

Manisha Construction Vs. the Asstt. Cit

Manisha Construction Vs. the Asstt. Cit

SooperKanoon Citation : sooperkanoon.com/75559

Court : Income Tax Appellate Tribunal ITAT Pune

Decided On : Mar-30-2007

Judge : C Sethi, F A Ahmad

Appellant : Manisha Construction

Respondent : The Asstt. Cit

Judgement :

1. In this appeal directed against the CIT(A)'s order dated 5-2-2004 in the matter of block assessment made Under Section 158BC(c) of the IT.Act, by the A.O for the block period 1-4-1990 to 9-11-2000 the assessee has taken the following grounds of appeal.

1. The Id. CIT(A) has erred in law and facts in passing the order confirming the addition of Rs. 18,80,870.

2. The Id. CIT(A) has erred in adding back the amount of Rs 18,80,870 being losses incurred by the appellant.

3. The Id. CIT(A) has (ailed to appreciate the provisions of Section 158BB(i)(c) of the Act regarding set off of losses during the block period in true and natural spirit.

4. The Id. CIT(A) has erred in disallowing set off of losses without giving proper reasoning for the same.

2. The facts giving rise to the aforesaid grounds of appeal may be set out as under. The assessee is a registered partnership firm consisting of Mr. Rajan H. Khinvasara and Mr. H. Khinvasara as partners sharing profits and losses equally. The firm is engaged in the business of promoters and builders. The assessee firm had filed its return of income regularly upto and inclusive of assessment year 1996-97. The returns for the subsequent assessment years upto the assessment year fallen due before the date of search were not filed. A survey action Under Section 133A was conducted on 9-11-2000 initially, which was converted into search and seizure. During the course of survey action Under Section 132 of the Act certain documents, incomplete books of accounts and papers were found and seized. A notice Under Section 158BC was issued by the A.O which was served on the assessee-firm on 5-6-2002 requiring the assessee to file a return of income for the block period from 1-4-1990 to 9-11-2000 in response to which the assessee furnished its block return in form No. 2B declaring the total undisclosed income at Rs. 23,35,977. The assessee furnished a computation of undisclosed income as under:for the block period from 01/04/90 to 09/11/2000 Rs. 18,35,977/-Add : unexplained expenditure incurred in cashBut not accounted for, Exp. Otherwise disallowable etc.

Rs. 5,00,000/- ----- 3. In part I of the block return, the assessee had given computation of undisclosed income as under:-----Asst. Year Total income Returned/assessed Indicate including income as on the whether Undisclosed income date of search Returned (R) computed Under or Assessed Section 158NN (A)----- 91-92 55,366/- 55,366/- A----- 92-93 39,818/- 39,818/- A----- 93-94 7,464/- 7,464/- A----- 94-95 7,659/- 7,659/- A----- 95-96 73,898/- 73,898/- A----- 96-97 74,788/- 84,788/- A----- 97-98 (-) 14,59,426/- - ----- 98-99 36,05,229/- - ----- 99-00 (-)

2,19,735/-	-	-----	00-01
1,11,618/-	-	-----	01-02 (-)
2,01,709/-	-	-----	
5,00,000/-		-----	25,94,960/-

2,58,983/- Total undisclosed income for the block period is shown at Rs. 23,35,9777: 4. On the basis of the aforesaid details the A.O analyzed the manner of undisclosed income computed by the assessee as under: 5. The aggregate of the loss of Rs. 18,80,870 shown for the assessment years 1997-98, 1999-00 and 2001-02 was not allowed to be set off against the aggregate of the undisclosed income of other years, by the A.O while making the block assessment determining the total undisclosed income at Rs. 42,16,847 the A.O has disallowed the set off of claim of losses amounting to Rs. 18,80,870 by discussing and observing as under: As per provisions of Section 158BB(1)(c) where the due date of filing a return of income has expired, but no return of income has been filed, 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...etc. as increased by aggregate of the losses of such previous years determined (A) on the basis of entries as recorded in the books of accounts and other documents maintained in the normal course on or before the date of search or requisition where such entries result in computation of loss for any previous year falling in the block period.

Thus, set off loss of any previous year where no return is filed, is available only in one circumstance i.e. where the loss is determined on the basis of entries as recorded in the books of account. In the present case, books of accounts seized do not reveal any entries pertaining to loss in business. This fact is also evident from various sworn statements of Shri Rajan Khinvasara recorded during survey and search. Some of the relevant questions-answers are / reproduced below for ready reference.

Q 35 of statement Under Section 133A dt. 10/11/2000 - "Please refer to the cash book pertaining to M/s Manisha Construction for the F.Y. 9697, 97-98, 98-99 and 2000-01 (upto 08/11/2000) relevant to A. Ys 97-98, 98-99, 99-00 and 2001-02. In all the cash books there are either no cash in hands or no entries have been made

on the receipt side (left side) of the cash book, although cash deposits were made for different years as under: The details of different dates of deposits are mentioned as per Annexure A and Annexure B. Since there was no receipts or cash in hand for depositing the same with the banks of different dates of the above years as per Annexure A & B the same were deposits made by you from undisclosed income which is obvious from the book of accounts maintained by you. What do you want to say in respect of my observation? Ans. I cannot explain the same right now. My C.A. will comment on it".

Ques No. 4 of sworn statement Under Section 132(4) dt. 15/11/2000 of Shri Rajan Khinvasara: It is also seen that the books of accounts of the various business concerns wherein you or your family members are the proprietor/partner have not maintained upto date from F. Y. 97-98 onwards. What is the reason for this failure on your part? Ans: I accept that the books of accounts of the business I concerns are not complete though most of the transactions I are recorded in the same as stated earlier, because of ill I health of my father & Chartered Accountant, this aspect of I our business was little neglected.

In view of these facts and legal proposition in this regard, the loss of Rs. 18,80,865/- for A. Y. 97-98, 99-00 and 01-02 (Part period of block) is not allowable. Hence undisclosed income of the assesses gets enhanced to the extent of Rs. 18,80,865/- as the same has been claimed set off by the assesses in his computation of Block return filed against the undisclosed income of other years of the block period.

6. Being aggrieved with the A.O's order in not allowing the assessee's claim of set off of losses amounting to Rs. 18,80,870 the assessee preferred an appeal before the CIT(A).

7. Before the CIT(A) the assessee submitted as under as reproduced by the CIT(A) in para 3 of his order.

The Assessing Officer stated that as per Section 158BB(1)(c) of the Act, the loss computed on the basis of the entries recorded in the books of account maintained on or before the date of search would only be allowed. Based on the interpretation

of the Section 158BB(1)(c) of the Act, the Assessing Officer held that the loss is allowed to be set off only when the loss is determined on the basis of the entries recorded in the books of account. Since the seized books do not reveal any entry in the books relating to loss, the said loss was not allowable. Hence, the Assessing Officer disallowed the loss to the extent of Rs. 18,80,870/- and made addition thereof assessing the income at Rs. 42,16,847/-. Being aggrieved by the same, the appellant has preferred the appeal and thus, this ground.

The disallowance made by the Assessing Officer is incorrect for the following reasons: The interpretation of the provisions of Section 158BB(1)(c) of the Act is incorrect.

(1) The undisclosed income of the block period shall be aggregate of the total income of the previous year falling with 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 intimation 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.

c. where the due date for filing a return of income has expired but no return of income has been filed, (i) on the basis of entries as recorded in the books where such entries result in computation of loss for any previous year falling in the block period or (ii) on the basis of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such income does not exceed the maximum amount not chargeable to tax for any previous year falling in the block period.

The above section specified that the manner in computing the undisclosed income. The said undisclosed income is computed by- Aggregating the total income of the previous years failing with the block period (which is inclusive of disclosed as well as undisclosed income).

- Increasing thereto the aggregate of the losses of such previous years.

The above reduction of the total income and increase in income by the loss is to be computed in the certain manner which is given in Sub-clause (a) to (f) of Section 158BB(1).

Thus, what is meant by the Section 158BB(1)(c) of the Act is that while computing the undisclosed income, only the loss which is on the basis of the entries recorded in the books of account should be added to the total income in order to find out the undisclosed income for the block period.

Total income earned in cash not disclosed to the department Rs. 100/- The Section 158BB would be applied by taking the aggregate total income for the entire block period which is $Rs. 100 + (-25) = 75/-$.

From this amount, the amount of loss which is computed as per the books of account should be added. Hence, the total undisclosed income would be $75 + 25 = 100/-$ Tabulating the above figures as follows would make the picture more clear.-----A.Yr.

Total	undisclosed	Refunded/	Total	income	(disclosed	+
Assessed-----					1	75
100-----						-25

It is submitted that the Assessing Officer has wrongly interpreted the said provisions and held that set off of loss is allowed only if the loss is as per the books of account. In fact, the true interpretation is other way round. What is intended by the legislature is that against the undisclosed income, only undisclosed losses should be allowed to be set off and not the losses, which are determined under the regular assessment.

In view of the above, the loss falling within the block period should be allowed to be set off against the other incomes of the block period.

The appellant's above view is fortified by the view taken by Honourable Mumbai Tribunal in the case of BDA Ltd. v. ACIT 65 ITD 501 wherein identical issue was involved.

The appellant quoted extensively from the said decision and has contended that the loss claimed by the appellant during any year falling with the block period was

allowable and could be set off against the income in the block period. It was also submitted that the loss, which has been claimed in the block period, has been determined in the same manner, as the income for the different assessment years was determined. The appellant also submitted that after the amendment in Section 158BB(1)(c) the loss was required to be added back to the undisclosed income if the same could be categorized as disclosed loss. It was the claim of the appellant that the loss, which was not disclosed before the department prior to search, could not be added back and should therefore be allowed to be reduced from the aggregate undisclosed income. The appellant had also filed the details of the statement of total income earned during different assessment years before CIT(A)-I who was originally having jurisdiction over this case. It was finally pleaded that since the present loss did not fall within the purview of Section 158BB(1)(c) of the IT Act, the disallowance of loss of Rs. 18,80,870/- was unjustified warranting its deletion. The appellant also relied on the decision given by CIT(A)-I, Pune in the appellate order against the block assessment order of Shri Rajan H. Khinvasara, Prop. Manisha Enterprises on similar facts.

8. Before the CIT(A) the assessee placed reliance on a decision of I.T.A.T. Bombay in the case of BDA Ltd. v. ACIT 65 ITD 501.

9. After considering the assessee's submission, the CIT(A) decided the issue against the assessee by holding as under: I have considered the submissions of the appellant. However, I am not inclined to agree with the submissions of the appellant and also beg to differ with the findings given by the CIT(A), on similar facts. in the case relied upon by the appellant. There is no dispute as regards the fact that the appellant had not filed his regular return of income from A.Y. 1997-98 onwards. It is the claim of the appellant that it had incurred loss of Rs. 14.60 lakhs for a.y.

1997-98, which should be set off against the undisclosed income of the subsequent years despite the fact that no return of income was filed either for the A.Y. 1997-98 or for the subsequent year.

Subsequent to the amendment in Section 158BB, which deals with the computation of undisclosed income of the block period, the contention of the

appellant deserves to be outrightly rejected.

There is a specific amendment to Section 158BB(1)(c) which would deny the appellant the so called claim of set off of undisclosed loss in an assessment year against the undisclosed income of another year both forming part of block assessment period. As per Section 158BB, the total income of the appellant has to be computed on the basis of evidences found during the course of search less the income returned or assessed or recorded in the books of account as the case may be. Where no regular return of income has been filed and the explanation of the evidences results in a computation of loss then the following method of computation of undisclosed income of this year is to be followed. The income of the appellant on the basis of the evidences found during the course of search if computed at 'X' and the income as per the books maintained in the normal course is also 'X' then the undisclosed income/loss for that assessment year would be NIL. For the A.Y. 1997-98 the claimed loss of the appellant is about Rs. 14.60 lakhs. This implies that both the loss computed as per the evidence found during the course of search and the loss computed on the basis of entries recorded in the regular books of account would be the same. This is quite evident and clear from the amended provisions of Section 158BB(1)(c). Therefore, for the A.Y. 1997-98 there would be no undisclosed loss available to the appellant which could be set off against the undisclosed income of either a preceding or a succeeding year. The decision relied upon by the appellant in the case of BDA Distilleries therefore do not hold good any more after the aforesaid amendment. The A.O has though not allowed the set off of the losses, has based her decisions on the findings that the books of account of the appellant did not indicate any entries pertaining to the loss in business. Even if the submissions of the appellant are accepted for argument sake that entries had indicated incurring of losses, such losses cancel out one another in the computation of undisclosed income/loss subsequent to the amendment in Section 158BB(1)(c). The same findings hold good for the other assessment years forming pan of block period and the appellant would not be entitled to set off all the so called losses of certain assessment years against the undisclosed income of the other assessment years forming part of the same block period. The grounds of appeal raised on this issue therefore fail.

11. The Id. A.R appearing before us has submitted that in the light of a decision of Bombay Bench of I.T.A.T. in the case of BDA Ltd. v. ACIT (supra) the loss incurred by the assesses for the assessment years 1997-98, 1999-00 and 2001-02 should have been allowed to be set off against undisclosed income of other assessment years declared by the assessee. In the course of hearing, the Id. A.R for the assessee invited our attention to the written submissions of the assessee filed before the CIT(A). In support of his case, the Id. A.R for the assessee relied on the following decisions.

12. In the written submissions of the assessee filed before the CIT(A), the assessee has quoted paragraphs 7, 8 and 9 of the Tribunal's order in the case of B.D.A. Ltd. (supra), where the Hon'ble Tribunal has considered the main provision of Sub-section (1) of Section 158BB read with Explanation (a) below Sub-section (1) of Section 158BB and Clause (c) (as it then stood) of Sub-section (1) of Section 158BB of the Act.

After referring the aforesaid paragraphs of the Tribunal's order, the Id. Counsel for the assessee submitted that the losses claimed by the assessee during the years falling within the block period can be set off against the income for the block period it is clearly pointed out in the aforesaid decision of the Tribunal in the case of B.D.A. Ltd. (supra) by holding that the object of the search is to obtain evidence regarding the true income of an assessee and if such an evidence points to a loss, there could be no escape from the conclusion that the loss has to be set off. Further, the Id. Counsel for the assessee has also submitted that on identical facts and circumstances of the case and an identical issue involved in the sister concern viz. Manisha Enterprises in ITA No. 201/PN/2004, the Hon'ble Tribunal has upheld the order of the CIT(A) in directing the A.O to allow the set off of the losses of previous years falling within the block period against the undisclosed income of other previous years falling within the block period. He further submitted that the books of accounts seized by the department indicated the loss for the A.Y. 1997-98, 1999-00 and 2001-02 and, as such, the loss determined on the basis of seized documents which are to be taken into account while computing the undisclosed income for the block period.

13. The Id. D.R, on the other hand, submitted that there is a categorical finding by the A.O that the loss claimed by the assessee for the assessment years 1997-98, 1999-00 and 2001-02 are not based on any incriminating seized materials or documents or material and information relating to the seized documents. He further pointed out that even if the contention of the assessee to the effect that the loss is determined on the basis of seized books of accounts or documents, is accepted for the sake of arguments, still the loss determined on such books of accounts or documents found in the course of search is not to be set off against the undisclosed income of other previous years falling within the block period, inasmuch as the seized books of accounts or documents found during the course of search were nothing but the books of accounts or documents maintained by the assessee in the normal course of business as admitted by the assessee in his statement recorded Under Section 132(4) of the Act as well as in the course of block assessment proceedings as provided under the newly inserted Sub-clause (A) of Clause (c) of Section 158BB(1) inserted by the Finance Act, 2002 with retrospective effect from 1-7-1995.

14. We have considered the rival contentions of both the parties and have carefully gone through the orders of the authorities below. We have also deliberated upon the relevant position of law as well as the decisions cited at the Bar.

15. We first find it relevant to refer to provisions of Section 158BB(1) providing the manner of computation of undisclosed income of any block period under Chapter XIVB of the Act. Section 158BB reads as under: 155BB(1). The undisclosed income of the block period shall be 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 A.O 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.

(a) where assessments under Section 143 or Section 144 or Section 147 have been concluded prior to the date of commencement of the search or the date of requisition on the basis of such assessments; (b) where returns of income have been filed under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns; (c) where the due date for filing a return of income has expired, but no return of income has been filed, - (A) On the basis of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such entries result in computation of loss for any previous year falling in the block period; or (B) On the date of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such income does not exceed the maximum amount not chargeable to tax for any previous year falling in the block period: (ca) where the due date for filing a return of income has expired, but no return of income has been filed, as NIL in cases not falling under Clause (c); (d) where the previous year has not ended or the date of filing the return of income under Sub-section (1) of Section 139 has not expired, on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years: (e) where any order of settlement has been made under Sub-section (4) of Section 245D, on the basis of such order: (f) where an assessment of undisclosed income had been made earlier under Clause (c) of Section 158BC, on the basis of such assessment.

Explanation - For the purposes of determination of determination of undisclosed income, - (a) the total income or loss of each previous year shall, for the purpose of aggregating, be taken as the total income or loss computed in accordance with the provisions of this Act without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under Sub-section (2) of Section 32: Provided that in computing deductions under Chapter VI-A for the purposes of the said aggregation, effect shall be given to set off of brought forward losses under chapter VI or unabsorbed depreciation under Sub-section (2) of Section 32; (b) of

a firm, returned income and total income assessed for each of the previous years falling within the block period shall be the income determined before allowing deduction of salary, interest commission, bonus or remuneration by whatever name called to any partner not being a working partner: Provided that undisclosed income of the firm so determined shall not be chargeable to tax in the hands of the partners, whether on allocation or on account of enhancement: (c) assessment under Section 143 includes determination of income under Sub-section (1) or Sub-section (18) of Section 143.

16. In the aforesaid main Sub-section (1) of Section 158BB the words "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 A.O and relatable to such evidence" has been substituted by the Finance Act, 2002 with effect from 1-7-1995 for the words "in accordance with the provisions of Chapter IV, 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 A.O.17. Further, the above-stated Clause (c) and (ca) of Sub-section (1) to Section 158 has also been substituted by the Finance Act, 2002 with effect from 1-7-1995 for then Clause (c). Prior to the substitution by the Finance Act, 2002 with effect from 1-7-1995, the Clause (c) of Sub-section (1) of Section 158 BB read as under: 158BB(1)(c): where the due date for filing a return of income has expired but no return of income has been filed, as nil.

18. It is thus found that the newly inserted Clause (c) along with its Sub-clauses (A), (B) and Clause (ca) to Section 158BB(1) were not in the statute in Section 158BB(1) prior to its substitution by the Finance Act, 2002 with effect from 1-7-1995. This newly inserted Clause (c) with Sub-clauses (A), (B) and Clause (ca) have been substituted with retrospective effect from 1-7-1995.

19. The scope and effect of the amendment (with retrospective effect from 1-7-1995) made in Section 158BB- have been elaborated in the following portion of the departmental circular No. 8 of 2002 dated 27-8-2002, as follows: 61.3 The existing provisions of Section 158BB specify the manner of computation of undisclosed

income of the block period. According to Sub-section (1) of the said section the first step is to compute the aggregate of the total income, including undisclosed income, of the previous years falling within the block period on the basis of evidence found as a result of search or requisition and such other materials or information as are available with the A.O. Such aggregate income, is thereafter, to be adjusted for the income or loss which has already been assessed or declared, to arrive at the undisclosed income of the block period.

61.3.1 Some appellate authorities have held that income which can be included in the block assessment is only such income which is directly evidenced by material found during the search and does not include income which has been discovered on the basis of post search inquiries made during the block assessment proceedings. This is contrary to the intention that any undisclosed income discovered as a result of search is to be included in the block assessment as long as such income has been detected as a result of evidence gathered during the search.

61.3.2 The Finance Act, 2002 has amended Section 158BB to clarify that the block assessment of undisclosed income is to be based on the evidence found in the search and material or information gathered in post search inquiries made on the basis of evidence found in the search.

61.4 As per Clause (a) of Sub-section (1) of Section 158BB as it existed, the aggregate total income of the block period including the undisclosed income was to be adjusted by the income or loss already assessed in regular assessments. However, the clause does not specify the date by which such assessments should be completed.

61.4.1 The Finance Act, 2002, has amended Clause (a) to clarify that the aggregate total income is to be adjusted by the income or loss assessed in assessments completed prior to the date of commencement of the search or the date of requisition.

67.5 Clause (b) of Sub-section (1) of Section 75888 states that the aggregate total income is to be reduced or adjusted by the income or loss disclosed in returns filed

under Section 139 or under Section 147, in cases where no assessments have been completed on the basis of such returns till the date of search. However, there can be cases where returns have been filed in response to notice under Section 142(1) and assessment has not been completed till the date of search.

67.5.1 The Finance Act, 2002, has amended the said Clause (b) to include a specific reference to such returns filed in response to notices issued under Section 142(1).

61.6 Under the existing provisions of Clause (c) of Section 158BB(1), where no return has been filed and the due date has expired, no adjustment is to be made to the aggregate total income for computing undisclosed income of block period. There could be cases where the regular books of accounts of the assessee reflected losses but no returns were filed by the due dates. While filing the return for block period, the assessee, in such cases used to consider such losses in computing the aggregate total income of the block period and used to claim that no adjustment should be made in view of Clause (c) of Section 158BB(1) and such losses should not be added back for computing undisclosed income of the block period.

67.6.1 There could also be cases where returns were not filed for some years by reason of the total income of those years being below the minimum taxable limit. The aggregate total income computed under Section 75868 would include such income but no adjustment of such income would be made to compute undisclosed income of the block period. These situations would result into incorrect computation of undisclosed income of the block period which was not the intention underlying the provisions of chapter XIV-B. 616.2 With a view to clarify the provisions, the Finance Act, 2002, has substituted Clause (c) of Section 158BB(1) to make it clear that losses incurred in years for which no return has been filed by the due date shall be added back while computing the undisclosed income, and further, that where returns were not filed because the total income was not taxable undisclosed income shall not include such total income.

20. The above Section 158BB provides the manner of computation of undisclosed income of the block period. The undisclosed income of the block period Under

Section 158BB(1) shall be computed first by aggregating of the total income of the previous year falling within the block period in accordance with the provisions of the Income-tax Act, on the basis of evidence found as a result of search or requisition of the books of accounts or other documents and such other materials or information as are available with the A.O and relatable to such evidence. Such aggregate of the total income is, thereafter, to be adjusted by the income or loss, as the case may be, determined as provided under Sub-clauses (a) to (f) thereto to arrive at the undisclosed income chargeable to tax for the block period. In other words, such Aggregate of the total income is thereafter to be reduced by the aggregate of the total income of any previous years falling within the block period, as provided under Clauses (a) to (f) thereto, or as the case may, is to be increased by the aggregate of the losses determined of such previous years falling within the block period as provided in Clauses (a) to (f) thereto. The old Clause (c) prior to its substitution by the Finance Act, 2002 with retrospective effect from 1-7-1995 had provided that where the due date for filing of return of income has expired but no return of income has been filed, the aggregate of total income shall be increased, or as the case may be, shall be reduced, by the "NIL" amount. Therefore, under the then existing provision of Clause (c) of Sub-section (1) of Section 158BB where no return has been filed and the due date for filing the return has expired, no adjustment was to be made to the aggregate total income for computing undisclosed income of block period. There could be cases where regular books of accounts of the assessee reflected losses but no returns were filed by the due date, and while filing the return for the block period, the assessee, in such cases, used to consider such losses in computing the aggregate of total income of the block period and then used to claim that no adjustment should be made in view of Clause (c) of Section 158BB(1) and such losses should not be added back for computing undisclosed income of the block period. This is what exactly has been decided by the Hon'ble Tribunal in the case of B.D.A. Ltd. (supra) in the light of the then existing Sub-clause (c) to Section 158BB(1). Therefore, with a view to remove this anomaly in the Section 158BB(1)(c), the legislature has substituted Clause (c) of Section 158BB(1) by inserting new Clauses (c) and (ca) by the Finance Act, 2002 with retrospective effect from 1-7-1995 to make it clear that the losses incurred in years for which no return has been filed by the due date shall be

added back while computing the undisclosed income, and further that where no returns were filed because the total income was not taxable, the undisclosed income shall not include such total income. By virtue of this amendment made by the Finance Act, 2002 with retrospective effect from 1-7-1995, much confusion which had remained earlier really got cleared and the picture was frescoed without any kind of haze. It is also explicit clear from the departmental circular No. 8 of 2002 dated 27-8-2002 clarifying the scope and effect of the amendment made in Section 158BB by the Finance Act, 2002 with retrospective effect from 1-7-1995 which has already been set out above herein. In the light of the provisions contained in newly inserted Clause (c) read with Sub-clause (A) and (B) thereto, where the due date for filing the return of income of any previous year falling within the block period has expired but no return of income has been filed, the aggregate of total income computed in accordance with the provisions of the Act as provided under the main Sub-section (1) of Section 158BB shall be increased by the aggregate of the losses of such previous years if such losses are determined on the basis of entries as recorded in the books of accounts and documents maintained in the normal course on or before the date of search or requisition where such entries result in computation of loss for any previous year falling in the block period. To put it in other words, in all cases, where the due date of filing a return of income has expired, but no return of income has been filed, the loss determined on the basis of entries as recorded in the books of accounts and other documents maintained in the normal course on or before the date of search or requisition where such entries result in computation of loss for any previous year falling within the block period shall be added back to the aggregate of total income determined in the manner provided in main Sub-section (1) of Section 158BB to arrive at the undisclosed income chargeable to tax for the block period. The intention of the Legislature in inserting this Sub-clause (A) to Clause (c) of Sub-section (1) to Section 158BB is thus clear that the assessee, who is subjected to search Under Section 132 or requisition Under Section 132A, shall not get the benefit of set off of the loss of any previous year, which is determined on the basis of the entries as recorded in the books of accounts and other documents maintained in the normal course on or before the date of search or requisition, against the I undisclosed income of a block period, where the due date for filing

the return of income has expired but no return of income has been filed. Further, where the due date for filing the return of income has expired but no return has been filed, the total income for the purposes of reduction from the aggregate of the total income shall be taken at NIL as clearly provided under Clause (ca) of Sub-section (1) of Section 158BB of the Act.

21. In the light of the above discussions, we may therefore, hold that where the due date for filing of the return of income has expired but no return of income has been filed, any loss determined on the basis of entries as recorded in the books of accounts and other documents maintained in the normal course on or before the date of search or requisition and forming part of the aggregate of the total income of the previous year falling within the block period as computed in the manner provided in main Sub-section (1) of Section 158BB shall be added back to such aggregate of the total income of the previous year falling within the block period computed under main Sub-section (1) of Section 158BB of the Act. Thus, when in any previous year, the assessee determines and claims a loss, on the basis of evidence found as a result of search or requisition of books of accounts or other documents and such other material or information as are available with the A.O and are relatable to such evidence, then the total loss of that previous year is, at the first stage, to be considered in the computation of the aggregation of total income as provided in main Section 158BB(1) and, thereafter, if any such loss is determined on the basis of entries as recorded in the seized books of account and other documents maintained in the normal course on or before the date of the search or requisition where such entries result in computation of loss of that previous year, shall be added back to the above aggregated total income computed in the manner as provided in Section 158BB(1) in all the cases where the due date for filing a return of income has expired, but no return of income has been filed, as clearly provided in Section 158BB(1)(c)(A) of the Act.

22. Having said so, we now proceed to appreciate the facts of the present case for the purposes of deciding as to whether the loss shown by the assessee for the A.Y. 1997-98, 1999-00 and 2001-02 aggregating to Rs. 18,80,870 is to be added back to the aggregate of total income of the previous year falling within the block period amounting to Rs. 23,35,997. In the present case the positive income for the

A.Y.1998-99, 2000-01 and 2001-02 was shown at Rs. 42,16,847 and loss for A.Y. 1997-98, 1999-00 and 2001-02 is shown at Rs. 18,80,870, and the difference of positive income of Rs. 42,16,847 and negative income of Rs. 18,80,870, coming to Rs. 23,35,997, has been shown as undisclosed income of the block period in the block return filed by the assessee.

The aggregation of total income of all the previous years falling within the block period as computed under main Section 158BB(1) comes to Rs. 23,35,977, and the same has also been treated as undisclosed income of the block period chargeable to tax, by the assessee. In other words, the assessee has disclosed undisclosed income at Rs. 23,35,977 by aggregating positive income of Rs. 42,16,847 and negative income of Rs. 18,80,870 as detailed above. In the block return, the assessee has not increased the aggregate of the total income amounting to Rs. 23,35,977 by the aggregate of the losses amounting to Rs. 18,80,870.

The A.O has increased the aggregate of total income amounting to Rs. 23,35,977 by the aggregate of the loss of Rs. 18,80,870, by saying that the seized books of accounts did not reveal any entries pertaining to loss in business. In support thereof, the A.O has placed reliance upon the sworn statement of Mr. Rajan Khinvasara recorded during the course of search and had reproduced part of the relevant questions and answers given by Shri Rajan Khinvasara in his assessment order for a ready reference, the extract thereof as reproduced by the A.O in his assessment order has already been set out in para 5 of this order.

23. The A.O has stated that the books of accounts seized did not reveal any entries pertaining to the loss in business. In the course of hearing, the Id. Authorized representative for the assessee has not been able to point out those seized documents and papers indicating the loss resulted out therefrom. It was only submitted by him that it was already pointed out to the A.O that the loss was determined or computed on the basis of the seized books of account or documents found during the course of search. In the paper book filed by the assessee, the assessee has not furnished any document or papers showing the manner and method or the basis on which the loss was computed by the assessee

for the A.Y. 1997-98, 1999-00 and 2001-02. It was further stated by the Id. Counsel for the assessee that the facts of the present case are identical to the case of other assessee of a same group viz. M/s.

Manisha Enterprises (Prop. Rajan Khinvasara), Pune, where the loss determined on the basis of seized books of accounts has been allowed to be set off by the CIT(A). He further submitted that the order of the CIT(A) in the above referred related case has been upheld by the Hon'ble Tribunal, Pune Bench 'A', Pune in ITA No. 201/PN/2004 vide its order dated 29-12-2006.

24. Admitting the assessee's contention, for the sake of argument, that the seized books of accounts and documents did reveal the loss in the assessment years 1997-98, 1999-00 and 2001-02, the next question arising would be that whether these seized books of accounts and documents were maintained by the assessee in the normal course. We have perused the statement of Shri Rajan Khinvasara as reproduced by the A.O in his assessment order. On perusal of the same, it is clear that at the time of search, the books of accounts, which were maintained by the assessee in the normal course were not complete, though most of the transactions were claimed to be recorded in the seized books of accounts. The assessee had given a reason of illness of his father as well as of the Chartered Accountant for not completing and finalizing the books of accounts maintained by the assessee from the A.Y. 1997-98 onwards till the date of search. It is the assessee's case that the seized books of accounts and other documents did reveal the loss arising to the assessee in the assessment years 1997-98, 1999-00 and 2001-02.

25. In the statement of facts annexed With the memorandum of appeal, the assessee has narrated the facts as under: 1. M/s. Manisha Constructions is a registered partnership firm consisting (1) Shri Rajan H. Khinvasara (2) Shri H.U. Khinvasara as partners sharing profits and losses equally. The firm is engaged in the business of Promoters and builders. The firm has undertaken a construction project at Hadapsar named as Manisha Blitz.

2. The assessee firm had filed its returns of income regularly upto and inclusive of A.Y. 1996-97. however, the returns for the subsequent years were remained to be filed in time due to ill health of Shri Harackchand U. Khinvasara a father of Shri

Rajan H. Khinvsara. Unfortunately during the same period Mr. U.B. Gujar, FCA, Chartered Accountant of the assessee developed certain heart problem and as such had to undergo a prolonged treatment for the same He was also advised to take compulsory bed rest and was also advised not to get involved in the activities, which may cause mental fatigue. Both of these incidents coupled together resulted in default in filing the returns of income for subsequent four years. However, notwithstanding this, the assessee had taken an abundant precaution to pay sufficient advance income tax after taking into consideration the TDS available to his credit for the estimated income, which he was having in his mind at that time.

3. The assessee was waiting for his CA to get well soon to compile and file his income tax return for all the pending years. The books of accounts' had been written, however, were remained incomplete due to pendency of certain matters, which ere to be discussed and confirmed with the Chartered Accountant of the assessee firm.

However, by the same time a survey action Under Section 133A was conducted on 8-11-2000 initially, which was converted into search and seizure action Under Section 132 of the Act due to certain group concerns were found irregular in filing their returns of income.

Certain documents, incomplete books of account and papers, which were found during the search were seized.

26. It is thus seen that the assessee firm had filed its returns of income regularly upto and inclusive of assessment year 1996-97 and the returns for the subsequent years were remained to be filed in time due to ill health of Shri Harackchand U. Khinvsara, a father of Shri 'Rajan H. Khinvasara. The another reason for not filing the return within due time, as given by the assessee, is that, unfortunately, during the same period, Mr. U.B. Gujar, FCA, Chartered Accountant of the assessee, developed certain health problems and had to undergo a prolonged treatment for the same and was advised to take complete rest. These reasons coupled together resulted in default in filing the return of income for subsequent four years. It was further stated that the books of accounts had been written, but were remained incomplete due to the pendency of certain matters which were to be discussed

and confirmed with the Chartered Accountant of the assessee-firm. He further submitted that certain documents, incomplete books of accounts and papers were found and seized during the search. From these facts, it is thus clear that the books of accounts, and papers found during the course of search were maintained by the assessee in the normal course, for the year pertaining to the A.Y. 1997-98 onwards, and the return of income for A.Y. 1997-98 onwards could not be filed due the aforesaid reasons as explained by the assessee.

27. Further, a useful reference may also be made to the ground No. 1 taken by the assessee before the CIT(A) which reads as under: It should be held that on the facts and circumstances of the case the Id. ACIT is not justified in disallowing the set off of losses claimed in the computation of the income of the block assessment period, in view of the entries for working out the losses for the concerned years having been recorded in the books of account found and seized as contemplated Under Section 158BB(1)(c) of the I. T. Act.

28. On reading the same, we find that the assessee has advanced a case that the loss for the concerned year/s has been worked out on the basis of entries recorded in the books of accounts found and seized in the course of search as contemplated Under Section 158BB(1)(c) of the Act.

It is thus clear that the books of account found during the course of search were the books of accounts that were maintained by the assessee in the normal course for the concerned years, in respect of which the return of income within due time could not be filed. It makes it clear that whatever loss has been worked out by the assessee for the A.Y.1997-98, 1999-00 and 2001-02 is based on the entries as recorded in the books of accounts or documents maintained by the assessee in the normal course of business on or before the date of search, and, thus, the provisions of Sub-clause (A) of Clause (c) of Sub-section (1) of Section 158BB is clearly attracted in the present case, with a result that the loss so worked out by the assessee shall be added back to the aggregate of the total income of the previous year falling within the block period computed in accordance with the manner provided under main Sub-section (1) of Section 158BB of the Act. In other words, the seized books of accounts and documents maintained by the assessee

in the normal course cannot be the basis to claim the set off of any loss resulted out from the entries as recorded in the said books of accounts and other documents maintained by the assessee in the normal course of its business against any undisclosed income determined for the previous years falling within the block period.

29. Further, the Id. Counsel for the assessee has also submitted that the facts and circumstances of the present case are quite identical and similar to the facts and circumstances in the case of Manisha Enterprises (supra). In that case, the contentions of the Id. Counsel for the assessee appearing therein, have been narrated by the Hon'ble Tribunal in paragraph (5) of its order, which read as under:
5. On the other hand, from the side of the respondent-assessee, Ld.

A.R Mr. Dharmesfi, Shah appeared and vehemently argued that the issue as raised from the side of the revenue is purely a legal issue that whether a loss arrived at in the light of the seized material can be taken into account for the purpose of computation of undisclosed income. He has referred Section 158 66 describing the computation of undisclosed income for the block period. He has mentioned that the undisclosed income has first to be determined on the basis of the main charging Section i.e. Sub-section 1 which should be the aggregate of total income to be computed on the basis of the evidence found as a result of search or requisition of Books of Accounts. He has further mentioned that in the statement recorded Under Section 32(4). the assessee has only admit the incompleteness of the books of accounts but nowhere stated that the books of accounts were altogether not maintained by him. He has further clarified that the admitted position was that the books of accounts have been maintained by the assessee in the regular course of business but they were not complete on the date of search. He has emphasized that the assessee was a regular tax payer and filed the returns from A.Y. 1991-892 to 1998-99 in the regular course which were assessed hence the requisite benefit had already been given by the A.O while computing undisclosed income of the assessee. He has also clarified the stand taken by assessee-that while computing the undisclosed income, the assessee himself has not taken the benefit of the income which were not returned till the date of search. He has clarified that under the head "returned/assessed income as

on the date of search" the assessee has declared 'Nil' figure pertaining to AY 1998-99 to 2001-02 since for those years, no return was filed. Case laws relied upon by him were B.D.A Ltd., 65 ITD 501, Singhania Polyester (P) Ltd., 96 TTJ 614 and G.C Associates, 80 TTJ 30. On reading the aforesaid contentions of the Id. Counsel for the assessee before the Tribunal in the case of Manisha Enterprises (Prop.

Rajan Khinvasara) (supra), it becomes clear that in that case also, the assessee had clarified that the books of accounts seized were maintained by the assessee in the regular course of business but they were not complete on the date of search. Therefore, from the facts of that case also, which has been relied upon by the Id. Counsel for the assessee in the present case, it is clear that the books of accounts and other documents seized by the department were the books of accounts and documents maintained by the assessee in the normal course though not found completed at the time of search. Therefore, accepting the assessee's contention, for the sake of arguments, that the seized books of account and documents did reveal the loss for the assessment years in question but the aggregate of losses so revealed from the seized books of accounts and documents would be added back to the aggregate of the total income computed in the manner as provided in the main Sub-section (1) of Section 158BB, in as much as the seized books of accounts and documents were maintained by the assessee in the normal course and the due date for filing the return of income had expired but no return of income was filed by the assessee. Therefore the assessee's claim to set off the aggregate loss against the aggregate of other undisclosed income of other assessment years is hit by the specific provisions contained in the newly inserted Sub-clause (A) or Clause (c) of Section 158BB(1) of the Act inserted by the Finance Act, 2002 with retrospective effect from 1-7-19,95.

31. Therefore, in the light of our discussions made above and having regard to the newly inserted Clause (c) with Sub-clauses (A) and (B) thereto by the Finance Act, 2002 with retrospective effect from 1-7-1995 we find that the decision in the case of B.D.A. Ltd. v. ACIT (1998) 65 ITD 501 and in the case of Singhania Polyester (P) Ltd. v.ACIT 96 TTJ 614 heavily relied upon by the Id. Counsel for the assessee, would be of no help to the assessee, inasmuch as these decisions were rendered

on an interpretation of Clause (a) of Explanation to Section 158BB(1) and Clause (c) as it stood prior to its substitution by the Finance Act, 2002 with retrospective effect from 1-7-1995 to Section 158BB(1), as it would be clear from para 7 to 9 of the order in the base of B.D.A. Ltd. (supra) which is reproduced as under: 7. In our opinion, there is no prohibition against the losses of some of the previous years comprised in the block period being set off against the income of the other years comprised in the block period. Even on first principles, it is not possible to countenance the argument of the revenue that the result of the computation of a particular period comprised in the block period has to be ignored, if such computation shows a loss. It would be the same thing as saying that in respect of a normal previous year consisting of a period of twelve months, the result of computation for the first period of six months would be ignored, if it shows a loss, and the income computed in respect of the rest of the six months only would be taken. Such an argument, if advanced in respect of an assessment of an assessee whose case is not covered by Chapter XIV-B, cannot be accepted, as it is a well accepted and recognized position that the computation must be made with reference to the whole period of twelve months comprised in the previous year and the tax is payable only if such computation shows a positive income. Losses incurred during the previous year cannot be ignored and this principle is in built in the concept of an assessment under the Income-tax Act. The principle is that for the purpose of charging income tax the various sources of income of an assessee have got to be aggregated and the results of each source for the entire previous year have to be reckoned and merely because the first few months of the previous year show a positive income and the rest of the period shows a negative income, the result of the later period cannot be ignored.

The income tax law does not permit this. In CIT v. National syndicate , the Supreme Court held that "if the profits or gains of a business for a particular year are to be taxed they must be computed for the whole year taking into account losses incurred during the same year (at page 234). What is true of the assessment of an assessee who has not been brought under Section 132 and in whose case Chapter XIV B does not apply is also true in respect of an assessee who has been searched and whose assessment is to be made under Chapter XIV B. There is no difference between the two types of cases so far as the application

of the principle is concerned. In the former, the previous year is the period with reference to which the income is to be ascertained, as defined in Section 3 of the Act: in the latter: it is the block period with reference to which the income is to be ascertained, and the block period consists of previous years relevant to ten assessment years preceding the previous year in which the search took place and includes the further period upto the date of commencement of the search. But the undisclosed income is to be computed with reference to the entire block period and it is the total undisclosed income relating to the block period that is charged to income tax under Sub-section (2) of Section 158BA. It follows that the results of the different previous years comprised in the block period is to be treated as the previous year and so it follows that the losses suffered during certain parts or periods of the block period have to be set off or adjusted against the income earned during the remaining parts or periods thereof.

8. We now proceed to examine whether the principle of aggregation has been given effect to in Chapter XIV-B and if so, to what extent.

Section 75880, which we have extracted earlier, gives effect to the principle of aggregation. To paraphrase Sub-section (1), it says that the undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period. The undisclosed income is to be computed in accordance with Chapter IV of the Act (Section 14 to 59).

Explanation (a) says further that for the purposes of determination of the undisclosed income the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation Under Section 32(2). Reading Sub-section (1) in conjunction with Clause (a) of the Explanation, it is clear that while aggregating the results of the different previous years falling within the block period, the losses have also to be taken into account. It may very well happen that while determining the result of a particular previous year falling within the block period on the basis of the evidence found as a result of the search or the documents or such other materials as are available with the A.O,

he may find that the computation of the income as per Chapter IV (Sections 14 to 59) yields a negative result, i.e. a loss. The possibility of this position has been taken into account by Clause (a) of the Explanation. It is significant-that having done so, the Explanation does not further say that if the computation results in a loss it should be ignored. On the contrary, it proceeds to say that the loss for that previous year shall be considered for aggregation. It further clarifies that only the brought forward losses under chapter VI and the unabsorbed depreciation Under Section 32(2) cannot be adjusted against the income of a previous year while resorting to aggregation, Mr. Sudhir Chandra says that Clause (a) of the Explanation prohibits set off of brought forward losses under Chapter VI or unabsorbed depreciation, and therefore the assessee's claim is untenable. We do not think so. Sub-section (1) mandates the computation of the undisclosed income of the block period to be the aggregate of the total income of the previous years falling within the block period computed in accordance with the provisions of Chapter IV on the basis of the evidence and the materials found at the time of search. As already seen, such computation may yield in a negative income (i.e. loss) for a particular previous year. That is why Explanation (a) says that such losses are also to be aggregated while determining the aggregate undisclosed income. One reason for excluding the brought forward losses and the unabsorbed depreciation from being set off against the undisclosed income computed in accordance with the provisions of Chapter IV may be to get over the decision of the Supreme Court in *Cambay Electric Supply Industrial Ltd. v. CIT* wherein it has been held that Section 72, which deals with the carry forward and set off of business loss, has a direct impact upon the computation of the income under the head "profits and gains of business or profession". It has been clearly held that it is not possible to accept the view that Section 72 has no bearing on or is unconnected with the computation of the total income of an assessee under the above head. Relying on this decision, an assessee whose case is covered by the provisions of Chapter XIV-B may attempt to reduce the undisclosed income by seeking to set off the past business losses, which have been determined in the regular assessments made earlier for the years falling within the block period and which have been permitted to be carried forward to the future years. The Legislature might have thought that such an attempt cannot be allowed to succeed

and that the block assessment under chapter XIV B, would have to be made untrammelled by what happened in the earlier regular assessments. The other reason why the brought forward losses under chapter VI are excluded is because the block assessment is confined only to the determination of the undisclosed income of the block period, whereas losses to be carried forward to future years may have been determined in the regular assessments made prior to the date of search under the normal provisions of the Act and in that very nature of things such losses, determined and allowed to be carried forward have no place in the context of a block assessment framed after the search. The two streams of assessment are kept apart and one is not projected into the other. The position is made clear beyond any doubt in Sub-section (4) of Section 158BB. It says that losses brought forward from the earlier years under chapter VI or unabsorbed depreciation under Section 32(2) will not be set off against the undisclosed income determined in the block assessment under chapter XIV-B, but will be carried forward for being set off in the regular assessments. Thus, reading Clause (a) of the Explanation to Sub-section (1) in harmony with the said subsection and Sub-section (4) we are of the opinion that the prohibition against setting off the losses against the undisclosed income of the block period applies only to losses under chapter VI (Section 72) and unabsorbed depreciation determined and permitted to be carried forward in regular assessments and does not apply to adjustment of the loss computed in respect of a particular previous year falling within the block period against the income computed in respect of the other years falling within the block period. Such adjustment or set off, in fact, cannot be considered to fall under the category of "brought forward losses under Chapter VI" at all. In this respect we are of the view that both Clauses (a) of the Explanation to Sub-section (1) of Section 158BB and Sub-section (4) thereof convey the same idea.

We are fortified in this by the view expressed by the Board in its circular cited supra at page 98 of 215 ITR St. to the effect that "where in the regular assessment proceedings set off of loss or unabsorbed depreciation has been allowed in the regular assessment proceedings, the same shall be ignored for determining the undisclosed income for the block period". Thus the object of the provisions appears to be to ensure that the assessee does not walk away with double set off of the brought forward losses under chapter VI, once in the regular assessments

and again in the block assessment. Nothing more can be read into the provisions.

9. It may be recalled that Mr. Sudhir Chandra had argued that Section 158BB(1)(c) proved the assessee's claim untenable. The argument cannot be given effect to. The clause does not speak of a return claiming loss. It only says that in a case where the due date for filing a return of income has expired, but no return of income has been filed, there will be no reduction of any amount for determining the undisclosed income. If the assessee has already filed a return showing positive income in respect of a previous year or years falling within the block period, the income declared in such return or returns will be reduced from the aggregate undisclosed income, where assessments on such return or returns have not been made till the date of search. This is provided in Clause (b). Clause (c) says where no such return has been filed before the due date no reduction will be possible. The provisions are intended to eliminate double taxation of the same income. Similarly double allowance of the same loss is also avoided by these provisions.

Clause (c) does not admit of the argument advanced by Mr. Sudhir Chandra to the effect that the returns for the A.Y 1989-90, 1993-94.

1994-95 and 1995-96 for which losses have been computed in the block assessment, not having been filed till the date of search, the losses computed for those years cannot be set off against the income computed in respect of the other years falling within the block period.

32. The decision in the case of Singhanian Polyster (P) Ltd. has been given by following the decision in the case of B.D.A. Ltd. (supra). On reading these two decisions, we find that these decisions were rendered in the light of provisions contained in (i) main Sub-section (1) of Section 158BB providing for aggregation of total income of all the previous years falling within the block period to be computed in accordance with the provisions of Chapter IV of the Act as it then stood; (ii) the original Clause (a) of Explanation to main Sub-section (1) of Section 158BB, and (iii) Clause (c) to Section 158BB(1) as it stood prior to its substitution by the Finance Act, 2002 with retrospective effect from 1-7-1995. The decision in the case of B.D.A.Ltd. (supra) was rendered on September 29, 1997 when the newly

inserted Sub-clause (c) and (ca) by the Finance Act, 2002 with retrospective effect from 1-7-1995 was not on the statute book. Prior to the substitution of old Clause (c) by newly inserted Clause (c) and (ca) by the Finance Act 2002 with retrospective effect from 1-7-19,95, the department in its circular No. 8 of 2002 dated 27-8-2002 has itself admitted the position that under the then existing provision of Clause (c) of Section 158BB(1), there could be cases where regular books of accounts of the assessee reflected the loss and no returns were filed by the due dates but while filing the return for the block period, the assessee in such cases used to consider such losses in computing the aggregate total income of the block period and used to claim that no adjustment should be made in view of Clause (c) of Section 158BB(1) and such losses should not be added back for computing undisclosed income for the block period. To remove this anomaly and to clarify the position, the Finance Act, 2002 has substituted Clause (c) to main Sub-section (1) of Section 158BB by newly inserted Clause (c) and (ca) thereto to, make it clear that the losses incurred in years for which no return has been filed by the due dates shall be added back while computing the undisclosed income. In other words, the amendment brought by the Finance Act, 2002 with retrospective effect from 1-7-1995 has nullified the effect of the decision in the case of B.D.A. Ltd. (supra) in so far as the issue relating to the claim of any assessee for not making any adjustment of the aggregate of losses to the aggregate of the total income of the block period computed in the manner provided in Section 158BB(1) of the Act in the cases where due date of filing the return of income has expired but no return of income has been filed, is concerned. Therefore, after the amendment made by the Finance Act, 2002 with retrospective effect from 1-7-1995 in Clause (c) of Section 158BB(1), the claim of the assessee that the losses as determined on the basis of entries as recorded in the seized books of accounts of the assessee maintained in the normal course on or before the date of the search or requisition for any previous year for which no return was filed by the due date, should not be added back to the aggregate of the total income of the block period computed in the manner provided in main Sub-section (1) of Section 1588B for the purposes of arriving at the undisclosed income of the block period, is without any merit.

33. Though the decision in the case of Singhanian Polyester (P) Ltd. (supra) has been rendered on 4-9-2003 by following the decision in the case of B.D.A. Ltd. (supra), the newly inserted Clause (c) and Sub-clauses (A) and (B) thereto by the Finance Act, 2002 with retrospective effect from 1-7-1995 was not brought to the notice of the Tribunal, and the Tribunal has thus proceeded to decide the issue by following the decision in the case of B.D.A. Ltd. (supra), which was rendered in the light of old Clause (c) of Section 158BB(1) and in the light of Clause (a) of Explanation to Section 158BB(1) of the Act. In the light of the Clause (c) as it stood prior to its substitution by the Finance Act, 2002 with retrospective effect from 1-7-1995 read with main Sub-section (1) of Section 158BB, there should not be any doubt as to the correctness of the decision rendered by the Hon'ble Tribunal in the case of B.D.A. Ltd. (supra) which has been followed by another Bench of the Tribunal in the case of Singhanian Polyester (P) Ltd. (supra). It is now only in the light of newly inserted Clause (c) and its Sub-section (A) and (B), that the position has been changed providing that the aggregate of the losses determined on the basis of entries as recorded in the books of accounts and other documents maintained in the normal course on or before the date of search or requisition shall be added back to the aggregate of the total income of the previous year falling within the block period computed in the manner provided in main Sub-section (1) of Section 158BB provided the due date for filing a return of income had expired but no return of income has been filed. After the aforesaid amendment of inserting new Clause (c) with its Sub-clauses (A) and (B) and Clause (ca) by the Finance Act, 2002 with retrospective effect from 1-7-1995, we would like to clarify that in the first step while computing the aggregate of the total income of the previous years falling within the block period, in accordance with the provisions of the Income-tax Act, on the basis of evidence found as a result of search or requisition of books of accounts or other documents and such other materials or information as are available with the A.O and relatable to such evidence, the loss determined on the basis of entries as recorded in the seized books of accounts and other documents maintained in the normal course on or before the date of search or requisition where such entries result in computation of losses for any previous year falling within the block period shall have to be taken into account as observed in the case of B.D.A. Ltd. (supra) as well as in the case of Singhanian Polyester (P) Ltd.

(supra), but in the next step the said loss is to be added back to such aggregate of total income as provided in Sub-clause (A) of Clause (c) of Section 158BB(1) provided the due date for filing a return of income has expired but no return of income has been filed. This aspect of the matter adjusting the aggregate of loss of any previous year envisaged under Sub-clause (A) to Clause (c) of Section 158BB(1) was not at all the subject matter of consideration before the Tribunal in both the cases viz. M/s. B.D.A. Ltd. (supra) and M/s. Singhanian Polyester (P) Ltd. (supra) which, as already discussed above, were rendered in the context of the provisions of old Clause (c) of Section 158BB(1) of the Act.

34. Further, the Id. Counsel for the assessee has also submitted that the issue based on identical facts and circumstances in the case of ACIT v. Manisha Enterprises (Prop. Rajan Khinvasara) (supra) in ITA No.201/PN/2004 dated 29-12-2006 has been decided in favour of the assessee by the I.T.A.T. 'A' Bench, Pune, directing to set off of losses for the A.Y. 1999-00 and 2000-01 against the undisclosed income of other previous years falling within the block period. The assessee submissions in that case were narrated by the Tribunal in para (5) of its order dated 29-12-2006. The aforesaid para (5) of the Tribunal's order narrating the assessee's submissions have been set out above in para (29) of this order. The operative portion of the Tribunal's decision in the case read as under.

6. We have heard the submissions of both the sides, carefully perused the material placed before us in the light of the precedents cited. In the backdrop of the facts as discussed herein-above, it is evident that there were books of accounts, though incomplete which were seized by the revenue department. This is not the case where no books of accounts have at all been maintained. Now the basic question is how to compute the aggregate total income/loss. Further the question is that if on the basis of the seized material the resultant figure is a loss, then whether the assessee is entitled for set off of such loss against the undisclosed income. Before we proceed further it is worth to mention at this juncture that the revenue has not built up this case on the ground that either the loss was not genuine or incorrectly computed. Rather the A.O. has not made the disallowance on that basis but simply disallowed the claim of set off purely on legal ground. So, we will confine ourselves to decide this appeal on the question of law.

and the applicability of Section 158BB within the compass of the admitted position of facts.

This legal question has already been answered by respected co-ordinate Lucknow Bench in the case of Singhanian Polyester Pvt.

Ltd., 96 TTJ 614 wherein it was observed that the mode of computation of undisclosed income is laid down in Section 158BB and losses computed by the A.C himself on the basis of the seized material are to be adjusted against the undisclosed income computed by the A. O during the block year. There is one more decision of ITAT Mumbai Bench namely B.D.A Ltd. 65 ITD 501 wherein it was held as under: the relevant portion is reproduced: Reading Sub-section (1) of Section 158BB in conjunction with clause(a) of the Explanation, it is clear that while aggregating the results of the different previous years falling within the block period, the losses have also to be taken into account. The Explanation does not say that if the computation results in a loss it should be ignored. On the contrary it proceeds to say that the loss for that previous year shall be considered for aggregation.

Only the brought forward losses under Chapter VI and the unabsorbed depreciation under Section 32(2) cannot be adjusted against the income of a previous year while resorting to aggregation. Thus, reading Clause (a) of the Explanation to Sub-section (4), the prohibition against setting of the losses against the undisclosed income of the block period applies only to losses under Chapter VI (Section 72) and unabsorbed depreciation determined and permitted to be carried forward in regular assessments and does not apply to adjustment of the loss computed in respect of a particular previous year falling within the block period against the income computed in respect of the other years falling within the block period. Such adjustment or set-off, in fact, cannot be considered to fall under the category of 'brought forward losses under Chapter VI' at all in this respect, both Clause (a) of the Explanation to Sub-section (1) of Section 158BB and Sub-section (4) thereof convey the same idea.

Section 158BB(1)(c) did not admit of the argument advanced by the Department to the effect that the returns for the assessment years 1989-90, 1993-94, 1994-95

and 1995-96, for which losses had been computed in the block assessment, not having been filed till the date of search, the losses computed for those years could not be set off against the income computed in respect of the other years falling within the block period.

For the above reasons, the assessee's claim was accepted and the losses for the assessment years 1989-90, 1993-94, 1994-95 and 1995-96 as computed in the block assessment, were directed to be set off against the undisclosed income computed in respect of the other previous years falling within the block period.

On reading the said decision, in the case of Manisha Enterprises (Prop. Rajan Khinvasara) (supra), it is clear that the I.T.A.T. 'A' Bench, Pune has decided this issue by merely following the decision in the case of B.D.A. Ltd. (supra) and in the case of Singhania Polyster (P) Ltd. (supra). Therefore, the decision in the case of Manisha Enterprises (supra) is also of no help to the assesses as pointed out above.

35. Further, a part of the assessee's claim of set off of loss pertaining to the assessment year 2001-02 amounting to Rs. 2,01,709 can be viewed from one more angle. The assessee has claimed the losses of Rs. 2,01,709 pertaining to the A.Y. 2001-02 i.e. related to the broken period falling in the previous year in which the search had taken place on 9-11-2000. In the present case, the search had taken place on 9-11-2000. The loss upto 9-11-2000 has been worked out by the assessee on the basis of the accounts or records found during the course of search. As already stated above that the assessee has been maintaining the books of accounts and other documents in its normal course and these were found during the course of search. In this respect, we may refer to Clause (d) of Sub-section (1) of Section 158BB where it is provided that where the previous year has not ended, the income or loss determined on the basis of. entries relating to such income or transaction as recorded in the books of accounts and other documents maintained in the normal course on or before the date of search or requisition relating to such previous year shall be reduced from or, as the case may be, be increased to, the aggregate of the total income of the previous year falling within the block period computed in accordance with Sub-section (1) of Section 158BB.

Therefore, the loss determined for the A.Y. 2001-02 on the basis of entries as recorded in the books of accounts and other documents maintained in the normal course on or before the date of search and pertaining to the previous year which was not ended on the date of search shall be added back to the aggregate of the total income of the previous year falling within the block period. Thus, the question as to whether the loss relating to the assessment year 2001-02 should be added back to the aggregate of the total income is also covered by Clause (d) of Sub-section (1) of Section 158BB also and therefore, on this count also, the loss for the A.Y. 2001-02 is not eligible to be set off against the undisclosed income of the block period.

36. In the light of the totality of the discussions made above and for the reasons we have given above, the order of the CIT(A) is thus upheld in confirming the order of the A.O in not allowing the set off of the losses of the assessment years 1997-98, 1999-00 and 2001-02 against the undisclosed income computed for the block period. We are in full agreement with the CIT(A)'s observation that the losses computed on the basis of entries recorded in seized books of accounts maintained in the normal course would not be available to the assessee which could be set off against the undisclosed income of either preceding or succeeding year after a specific amendment to Section 158BB(1)(c) of the Act, is made. The order of the CIT(A) is, thus, upheld. In the result, the appeal filed by the assessee is dismissed. The judgment was announced in the open court on 30-3-2007.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com