

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ {ITA 276 of 2009}
{ITA 302 of 2009}
{ITA 396 of 2009}

% Judgment Reserved on: 17.09.2010
Judgment Delivered on:29.11.2010

(1) ITA 276 of 2009

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra,
Advocate

VERSUS

LATE SH. RAJ PAL BHATIA . . .RESPONDENT

Through: Mr. C.S. Aggarwal, Sr.
Advocate with Mr. Prakash
Kumar, Advocate

(2) ITA 302 of 2009

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra,
Advocate

VERSUS

LATE SH. OM PRAKASH BHATIA . . .RESPONDENT

Through: Mr. C.S. Aggarwal, Sr.
Advocate with Mr. Prakash
Kumar, Advocate

(3) ITA 396 of 2009

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Rashmi Chopra,
Advocate

VERSUS

HAKIM RAI BHATIA . . .RESPONDENT

Through: Mr. C.S. Aggarwal, Sr.
Advocate with Mr. Prakash
Kumar, Advocate

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. All these appeals arise out of the common order dated 11th July, 2008 passed by the Income-Tax Appellate Tribunal thereby allowing three appeals of the assessees/respondents and deleting the additions made by the Assessing Officer. The respondents were the brothers and two of them passed away during the pendency of the Income Tax proceedings. Their spouses were impleaded in their place in their capacity as the legal heirs. These brothers were the joint owners of property bearing no. 112, Golf Link, New Delhi, which was sold to Sh. Sunil Charla and his wife Smt. Sureksha Charla. The additions in the income of these three brothers were made qua Block Assessment proceedings on the premise that consideration of the said property was under-stated in the sale deed executed by these assessees in favour of the aforesaid two purchasers. According to the Department, the actual price received was ₹ 6.5 crores, the consideration shown in the sale deed was only ₹ 1.40 crores. The additions made by the Assessing Officer in their respective assessment were sustained by the CIT (A), however, the Income-Tax Tribunal has deleted the same.

2. The Tribunal in the impugned order has correctly stated the facts under which the Block Assessment proceedings were initiated by the Assessing Officer in respect of these assesseees and aforesaid additions made. Therefore, in so far as facts of these cases are concerned, one can safely rely upon the Tribunal's order without any fear of contradiction. We are, therefore, referring these facts from the said order.

3. A search was conducted under Section 132 (1) of the Income Tax Act at the residential premises of Shri Sunil Charla and others at 4, Malka Ganj, Delhi. During the course of search statement of Smt. Surksha Charla, wife of Shri Sunil Charla, a co-owner in the property at House No. 112, Golf Links, New Delhi was recorded. Shri Sunil Charla, Smt. Surksha Charla and Shri Sunil Charla HUF have purchased a house property at No. 112, Golf Links, New Delhi from the co-owners. In her statement dated 24.09.2002 Smt. Surksha stated as under:-

“Q.6 Please give the details of your all immovable properties in your name or in which you have share and in the name of your family member.

Ans. House No.4 Malka Ganj is family property and other property bearing No. 112, Golf Links is joint name i.e. me and my husband Shri Sunil Charla, which is also residential house.

Q.7 when was this property at Golf Link was purchased and from whom.

Ans. It was purchased roughly three years back in Dec., 99 from Sh. Bhatia's family of three brothers namely Shri O.P. Bhatia, R.P. Bhatia and H.R. Bhatia.

Q.8. What was the purchase consideration of this properties at Golf Link.

Ans. Aprox. 5 to 6 crores and cheque payment of ₹ 1.40 crore was paid by us. The balance was paid in cash”.

4. Smt. Surksha Charla thereafter filed a letter dated 26.09.2002 addressed to the Addl. Director of Income Tax (Inv.) Unit-II, New Delhi retracted her statement recorded during search on 24.09.2002. The DDI (Inv.)-II, New Delhi thereafter issued summons under section 131 to Smt. Surksha Charla. Her statement was recorded by DDIT (Inv.) on 01.11.2002.

5. The Assessing Officer considered that since buyers have paid sum over and above that stated in the sale deed, to that extent the amount is also received by the sellers (appellants herein). Since sellers have understated the value of property sold, action under Section 158 BD ought to be taken in the hands of the sellers of the property. Accordingly notices under Section 158 BC read with Section 158 BD were issued to the assessee. The Assessing Officer held that the assessee was confronted with the statement of Smt. Surksha Charla stating that property No. 112, Gold Link, New Delhi was purchased for ₹ 6 crores by them and hence the sale consideration of ₹ 6.5 crores was received over and above the stated consideration. The assessee contended that the property was sold for only the stated consideration as mentioned in the sale deed. It was duly registered and in respect of which capital gain was offered for taxation. The assessee also submitted that Smt. Surksha Charla had already denied receipt of any cash consideration. The other co-owners who are also the purchaser of the property had also denied involvement of any cash consideration in the deal.

6. The assessee also contended that an opportunity to cross-examine the persons whose statement sought to be relied upon, be granted. The assessing Officer concluded that the property which was valued at ₹ 120 lacs on 1.4.1981 would not have been sold after 20 years for a consideration of ₹ 135 lacs only whereas the rates of property have increased manifold during these 20 years. In her statement Smt. Surksha Charla, a co-purchaser had admitted having purchased the property for over ₹ 6 crores. The property bulletins are showing the market rate of Golf Links at ₹ 80,000/- per sq. yard during financial year 1999-2000. The addition was made in the block assessment of Charla family on the basis of these facts and additions have been confirmed by the learned CIT (A). The assessing officer therefore, adopted the consideration over and above the declared one at ₹ 6.5 crores, which was equally divided amongst three appellants and additions were made accordingly.

7. The learned CIT (A) held that Smt. Surksha Charla had given graphic details about the transaction of the property that was the first version given by one of the co-owners of the property. There was no duress while recording the statement and no pressure was exerted. The statement was not "extracted" from Smt. Charla. An admission is the best evidence against a person making such admission. It can be retracted but cogent reason must come forward to justify such retraction. The retraction after 2 days if she had been doctored to retract is not a genuine one and cannot be lent any credence. The learned CIT (A) held that since he has upheld the addition made in the case of purchasers, the action of the Assessing Officer is to be confirmed.

8. The Tribunal, however, has deleted the aforesaid addition taking a view that the very provisions of section 158 BD of the Act invoked by the Assessing Officer and initiating Block Assessment proceedings itself was illegal. He was thus of the view that the entire assessment proceedings were without jurisdiction. The precise reasoning in support of the aforesaid conclusion can be found in para 8 of the impugned order which reads as follows:-

“8. We have carefully considered the relevant facts, arguments advanced and the case laws cited. In the present case, the Assessing Officer has sought to invoke provisions of Section 158 BD so as to compute the undisclosed income of the persons other than the persons searched. The pre-requisite for invoking the provisions of Section 158 BD is that where the Assessing Officer of the searched person is satisfied that undisclosed income belongs to person other than the person search, the books of accounts or other documents or assets seized shall be handed over to the assessing Officer having jurisdiction over such other person and the Assessing Officer of such other person shall proceed under Section 158 BC against such other person and then the provision of Chapter XIVB shall apply. However, in the present case it is seen that no books of accounts or other documents or assets pertaining to person other than person searched were found or seized. Thus there was no question of handing over such material to the Assessing Officer of the person other than the person searched. It was only the statement of Smt. Surksha Charla recorded during the course of search is considered to the material for exercising jurisdiction under Section 158 BD. In our opinion,

the statement of Smt. Surksha Charla cannot be considered as “Books of accounts or other documents or assets” and hence, the Assessing Officer could not have invoked the provisions of section 158 BD read with section 158 BC to frame the assessment for block period as per Chapter XIV-B. Though satisfaction note is not made available to us, the Assessing Officer proceeded with the fact that in view of the statement of Smt. Surksha Charla, action under Section 158 BD was taken. Notice under section 158 BD was issued on 9.5.2003. First statement of Smt. Surksha Charla was recorded on 24.09.2002 which was retracted by her on 26.09.2002 and was also further clarified by her, while deposing before the DDIT (Inv.) on 1.11.2002. No other books of accounts or other documents or assets pertaining to these assessees were found during the course of search. We, therefore, hold that the Assessing Officer could not have validly initiated proceedings under Section 158 Bd. This could have been a matter of regular assessment but not atleast under the provisions of Chapter XIV-B of the Act. The provisions are not invoked in accordance with law and consequently the entire assessment proceedings under Chapter XIV- B being illegal and without jurisdiction are to be cancelled. We hold so.”

9. As the Tribunal quashed the assessment proceedings itself, it did not go into the other issues. However, one material observation made by the Tribunal is that though proceedings were based on the statement of Smt. Surksha Charla, an unrelated party to the assessees, she was not produced for cross examination by the assessees even when specific request was made by the assessees in this behalf. On this basis, additional reason given by the Tribunal is

that such a statement of Smt. Suraksha Charla without affording an opportunity of cross examination, could not be admitted in evidence.

10. We heard in detail the submission of learned counsel for the parties on admission. It is to be borne in mind that in the instant case premises of the assessee were not searched. The search was in fact carried out at the premises of Smt. & Shri Charla. It is on the basis of the said statement of Smt. Charla recorded during the said search operation that proceedings were initiated against the assessee herein under Section 158 BD of the Act. Law provides for block assessment in case of the assessee whose premises are searched under Section 158 BA of the Act. It can be done when some material during the said search is seized by the Income Tax authorities from which it is found that there was some undisclosed income which is found as a result of search of the persons whose premises was searched. When the block assessment proceedings are to be initiated against the persons whose premises are searched, procedure for that is provided under Section 158 BC of the Act. However, if during the search carried out at the premises of one person, some documents/material is found or asset seized etc. on the basis of which the Assessing Officer is satisfied that any undisclosed income belongs to a third person i.e. a person other than one whose premises were searched under Section 132 of the Act, the procedure for carrying out block assessment in that eventuality is provided under Section 158 BD of the Act. It was for this reason that in the case of these assessee provisions of Section 158 BD of the Act were invoked. Section 158 BD of the Act reads as under:-

“where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other

than the person with respect to whom search was made under Section 132 or whose books of account or other documents or any assets were requisitioned under Section 132A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and the provisions of this Chapter shall apply according”.

11. It clearly emerges from the reading of this provision that before invoking the provisions of Section 158 BD of the Act, the Assessing Officer of the person searched u/s 132 (1) must satisfy himself that some undisclosed income belongs to a person other than the persons with respect to whom search was made under Section 132 (1) of the Act. Such satisfaction must be based on the material found in the course of search. In the absence of any such satisfaction (which is to be recorded in writing) the concerned Assessing Officer does not get any jurisdiction to assess that other person by invoking the section 158 BD of the Act. Further, the satisfaction of the Assessing Officer has to be in respect of the following aspects:-

i) there should be “undisclosed income” within the meaning of section 158 (b) referable to the assets or books/documents found seized/requisitioned;

ii) there should a finding by the Assessing Officer that there was undisclosed income in such assets or books of account or documents of the searched person;

iii) and that such undisclosed income belonged to the person other than the one searched.

12. In the present case, admittedly, during the search carried out at the premises of Mr. & Mrs. Charla, no books of accounts or other documents or other assets pertaining to the assessee herein was found or seized. The entire foundation of the block assessment

under Section 158 BD of the Act, in so far assesseees are concerned, was the statement of Smt. Suraksha Charla recorded during the course of search.

13. The Tribunal has held that this statement could not be treated “books of accounts or other documents or assets” which only could be the basis for invoking the provision of Section 158 BD of the Act. Admittedly, statement of Mrs. Charla is neither ‘books of accounts’ or ‘assets’. The question, therefore, is as to whether this statement can be treated as ‘other documents’. Prima facie, it is difficult to accept this proposition. Statement was not the document which was found during search. In fact this was the document which came to be created during the search as the statement was recorded at the time of search. Therefore, it cannot be said that the statement was ‘seized’ during the search and thus, would not qualify the expression “document” having been seized during the search. In such a scenario, proper course of action was reassessment u/s 147 read with section 148 of the Act.

14. Learned counsel for the Revenue relied upon the judgment of the Supreme Court in the case of **CIT Vs. Mukundray K. Shah**, 290 ITR 433. However, that was a case where during the search conducted in the premises of a company under Section 132 of the Act, apart from cash or jewellery, a diary belonging to the assessee was seized. The proceedings against the assessee under Section 158 BD of the Act originated on the basis of the said diary. This diary which belonged to the assessee was clearly a “document” seized during the search and on this basis the Supreme Court held that the proceedings initiated against the assessee were valid.

15. In the case of **Smt. Chitra Devi Vs. CIT** decided by Jodhpur Bench of Income Tax Appellate Tribunal, reported in 77 TTJ 430, it is held that statement recorded under Section 132 (4) of the Act during the search is no evidence as contemplated under section 158BD of the Act and on that basis no valid proceedings in Chapter XIV-B of the Act could be initiated.

16. However, it is not even necessary to decide this aspect authoritatively in these appeals, inasmuch as, order of the Tribunal warrants to be sustained because of the following reason.

17. The Assessing Officer before issuing notice under Section 158 BD of the Act did not record any satisfaction which is a mandatory requirement as per the said provision. The Tribunal has returned categorical finding to this effect which could not be shaken. We have already reproduced the language of Section 158BD of the Act. It requires that the Assessing Officer is has to be satisfied that any undisclosed income belongs to any third person, i.e. the person whose premises are searched. It cannot be disputed that the recording of "satisfaction" is necessary precondition and, is a must in order to safeguard the otherwise abuse of power and it is inbuilt under the provisions of Section 158 BD of the Income-Tax Act. Such a satisfaction has to be in writing. Since in the discharge of the official function, where a statute requires the satisfaction to be reached, the same can be arrived at only when the same are recorded by recording such reasons on which satisfaction has been arrived at.

18. In the present case no such note of satisfaction could be produced before the Tribunal. This aspect is conclusively determined by the Supreme Court in the case of **Manish Maheshwari Vs. ACIT**, 289 ITR 341 wherein it is held as under:-

“Condition precedent for invoking a block assessment is that a search has been conducted under Section 132, or documents or assets have been requisitioned under Section 132A. The said provision would apply in the case of any person in respect of whom search has been carried out under Section 132A or documents or assets have been requisitioned under Section 132A. Section 158BD, however, provides for taking recourse to a block assessment in terms of Section 158BC in respect of any other person, the conditions precedents where for are : (i) Satisfaction must be recorded by the AO that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 of the Act; (ii) The books of account or other documents or assets seized or requisitioned had been handed over to the AO having jurisdiction over such other person; and (iii) The AO has proceeded under Section 158BC against such other person.

The conditions precedent for invoking the provisions of Section 158BD, thus, are required to be satisfied before the provisions of the Chapter XIV-B are applied in relation to any person other than the person whose premises had been searched or whose documents and other assets had been requisitioned under Section 132A of the Act.”

19. We may also add that this Court in the case of **Amity Hotels (P) Ltd. reported** 272 ITR 75, has also held that the reasons must be recorded by the Assessing Officer having jurisdiction over the

assessee who had been searched before issuing the notice u/s 158 BD of the Act. The aforesaid view has been reiterated by this Court in the case of ***CIT Vs. Karan Engg. P. Ltd.*** and ***Janki Exports International Vs. UOI***, 193 CTR 730.

20. We, therefore, of the opinion that no substantial question of law arises and accordingly these appeals are dismissed in *limini*.

**(A.K. SIKRI)
JUDGE**

**(MANMOHAN SINGH)
JUDGE**

NOVEMBER 29, 2010
Skb