, was brought on record by him to support and substantiate the said explanation. On the other hand, the statements of Shri

Sitaram Kesri and Shri Ahmed Patel, President and Treasurer of the Congress (I) Party were recorded by the ADIT(Inv.) and in these statements, the deponents have denied categorically of having any involvement of the Congress (I) Party in the cash found in the possession of the assessee. As rightly contended by the learned DR before us, statements of Shri Sitaram Kesri and Shri Ahmed Patel were recorded by the Department merely to verify the veracity of the assessee's explanation as regards the cash found in his possession and the addition on account of the said cash was made by invoking the provisions of Section 69A and not on the basis of the said statements. In that sense, the said deponents were not the witnesses of the Revenue and the addition having been made on account of unexplained cash not relying on the said statement but by invoking the provisions of Section 69A, there was no legal requirement to allow an opportunity to the assessee to cross-examine the said deponents. Nevertheless, the copies of statements of Shri Sitaram Kesri and Shri Ahmed Patel were made available by the ADIT to the assessee immediately and despite having come to know about the contents of the said statements, nothing was brought on record by the assessee to support and substantiate his explanation that the cash found in his possession was belonging to Congress (I) Party. As mentioned by the Assessing Officer in his order, even the books of account of the Congress (I) Party were verified by the ADIT(Inv.) which revealed that no corresponding entries in respect of cash found in the possession of the assessee were appearing therein.

It is thus clear that no satisfactory explanation in respect of cash found in his control and possession during the course could be offered by the assessee and there was a clear failure on his part to discharge the onus lay on him under Section 132(4A) read with Section 69A.57. In the case of Churamal (supra), it was held by the Hon'ble Supreme Court that the possession of the wrist-watches having been indubitably found with the assessee, the onus was on him to prove on evidence that he was not the owner of the said wrist-watches and having failed to discharge the same, the investment made in the said wrist-watches was rightly treated as his income under Section 69A. In the case of K.T.M.S. Mohamood (supra), Hon'ble Madras High Court has held that the burden to prove that the cash found in his possession does not belong to his lies on the assessee and if he fails to discharge the same, it can reasonably be presumed that the same belongs

to him and represents his income under the deeming provisions of Section 69A.58. As such, considering all the facts of the case and keeping in view the legal position emanating from the aforesaid judicial pronouncements, we are of the view that the presumption available to be drawn against the assessee under Section 132(4A) in respect of cash found in his control and possession was not successfully or satisfactorily rebutted by the assessee and there being no satisfactory explanation offered by him in respect of the said cash, the same was rightly added to his undisclosed income by the Assessing Officer invoking the provisions of Section 69A. In that view of the matter, we find no infirmity in his impugned order on this issue and upholding the same, we dismiss ground No. 3 of the assessee's appeal.

59. The various additions made by the Assessing Officer to the undisclosed income of the assessee on estimated basis have been challenged by him in the following grounds :--Ground No. Particulars Amount (In Rs.)3(ii) and 11 Estimated value of furniture, fittings etc.

25,00,0003(iii) and 12 Estimated household expenses over and above shown by the assessee 1,50,00,0003(iv) and 13 Estimated foreign travel/medical the assessee 15,00,0003(v) and 14 Investment/income relating to dairy farm 15,00,000 60. We have heard the arguments of both the sides and also perused the relevant material on record. It is observed that the aforesaid four additions were made by the Assessing Officer to the undisclosed income of the assessee for the block period on the basis of following observations recorded in his impugned order:-- Based on the entries recorded in document No. M-161/96 wherein record of household expenses for the period January 1993 to June 1993 to the tune of Rs. 9,41,727 was found. On an average it comes to Rs. 1,50,000 per month. The minor variation may be due to estimation of expense and also fluctuations over a period of time.

Further document No. 01/M-158/96 reveals various household expenses recorded by Smt. Ram Devi which total upto Rs. 7,51,200. In response to the show cause notice proposing an addition of Rs. 1.50 crores to the income of the assessee on account of household withdrawals a reply dated 18-8-1997 was filed in which Rs. 44.72 lakhs were declared under the various sub-heads without the accompanying

evidences. Further vide this office letter dated 19-8-1997 attention of the assessee was drawn to the amount of withdrawals shown based on estimates and guess work. Again a reply was filed on 21-8-1997 in which it was explained that household withdrawals declared are not based on guess work but still assessee failed to file any evidence in support of the same. For e.g. Assessee failed to show as to the drawings declared are out of withdrawals from which bank account and what expenses have been incurred. The assessee in his annual statement of affairs has declared nominal withdrawals per annum and without correlating them as to when and how they have been withdrawn and from where they have been withdrawn. In the absence of these details it is imperative to make an estimate of withdrawals. Keeping in view the lavish style of living enjoyed by the assessee family and also on the basis of list of valuables (which includes a number of colour T.V.s, V.C.R., Music systems, A.C.s and other costly wares) found but not seized during the course of search at Mandi and Delhi and various seized documents namely M161/96 and M158/96 (copies of few pages of these documents have been shown as annexure A to the order). I estimate an amount of Rs. 1.50 crores as household withdrawals of the assessee for the block period as unexplained expenditure, including the expenses incurred on the marriage of Sh. Anup Sharma and daughter Kavita.

In response to the show-cause notice dated 11-8-1997 the assessee filed a reply submitting that no investments have been made during the block period on account of furniture, fixture and furnishings.

However during the course of search it was found that house property at Ghaziabad and Mandi has been lavishly furnished in the form of teak furniture - Sofa, Double beds, Almirah and other wooden interior apart from Chandeliers, carpets, glass ware, decorative fittings etc.

In the absence of any explanation from the assessee I estimate Rs. 25 lakhs as unexplained expenditure under this head taxable for the block period.

Unexplained expenditure on account of foreign travelling and medical expenses
The assessee filed a reply dated 18-8-1997 in which it was explained that all the foreign travel expenses and medical expenses have been reimbursed by the Govt.

and hence no expenses have been incurred by the assessee.

In view of the failure of the assessee to furnish any information along with relevant evidences in support of his contentions, I estimate an expense of Rs. 15,00,000 as unexplained expenditure and add the same to the income of assessee for the block period. The estimate is justified in view of the fact that a copy of full passport was given to the assessee where in a number of entries relating to foreign visits have been made during the block period.

The assessee had failed to furnished any cogent explanation in support of the entries in the passport and rather submitted a casual reply stating that all foreign visits expenses were borne by the Government.

The assessee filed a reply dated 18-8-1997 in response to the show-cause notice proposing an addition of Rs. 15 lakhs on account of unexplained investments and income from dairy activity at Mandi, in which it was stated that dairy activity is actually run by his wife Smt. Ram Devi.

This stand of the assessee is actually an about turn of the position taken during the course of post search enquiries by the Investigation Wing. In his statement recorded before ADIT (Inv.) Shri Sukh Ram admitted a number of times that dairy activity is run by him since 1960 and income therefrom has not been disclosed to the Income Tax Department before the date of search. He also admitted having 30 to 35 Jersy/Holstein Cows at his dairy farm for which even a declaration has been filed in the P.M.O. by the assessee in 1987-88 and 1988-89 acknowledging at that time about having 25 Jersy/Holstein Cows.

In view of the above, the stand taken by the assessee is not accepted since no evidence in support of the same has been furnished and in view of the statement recorded on oath of the assessee for which no cogent reason has been given to disbelieve the same hence I estimate the income and investments on this activities at Rs. 15 lakhs for the block period as undisclosed income.

61. As is evident from the aforesaid observations recorded by the Assessing Officer in support/justification of the four additions made on estimated basis, all

these additions were made by him mainly on the basis of post-search enquiries and the same were not based on any evidence found as a result of search or the requisition of books of account etc. under Section 132A. Even though there was some reference made by him at some places to the entries found recorded in the diaries seized by the CBI, we have already held that the said diaries cannot be considered as the evidence found as a result of search or requisition of books of account etc. under Section 132A nor the same were relatable to such evidence. Even the addition made by him on estimated basis on account of unexplained investment in furniture, fittings etc. was based merely on the finding of the search about the lavish furniture available in the residential house of the assessee without giving any other particulars such as description, quantity, valuation basis etc.

and there was no other evidence whatsoever found during the course of search to show the value of the same or the period in which the investment was made by the assessee in the furniture. Moreover, all these estimations were made by the Assessing Officer arbitrarily without giving any basis whatsoever in support of the same.

62. As already discussed in the earlier part of this order, the special assessment under Chapter XIV-B is intended to make assessment of the undisclosed income of the assessee for the block period on the basis of evidence found as a result of search or requisition of books of account etc. under Section 132A and its scope and ambit is thus limited in that sense to the materials unearthed during the search. There should be direct evidence found as a result of search for the purpose of computation of undisclosed income. No ad hoc addition or addition contrary to the material found as a result of search is permissible.

The quantum of addition need to be restrained to accord with the material found. In the case of *Jaya S. Shetty v. Asstt. CIT* [1999] 69 ITD 336, Mumbai Bench of ITAT deleted the additions based on conjectures and surmises or estimates and presumption not supported by any evidence, documents etc. found as a result of search. In the case of *Ramesh Chand Modi* (supra), the Jaipur Bench of ITAT has held that no addition can be made in the block assessment simply on the basis of estimates and surmises without there being any evidence found as a result of

search. In the case of CIT v. Rajendra Prasad Gupta , Hon'ble Rajasthan High Court held that although the Assessing Officer has jurisdiction to make best judgment assessment in the proceedings under Chapter XIV-B, he has no power to make estimation of income de hors the evidence found as a result of search. It was also held by the Hon'ble Rajasthan High court that the block assessment under Section 158BC is to be framed in the light of material that comes to the possession of the assessing authority during the course of search. To the similar effect is the decision of Hon'ble Calcutta High Court in the case of CIT v. Ashim Krishna Mondal [2004] 270 ITR 160 wherein the order of the Tribunal deleting the addition by the Assessing Officer on estimated basis without there being any material to arrive at the figures of purchase and consumption was upheld by their Lordships observing that such estimation is not permissible in the block assessment. In the case of Radhey Shyam Tanwar v. Asstt CIT [2002] 77 TTJ (Jodh.) 505, the Jodhpur bench of ITAT has held that Section 69 casts heavy burden on the Revenue to establish that the assessee has actually made the alleged unexplained investment and in the absence of any incriminating documents found during the course of search showing the factum of such investment, neither the estimation of quantum nor the addition thereof to the undisclosed income would be called for in the block assessment.

63. It is also pertinent to note here that a letter dated 18-8-1997 was filed by the assessee with the Assessing Officer (copy at pages 45 to 48 of the assessee's paper book) during the course of assessment proceedings. In the said letter, an attempt was made by the assessee to explain the sources of funds to meet the household expenses, foreign travelling expenses, furniture, fittings etc. A statement was also furnished alongwith the said letter showing the availability of such funds during the block period to the extent of Rs, 44,72,757 giving year-wise as well as head-wise break up. It was also pointed out by the assessee in the said letter that the dairy activities were being carried on by his wife Smt. Ram Devi and not by him as alleged by the Assessing Officer. The Assessing Officer, however, appears to have ignored these submissions made by the assessee alongwith the relevant and material details altogether and proceeded to make the impugned additions on estimated basis without even rebutting the explanation offered by the assessee. It clearly shows that the said additions were made by him arbitrarily and

there being no basis whatsoever given by him, the same are not sustainable even on merits also.

64. As such, considering all the facts of the case as well as keeping in view the judicial pronouncements discussed above, we hold that the additions in question made by the Assessing Officer on estimated basis are not sustainable either in law or on facts and deleting the same, we allow the relevant grounds raised by the assessee challenging the said additions.

65. In ground No. 9, the assessee has challenged the additions of Rs. 32,59,016 made by the Assessing Officer on account of alleged unexplained investment made in the immovable properties, 66. As mentioned by the Assessing Officer in his assessment order, it was found by him during the course of post-search enquiries that the assessee has made substantial investment in the following immovable properties : The Assessing Officer required the assessee to explain the source of funds utilized for making the aforesaid investments. In reply filed on 19-8-1997, it was submitted by the assessee that the investment of Rs. 27.64 lakhs (excluding interest on loan) was made in the property being D-42, Kaushambi, Ghaziabad, out of which, a sum of Rs. 10 lakhs was contributed by his wife Smt. Ram Devi. The investment claimed to be made by his wife Smt. Ram Devi to the extent of Rs. 10 lakhs was not considered by the Assessing Officer in the assessee's hands. However, his explanation about having invested a sum of Rs. 17.64 lakhs in the said property was not accepted by the Assessing Officer in the absence of satisfactory evidence to support and substantiate the same. He, therefore, added the said amount to the income of the assessee being unexplained investment made in the property. In the document No.M-161/96 representing diary, disbursements made by Smt. Ram Devi on behalf of the assessee for construction of the said property were found to be recorded by the Assessing Officer to the tune of Rs. 39.90 lakhs.

Relying on these entries found recorded in the relevant diary as well as the valuation made by the Engineering Wing of the CBI, the Assessing Officer held the total investment made by the assessee in the said property to be Rs. 39.90 lakhs and the difference between the said value and the value shown by the assessee at

Rs. 27.64 lakhs was added by him to the total income of the assessee. Thus, a total addition of Rs. 29.90 lakhs (Rs. 17.64 lakhs + Rs. 12.26 lakhs) was made by the Assessing Officer to the undisclosed income of the assessee. As regards the investment of Rs. 6,80,100 found to be made in the second property being flat in Nav Sansad Vihar Society during the block period, the Assessing Officer accepted the explanation of the assessee as regards sources for making the said investment to the extent of Rs. 4,99,996 and the remaining amount of Rs. 1,80,104 was added by him to the undisclosed income of the assessee treating the same as unexplained. As regards the third property being land at Kotadhar, the Assessing Officer found that the said investment made in the year 1972 was outside the block period and therefore, the same was not considered by him in the assessment of assessee's undisclosed income for the block period. As regards the fourth property being Apple Orchard at Village Surath, Mandi, the Assessing Officer found that the concrete stairs constructed at the said property was not disclosed by the assessee and the investment made in the said construction as valued by the DVO at Rs. 74,012 was added by him to the total income of the assessee treating the same as unexplained. Accordingly, a total addition of Rs. 32,59,016 was made by the Assessing Officer to the total undisclosed income of the assessee on account of unexplained investment in immovable. properties.

67. Before us, the main contention raised by the learned Counsel for the assessee is that there was no evidence whatsoever found as a result of search showing any unexplained investment made by the assessee in the four immovable properties in question. He has contended that the additions made by the Assessing Officer on this issue merely on the basis of post-search enquiries without there being any evidence found as a result of search were beyond the scope of the block assessment.

The learned DR, on the other hand, has not been able to dispute this position except pointing out that the entries found recorded in the seized document No. M-161 /96 were also relied upon by the Assessing Officer in support of the addition of Rs. 29.90 lakhs made on account of unexplained investment made by the assessee in the immovable property being D-42, Kaushambi, Ghaziabad. However, as already held by us in the preceding paragraphs of this order, the said

diary seized by the CBI from the residence of the assessee could not be considered as evidence found as a result of search conducted under Section 132. It, therefore, follows that there was no evidence found as a result of search under Section 132 or requisition made under Section 132A on the basis of which, the additions in question on account of unexplained investment in the immovable properties were made by Assessing Officer.

The said additions thus were made merely on the basis of post-search enquiries without there being any evidence found as a result of search and this being so, we hold that the additions made by the Assessing Officer on this count were clearly outside the scope of block assessment. The same, therefore, are deleted allowing ground No. 9 of the assessee's appeal.

68. In ground No. 10, the assessee has challenged the addition of Rs. 27,37,500 and Rs. 5,00,000 made by the Assessing Officer on account of award in defamation suit received by the assessee in UK and the estimated expenditure incurred on the said suit respectively.

69. In his return of income filed for the assessment year 1996-97, a sum of Rs. 27,37,500 received by way of award in defamation suit in UK was declared by the assessee and the same was claimed to be exempt in Part-III of the said return. During the course of block assessment proceedings, the Assessing Officer examined the nature of the said receipt and treating the same as revenue receipt on such examination, he held that the said receipt was taxable in the hands of the assessee under the head "income from other sources". Accordingly, he added the same to the undisclosed income of the assessee for the block period.

The assessee was also called upon by him to give the details of legal expenses incurred in connection with the defamation suit and the sources thereof. In reply, it was submitted by the assessee that the said expenses were incurred by his son-in-law, a resident of UK and the same were subsequently reimbursed to him by the defendant as per the Court order. The Assessing Officer, however, did not find the explanation of the assessee to be satisfactory for the reason that the relevant details were not filed by the assessee. He, therefore, estimated such expenses at Rs. 5 lakhs and added the same to the undisclosed income of the assessee

treating it as unexplained.

70. We have heard the arguments of both the sides on this issue and also perused the relevant material on record. It is observed that the amount of Rs. 27,37,500 received by the assessee by way of award in defamation suit in UK was duly disclosed by him in his return of income filed regularly for assessment year 1996-97 and this fact is not in dispute. It is also not in dispute that no evidence was found as a result of search to show that this receipt claimed to be exempt by the assessee in his return of income was not eligible for such exemption.

In these circumstances, the examination of the assessee's claim for exemption was the subject-matter of regular assessment and not the block assessment. As held by the Hon'ble Calcutta High Court in the case of Bhagwati Prasad Kedia v. CIT , the Assessing Officer was not entitled to question the loan duly disclosed by the assessee in his regular return of income during the course of block assessment proceedings since the same was a subject-matter of regular assessment. Explaining further, Hon'ble Calcutta High Court observed that a composite reading of the relevant provisions contained in Chapter XIV-B makes it crystal clear that the Legislature thought it fit to make a distinction between the block assessment and the regular assessment and the Assessing Officer, therefore, was wrong in holding that the sum featured in the regular books of account can be taxed in the block assessment. It was also observed by the Hon'ble Calcutta High Court that the Assessing Officer while dealing with the regular assessment is free to examine the veracity of the return as well as the claims made by the assessee with regard to exemption and/or deduction.

In the case of Essem Intra-port Services (P.) Ltd, (supra), Hyderabad Bench of ITAT has held that the true nature of undisclosed income, as it is construed in Chapter XIV-B, is that the assessee has not or would not have disclosed to the department and such income should be found out by the department as a result of search or requisition of books of account etc. The Tribunal also held that the factum of non-disclosure on the part of the assessee should, therefore, be existing and such nondisclosure should have been blown out as a result of search or requisition of books etc. In the present case, both these conditions were not

satisfied inasmuch as neither there was a non-disclosure on the part of the assessee nor there was any incriminating material found as a result of search creating any doubt about the exemption claimed by the assessee in respect of the amount in question in the regular return of income. As such, considering all the facts of the case as well as keeping in view the legal position emanating from the aforesaid judicial pronouncements, we hold that the impugned additions made by the Assessing Officer were outside the scope and purview of the block assessment and the same, therefore, are not sustainable. Similarly, the addition of Rs. 5,00,000 made by him on estimated basis on account of legal expenses incurred in connection with defamation suit in UK was also not sustainable since the same was not based on any evidence found as a result of search. We, therefore, delete both the additions made by the Assessing Officer on these counts and allow ground No. 10 of the assessee's appeal.

71. As regards the addition of Rs. 16,96,871 made by the Assessing Officer under Section 68, it is observed that the assessee was found to have maintained seven bank accounts during the course of block assessment proceedings. On examination of the said accounts, it was further noticed by the Assessing Officer that various amounts were credited in the said accounts. He, therefore, required the assessee to explain the said credits appearing on the different dates falling within the block period. The assessee, however, failed to explain the same to the satisfaction of the Assessing Officer and consequently, the amount of such credits totalling to Rs. 16,96,871 was added by the Assessing Officer to the undisclosed income of the assessee under Section 68 treating the same as unexplained.

72. Before us, the learned Counsel for the assessee has challenged this addition made by the Assessing Officer under Section 68 by raising two-fold contentions. His first contention was that this addition made by the Assessing Officer was not based on any evidence found as a result of search but the same was based entirely on the post-search enquiries made by the Assessing Officer during the course of assessment proceedings. Secondly, he has contended that all the seven bank accounts wherein the credits in question were found to be appearing, had been disclosed by the assessee in his regular returns of income filed before the search by way of declaring the interest received on the said saving bank accounts.

He has also filed a statement showing the details of such declaration and a perusal of the same clearly shows that all the seven bank accounts were duly disclosed by the assessee in his returns of income filed regularly before the date of search by declaring interest earned on the said accounts mentioning specifically the details of account number, name of the bank as well as branch. As already discussed in the earlier part of this order relying, inter alia, on the decision of Hon'ble Calcutta High Court in the case of Bhagwali Prasad Kedia (supra), the block assessment under Chapter XIV-B is in addition to the regular assessment and the Assessing Officer is not entitled to question or examine the transactions disclosed in the regular return during the course of block assessment proceedings since the same are the subject-matter of the regular assessment. In the present case, all the seven bank accounts were duly disclosed by the assessee in his returns of income filed regularly and this being the admitted position, the addition on account of unexplained cash credits, if any, appearing in the said accounts was permissible only in the regular assessment and not in the block assessment. We, therefore, hold that the addition in question made by the Assessing Officer under Section 68 in the block assessment is not sustainable and accepting the contention raised by the learned Counsel for the assessee on this issue, we delete the same.

73. This takes us to the last ground raised by the assessee in the present appeal challenging the action of the Assessing Officer in giving credit of Rs. 21,40,788 as against Rs. 25,51,170 claimed by the assessee on account of income already declared in the return.

74. After considering the rival submissions and perusing the relevant material on record, it is observed that the relief claimed by the assessee on this issue can be allowed only after verifying the relevant details from the actual record. We, therefore, remand this matter to the Assessing Officer with a direction to verify such relevant details and allow the appropriate relief to the assessee after such verification.