IN THE INCOME TAX APPELLATE TRIBUNAL
Bangalore 'A'Bench, Bangalore

Before Shri Rajpal Yadav, Judicial Member
And Shri Abraham P. George, Accountant Member

S.No	IT(SS)A No.	Appellant	PAN	Respondent
1	7/Bang/2012	Mr.Mohd. Khasim, No. 217/55, 11th Cross Wilson Garden Bangalore	AJQPS 0787 D	ACIT, Central Circle 2(2) Bangalore
2	8/Bang/2012	Mr. Imtiaz Pasha, No. 217/55, 11th Cross Wilson Garden Bangalore	ABZPP 2650 B	-do-
3	9/Bang/2012	Mr. Tippu Sultan, No. 217/55, 11th Cross Wilson Garden Bangalore	AAACT 6198 D	- do -
4	10/Bang/2012	Mr. Chand Pasha, No. 217/55, 11th Cross Wilson Garden, Bangalore	AGRPP 7236 J	- do -

Block period w.e.f1.4.1991 to 29.05.2011

Assessee by: Shri S. Parthasarathy, Advocate
Department by: Shri C.H.Sundarao, CIT, (DR)

Date of Hearing: 01/09/2014
Date of Pronouncement: 26/09/2014

O R D E R

Per Rajpal Yadav, J.M.

The present apopeals are directed at the instance of the assessee against the common order of the learned CIT (A) dated 22.03.2012 passed for the block period starting from 1.4.1991 and ending on 29.05.2011 on the appeals of appellants. Since a common question of law and facts is involved in all the appeals, therefore, we heard them together and deem it appropriate to

dispose of them by this common order. The grounds of appeal taken by the appelalnts are not in consonance with Rule 8 of the ITAT Rules, they are descriptive and argumentative in nature. In brief their common grievance is that the learned CIT (A) has erred in confirming the penalty imposed upon them u/s 158BFA(2) of the Income Tax Act, 1961.

2. The facts on all vital points are common in all the appeals. Therefore, for the facilitative reference, we are taking up the facts from the appeal of Shri Mohd. Khasim for which the learned representatives have addressed their arguments. The adumbrated facts are that a search and seizure operation was carried out u/s 132 of the Income Tax Act at all the appellants on 29th May, 2001. Along with the appellants, premises of one M/s Domicile Developers Ltd along with the premises of assessees were also covered. During the course of search, incriminating documentary evidence were found and seized. In order to give a logical end to the proceedings, a notice u/s 158BC dated 8.5.2002 was served upon the assessee on 21.5.2002. The assessees were directed to file return of income within 30 days from the date of notice. Shri Mohd. Khasim had filed his return of income 18/06/2002 declaring nil undisclosed income. Similarly the other appellants have also declared nil income. Notices u/s 143(2) and 142 (1) were issued and served upon the assessee. The case of the Assessing Officer is that Shri Mohd. Kasim along with his wife Ms. Naseemunisa and family members namely Shri Tipu Sultan, Shri Chand Pasha, Shri Imtiaz Pasha, Shri Mohammed Ali (4 sons of Shri Mohd. Khasim), and Ms. Shabana Taj (daughter of Shri Mohd. Khasim) jointly purchased a land measuring about 3 acres and 7 guntas situated in Survey

Nos. 181 and 182 at Bilekanahally, Berur Hobli was purchased during 1994-95. According to the Assessing Officer this land was purchased in individual names. Each family members have entered into an agreement for sale of this land with M/s Domicile Developers on 8th Nov. 1996. Assessing Officer has noticed the details of these agreements in Paragraph No.3. According to Assessing Officer, there were three agreements found at the premises of M/s Domicile Developers. The first agreement is dated 8.11.1996, 2nd agreement is dated 22.11.1999 and one more agreement is dated 15.3.1997. In all these three agreements, different sale considerations has been agreed between the parties. According to the agreement dated 8.11.1996, the land was agreed to be sold for a consideration of Rs.1.27 crores, out of that Rs.67.00 lakhs was received by the respective vendors and Rs.60.25 lakhs is still to be received from M/s Domicile Developers. As per the agreement dated 22.11.1999, the sale consdieration was settled at Rs.4,65,50,000/-, the vendor has paid Rs.4,13,00,000/- and the balance was payable at Rs.52,50,000/-., As per the third calculation, the sale consideration was settled at Rs.5,53,21,000/-. The investigation team has recorded the statement of Shri Naved, Managing Director of Domicile Developers alleged vendee and Mr. Chotu Sab and Mr.Tipu Sultan. Mr. Tipu Sultan was also put to cross examination by Mr. Naved during the investigation itself. According to the Assessing Officer in the cross examination, Mr. Tipu Sultan had agreed that they have received Rs.2.75 crores as the sale consideration from the vendee. However, during the assessment proceedings he has re-retracted from his earlier version. He has filed a letter before the authorities for retraction for his alleged

admission. The Assessing Officer observed that M/s Domicile Developers had claimed an expenditure of Rs.2.834 crores on account of land purchased. Thus, on the basis of the entries made by the vendee in its books of accounts, he construed that the land was sold for a sum of Rs.2.83,01,868/- after debting the cost of land and other payment for eviction, brokerage etc. He calculated the capital gain assessable in the hands of each appellants.

3. On the other hand, the stand of the appellants was that at the time of purchase of the land, a partnership firm in the name and style of M/s Tipu Sultan & Co. was constituted on 3.4.1996. The firm has credited the partners a/c with the value of the land brought in as their share. It has been filing regular return of income, but no income has been offered on sale of the property as on date and it was treated as stock-in-trade. The amounts received from M/s Domicile Developers is treated as an advance. The 2nd submissions of the appellants was that as per the agreement dated 8.11.1996, the sale consideration was settled at Rs.1.27 crores. The assessees had received Rs.67.00 lakhs through account payee cheques which has been duly showed. Shri Mohd. Khasim has received a sum of Rs.5.00 lakhs through cheque No.557308 dated 20.10.1996 drawn on Vijaya bank, Austin Town Branch. Similar is the position with regard to other vendors. The existence of other agreements were not specifically denied, but it was contended that they put the signature on asking of the vendee who wants to denotify this land from Park Zone and wants to avail loans etc. When statement of Shri Tipu Sultan and Mr.Chotu Sab was recorded u/s 132(4), they disclosed sale consideration of Rs.1.27 crores only. It is alleged

that at about 2.00 am in the night on 30.05.2001, they were brought at the premises of M/s Domicile Developers and there during the cross examination a disclosure was obtained for a sale consideration of Rs.2.75 crores. Shri Naved, partner of M/s Domicile Developers cross examined Mr. Chotu Sab also. We will be discussing these evidences in the later part of the order. The Assessing Officer was not conclusively satisfied that the vendee has made payment to the assessee. It is also pertinent to mention here that the sale deeds were not executed. Unless sale deed was being executed, the Developer M/s Domicile Developer will not be in a position to create third party right in the property even after development. Assessing Officer has assessed the alleged capital gain on protective basis in the hands of the assessee, his findings in this regard read as under:

> *"3.7 The onus is on M/s Domicuile Developers to prove that the payments have been made as they have claimed an expenditure of Rs.2,83,01,868/- on account of land purchase. As on date, they are unable to prove. But however, considering the contradictory stands Mr. Chotu Sab's family has been taking at various points of search and assessment proceedings, an amunt of Rs.2,83,01,868/- is being treated as the amount received by the family members and the gains are being assessed on a protective basis in the hands of family members".*

The computation of capital gain read as under:

Total consideration received		Rs.2,83,01,868
Less:cost of land	Rs.23,65,000	
Other payments for eviction, brokerage etc	Rs.50,91,541	Rs.74,56,591
Short Term Capital Gains		Rs.2,08,45,277

4.1 This short term capital gain is apportioned on a proportionate basis as per their land holdings held as a share by the various individuals.

5. The assessee owns 18 guntas of land. Therefore, the undisclosed income worked out to be Rs.29,54,448/-.

Undisclosed income as explained abut	Rs.29,54,448
Taxable Income	Rs.29,54,448
Tax thereon @ 60%	Rs.17,72,669
Add:Surcharge @ 2%	Rs. 35,453
Total Tax Payable	Rs. 18,08,122

4. The addition so made has been confirmed up to the Hon'ble High Court. During the course of hearing, it was pointed out that SLPs have been filed before the Hon'ble Supreme Court but the learned DR informed in the Court that the SLPs have also been dismissed. Assessing Officer has initiated the penalty proceedings u/s 158 BFA(2) on the ground that the assessees have failed to disclose the true undisclosed income in the shape of capital gain. The Assessing Officer has imposed a penalty of Rs.18,08,122/- in the case of Shri Mohd. Khasim. The penalties have accordingly been computed in the cases of other assessees. The operative part of the penalty order read as under:

"*7. It is to be mentioned here that apart from mentioning the above, the assessee in his letter filed 20.11.2009 has not submitted any explanation for the show cause notice, inspite of the fact that the undisclosed income determined by the Assessing Officer has been upheld by both the appellate authorities. It is very much apparent that the assessee has no explanation to offer for the undisclosed income determined by the Assessing Officer against which the penalty proceedings u/s 158BFA(2) were initiated. This is a fit case for levy of penalty u/s 158BFA(2). The maximum penalty*

leviable is Rs.54,24,366/- and the minimum penalty leviable is Rs.18,08,122/-. I hereby levy penalty of Rs.18,08,122/- (Rupees Eighteen Lakhs Eight Thousand One Hundred Twenty-two only) being the minimum penalty leviable in the case u/s 158BFA(2) of the I.T. Act, 1961.

8. This order is passed after obtaining approval of the Addl. CIT, CR-2, Bangalore vide letter No.25/Addl.CIT-CR-2/2009-10 dated 29.01.2010. Issue DN & Challan accordingly".

5. With the assistance of the learned representatives, we have gone through the record carefully. Before embarking upon an inquiry, as to penalty u/s 158BFA(2) can be imposed upon the assessee or not in the given facts and circumstances, we think it appropriate to bear in mind certain basic principles of computation of income in the block period and perceptional differences between the operative force penalty provisions imposable u/s 158BFA(2) vis-à-vis section 271(1)(i)(c). Thus In order to adjudicate this question we have to understand the method of determining undisclosed income in a block assessment and scope of block assessment. Sections 158B(b) and 158BB provide the definition of undisclosed income and its computation for the block period. These provisions read as under:

"158B(b) 'undisclosed income' includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property

which has not been or would not have been disclosed for the purposes of this Act or any expense, deduction or allowance claimed under this Act which is found to be false.

158BB Computation of undisclosed income of the block period.—(1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the AO 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 s. 143 or s. 144 or s. 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 s. 139 (or in response to a notice issued under sub-s. (1) of s. 142 or s. 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 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;

(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 cl. (c);

(d) where the previous year has not ended or the date of filing the return of income under sub-s. (1) of s. 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-s. (4) of s. 245D, on the basis of such order;

(f) where an assessment of undisclosed income had been made earlier under cl. (c) of s. 158BC, on the basis of such assessment.

Explanation.—For the purposes of determination of undisclosed income,—

(a) 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 this Act without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-s. (2) of s. 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-s. (2) of s. 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 s. 143 includes determination of income under sub-s. (1) or sub-s. (1B) of s. 143.

(2) In computing the undisclosed income of the block period, the provisions of ss. 68, 69, 69A, 69B and 69C shall, so far as may be, apply and references to 'financial year' in those sections shall be construed as references to the relevant previous year falling in the block period including the previous year ending with the date of search or of the requisition.

(3) The burden of proving to the satisfaction of the AO that any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.

(4) For the purpose of assessment under this chapter, losses brought forward from the previous year under Chapter VI or unabsorbed depreciation under sub-s. (2) of s. 32 shall not be set off against the undisclosed income determined in the block assessment under this chapter, but may be carried forward for being set off in the regular assessments."

6. Expounding the scope of the block assessment and inclusion of undisclosed income, the Hon'ble Delhi High Court in the case of CIT vs. Ravi Kant Jain (2001) 167 CTR (Del) 566:

(2001) 250 ITR 141 (Del) has observed that the special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. As the statutory provisions go to show, it is not intended to be a substitute for regular assessment. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of accounts or documents and such other materials or information as are available with the AO. Evidence found as a result of search is clearly relatable to ss. 132 and 132A. Similarly Hon'ble Rajasthan High Court has explained the scope of block assessment and determination of undisclosed income in CIT vs. Rajendra Prasad Gupta (2001) 166 CTR (Raj) 83 : (2001) 248 ITR 350 (Raj). The following observations are worth to note :

> *"However, under the scheme of the provisions for block assessment, it is apparent that it relates to assessment of 'undisclosed income' of the assessee excluding the income subjected to regular assessment in pursuance of the returns filed by the assessee for such period. It is also apparent from the perusal of s. 158BB that the returns are also required to be filed in pursuance of the notice under s. 158BC(a) and the assessment is to be framed on that basis in the light of material that has come into possession of the assessing authority during the course of search which is the foundation of the proceedings. That being so, the correctness or otherwise of the returns filed in pursuance of the notice under s. 158BC(a) has to be examined with reference to the material in the possession of the assessing authority having nexus to assessment of 'undisclosed income' which is with the assessing authority, and premise of such proceedings. If the returns filed by the assessee do not accord with the materials which are already in the possession of the*

authority, it can be estimated to the best judgment by the assessing authority on the basis of the material in his possession. However, the assessing authority is not conferred with power to make estimation of income de hors the material in his possession, while making regular assessment order under s. 158BB. It has to be borne in mind that proceedings under ss. 158BB and 158BC are that of undisclosed income. Therefore, the proceeding carries with it a presumption that returns filed in pursuance of such proceedings are of undisclosed income and not necessarily in accordance with the books of accounts. Its verification has to be searched outside regular books with reference to material that has been found during search. That makes it imperative to adjudicate the return with reference to material that has come in the possession of the assessing authority during the course of search proceedings and on which basis the belief about the existence of undisclosed income is entertained by the assessing authority inviting invocation of ss. 158BB and 158BC. The enquiry into the correctness of such returns with reference to material so found has nexus with the object of the special provisions, to adjudicate whether the assessee is still honestly disclosing his income correctly after incriminating material has been found in the possession of the Revenue authority before such returns can be rejected and thereafter to frame assessment estimating the income liable to tax to the best of judgment on the basis of the material that is available with him."

7. The Hon'ble Bombay High Court had also an occasion to examine the concept of block assessment in CIT vs. Vinod Danchand Ghodawat (2000) 163 CTR (Bom) 432 : (2001) 247 ITR 448 (Bom), wherein it was found that an assessee had constructed a bungalow and incurred an expense of Rs. 4,16,000. Thereafter search was carried out and the AO referred

the valuation of the bungalow to the Departmental Valuer who determined the value of the property at Rs. 6,66,000 and the AO added the difference to the income of the assessee as undisclosed income. The Tribunal has deleted the addition on the ground that addition was not made on the basis of the material gathered during the course of search, rather all these informations were available to the AO at the time of regular assessment. He obtained the DVO's report subsequent to the regular assessment, therefore, addition is made beyond the scope of block assessment. The Hon'ble jurisdictional High Court upheld the deletion made by the Tribunal.

8. The Tribunal Mumbai Bench in the case of Sunder Agencies vs. Dy. CIT (1997) 59 TTJ (Mumbai) 610 : (1997) 63 ITD 245 (Mumbai) has made extremely lucid enunciation of law on the subject and we cannot do better than to extract some of the observations made in that decision;

> *"23. There are adequate safeguards present against any possible misuse of the provision of search and seizure. Chapter XIV-B was introduced in order to make procedure of assessment of search and for requisition cases more effective. Under the provisions of this chapter the undisclosed income detected as a result of search initiated or requisition made after 30th June, 1995 be assessed separately as income of that block of ten previous years. The provision was introduced to streamline the procedure concerning the search matters. It is abundantly clear from the perusal of the prescription of s. 158BA that within the pale of Chapter XIV-B assessment could be made only in respect of the undisclosed income. Such undisclosed income must come as a result of*

search. This section does not provide a licence to the Revenue for making roving enquiries connected with the completed assessment. It is beyond the power of the AO to review the assessments completed unless some direct evidence comes to the knowledge of the Department as a result of search which indicates clearly the factum of undisclosed income. Without such evidence or material the AO is not empowered to draw any presumption as to the existence of undisclosed income. A presumption is an inference of fact drawn from other known or proved facts. It is rule of law under which Courts are authorized to draw a particular inference from a particular fact, until and unless the truth of such inference is disproved by other evidence. We find that the scheme of Chapter XIV-B does not give power to the Revenue to draw the presumption in regard to the undisclosed income. The AO could proceed on the basis of material detected at the time of search and the evidence gathered. Under s. 132(4), the authorized officer may, during the course of search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Act."

9. From the above it is clear that undisclosed income in block assessments has to be determined on the basis of the seized material. Thus for assessing an assessee for a block period there should be a search conducted under s. 132. The search only would infuse jurisdiction to an AO over the assessee. The next step for the AO is to serve a notice upon the assessee under s. 158BC inviting it for furnishing the return. When the return is being furnished the AO was required to issue notice under s. 142(2) or under s. 143(2) etc. and compute the undisclosed

income of the assessee. If such return was not filed then on the basis of the seized material AO would compute the undisclosed income for the block period.

10. The scheme of the block assessment indicates that assessee has to compute its undisclosed income for the purpose of filing a block return on the basis of seized material. If he failed to compute the true undisclosed income on the basis of the seized material and the AO determined a different undisclosed income than the one disclosed by the assessee, the assessee would be liable to penalty under s. 158BFA(2).

11. The second proviso appended with s. 158BC(1) prohibits an assessee to revise its return filed for the block period. Thus in response to a notice under s. 158BC if an assessee had filed the return of income, it cannot revise that return.

12. We also deem it appropriate to take note of the penalty provisions u/s 271(1)(i)(c) where penalty is being imposed upon an assessee for concealing income or furnishing inaccurate particulars of income. Section 271 read as under:

> *"Failure to furnish returns, comply with notices, concealment of income, etc. (1). If the Assessing Officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person*
> *(a) and (b)*********
> *(c) has concealed the particulars of his income or furnished inaccurate particulars of such income.*

He may direct that such person shall pay by way of penalty.

*(i) and (Income-tax Officer,)********

(iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall Asstt. Year 2000-01 not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:

Explanation 1.- Where in respect of any facts material to the computation of the total income of any person under this Act, (A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner(Appeals) or the CIT to be false, or (B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of Clause (c) of this sub- section, be deemed to represent the income in respect of which particulars have been concealed".

13. A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the

assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this section are deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeals); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to playa if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total

income have been disclosed by the assessee. These two situations provided in Explanation 1 appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee, for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

14. The penalty on the appellants has been imposed u/s 158BFA. Let us take note of these provisions. The relevant provisions are as follows :

> *"158BFA. (1) Where the return of total income including undisclosed income for the block period in respect of search initiated under s. 132 or books of account, other documents or any assets requisitioned under s. 132A on or after the 1st day of January, 1997, as required by a notice under cl. (a) of s. 158BC, is furnished after the expiry of the period specified in such notice, or is not furnished, the assessee shall be liable to pay simple interest @ one per cent of the tax on undisclosed income determined under cl. (c) of s. 158BC for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time specified in the notice, and— (a) where the return is furnished after the expiry of the time aforesaid, ending on the date of furnishing the return; or (b) where no return has been furnished, on the date of completion of assessment under cl. (c) of s. 158BC. (2) The AO or the CIT(A) 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 AO under cl. (c) of s. 158BC :*

Provided that no order imposing penalty shall be made in respect of a person if— (i) such person has furnished a return under cl. (a) of s. 158BC; (ii) the tax payable on the basis of such return has been paid or, if the assets seized consist of money, 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 AO 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.

15. On a comparative study of the scheme of assessment of undisclosed income for the purpose of block period, penalty impossible u/s 271(1)(i)(c) and penalty impossible on the undisclosed income in the block period, we find that income for the block period has to be determined on the basis of material seized during the course of search. This material was to be supplied to the assessee before he could be asked to submit his return in response to the notice issued u/s 158BC meaning thereby the material goads any person to compute true undisclosed income. The material is already available with the Assessing Officer. From that very material, true and undisclosed income has to be computed by the assessee and to be disclosed in the block return in response to the notice received u/s 158BC. Thus there is a perceptional difference in the operative force of section 271(1)(i)(c) vis-à-vis section 158BFA(2). The charge against the assessee u/s 158BFA(2) could be, why they failed to compute true disclosed income out of the seized material.

Whether the assessees have made a deliberate attempt to disclose nil undisclosed income or they have sufficient reasoning for forming belief that no undisclosed income is available in their hands which is to be disclosed in response to the notice received u/s 158BC.

16. In the light of the above proposition, let us consider the facts of the present case. We are conscious of the fact that additions have been made by the Assessing Officer and those additions have been confirmed by the CIT (A), ITAT and by the Hon'ble High Court. To that extent being a subordinate appellate authority, Tribunal cannot question the quality of evidence or whether those conclusions could be arrived or not. It is also equally undisputed position that the penalty proceedings is an independent proceeding, where the evidence can be re-appraised but again that could not authorize the Tribunal to take a contradictory view in the penalty proceedings with regard to inference of facts arrived at in the quantum proceedings and upheld by the Hon'ble High Court.

17. The question before us is, whether at the time of filing the return, a man of ordinary prudence can form a belief that he has no undisclosed income on the basis of seized material supplied to him. Whether such formation of belief is a bonafide one having regard to the material on the record or it is merely a Performa explanation. It is to be kept in mind that if a claim was not made in the return, then the assessee would be foreclosing his right to dispute the claim and would accept the stand of the Revenue. The Hon'ble Supreme Court in the case of Reliance Petro

Products Ltd [2010] 322 ITR 158 (SC) has observed that making incorrect claim does not amount to concealment of particulars, because the assessee wants to take a particular stand on the given facts.

18. Let us consider the evidence available on the record. The evidence put into service by the Revenue contains copy of the supplementary agreement dated 22.11.1999 found at the premise of M/s Domicile Developers. The statement of Shri Naved, Managing Partner in M/s Domicile Developers recorded u/s 132(4) of the Income Tax Act. The details of payments amounting to Rs.2,82,07,000/- supplied to the assessee, and the admission of two appellants during cross examination conducted at the premises of Domicile Developer on the date of search. Contrary to this, the stand of the appellants is that they have entered into agreements with M/s Domicile Developers Ltd on 08.11.1996. These are the independent agreements between the family members of the appellants and Domicile Developers. According to these agreements, the sale consideration settled between the assessee and the Developer was Rs.1,27,00,000/-, a sum of Rs.67.00 lakhs was received and the balance was to be received. Shri Mohd. Khasim was cross examined by Shri Naved during the course of assessment proceedings. However, it is not discernible whether Shri Naved was put for cross examination or not.

19. Let us take the note of the relevant clauses of the agreement as well as the replies in response to the question. The first document is the copies of agreements dated 8.11.1996

which were entered individually by the family members of the assessee with Domicile Developers. On page No.63 of the paper book, copy of the agreement of sale between Mohd. Khasim and Mr. Naved are available. The consideration clause read as under:

> *"….. AND WHEREAS, the Purchasers have approached the Vendor to purchase the Schedule Land for a total sale consideration amount of Rs.19,60,000/- (Rupees Nineteen Lakhs and Sixty Thousand only) free from all encumbrances, charges, litigations etc;*
>
> *AND WHEREAS, the Vendor has agreed to sell the Schedule Land to the purchasers for the aforesaid sale consideration amount of Rs.19,60,000/- (Rupees Nineteen Lakhs and Sixty Thousand only) free from all encumbrances, charges, litigations, etc. and subject to the terms and conditions contained hereunder:*
>
> *NOW THIS AGREEMENT OF SALE WITNESSETH AS HEREUNDER:*
>
> *1. The purchasers had paid an advance amount of Rs.5,00,000/- (Rupees Five Lakhs only to the Vendor by cheque bearing No.557308 dated 20.10.1996 drawn on Vijaya Bank, Austin Town Branch, Bangalore;……..*

Similar clauses are available in the agreements of other vendors.

20. The next relevant item is the supplementary agreement dated 22.11.1999 which is being put in service by the Revenue. The consideration clause in this agreement read as under:

> *"WHEREAS the vendors above named had entered into an agreements of sale on different dates individually with the purchases above named in respect of the property bearing Sy. Nos. 181 & 182, situated at Bilekahalli village, Begur Hobli, Bangalore measuring 3 acres, 7 guntas excluding 1 gunta of Karab land, and in part performance of agreements of sale. The Vendors above named have received a total part sale*

consideration of Rs.4,13,00,000 from out of total sale consideration of Rs.4,65,50,000/- balance sale consideration of Rs.52,50,000/- is to be payable".

This agreement contains the rights of third persons also to whom payments were made and they were with held by the vendee. It is relevant to take note of these clauses also:

"1. Claim of B.V. Sampath

It is agreed by the vendors that the purchasers are entitled to hold a sum of Rs.17,40,000/- which amount they have already paid to B.V. Sampath apart from a sum of Rs.6,60,000/- paid to him by these vendors in order to avoid any inconveniences in construction. However, in case B.V. Sampath wins the dispute, the vendors have no claim on it. Otherwise it is the responsibility of the purchasers to realize a sum of Rs.17,40,000/- which they paid to B.V.Sampath and pay the same to these vendors. However, the sum of Rs.6,60,000/- paid by these vendors to B.V.Sampath has to be realized from him by them on their own.

2. Claim of M/s Manjog Builders

In respect of the aforesaid claim of M/s Manjog Builders, the vendors had earlier negotiated with the said firm for resolving the dispute and had committed to pay a sum of Rs.30.00 lakhs to its proprietrex but had not paid the same in view of the fact that a suit in OS 1595 of 1999 filed by the said firm is pending before city civil court, Bangalore as she did not withdraw the said case.

In view of the above fact the vendors have agreed to permit the purchasers to hold a sum of Rs.30.00 lakhs from out of the balance sale consideration amount subject to the result of the case.

However, the vendors have requested the purchasers to release a sum of Rs.5.00 lakhs from out of the aforesaid sum of Rs.30.00 lakhs, which is again adjustable subject to the result of the case in the following manner:

a) In case, M/s Manjog Builders wins the above case, the vendors are not liable to claim the aforesaid sum of Rs.30.00 lakhs from the purchasers and the vendors are bound to return the aforesaid sum of Rs.5.00 lakhs already paid as stated supra.

If M/s. Manjog Builders loses the above case, and also if the vendors win the case filed by one Mr. Ramanna now pending before the High Court of Karnataka which was earlier decided in vendors favour in the Karnataka Appellate Tribunal the vendors are entitled to receive a sum of Rs.30.00 lakhs less Rs.5.00 lakhs (already paid) after deducting litigation expenses from the balance sale amount"……

21. The third evidence is a list of payments exhibiting the payments made by M/s Domicile Developers; they read as under. It contains date of payments from 3.4.1997 to 22.1.1998. This list was confronted to the assessee and these amounts were taken into consideration by the Assessing Officer.

S.No	Date	Name of the person	Amount
1	11.09.97	Assad A/c	1,50,00,000.00
2	21.01.98	Saudi Riyals	1,00,000.00
3	19.01.98	Self	1,00,000.00
4	19.01.98	Self	1,00,000.00
5	11.01.98	Akram	5,00,000.00
6	02.01.98	Javeed BTM	3,50,000.00
7	02.01.98	Javeed BTM	15,00,000.00
8	02.01.98	Javeed BTM	15,00,000.00
9	11.12.97	Mahadevappa ULC	2,50,000.00
10	22.08.97	Imtiyaz	2,00,000.00
11	22.08.97	Ashraf	5,00,000.00
12	22.08.97	Nameer Shariff	1,00,000.00
13	22.08.97	Sadath	2,00,000.00
14	22.08.97	Rafi Baig	5,00,000.00
15	06.06.97	Prakash	70,000.00

16	17.04.97	Self	5,00,000.00
17	16.04.97	Self	5,00,000.00
18	16.04.97	Self	5,00,000.00
19	03.04.97	Riyaz	2,00,000.00
20	03.04.97	Riyaz	2,00,000.00
21	03.04.97	Self	2,00,000.00
22	03.04.97	Self	2,00,000.00
23	97	Shankar	2,00,000.00
24	97	BV Sampath	5,00,000.00
25	97	Fayazuddin	4,00,000.00
26	97	Self	6,00,000.00
27	97	Self	1,00,000.00
28	97	Navneeth	3,00,000.00
29	97	Sunil	3,00,000.00
30	97	Prakash	4,00,000.00
31	97	Chandrashekar	5,00,000.00
32	97	Self	4,55,000.00
33	97	Yellappa	2,00,000.00
34	97	Imtiyaz	8,45,000.00
35	97	Self	1,00,000.00
36	97	Self	1,00,000.00
Total amount stated to have been paid through Bank Cheque 2,82,70,000.00			

22. Let us take note of the questions and replies put to Shri Naveed in his statement u/s 132(4).

> *Statement u/s 132(4) dated 29.05.2001 Naveed S/o Sayed Ghouse:*
>
> *Q.No.5 Please state the sale consideration in respect of the lands purchased from Mohd. Kasim and his family members on which Domicile Developers has constructed 308 flats and how much amount has been paid so far to them?*
>
> *Ans. The sale consideration is Rs.4,65,50,000/-. We have been paid a sum of Rs.2,75,00,000/- approximately to Mr. Mohd. Kasim and his family*

members through cash and cheques. A sum of rs.1,38,00,000/- has been debited on account of development charges, construction charges, payment of on encroachers and other incidental expenses, which have been incurred by us, which actually should have been incurred by Chotu Sab and his family members. A sum of Rs.52,50,000/- is still payable to Sri Choto Sab and others, provided the legal disputes are decided in his favour.

Q.No.6. Do you have any evidence that a sum of Rs.2,75,00,000/- as per the above statement has been paid to Mr.Chotu Sab and Others?

Ans. I do not have any documentary evidence in the family written agreement in this regard with the above persons. All these payments are properly recorded in the books of accounts of Domicile Developers. These payments are made both by cheques and cash. For some cash payments, we have obtained the receipts.

Q.No.7. I am showing you the original copy of the supplemental agreement dt. 22.11.99 at Bangalore between Mohd.Khasim alias Chotu Sab and Siy others (Vendors) and M/s Domicile Developers, represented by you and Sri Javeed, Pr. Wherein there is no mention regarding the development charges etc, amounting to Rs.1,38,00,000/- stated to have been incurred by M/s Domicile Developers and included in the payment of part sale consideration of Rs.4,13,00,000/-. Please go through the above agreement and explained the reasons (vide documents No.A/NBD/01 dt. 29.5.01).

Ans. Yes, I submit that the same has not been figuring in the supplementary agreement dt. 22.11.1999 even though by that time was almost completed and the above expenses have already incurred.

Q. No.8 Did land owners, Mr. Chotu Sab and others have incurred any expenditure for development of land, construction of wall or roads etc.?

Ans. They have not incurred any expenditure on account of development of land or any other improvement and they have handed over the land during 1996-97 through GPA. The entire land as is where is condition".

Q.No.14. From the evidences in the form of agreement entered with Mr.Chotu Sab and others, and from your own statement, it is seen that the amount shown in the agreement, amounting to Rs.4,65,50,000/- appears to be not reflected correctly in the profit and loss account and the book of a/c.which are audited by the C.A. What do you Say?

Ans. The books were audited by m y CA by Mr. H.K. Dogra in respect of Domicile Developers. The statement and the books have been prepared without considering the above agreements, but based on the actual expenses incurred by Domicile Developers.

23. Analysis of the above evidences as well as the assessment order indicate that the Assessing Officer has used the disclosure made by Mr.Chotu Sab alias Mohd. Khasim during the course of search. According to the Assessing Officer, he and his son Tipu Sultan were cross examined in the presence of Shri Naveed and they have admitted the sum of Rs.2.75 crores as the sale consideration received by them. The other evidence is the copy of the supplementary agreement and the disclosures made by Shri Naveed. A perusal of the statement of Shri Naveed would suggest that his concern has not given effect to the supplementary agreement into the books of accounts. It is explicitly clear from the reply to the Question No.14. He has disclosed incurrence of Rs.1.38 crores towards development charges which is part of the total consideration settled at Rs.4.65 crores in the supplementary agreement. But this figure was nowhere mentioned in the agreement. It was a contradiction emerges out

in his statement. For the Developers, it was an expenditure which is of allowable nature. Therefore, the stand of the developer would always be that it has incurred expenditure. As far as disclosure made u/s 132(4) is concerned, it is admissible only against the interest of Shri Naveed and bound Domicile Developers and not the assessee. Against the assessees, it is a corroborative piece of evidence suggesting they have received an amount as per the supplementary agreement. But onus is upon the Revenue to prove that they have actually received.

24. The assessees have been confronted with a list of payments extracted (Supra). On a perusal of their details it revealed that they pertain to 1997 to 1998. At that point of time, the agreements dated 8.11.1996 was only in operation. Supplementary agreement did not see the light of the day, then how the builder can suppose to make the payments to the appellants. There was no noting in the individual agreements that vendors would receive more payments. It is to be seen that without execution of any enforceable agreement, no builder would make the payments to vendors. The alleged supplementary agreement is a common agreement, it talks about the earlier individual agreement and alleges that as a part performance of those agreements, developer has paid Rs.4.13 crores. But the agreements did not stipulate that consideration. We have extracted the consideration in those agreements. This aspect is to be appreciated in the light of reply given by Shri Mohd. Khasim. Shri Naveed has confronted him about the payments but he had denied such suggestions. He deposed that no expenditure should be incurred in his account and

supplementary agreement was prepared by Shri Naveed they have signed it without reading. But what was the obligation upon the builder to pay over and above agreed as per agreements dated 8.11.1996. Was there any oral understanding, no such evidence came on the record. It is highly impossible that a builder would give Rs.4.13 crores (without any writing), instead of Rs.1.27 crores settled as per the agreement.

25. Let us evaluate the replies given by Shri Mohd. Khasim. Whenever Shri Naveed has suggested anything on the basis of his disclosure made during the course of search, the replies given by Shri Khasim are categorical and he has denied the allegations. He has specifically alleged that supplementary agreement was signed with a view to enable Domicile Developers to obtain loan.

> ***"Statement u/s 131***
>
> *Examination of Mr. Md. Kasim by Mr. Naveed of M/s Domicile Developers.*
>
> *Naveed. Was it an agricultural land at the time of sale?.*
>
> *Kasim. Yes it was an agricultural land.*
>
> *Naveed. Did I not got your same land converted to residential status and paid the betterment charges and conversion charges to the authorities?.*
>
> *Kasim. I have paid the betterment charges and handed over the properties to you.*
>
> *Naveed. The statement given by you that the agreement dt. 22.11.1999 was for having received a consideration of Rs.4.13. crores was only in good faith and further stating with the interest obtaining loan from the Bank. This statement is absolutely fake and misleading. Did I tell you that you are signing this agreement for availing loan or for canvassing?*

Kasim. Yes you told me.

Naveed. Do you know that I being a BPA Holder and an agreement holder is not entitled for obtaining the bank loans.

Kasim. I do not know and I am not aware of it.

Naveed. Was it not your property under the park zone under BDA and which I got it denotified. Was it a fact.

Kasim: Yes it is a fact

Naveed. Were Mr. Shankar and Mr.Mahadevappa not your agents for getting the land converted to whom money has been paid by me as per your guideline?

Kasim. Mr. Shankar and Mr. Mahadevappa are the real estate brokers who were involved in the park zone denotification. I had asked Mr.Naveed to make payments but not under my amount.

Naveed. In the supplementary agreement dt. 22.11.1999 were you have acknowledged receipt of Rs.4.13 crores saying it was for the purpose of bank loan, where is the necessity of mentioning in the same documents the litigations of Mr.B.V.Sampath and Manjog Builders?

Kasim. The agreements was prepared by you and we have signed without reading the same".

26. The Assessing Officer on evaluation of these evidences failed to reach on a firm conclusion. He has assessed the income on protective basis. The findings recorded by the Assessing Officer in Paragraph No.3.7 in this regard in the case of Shri Mohd. Khasim read as under:

"3.7 The onus is on M/s Domicuile Developers to prove that the payments have been made as they have claimed an expenditure of Rs.2,83,01,868/- on account of land purchase. As on date, they are unable to prove. But however, considering the contradictory stands Mr. Chotu Sab's family has been taking at various points of search and assessment proceedings, an amunt of Rs.2,83,01,868/- is being treated as the amount

received by the family members and the gains are being assessed on a protective basis in the hands of family members".
The computation of capital gain read as under:

Total consideration received		Rs.2,83,01,868
Less:cost of land	Rs.23,65,000	
Other payments for eviction, brokerage etc	Rs.50,91,541	Rs.74,56,591
Short Term Capital Gains		Rs.2,08,45,277

4.1 This short term capital gain is apportioned on a proportionate basis as per their land holdings held as a share by the various individuals.

5. The assessee owns 18 guntas of land. Therefore, the undisclosed income worked out to be Rs.29,54,448/-.

Undisclosed income as explained abut	Rs.29,54,448
Taxable Income	Rs.29,54,448
Tax thereon @ 60%	Rs.17,72,669
Add:Surcharge @ 2%	Rs. 35,453
Total Tax Payable	Rs. 18,08,122

27. One of the major evidence against the assessee is that Chotu Sab an d Tippu Sultan have admitted receipt of Rs.2.75 crores during the cross examination at the time of search in the presence of Shri Naveed. No doubt, the disclosures or admission made u/s 132(4) of the Income Tax Act during the search proceedings is admissible evidence but not a conclusive one. This presumption of admissibility of evidence is a rebuttable one and if an assessee is able to demonstrate with the help of some material that such admission was either mistaken, untrue or under the misconception of facts, then only on the basis of such admission, no addition is required to be made. It is true that

admissions being a declaration against an interest are good evidence, but they are not conclusive and parties always at liberty to withdraw the admission by proving that they are either mistaken or untrue. In law retracted confession even may form the legal basis of addition, if the Assessing Officer is satisfied that it was true and was voluntarily made. But basing the addition on a retracted declaration solely would not be safe. It is not strict rule of law but it is only a rule of prudence. As a general rule of practice, it is unsafe to rely upon the retracted confession without corroborative evidence. According to the appellants the alleged statement was recorded at 2.00 am in the night at the premises of M/s. Domicile Developers. They were examined in the village. Thereafter they were brought to the premises of Domicile Developers. This situation is to be visualized in the background of intellectual compatibility of these two persons vis-à-vis the authorized officer who recorded the statement and who has cross examined the assessee being a trained Revenue Officer and a businessmen engaged in construction and development of properties. The possibility of layman to come under the influence of more intellectual person under any allurement etc., cannot be ruled out.

28. Thus the question in the light of two sets of evidence was whether it was conclusive to any person to say, what could be the true undisclosed income?, whether the assessees have actually received the amount as ultimately determined in the assessment order, upheld by the Hon'ble High Court or it gives an iota of doubt that they have not received. If the assessees have disclosed, these amounts in their undisclosed income, then

they would be restrained to revise the return as per the scheme of the Act. They will not be able to defend their stand, that they have not received the amount. This aspect is more discernible from the conclusions of the Assessing Officer, when he treated this income in the hands of the assessee on protective basis. Assessing Officer himself was not sure that these are the income only assessable in the hands of the assessee and in the hands of payer it is to be allowed as business expenditure.

29. During the course of hearing, one more aspect was pointed to us that in the hands of M/s Domicile Developers this payment was allowed as business expenditure by the Tribunal. However, the Revenue has challenged the order of the Tribunal and the appeal bearing ITA No.57/12 has been admitted by the Hon'ble High Court. The question raised by the Revenue in its appeal is as under.

> *"1. Whether the Appellate Authorities were correct in holding that the sum of Rs.2,83,01,868/- reflected in the Profit & Loss A/c. and the books of accounts of the assessee as payment made to Mr. Chotu Sab and his relatives for purchase of land should be accepted in its entirety even though the finding are based on mere conjuncture and surmises when proof of Rs.1,27,00,000/- only was shown and the balance Rs.1,56,01,868/- had not been proved by the assessee by adducing any cogent evidence and consequently recorded a perverse finding"?.*

The Hon'ble High Court has admitted the appeal considering substantial question of law. In this background of facts when Revenue is not sure whether the payer has actually incurred the

expenditure towards purchase of land, whether the alleged capital gain is conclusively to be assessed in the hands of the assessee or it is a protective addition, then how it be expected from the layman to compute true undisclosed income equivalent to the amount ultimately determined by the Assessing Officer in the assessment order, in these facts and circumstances. Therefore, we allow all the appeals and delete the penalty.

30. In the result appeals filed by the assessees are allowed.

Order pronounced in the Open Court on 26th September, 2014.

Sd/-	Sd/-
(Abraham P. George)	**(Rajpal Yadav)**
Accountant Member	**Judicial Member**

Bangalore dated 26th September, 2014.

Vnodan/sps

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, ITAT, Bangalore*
6. *Guard File*

By Order

ASSISTANT REGISTRAR
Income Tax Appellate Tribunal,
Bangalore Benches, Bangalore