IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:
THE HONOURABLE MR.JUSTICE C.N.RAMACHANDRAN NAIR
& THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 10TH DAY OF FEBRUARY 2012/21ST
MAGHA 1933
ITA.No. 323 of 2002 ( )

(AGAINST ORDER IN IT(S&S) A NO.1/COCH/2000 DATED 21/05/2002

APPELLANT(S)/APPELLANT::

THE COMMISSIONER OF INCOME TAX (CENTRAL) COCHIN.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT(S)/RESPONDENT::
----

1. SHRI P.D.ABRAHM ALIAS APPACHAN, M/S. SWARGACHITRA, JAIL ROAD, CALICUT.
*ADDL.R2 FINANCE SECRETARY, GOVERNMENT OF INDIA.
*(ADDITIONAL 2ND RESPONDENT IS IMPLEADED AS PER ORDER DATED 15/12/2008 IN ITA NO.323/02 & C.O.NO.112/2008 IN ITA NO.323/2002.)
BY ADV. SRI.DALE P.KURIEN FOR R1 SRI.P.PARAMESWARAN NAIR,ASG OF INDIA

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 10- 02-2012, ALONG WITH CO. 112/2008 & ITA. 177/2008,

THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
ITA NO.323/2002 APPENDIX APPELLANT'S EXHIBITS

ANNEXURE-A : COPY OF ORDER OF THE ASSESSING OFFICER.
ANNEXURE-B : COPY OF ORDER OF THE COMMISSIONER OF INCOME TAX (APPEALS).
ANNEXURE-C : COPY OF ORDER OF THE APPELLATE TRIBUNAL.
ANNEXURE-C1 : COPY OF STATEMENT/LETTER FROM MR.FAZIL.
ANNEXURE-E : COPY OF LETTER DATED 07/02/2011.
FIRST RESPONDENT'S
EXHIBITS ADDL. ANNEXURE-D :
COPY OF JUDGMENT DATED 17/01/2008 IN ITA NO.14/2001.
ADDL. ANNEXURE-E : COPY OF GIVING EFFECT TO ORDER DATED 29/07/2002.
ADDL. ANNEXURE-F : COPY OF ITAT ORDER DATED 30/08/2006. ADDL.
ANNEXURE-G : COPY OF SUPREME COURT JUDGMENT DATED 11/12/2002-

J U D G M E N T

Ramachandran Nair, J. The above two appeals filed by the Revenue and the Cross Objection filed by the assessee arise from the block assessment and penalty orders issued against the assessee for the block period 1988-89 to 1997-98 (relevant for the period from 01/04/1987 to 24/07/1997) under Sections 158BC and 158BFA(2) respectively of the Income Tax Act, 1961 (hereinafter referred to as the Act for short). These proceedings were completely based on search made in the residential and business premises of the assessee on 24/07/1997 under Section 132 of the Act.

2. We have heard Shri.P.K.R.Menon, learned Senior Standing Counsel, appearing for the Revenue, and Shri.Dale P.Kurian, learned counsel appearing for the assessee. We have also gone through the argument notes filed by assessee's counsel and the several decisions cited by him. The facts leading to the block assessments made under Chapter XIV B are briefly stated hereunder.

3. The assessee is a leading producer and distributor of motion pictures in Kerala. A search was made by the Intelligence Wing of the Income Tax Department under Section 132 of the Act in the residential and business premises of the assessee on 24/07/1997, which led to recovery of various incriminating documents and books of accounts and details of investments made by the assessee in acquisition of agricultural lands, construction of residential house etc. Pursuant to search, notice was issued to the assessee under Section 158BC of the Act requesting to file return of undisclosed income. The assessee filed return in Form No.2B on 27/02/1998 declaring an undisclosed income of Rs.43 lakhs for the entire block period. However, dissatisfied with the quantum of undisclosed income declared by the assessee, the Assessing Officer issued notice proposing assessment. Since accounts and documents seized revealed unaccounted business, massive investments and expenditure as well, the assessee was required to furnish cash flow and wealth statements. Sworn statement was also recorded from the assessee on the date of search i.e. on 24/07/1997 and on 29/07/1997. In the detailed statement given by the assessee, the assessee clearly stated that assessee and his family members have no other loan other than a bank loan of Rs.10 lakhs taken by him along with his wife and son for meeting the expenditure for publicity of films. However, in the course of assessment, along with other claims made, the assessee also contended that he has other debts particularly a loan of Rs.20 lakhs taken from his sister-in-law and Rs.5 lakhs borrowed from a priest and around Rs.15 lakhs towards balance outstanding due to theatre owners. After analyzing the cash flow and wealth statements furnished by the assessee with reference to the evidence collected during search and sworn statements recorded, the Assessing Officer completed the assessment on a total undisclosed income of Rs.2,87,82,320/-. Even though in the first appeal, the CIT (Appeal) granted substantial reduction to the assessee, on 2nd appeal, the Tribunal refixed the total undisclosed income for the block period at Rs.1,09,16,440/- i.e. by making an addition of Rs.67,48,250/- over the undisclosed income of Rs.43 lakhs declared by the assessee. Even though the assessee initially accepted the Tribunal's order sustaining an addition of Rs.67 lakhs over the undisclosed income declared by the assessee, the assessee after six years of filing of appeal by the Revenue filed the above Cross Objection challenging the findings of the Tribunal with regard to 3 items of additions sustained by it. While the Revenue's appeal is to restore the deletions made by the Tribunal, the assessee's Cross Objection is for the purpose of further reduction of the addition of three items of undisclosed income sustained by the Tribunal.

4. So far as the penalty appeal i.e. ITA No.177/2008 is concerned, what is seen is that penalty under Section 158BFA (2) of the Act is levied not with reference to the original undisclosed income assessed which is sought to be sustained in this appeal, but only with reference to the addition of Rs.67,48,250/- sustained by the Tribunal. Penalty levied is minimum as provided under Section 158BFA(2) i.e. Rs.40,48,950/-. Even though first appellate authority sustained the

penalty, the Tribunal on 2nd appeal filed by the assessee cancelled the penalty completely. Revenue's appeal is for restoring the penalty that was sustained in first appeal.

5. We first proceed to consider the assessment appeal (ITA No.323/2002) filed by the Revenue and Cross Objection filed by the assessee.

6. Before proceeding to consider the various questions raised in the appeal, we have to consider the preliminary objection raised by the learned counsel for the respondent that no substantial question of law arises for consideration by this court with regard to the concurrent findings on fact recorded by the first appellate authority and confirmed by the Tribunal. Senior counsel appearing for the Revenue on the other hand contended that the appeal has to be considered by keeping in mind the special provisions of the Act contained in Chapter XIVB of the Act which specifically provide in Section 158BB that a block assessment has to be completed 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. We have to certainly consider the salient features of block assessment contemplated under Chapter XIVB which provides for block assessment for a maximum period of 10 years ending with the date of search. While Section 158BC provides for block assessment of the assessees searched under Section 132 of the Act or whose books of accounts are called under Section 132A of the Act, Section 158BD provides for block assessment of assessees other than searched assessees based on evidence or materials received in the course of search. The peculiar feature of this case is that the respondent-assessee is mainly a film distributor and is also a film producer, while the other assessee simultaneously searched namely, Sri.A.M. Fazil, is a film director and producer as well and both these persons have so much of extensive business connections and, therefore, the records seized from both the assessees and the statements recorded from both of them relate to same transactions that is the income and expenditure from film making, direction and distribution. We are very conscious of the fact that the appellate jurisdiction of this court under Section 260A is limited to substantial questions of law arising from orders of the Tribunal. The contention raised by counsel for the assessee that concurrent findings on appreciation of evidence recorded by two appellate authorities normally should not be interfered by this court to reach a different conclusion again by reappraising the evidence is quite a sound principle of law. However, the contention raised by Senior counsel for the Revenue is that when assessment of undisclosed income is based on concrete evidence received from the documents and accounts seized from the residence of assessee and the film director above referred, the Tribunal's refusal to uphold the assessment without any basis or material is a perverse finding which gives rise to a question of law. We find force in this contention because when block assessment of any item is made based on evidence collected in the course of search, the assessment under Section 158BC read with Section 158BD is supported by statutory provision namely, Section 158BB of the Act. The Tribunal cannot cancel the assessment of undisclosed income if the same is based on tenable and acceptable evidence recovered in the course of search and which is not disproved by the assessee. Keeping this in mind we proceed to consider the appeal on the various grounds raised and the questions raised with reference to specific additions.

7. The first item of addition is of Rs.1.09 crores, which is the sum total of unaccounted payments made by the assessee to film directors Shri. Siddique & Lal and Shri. Fazil and also to the film producer, M/s.Kumudavally Pictures. The reason for the addition is that all the three film directors denied receipt of payments from the assessee, and M/s.Kumudavally Pictures did not confirm receipt of the amount from the assessee, to the Department. Consequent upon non confirmation of payments as claimed by the assessee, an amount of Rs.1.09 crores and odd was assessed as undisclosed income of the assessee. The first appellate authority as well as the

Tribunal accepted the explanation of the assessee that the details of unaccounted payments along with unaccounted receipts were available in the seized records and when entries in the seized books pertaining to unaccounted receipts are accepted by the Assessing Officer, he has no justification to reject unaccounted expenditure also seen recorded in the books of accounts. Learned Senior Standing Counsel appearing for the Revenue contended that when an expenditure is claimed by the assessee, it is for the assessee to prove the same by identifying the payees and by proving that the payments were genuine and were in fact made to the payees. However, the contention raised by the assessee's counsel which found acceptance with the first appellate authority as well as the Tribunal is that details of unaccounted income and details of unaccounted payments were collected from the seized records and if evidence collected during search is believed there is no justification for the Department to believe partly as regards income and to disbelieve as regards expenditure.

8. After hearing both sides and after going through the orders, what we notice is that the Assessing Officer has considered the claim of the assessee that film directors were paid profit share of various films directed by them for the assessee. Moreover, details of payments were also available in the seized records. However, the Assessing Officer declined to believe assessee's claim for the reason that there is no written agreement between the assessee and the film directors for profit sharing over and above the agreed consideration paid to them and the cost reimbursed for the production of the film. Further the Assessing Officer has heavily relied on the denial made by the film directors against receipt of payments. We are unable to uphold the Revenue's claim for many reasons. In the first place, admittedly assessee was engaged in unaccounted business and accounts seized pertain to clandestine transactions showing unaccounted receipts and unaccounted expenditure. The assessee himself has voluntarily declared undisclosed income of Rs.43 lakhs over the income returned for the block period. So much so, there is no justification for doubting the entries found in the seized records pertaining to expenditure while accepting the income found recorded therein. When the Department relies on the seized records for estimating undisclosed income, we see no reason why the expenditure stated therein should be disbelieved merely because there is no written agreement and that payments were not made through cheques or demand drafts. Even when unaccounted income is determined from business carried on clandestinely or not, the statute does not authorize assessment of anything other than "undisclosed income" which has to be arrived at after allowing expenditure incurred by the assessee whether it be accounted in the regular books or not. What is clear from the clandestine records seized from the assessee is that both the film producer and the film directors were engaged in collections and payments outside the regular books of accounts and that is the only reason why there is no written agreement between them in regard to profit sharing and the payments are consciously not made through cheques or demand drafts. The Assessing Officer has also stated that the purpose of payments is not seen recorded in the seized records. We do not think this unrealistic stand is justified in the context of the business carried on by the assessee because between the film producer and the film directors income seen recorded and payments seen made should be taken as relating to business and nothing else. The mere fact that film directors have not confirmed receipt of payment in cash from the assessee also is not a ground for treating the payments as bogus or not genuine. In our view, there is nothing to doubt the genuineness of the payments because assessee himself explained that the film directors are entitled to share profits in respect of successful movies, and the Department has not established that such practice is not there in the film industry. Since, in principle, we uphold the order of the Tribunal that entries relating to payments to film directors found in the seized records should be accepted, we do not think there is any need for us to go to the details of the films produced and various amounts paid periodically by the assessee. Therefore, we do not find any justification to interfere with the findings of the Tribunal with regard to the payments made to the Directors though not recorded by the assessee or the payees in the regular books of accounts.

9. The remaining part of the addition is only disallowance of payments stated to have been made by the assessee to M/s.Kumudavally Pictures for purchase of a Tamil film. It is seen that while the total payments were Rs.37 lakhs, only Rs.22 lakhs was accounted and balance Rs.15 lakhs was unaccounted payments, which is also seen recorded in the seized records. We do not think there is anything to doubt the genuineness of the transaction because generally what is found by the Department from the seized records is that the business is done partly with black money and partly with white money though accounting of income and expenditure are of insignificant amounts.

10. Learned Senior Standing Counsel for the Revenue has also made reference to the explanation to Section 37(1) of the Act and also to the scope of the proviso inserted to Section 69C of the Act by the Finance (No.2) Act, 1998 with effect from 01/04/1999. Learned counsel for the assessee contended that film production is not an illegal business and therefore payments made though without accounting cannot be said to be illegal payments attracting explanation to Section 37(1) of the Act. We do not think unaccounted expenditure in a proper business can be treated as an expenditure prohibited by law to attract explanation to Section 37(1). So far as the proviso to Section 69C is concerned, in the first place the proviso introduced with effect from 01/04/1999 does not apply to the block assessment for the period covered herein and secondly we do not think excess expenditure over accounted expenditure in business is covered by Section 69C itself. We therefore do not think there is any application of these two Sections to the case in hand. We, therefore, do not find any ground to interfere with the orders of the Tribunal with regard to the deletion of total addition of Rs.1.09 crores and odd to three film directors and one film producing Company towards unaccounted payments made by the assessee to them. The first question raised in Revenue's appeal is therefore answered against the Revenue and in favour of the assessee.

11. Second and third questions in the Revenue's appeal pertain to the deletion of Rs.44.62 lakhs by the Tribunal by accepting the explanation from the assessee that the said amount represents advances received from theatre owners. In fact in the cash flow statement, the assessee tried to explain the source for the investments by stating that Rs.50 lakhs was received from theatre owners during the years 1991-92, 1992-93 and 1993-1994 towards advances for production and making available two films for distribution. On the facts it is seen that the two films for which advances were taken were produced only in the year 1996-97 whereas the advances were stated to have been taken by the assessee during the period 1991-92 to 1993-94 i.e. 3 to 6 years prior to the production of the movies. Even though sworn statements were recorded on two occasions on the date of search (24/07/1997) and subsequently on 29/07/1997, the assessee did not furnish any details about the advances taken from theatre owners to fund his business. Further, even in the seized records, there is no mention about advances taken by the assessee from the theatre owners. It is only at the stage of filing the cash flow statement, the assessee claimed to have received unaccounted advances taken in cash from various theatre owners totaling Rs.50 lakhs. The assessee could not establish with any details the dates of taking the loan, the dates of repayment except stating various amounts as received in each of the three years. The assessee, however, tried to prove the claim by producing confirmation letters from theatre owners, which do not contain dates of issuance of confirmation letters or the dates of giving the advances or the dates of repayments. Even though the Assessing Officer found these confirmation letters only as an after thought and evidence created by the assessee, the Tribunal just believed the confirmation letters and solely based on the same, deleted the entire additions covered by the letters and sustained only the balance addition of Rs.5.38 lakhs for which there was no confirmation letter. Learned Senior Standing Counsel for the Revenue contended that there is no justification for the Tribunal to rely on fabricated documents which were intrinsically vague and lack any particulars including dates of issue, dates of giving advances to the assessee and dates of repayment. The Revenue's

counsel further submitted that if it is a practice in the film industry for producers to take advances from theatre owners, as stated by the Tribunal, then the assessee has no explanation why payments could not be accounted or could not be taken through cheques or demand drafts. Learned Senior Standing Counsel for the Revenue also placed reliance on Section 269SS and 269T of the Act in regard to acceptance of deposits and repayments of the same other than through account payee cheques or demand drafts. Learned counsel for the assessee submitted that in the course of estimating undisclosed income based on documents seized for the purpose of assessment under Section 158BC of the Act, the assessee is entitled to establish through cash flow statement as to how he sourced the funds for the business and for the investments seen made by the assessee.

12. On going through the Tribunal's order, we notice that the Tribunal's findings do not justify the ultimate conclusion arrived at by them. The assessee in the sworn statement stated that advances from theatre owners were received for exhibiting just two films, Aniyathipravu and Chandralekha. However, admittedly, these films were produced and released in the year 1996-97, whereas the advances were stated to have been received during the period 1991-92 to 1993-94. The assessee has no explanation as to why advance payments received, which were stated to be accounted by theatre owners, were not accounted by the assessee. There is also no explanation as to why the payments were not received in cheques or demand drafts. Further, the assessee has a specific case that Rs.35 lakhs were returned to the theatre owners during 1995-96 and 1996-97. Normally, advances received from theatre owners only get adjusted against payments due to the Distributor and the assessee does not explain as to why and when repayments were made in cash by him. Neither the assessee nor the theatre owners in their confirmation letters gave the dates or even the months in which advances were taken by the assessee and the dates on which the amounts were repaid. The assessee's case is that during the years 1991-92, 1992- 93 and 1993-94, Rs.8.60 lakhs, Rs.18.30 lakhs and Rs.17.72 lakhs respectively were received. Even in the confirmation letters issued by the theatre owners, only a statement is given that so much are the amount that were advanced and taken back by the theatre owners. We do not know how parties who waited for 3 to 6 years remembering these cash transactions without any account whatsoever. When the theatre owners issued confirmation letters, obviously they would have accounted the advances made to the assessee. Why then they could not furnish the details, at least the dates of payments & repayments is the question which remains unanswered. We feel these bogus advances were claimed of earlier years beyond period of limitation for reassessments because otherwise the theatre owners who helped the assessee with the confirmation letters would have faced income tax re- openings. The most important evidence against the assessee is a negative one because the assessee who is in the habit of maintaining detailed clandestine accounts which were seized has not accounted these advances or repayments in such accounts. The whole story anybody can guess is cooked up and is unbelievable. It is also put forward by the assessee at a later stage, in the course of adjudication, to explain unexplained investment in house and several properties, details of which were found by the Department from the seized materials. We cannot also forget the back ground herein because assessee was progressively making profits and investing in agricultural land and house property. In the normal course, an assessee who was surplus of fund and is not short of cash flow as is seen from the seized records should not go for any borrowals from theatre owners. Though the Tribunal accepted the reasoning of the Assessing Officer and the probabilities drawn by him to reject the explanation offered by the assessee, they completely believed the confirmation letters. Both sides produced copies of the confirmation letters before us and on verifying it, we notice that these are undated letters without giving dates or months in which amounts were advanced to assessee or the dates on which the amounts were repaid and all what is sated is the consolidated amount as having been advanced to the assessee and taken back by the theatre owners. In our view, the confirmation letters on the face of it are not genuine and no reasonable man can accept it as proof of cash transactions running into lakhs

of rupees. Going by the assessee's financial position and investments revealed by seized records, it is difficult to accept the theory of advance from theatre owners put forward by the assessee later. The Tribunal has without any material assumed that in the film industry there is a practice of taking advances by film producers from theatre owners which may or may not be true, and may be true with some producers or a set of theatre owners but is certainly not a presumption available to be acted upon without acceptable evidence. Further it is difficult to believe that theatre owners advanced funds and waited for 3 to 6 years for films to be produced and supplied. It is also to be noticed that the Tribunal itself disallowed Rs.5.38 lakhs as the assessee could not prove any such advance having been taken by him from theatre owners. The only reasoning for the Tribunal to allow the balance amount of Rs.44.62 lakhs is confirmation letters, which we find lack any credibility or trustworthiness and in our view, no reasonable man can even accept it as genuine. The Tribunal in our view allowed the claim without any credible material or evidence and therefore it's order is unsustainable. We therefore, allow the appeal on this issue by restoring the addition of Rs.44.62 lakhs towards undisclosed income. Question Nos.2 & 3 are accordingly answered in favour of the Revenue and against the assessee.

13. The last question raised in the Revenue's appeal is with regard to the assessee's entitlement for deduction under Section 80-IA which provides for deduction for industries engaged in manufacturing and production of goods. The Assessing Officer noticed that the assessee has been filing returns regularly and up to the assessment year 1998-99 the assessee has not made any claim for deduction under Section 80-IA for any of the assessment years. Further finding of the Assessing Officer is that the assessee is mainly engaged in film distribution which is not an industrial undertaking engaged in the business of production of any article or thing eligible for deduction under the said Section. So far as film production is concerned, the findings of the Assessing Officer is that the assessee was engaged in production of two films i.e. in 1991-1992 and 1992-1993 and in remaining years the assessee has done only film distribution. The main ground on which the Assessing Officer disallowed the claim is that the claim for deduction under Section 80-IA should be made along with regular return that too accompanied by audit report in a mandatory form, i.e. in Form No.10CCB as required under Section 80-IA of the Act and in the absence of such audit report to be filed along with regular return, the claim cannot be entertained. However, before the first appellate authority, the assessee pleaded that production of motion pictures, as per circular No.24 dated 23/07/1969 issued by the Board of Direct Taxes, is production of goods eligible for deduction under Section 80-IA. Going by this circular, the CIT (Appeals) allowed assessee's claim. However, in second Appeal, the Tribunal remanded the matter back to the Assessing Officer for considering the claim only with reference to film production made by the assessee that too for two years. It is against this order of the Tribunal, the Revenue has come up in appeal. While the Revenue's counsel heavily relied on the findings of the Assessing Officer particularly with reference to the requirement of audit report in Form 10CCB, the assessee's counsel contended that at any time the assessee is entitled to claim deduction under Section 80-IA of the Act.

14. After hearing both sides, we are of the view that in order to consider claim of deduction under Section 80-IA a statutory audit report in form No.10CCB is mandatory as required under the above provision of the Act. Admittedly, the assessee has not made any claim in the regular returns filed up to the assessment year 1998-99. The requirement of an audit report in form 10CCB is for the Department to verify the factual position with reference to the data contained therein, which has contemporary relevance. The block assessment happened to be completed 6 to 7 years after the relevant years to which the assessee's claim for deduction under Section 80- IA relates. Standing Counsel submitted that the Department cannot verify the genuineness of the claim with reference to Form 10CCB, if the same is furnished for the years 1991-92 & 1992-93, 10 years after the closure of those years, pursuant to remand order issued by the Tribunal. In our

view, a claim of deduction under Section 80-IA is admissible only in regular assessment that too if it is claimed along with the return accompanied by audit report in form 10CCB. In fact, if the assessee has not furnished audit report along with the return, the Assessing Officer is not required to consider the claim. We do not think the deduction can be claimed for the first time in the computation of undisclosed income in the assessment under Section 158BC of the Act. We, therefore, do not find any justification for the Tribunal to remand the matter at this distance of time. We therefore answer the last question in favour of the Revenue and against the assessee.

15. The main dispute raised in the cross objection filed by the assessee is with regard to the addition of Rs.20 lakhs sustained by the Tribunal as undisclosed income. The assessee's case is that he borrowed Rs.20 lakhs from his sister-in-law, Dr. Mary Singh. The Department recorded the statement of assessee's sister-in-law, namely Dr. Mary Singh and later she has issued confirmation letters. However, the Assessing Officer disbelieved the assessee's claim for several reasons. In the first place in the two sworn statements recorded the assessee clearly stated that he has no other debt other than Rs.10 lakhs borrowed from the Bank by himself, his wife and son together for meeting cost for publicity of films. However, later, he produced a letter from his sister-in-law, Dr. Mary Singh, wherein she has stated that she had given a loan for Rs.20 lakhs and the same was from her income and she had in fact made a voluntary disclosure in the year 1997. However, when the Departmental Officer questioned her, she took a stand that the loan is given by her late husband, which is from his own income. The Tribunal noticed that there is inconsistency in the sworn statements of the assessee and the subsequent evidence produced by him through confirmation letter from his sister-in-law. The Tribunal further noticed that assessee's sister-in-law herself took inconsistent stand because what she has stated in the confirmation letter is not what she has stated before the Assessing Officer when her statements were recorded on 09/07/1999 and on 13/07/1999. The Tribunal therefore found that the borrowal from his sister-in-law is a bogus case, and the assessee and his sister in law have not explained as to why the amount was not paid or repaid through cheque or demand draft. We do not find any question of law arising from the findings of the Tribunal in this behalf. In our view, the Tribunal's findings and conclusions are well founded. We, therefore, dismiss the Cross Objection on this issue which is an after thought as is filed after 8 years of filing of appeal by the Department. The disallowance of the other two items raised in the Cross Objection are also based on evidence and no question of law arises from the findings of the Tribunal for consideration by us.

16. In so far as the penalty appeal, i.e. ITA No.177/2008 is concerned, it may be noticed that there was difference of opinion between the Accountant Member and the Judicial Member of the Tribunal who had heard the penalty appeal. While the Accountant Member cancelled the penalty in toto, the Judicial Member through a detailed order examined the scope of the provisions of Section 158BFA(2) and considered penalty with reference to each and every item of undisclosed income sustained by the first appellate authority. The judicial member held that penalty was rightly levied in respect of four items specifically considered by him. On reference, the 3rd member agreed with the Accountant Member and hence by majority, the Tribunal cancelled the penalty by reversing the order in first appeal by the CIT(Appeal). It is against this order, the Revenue has come up with this appeal.

17. We feel before proceeding to consider the specific grounds raised by the Revenue for sustaining penalty on several items of undisclosed income assessed, we have to consider the scope of the statutory provisions, which is different from Section 271(1)(c) of the Act, the general provisions on penalty for concealment of income. Section 158BFA(2) is therefore extracted hereunder.

"Levy of interest and penalty in certain cases

158BFA(1) xxx xxx xxx

(2) The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, may direct that a person shall pay by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under clause (c) of section 158BC:

Provided that no order imposing penalty shall be made in respect of a person if- (i) such person has furnished a return under clause (a) of Section 158BC;

(ii) been the paid tax if the assets seized consist of money, orpayable on the basis of such return has the assessee offers the money so seized to be adjusted against the tax payable;

(iii) evidence of tax paid is furnished along with the return; and

(iv) an appeal is not filed against the assessment of that part of income which is shown in the return;

Provided further that the provisions of the preceding proviso shall not apply where the undisclosed income determined by the Assessing Officer is in excess of the income shown in the return and in such cases the penalty shall be imposed on that portion of undisclosed income determined which is in excess of the amount of undisclosed income shown in the return."

It may be noticed that penalty under the above provision is the general Rule in the event of assessment of undisclosed income under Section 158BC and exclusion from penalty is an exception covered by the first proviso to the main Section, which is subject to the second proviso thereto. What is clear from the first proviso is that if, pursuant to the notice issued under Section 158BC(a) assessee files return, remits tax and does not proceed to contest the undisclosed income returned based on which assessment is made, there is no scope for any penalty. However, the second proviso is an exception to the first proviso which makes it clear that if any undisclosed income is assessed over and above the undisclosed income returned by the assessee in the return filed pursuant to notice issued under Section 158BC(a), penalty is to be levied on such excess income assessed. The main provision gives a limited discretion to the Assessing Officer to levy penalty ranging from a minimum amount, which is equal to the amount of tax payable in respect of undisclosed income and the maximum is three times of such tax. In other words, unlike under Section 271(1)(c), which provides for penalty for concealment of income, Section 158BFA(2) provides for mandatory penalty in respect of tax assessed on undisclosed income other than undisclosed income admitted without further contest and on which tax is paid based on return filed by the assessee against notice issued under Section 158BC(a) of the Act. Applying the above provision, what we notice is that in this case, the assessee returned the undisclosed income of only Rs.43 lakhs pursuant to notice issued under Section 158BC(a) of the Act. However, the Tribunal sustained an addition of Rs.67,48,250/- to the declared income, which is not seriously contested by the assessee except by filing a belated cross objection in the appeal filed by the Revenue challenging some amount of addition, which was considered and dismissed by us above. Going by the scope of the Section as explained by us, penalty is payable on the differential amount, which is exactly what the Assessing Officer has done and he has exercised his discretion in favour of the assessee by limiting the penalty to the minimum i.e. the amount of tax payable. It is this order, that is cancelled by the Tribunal by a majority judgment when the Judicial Member through a detailed order sustained penalty on four items of additions.

18. After hearing both sides what we notice is that most of the additions of undisclosed income are essentially estimate of profits from film industry and the assessment is based on accounts seized during search and statements recorded from the assessee, which are admissible under Section 132(4) of the Act. Going by the strict provisions of law as explained by us above, penalty is leviable on the differential amount assessed and sustained in appeal which is exactly what the Assessing Officer has done. However, we feel for the first time such a strict interpretation on penalty need not be applied to the assessee at this distance of time after the relevant years. We therefore proceed to consider penalty appeal item-wise. The first question raised by the Revenue pertains to the carry forward of loss claimed by the assessee amounting to Rs.33,74,884/- to offset the undisclosed income details of which were obtained in the course of search. We notice that there is statutory prohibition against allowing set off of carried forward losses from the previous years against undisclosed income under Section 158BB(4) of the Act, and in spite of the prohibition, the assessee ventured to claim carry forward loss against undisclosed income, which was rightly declined. Still we feel this amount need not be considered for penalty under Section 158BFA(2) of the Act as it was only a folly to make the claim. However, we feel penalty should be considered if the assessee has consciously suppressed undisclosed income from the return filed pursuant to notice issued under Section 158BC(a) of the Act even after recovery of details of undisclosed income during the search by the Department. Here we feel two items deserve to be considered, one the claim of borrowal claimed by the assessee from his sister-in-law, Dr.Mary Singh to off-set undisclosed income found in search, and the other is income from real estate business, which was found to be at Rs.10 lakhs.

19. So far as the borrowal claimed by the assessee from his sister-in-law is concerned, it is seen from the order that the assessee on the date of search gave sworn statement declaring that the only loan he had was Rs.10 lakhs availed from the Bank by himself, his wife and son. However, later in the course of assessment, the assessee gave a confirmation letter from his sister-in-law, Dr.Mary Singh stating that she has given an advance of Rs.20 lakhs and later another Rs.5 lakhs to the assessee. The case advanced by the assessee's sister-in-law was that she is a medical practitioner and she gave the loan to the assessee from her own savings, which was disclosed under the VDIS, 1997. However, when the Departmental Officials questioned her, she stated that the amount was given to the assessee by her late husband from his own income. So much so, all the authorities concurrently found that the assessee himself made an inconsistent stand by giving a sworn statement that he has no borrowals, but later he changed his stand and claimed that he has borrowals from his sister-in-law, by producing a confirmation letter. Unfortunately, assessee's sister-in-law gave sworn statement contrary to her own confirmation letter, and so much so, the whole story became unbelievable and rejected by all the authorities including the Tribunal. There can be no doubt that this is a conscious effort made by the assessee to account source for Rs.20 lakhs by brining a bogus claim of borrowal from his sister-in-law, which the assesse and his sister-in-law failed to prove. We feel penalty is rightly levied on this undisclosed income. In fact going by the conduct of the assessee, maximum penalty could be levied. However, we do not think, we should change the yardstick applied by the Assessing Officer who limited the penalty to equal amount of tax. We therefore sustain the minimum penalty on this amount of addition.

20. Among several additions sustained by the Tribunal, we feel one of the items, which is of an exceptional nature, is undisclosed income from real estate business, which is fixed by the Assessing Officer at Rs.10 lakhs. What we notice from the orders of the authorities including the Tribunal is that the basis for assessment of income from real estate is recovery of a crossed cheque of Rs.30,63,660/- drawn on Nedungadi Bank Ltd. issued in assessee's favour. When the assessee was questioned about the business transaction pertaining to the cheque, he clearly admitted that he was engaged in real estate business and the cheque was issued by one

Mr.Aboobacker. The assessee conceded that 5 to 6 property transactions in the course of time fetched him a profit of Rs.10 lakhs. Even after admitting the income from real estate business at Rs.10 lakhs, which is the only amount assessed by the Assessing Officer without any addition, still, the assessee contested the liability in appeal, but the Tribunal sustained it. We are unable to appreciate the conduct of the assessee because recovery of cheque is an evidence based on which assessment of undisclosed income could be made. Instead the Assessing Officer was very considerate, who recorded sworn statement of the assessee and based on assessee's sworn statement income conceded by him at Rs.10 lakhs from real estate business was assessed as undisclosed income. There is no justification for the assessee to suppress the same in return and to contest it in appeal up to the Tribunal. Assessee's sworn statement is an admissible evidence under Section 132(4) of the Act and the document received, namely the cheque, is admissible evidence under Section 132(4A) of the Act, unless the assessee established that the transaction representing the document did not bring any undisclosed income to the assessee. Here again we are of the view that the conduct of the assessee justifies maximum penalty. But the Assessing Officer was considerate and limited the penalty covering this amount also at the minimum. We therefore allow the appeal on this issue by reversing the order of the Tribunal, and by restoring the minimum penalty confirmed by the first appellate authority. In the result, the appeal is allowed in part sustaining the penalty only on the above two items of undisclosed income of total amount of Rs.30 lakhs.

21. Before parting with the matter, we are constrained to observe about the effort made by us to persuade the Central Government to take steps to prevent generation and circulation of black money. Through a detailed interim order we appraised the Government that unless prohibition is introduced against cash dealings particularly in property sales in film industry and the like against at least for payments over a certain limit in cash, black money generation and circulation cannot be controlled because the disincentives on cash dealings contained under the various provisions of the Income Tax Act have failed to achieve the objective. Further, by prohibiting use of cash in major transactions terror and mafia funding and corruption could be arrested to a large extent. Above all, the worst enemy of our economy that is, circulation of high denomination counterfeit currencies (presently estimated at 7000 crores) could be prevented to a large extent. Unfortunately, the response of the Central Finance Ministry is not at all encouraging in as much as Government wants status quo to continue to the detriment of the economic interest of the country and the people as a whole. Our limitations while exercising appellate jurisdiction under Section 260A of the Act inhibit us from initiating any proceedings or issuing direction against the Central Government. However, we express our anguish on the attitude of the Central Government to have created this vicious situation and allow the same to continue. In the result, the appeals filed by the Revenue are allowed in part as indicated above and the Cross Objection filed by the assessee is dismissed.

(C.N.RAMACHANDRAN NAIR, JUDGE)
(K.VINOD CHANDRAN, JUDGE)