

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

+ **I.T.As. No.1277/2007, 572/2008 and 928/2008**

Order reserved on: 02.02.2011

% **Date of Decision: 25.03.2011**

ITA No.1277/2007

The Commissioner of Income Tax – XIII Appellant
Through: Mr.Sanjeev Sabharwal and
Ms.Suruchi Aggarwal, Sr. Standing
Counsel

Versus

M/s.Mittal Consul & Co. Respondent
Through: Mr.C.S. Aggarwal, Sr. Advocate
with Mr.Prakash Kumar, Advocate

AND

ITA No.572/2008

The Commissioner of Income Tax – VI Appellant
Through: Mr.Sanjeev Sabharwal and
Ms.Suruchi Aggarwal, Sr. Standing
Counsel

Versus

Tushar Stock & Share Brokers (Pvt.) Ltd. Respondent
Through: Mr.C.S. Aggarwal, Sr. Advocate
with Mr.Prakash Kumar, Advocate

AND

ITA No.928/2008

The Commissioner of Income Tax – XIII Appellant
Through: Mr.Sanjeev Sabharwal and
Ms.Suruchi Aggarwal, Sr. Standing
Counsel

Versus

R.K. Mittal 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 M.L. MEHTA

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the reporter or not? | Yes. |
| 3. | Whether the judgment should be reported in the Digest? | Yes. |

M.L. Mehta, J.

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1. By this common judgment we propose to dispose of the aforesaid three appeals, arising out of separate orders dated 30th May, 2005 and 31st October, 2007 of the Income Tax Appellate Tribunal (hereinafter, referred to as 'the Tribunal'). All these three appeals are interrelated. The respondents/assesseees were assessed separately for the block periods. Vide common order dated 3rd December, 2004, their appeals against the orders of the Assessment Officers were

rejected by the Commissioner of Income Tax (Appeals) [hereinafter, referred to as 'CIT(A)']. The assessee filed separate appeals before the Tribunal. Vide the impugned order dated 30th May, 2005, the Tribunal allowed the appeal of the assessee M/s Mittal Consul & Company (hereinafter, referred to as 'MCC') which is under challenge in ITA No. 1277/2007. Similarly vide separate orders dated 31st October, 2007, the Tribunal also allowed the appeal of the assessee M/s.Tushar Stock and Share Brokers (Pvt.) Ltd. (in short "Tushar") which is under challenge in ITA No. 572/2008 and the appeal of R.K. Mittal (hereinafter, referred to as 'Mittal') which is under challenge in ITA No.928/2008.

2. A raid was conducted on assessee Tushar by the Enforcement Directorate (hereinafter, for short 'ED'), which lead to discovery of cash as well as other documents relating to all the respondents/assesseees. Relevant proceedings were initiated by the Department against the respondents. Since the impugned order of the Tribunal dated 30th May, 2005 (in case of MCC) came to be passed prior in time and was also relied upon by the Tribunal in their subsequent impugned orders of 31st October, 2007 with respect to the other respondents/assesseees (Tushar and Mittal), we can safely rely

upon the facts as noted by the Tribunal in its impugned order of 30th May, 2005 and also by the CIT(A) in its order dated 3rd December, 2004 without any fear of contradiction. We, therefore, refer to the facts from the said orders.

3. Search and seizure operation was conducted by ED in the premises of Tushar on 12th December, 1995. During the course of search, thirty cheque books as well as cash worth ₹2,41,000/- were found besides other documents. A notice under Section 132A of the Income Tax Act (hereinafter, referred to as 'the Act') was issued requisitioning the cash and other documents which were seized by the ED at the time of search. During the course of search, statement of Mittal, Director of Tushar and partner of MCC was recorded by the ED. Mittal had stated that the cheque books found and seized during the course of search, either belonged to his clients, he being a Chartered Accountant, or to the company/firms in which his relatives/friends were directors/partners. The MCC was also found to be operating from the premises of M/s Tushar which was searched by the ED. Cash of ₹2,41,000/- was seized by ED from two persons, namely, Shri Vimal Verma and Shri Vinod Kumar, who were present in the premises at the time of search. These persons

claimed ownership of the cash. A notice under Section 158BC was issued by the Joint Commissioner Income Tax, Special Range (hereinafter, referred to as 'JCIT') to Tushar on 8th April, 1997. It may be noted here that in the case of Tushar, the JCIT was the Assessing Officer. In response to this notice, Tushar filed return declaring NIL undisclosed income. The JCIT did not consider the said cash at the hands of Tushar and also did not draw any adverse inference in this regard. With regard to seized thirty cheque books (in fact 27 as there was repetition of three), the Income Tax Department wrote a number of letters to ED for sending copies of seized documents. Even the JCIT wrote a few letters for sending seized documents and since they were not received, JCIT proceeded with investigation in respect of twenty seven bank accounts by writing to different banks asking for copies of those accounts, account opening forms, names and addresses of the introducers and copies of cheques issued. Based on the information received, it was noted that substantial cash deposits made in these bank accounts from time to time were immediately withdrawn. Tushar was asked to explain the source of deposits. Mittal had claimed that these cheque books belonged to his clients who had given the same to him

for completing the accounts and Income Tax Returns. This he had confirmed vide letter dated 15th January, 1999 and also in his statement recorded on 21st February, 1999. He was required to produce the account holders physically as well as furnish confirmation/affidavits along with PAN/GIR number and Income Tax jurisdiction. Mittal produced confirmation in respect of some of the bank accounts, but despite offering he could not produce the bank account holders, except two, namely, Gigo Thomas and Ramesh Chander. It was found that out of twenty seven bank accounts only seven were of existing companies/concerns. The genuineness of these accounts was accepted. Out of the remaining twenty, affidavits of only four individual account holders were produced. Even out of those four, two affidavits of Ramesh Chander were found to be full of inconsistencies from his statement. To the same effect was the statement of Gigo Thomas, who was also found to be unreliable. Hence, the money invested in their accounts was considered as not belonging to them. However, Mittal produced copy of client register and copies of return acknowledgments in respect of some individuals. Neither of these two documents was found to be reliable in the absence of supporting books of accounts.

Based on this, the aggregate deposits were treated as unaccounted investment of either of the assessee. Since Mittal had himself owned the seized cheque books in respect of all the above account holders claiming them to be his clients, the investments in these deposits was opined to be in the hands of MCC on substantive basis. However, to protect the interests of the Revenue, the said amount was also treated as undisclosed income of Tushar and Mittal on protective basis. This amount of undisclosed income was calculated to be ₹86,07,403/-.

4. A diary was also seized from the residential premises of Shri A.S. Aneja, Director of Tushar. It contained following entries:-

“Rs.5,10,000/- share application
Rs.4,00,000/- Advance against property 31.3.1994
Rs.4,00,000/- advance against property 31.3.1995
Rs.13,10,000/-”

5. The plea taken by Tushar before the JCIT with regard to this diary that it was rough sheet and jottings, was rejected by the JCIT and he proceeded to treat this amount of ₹13,10,000/- as undisclosed income of Tushar for the block period 1.4.1986 to 20.1.1997.

6. In its return for the block period filed in response to notice under Section 158 BC, Tushar had debited some amounts towards telephone expenses, petrol car expenses or car insurance for the present block year. The JCIT added 1/10th of these expenses as income for the block period, thereby making a total income of ₹7,83,351/-. Tushar had also given details of additions in share capital/ application money of some shareholders of the block period as under :

Assessment Year 1995-96 Rs.1,02,11,000/-

Assessment Year 1996-97 Rs.1,65,02,000/-

- (i) Confirmations in respect of shareholders along with their PAN/GIR numbers were furnished, but, in respect of some confirmations, either jurisdiction was not stated properly or it was not stated at all. The details of such persons are as under:

<u>A.Y. 1995-96</u>	Amount
(i) Naewatia Consultants P. Ltd.	1,80,000
(ii) Busy Traders & Finance P. Ltd.	1,00,000
Total	2,80,000
<u>A.Y. 1995-96</u>	Amount
(i) M/s.Aneja & Sons	3,00,000

(ii) Paramjeet Kumar	18,000
Total	3,18,000

(ii) Since no confirmation was filed in respect of above persons nor they were produced, therefore the aforesaid amounts were treated as undisclosed income of the assessee/Tushar for the block period under Section 68.

(iii) Furthermore, confirmations from various persons were furnished in respect share capital/application money of Rs.2,11,000/- for assessment year 1995-96 and Rs.2,71,000/- and for assessment year 1996-97. Thus the total additions which were made were worked out is as under:

<u>A.Y. 1995-96</u>	Amount
(i) On account of jurisdiction not stated.	2,80,000
(ii) On account of confirmations not filed	2,11,000
	Amount
<u>A.Y. 1995-96</u>	
(i) On account of jurisdiction not stated.	3,18,000
(ii) On account of confirmations not filed	2,71,000
	10,80,000

7. The JCIT informed the concerned Income Tax Officer of MCC and Mittal about the search operation and of recovered cash and cheque books. Based on this, ACIT (Assessing Officer of MCC & Mittal) issued notices to MCC and Mittal under Section 158 BD of the Act. In response thereto, both MCC and Mittal filed their returns for the block period of 1/4/1986 to 10/1/1997.
8. In the proceedings initiated by ACIT (Assessing Officer) against MCC and Mittal under Section 158BD, both these respondents/assesseees contended that the proceedings were not valid because there had been no search or seizure under Section 132 and no books of accounts or other documents relating to them were either requisitioned from ED or handed over to ACIT under Section 132A. Contentions were also raised that the proceedings initiated under Section 158BD of the Act were not valid inasmuch no satisfaction was recorded by the Assessing Officer of Tushar that undisclosed income belonged to MCC or Mittal as was contemplated under Section 158BD. These contentions were rejected holding that proper requisition was made under Section 132A by the Investigating Wing of the Income Tax Department and that notices under Section 158BD were validly and legally issued

to the assessee as per the conditions mentioned therein. ACIT also made inquiries in respect of the bank accounts as intimated by JCIT. ACIT in both the cases recorded that Mr. Mittal was asked to give the details of the account holders and file their affidavits, but, he could neither produce them nor give the details of the account holders or their identities in respect of the said 20 account holders. Though Mittal had been claiming the accounts to be of his clients, he could neither produce them in person nor file their confirmations. He, however, produced one client register and the income tax return acknowledgment in respect of some individuals, but since these were not supported by the books of accounts, were not relied upon by the ACIT. ACIT found that in respect of eight account holders, the addresses were shown as 7477, Tel Mill Marg, Ram Nagar and 16226, Nai Wala, Karol Bagh, which were the past and present addresses of the MCC. It was also found that some of these accounts were introduced by the assessee or by a person having address as 7477, Tel Mill Marg. This fact was found substantiated as after the search and seizure, these accounts had not been operated by anyone. Based on all this, it was concluded that these accounts are not genuine but belonged to the assessee firm

and were being operated by Mittal and his persons. In respect of 20 bank accounts, ACIT calculated the figure at ₹1,06,23,044/-. In addition to this, ACIT also estimated ₹5.00 lakh each as deposit in unverified four bank accounts and also further amount of ₹5.00 lakh each as deposit in the bank accounts belonging to MCC in which Mittal or his relatives or friends were stated to be the partners or the Directors. This way, ACIT estimated ₹40.00 lakhs as undisclosed income on this account and thereby arrived at a total undisclosed income of MCC as ₹1,46,23,044/-. This was treated as undisclosed income of MCC on substantive basis and in case of Mittal on protective basis.

9. The assessee preferred appeals against the orders of their respective assessments. These were disposed of by a common order of CIT(A). The CIT(A) held as under:-

- "a) The proceedings under section 158 BC in the case of M/s.Tushar Stock & Share Brokers P. Ltd. and under Section 158BD in the case of M/s.Mittal Consul & Co., and Shri R.K. Mittal are treated as valid, in order and within the time prescribed under the Act.
- b) The assessment orders in all three cases have been framed after considering the submissions of the appellants.
- c) The seized documents were properly requisitioned by the investigation wing of Income Tax Department.

- d) The addition of Rs.1,06,23,044/- in the hands of M/s.Mittal Consul & Co. on substantive basis is confirmed. The same amount is treated as income of M/s.Tushar Stock & Share Brokers P. Ltd. and Shri R.K. Mittal on protective basis. All other additions made on estimate basis as deposits in Bank accounts are deleted.
- e) The interest under Section 158BFA will be recalculated by the Assessing Officer.
- f) In the case of M/s.Tushar Stock & Share Brokers P. Ltd. additions of Rs.13,10,000/- and Rs.10,80,000/- and disallowance of Rs.78,335/- out of telephone and car expenses are confirmed.

In the result, all three appeals are partly allowed.”

10. The assessee preferred further appeal before the Tribunal. The appeal of the appellant/assessee MCC was disposed of by the Tribunal on 30th May, 2005 and that of Tushar and Mittal vide separate orders dated 31st October, 2007. With regard to the plea regarding validity of proceedings initiated under Section 158BD against MCC and Mittal, the Tribunal in its order of 30th May, 2005 in the case of MCC recorded as under:-

- “8. As is evident from the perusal of the aforesaid provisions, the satisfaction of the AO about any ‘undisclosed income’ being belonged to any persons other than the person with respect to whom search was made u/s 132 or whose books of account or other documents or any assets were requisitioned u/s 132A is a condition precedent for proceeding against that person u/s 158BD. The expression ‘undisclosed income’ is defined in Section 158BB contained in Chapter XIV – B and as per the provisions of sub-section (1) of section 158BB, such undisclosed income for the block period is required to be computed, in accordance with the provisions of the Act, on

the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the AO and relatable to such evidence. A conjoint reading of these provisions makes it clear that the satisfaction of the AO as regards any undisclosed income belonging to other person as envisaged in Section 158BD has to be on the basis of evidence found as a result of search or requisition of books of account or other documents and such other material or information as are available with the AO and relatable to such evidence and unless it is found on the basis of such evidence that any undisclosed income belongs to the assessee, no proceedings u/s 158BD can be validly initiated against him.

9. In the present case, nothing other than cash was requisitioned by the Department u/s 132A made in the case of M/s.Tushar Stock & Share Brokers P. Ltd. and since the said cash did not admittedly belong to the assessee, there was no evidence found as a result of requisition of books of account or other documents for deriving satisfaction that any undisclosed income belonged to the assessee. It is thus clear that the condition precedent for initiating proceedings u/s 158BD against the assessee was not satisfied in the present case and consequently, the proceedings so initiated were bad in law. As such, considering all the facts of the case and keeping in view the relevant provisions of Chapter XIV-B as discussed above, we hold that the assessment made by the Assessing Officer u/s 158BC read with Section 158BD was void ab-initio and the same, therefore, is liable to be quashed...”

11. The above findings of the Tribunal with regard to invalidity of proceedings under 158BD and 158BC in the case of MCC were accepted by the Tribunal in the cases of Tushar and Mittal also. The Tribunal in the cases of Tushar and Mittal

also quashed the assessments and consequently deleted the additions made on protective basis.

12. Based on the reasoning of invalidity of proceedings, the Tribunal deleted addition of ₹10.80 lakh in the case of Tushar, and recorded as under:-

“17.3 We have carefully considered the entire material on record and the rival submissions. It is undisputed that no search was conducted in the case of the assessee by the Income-Tax Department nor any requisition was made u/s 132A of the Act. Therefore, the amount of Rs.10,80,000/- representing share application money cannot be treated to be undisclosed income for making block assessment order u/s 158BC. The fact that the assessee had disclosed share application money in the return filed has also not been controverted. From this fact also the contention of the assessee that the addition is not based on any material found during the course of search and therefore is not maintainable, is acceptable.”

13. Similarly, addition of ₹13.10 lakh in the case of Tushar was also deleted by the Tribunal with the following reasons:-

“18.3 We have carefully considered the entire material on record and the rival submissions. It may be pointed out that no proper requisition regarding this document was made by the income-tax department from FERA authorities u/s 132A. Merely because the department obtained a copy of the seized diary it could not be said that the material came through a valid and proper requisition, order or warrant as prescribed u/s 132A. The matter has been considered in detail in the case of Sukh Ram v. ACIT 99 ITD 417 (Del) wherein it has been held by the Tribunal that any evidence which has not been found as a result of

search or such evidence which has been gathered is not relatable to evidence found as a result of search cannot be made the basis of block assessment under Chapter XIV-B of the I.T. Act.”

14. Likewise, addition of ₹78,335/- on account of personal use of car and telephone expenses was also deleted by the Tribunal with the following reasons:-

“19. As observed earlier, no search was conducted in the case of the assessee nor any material was found during the course of survey or search so as to justify the ad hoc addition made on estimate basis. The course adopted by the AO cannot be justified in the block assessment proceedings under Chapter XIV-B because in the block assessment proceedings any addition on account of undisclosed income can be made only on the basis of material found during the course of search or on the basis of any other material in the possession of the AO relatable to such material or evidence found during the course of search. In the present case no such material is found during the course of search or on the basis of any survey u/s 132A. Therefore, the provisions of Chapter XIVB cannot be invoked for justifying such addition. In view of the above this addition is also not justified.”

15. The present appeals have been preferred by the respondents/assesses against the aforesaid impugned orders of the Tribunal. The appeals are admitted on the following substantial questions of law:-

ITA No. 572/2008

Whether the Tribunal was correct in law and in merits in holding that the proceedings under Section 158BC were not validly initiated in the present case and as such the block assessment is liable to be quashed?

ITA Nos. 1277/2007 and 928/2008

Whether the Tribunal was right in holding that the proceedings under Section 158 BD and 158 BC were void *ab initio* and are liable to be quashed?

16. Learned counsel for the respondents/assesseees submitted that the proceedings under Section 158BC and 158 BD could not be justified because there was neither any material nor evidence found during the course of search from the possession of the assesseees nor any material was requisitioned from ED to form the basis of block assessment proceedings. He submitted that since there was no requisition by the Income Tax Department under Section 132A of the Act for any books of accounts or documents seized by ED and it was only for cash which too admittedly did not belong to any of the assesseees, but to Vimal Verma

and Vinod Kumar, the initiation of proceedings under Section 158BD was not valid. He further submitted that the diary which was made basis of additions of Rs.13,10,000/- in the case of Tushar could not be relied upon inasmuch as there was no requisition made under Section 132A in respect thereof. In this regard, he further submitted that scope of framing block assessment under Section 158BD is limited to the material found as a result of search conducted on third party and requisition made in that regard. Since no requisition was made, no addition could have been made on the basis of the entries found in the diary. He relied upon ***CIT v. G.K. Sanniappan***, 284 ITR 220 and ***CIT v. R.M. Patel (HUF)***, 298 ITR 274.

17. The learned counsel also submitted that in any case, requisition was made under Section 132A on 20th January, 1997 of Rs.2,41,000/- seized by ED, but notice under Section 158BC was issued to the assessee only on 22nd October, 1999 and that being highly belated, the proceedings initiated under Section 158BD of the Act are untenable in law. In this regard he relied upon ***Khandubhai Vasanji and others v. CIT***, 236 ITR 73.

18. With regard to the additions of Rs.10,80,000/- on account of share capital in the case of Tushar, he submitted that the same was duly recorded in the books of accounts and the addition was rightly held as untenable by the Tribunal. He also submitted that addition of Rs.1,06,23,044/- in the hands of MCC on substantive basis and in the hands of Tushar and Mittal on protective basis was untenable in the absence of any evidence found as a result of search or requisition of books of accounts or other documents deriving satisfaction.
19. On the other hand, learned counsel for the Revenue submitted that in the process of search of Tushar, ED not only recovered cash of Rs.2.41 lakhs but also 30 cheque books (in fact 27 as there is repetition of three accounts) and also a diary which were seized by the ED. A requisition was made under Section 132A of the Act. Details of the cheque books accounts were furnished by the ED. The copy of diary was also received by the investigating wing of the Income Tax Department. It was based on the contents of the cheque books that the investigation was conducted from the banks and from the assesseees. He submitted that in the post-search inquiry also, Mr.Mittal stated that some of the cheque books related to his clients and some to his companies/concerns in

which his relatives/friends were interested. He submitted that the post-search inquiry was based on the documents seized and the information received was relatable to the assessee and that being so, was a relevant piece of evidence/information. He relied upon ***CIT v. Mukundray K. Shah*** 290 ITR 433 SC and ***Manish Maheshwari v. Asstt. CIT*** 289 ITR 341 SC.

20. Chapter XIV-B provides for 'Special Procedure for Assessment of Search Cases'. How a search would be conducted is provided for in Section 132 of the Act.
21. For the present purpose, it would be useful to refer to the relevant provision as contained in Section 132A, 158BB, 158BC and 158BD of the Act.

“132A. Powers to requisition books of account, etc. - (1) Where the [Director General or Director] or the [Chief Commissioner or Commissioner], in consequence of information in his possession, has reason to believe that—

(a)

(b) any books of account or other documents will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act and any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, such books of account or other documents on the return of such books of account or other documents by any officer or authority by whom or which such books of account or other documents have been taken

into custody under any other law for the time being in force, or”

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

158BB

- (1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with Assessing Officer, 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...

158BC

Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then, -

- (a) The Assessing Officer shall,
- (ii) In respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1st day of January, 1997 serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days, as may be specified in the notice a return in the prescribed form and verified in the same manner as a return under clause (i) of sub-section (1) of section 142, setting forth his total income including the undisclosed income for the block period :

Provided that no notice under section 148 is required to be issued for the purpose of

proceeding under this Chapter : Provided further that a person who has furnished a return under this clause shall not be entitled to file a revised return;

- (b) The Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 shall, so far as may be, apply;

158BD

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 accordingly.

22. The above provisions came to be interpreted by the Apex Court in the case of ***Manish Maheshwari v. Asstt. Commissioner of Income Tax and Anr.*** [2007] 289 ITR 341 (SC), wherein it was held as under:-

- “10. 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 Assessing Officer 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 Assessing Officer having jurisdiction over such other person; and (iii) The Assessing Officer has proceeded under Section 158BC against such other person.

11. The conditions precedent for invoking the provisions of Section 158BD, thus, are required to be satisfied before the provisions of the said chapter 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.”

23. In the case of Manesh Maheshwari (supra) the Apex Court also referred to various judgments of different High Courts and particularly that of Gujarat High Court in ***Khandubhai Vasanji Desai and Ors. v. Deputy Commissioner of Income-Tax and*** [1999]236ITR73, wherein it was held as under:

“This provision indicates that where the Assessing Officer who is seized of the matter and has jurisdiction over the 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, he shall proceed against such other person as per the provisions of Chapter XIV-B which would mean that on such satisfaction being reached that any undisclosed income belongs to such other person, he must proceed to serve a notice to such other person as per the provisions of Section 158BC of the Act. If the Assessing Officer who is seized of the matter against the

raided person reaches such satisfaction that any undisclosed income belongs to such other person over whom he has no jurisdiction, then, in that event, he has to transmit the material to the Assessing Officer having jurisdiction over such other person and in such cases the Assessing Officer who has jurisdiction will proceed against such other person by issuing the requisite notice contemplated by Section 158BC of the Act.”

24. In the present case the Tribunal had recorded that no material other than cash was requisitioned and hence there was no material before the Assessing Officer to confirm the information or to record satisfaction as contemplated under Section 158BD. In this regard, at the outset, it was submitted by learned counsel for the Revenue, and rightly so, that these findings of the Tribunal are contrary to the facts inasmuch as it was not only the cash which was requisitioned but the other documents seized by the ED also. It was in response to the requisition that details of 27 cheque books was furnished by the ED to JCIT. JCIT proceeded to enquire the details of information so furnished by the ED relating to those cheque books from different banks. It was sequitor to the above information related to the cheque books that the course of inquiry/information was conducted by the JCIT from the Banks and Mittal. The information so gathered by the JCIT was related to the third party i.e. MCC and relatable to the

information so furnished by the ED. Post search material information developed by JCIT (Assessing Officer of Tushar), was very much relevant for arriving at satisfaction of undisclosed income at the hands of MCC and same was correctly considered at the time of drawing of satisfaction by the JCIT. It was after making inquiry from the Banks and Mittal that the JCIT recorded his satisfaction and communicated it to ACIT on 17.02.1990. A perusal of this detailed information contained in as many as five pages reveals the conclusive finding arrived at by JCIT regarding undisclosed income of MCC.

25. In the case of ***CIT, Central v. R.M.Patel (Huf)*** [2008] 298 ITR 274 (Mad), it was held as under:-

3. Concededly, the seized materials did not relate to the assessee. On the other hand, what is contemplated under Section 158BB is that the undisclosed income shall be computed only in accordance with the provisions of the Act on the basis of evidence found as a result of search and such other material or information which are relating to such material. If the material seized do not, in any way, connects the assessee indicating that the assessee had any undisclosed income, it may not be proper to proceed against the assessee under Section 158BD read with Sections 158BC and 143(3) of the Act without any basis whatsoever, especially in the absence of any material indicating any suppression of sales or suppression of income by the assessee.
4. If that be so, we do not have any hesitation to hold that the undisclosed income cannot be

assessed in the absence of any material collected during the search relating the assessee and that the Revenue cannot proceed on the basis of such material which is not related to the assessee invoking Section 158BD read with Sections 158BC and 143(3) of the Act for assessing the undisclosed income during the block period of 1988-89 to 1997-98 and 1.4.1998 to 5.11.1998.

26. In the case of ***CIT v. G.K. Senniappan*** [2006] 284 ITR 220 (Mad) also Section 158 BB was under consideration and it was held as:-

Section 158BB occurs in Chapter XIV-B, which provides for special procedure for assessment of search cases. The computation of undisclosed income of the block period is contemplated under Section 158BB. As per the section, the undisclosed income of the block period should 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 the evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years.

4. A mere reading of the above provision clearly indicates that the sentence "such other materials or information as are available with the Assessing Officer" cannot be bisected or taken in isolation for the purpose of computation. Such other materials or information as are available with the Assessing Officer, should as per the section relatable to such evidence. The word "such" used as a prefix to the word "evidence" assumes much significance, in this provision, as it indicates only the evidence found, as a result of search or requisition of books of account or other documents, at the time of search. Any other material cannot form basis for computation of undisclosed income of the block period.

27. In the case of ***CIT v. Mukundray K. Shah*** [2007] 29 ITR 433 (SC), the same provisions came to be considered by the Apex Court. In this case the assessment order originated on search conducted under Section 132(1) in which a diary was identified. That identification was a starting point of the enquiry relating to the detection of undisclosed income. The diary made the Assessing Officer to hold an enquiry and in the enquiry the cash flow statement emerged and resulted in detection of undisclosed income. It was held that the undisclosed income did not arise from any scrutiny proceedings, tax evasion, surveys, information received from external agency, etc, but was detected by Assessing Officer wholly and exclusively as a result of search and therefore the department was right in invoking the provisions of Chapter XIVB.

28. In the present case, search was conducted on Tushar in the premises which was not only that of Tushar but also of MCC and Mittal. During the search, not only cash of Rs.2.41 lakhs was recovered, but as many as 30 cheque books (in fact only twenty seven because of repetition of three names) were also recovered. A diary was also seized from the residence of the

Director, A.S. Aneja. The seized cash and documents were requisitioned under Section 132A of the Act by the Income Tax Department. Though the original cheque books were not given by the ED, detailed information with regard to the accounts etc. of those cheque books was furnished. It was based on the details of these accounts that the AO of Tushar proceeded to issue notice under Section 158BC to Tushar. It was during the course of assessment of Tushar that detailed information regarding those cheque books accounts etc. came to be known. Mittal was who not only Director of Tushar but also a partner of MCC, a Chartered Accountant firm, had claimed some of those cheque books to be of his clients and some of his friends and relations. He, however, could not give any satisfactory or documentary evidence. He also failed to produce account details except that of two, who were also found not reliable being inconsistent in their statements with the bank records.

29. From our above discussion, we are of the considered view that the proceedings, as initiated under Section 158 BD and also under Section 158 BC against the respondents/assesseees were legally valid. That being so, we answer all the questions

in favour of the Revenue and against the respondents/assesseees.

30. As noted above, the Tribunal in the case of MCC vide order dated 30th May, 2005 arrived at a conclusion that the proceedings under Section 158BC read with Section 158BD were void *ab initio* since the condition precedent for quashing the proceedings thereunder against the assessee were not satisfied. It was based on this reasoning alone that the Tribunal quashed the assessment against the MCC. The Tribunal did not go into the merits of the case of the assessee/MCC. It was based on this finding of the Tribunal with regard to the invalidity of the proceedings in the case of MCC, the Tribunal in the cases of Tushar and Mittal as well vide separate impugned orders quashed the assessments and consequently deleted the additions made on protective basis in their cases. The Tribunal did not go into the merits of these cases simply by recording that no search was conducted in the case of the assessee/Tushar nor any requisition was made under Section 132A and, therefore, the additions of Rs.10.80 lakhs, Rs.13.10 lakhs and Rs.78,335/- could not be treated as undisclosed income. Since the Tribunal has not gone into the merits of the cases based on his finding that the

proceedings under Sections 158BC and 158BD were bad in law, the cases are being remitted back to the Tribunal in view of our findings with regard to the validity of the proceedings under those provisions of law.

31. The present appeals are, accordingly, disposed of.

M.L. MEHTA, J.

MARCH 25, 2011
Dev/AK

A.K. SIKRI, J.