OD-1 **A. F. R.**

ITA/648/2004

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (Income Tax)
ORIGINAL SIDE

ASHOK VARDHAN KOTHARI

-Versus-

C.I.T. CENTRAL – II, KOLKATA

BEFORE :
THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI
And
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ
Date : 6th February, 2024

Appearance:
Mr. Saumyajit Dasgupta, Adv.
...for the appellant.

Mr. Prithu Dudheria, Adv.
...for the respondent.

1. Heard Sri Saumyajit Dasgupta, learned counsel for the appellant/assessee and Sri Prithu Dudheria, learned junior standing counsel for the respondent/income tax department.
2. This appeal was admitted by this Court by order dated 08.10.2004 on the following substantial questions of law:

    i) Whether the assessment of the sum of Rs.12,57,150/- in the hands of the appellant was without jurisdiction and the Tribunal was justified in law in presuming that the assessment was made by invoking section 158BD when the record did not show that any satisfaction was recorded nor *any notice was issued under the said provision read with section 158BC to the appellant ?*

ii) *Whether and in any event it was open to the Assessing Officer to accept only a part of the statement/admission of the appellant and he was bound to either accept or reject the same in its entirety and any proceedings under section 158BD could be initiated against the appellant or any addition could be made in his hands on the basis of such statement/admission ?*

iii) *Whether the Tribunal was justified in law in holding that the appellant was required to be presumed to be the owner of the seized cash and the burden to prove the nature and source thereof was upon the appellant and proceedings had been rightly taken against the appellant in respect thereof ?*

iv) *Whether and in any event the Tribunal was justified in law in rejecting the explanation of the appellant that the seized cash of Rs.12,57, 150/- belonged to M/s. S. K. Investment (Rs.6,30,000/-), M/s. ARC Finance Limited (Rs.6,07,150/) and M/s. Zenith Finvest Pvt. Limited (Rs.20000/-) and its purported findings upholding the addition of the said sum of Rs.12,57,150/- in the hands of the appellants are arbitrary, unreasonable and perverse ?*

3. Briefly stated facts of the present case are that the appellant/assessee is director in two companies namely, Zenith Finvest Pvt. Ltd. and ARC Finance Ltd. He is partner in M/s. S.K. Investment, which is a partnership firm. Offices of all the aforesaid three entities are situated at the 4th Floor, 32A, C.R. Avenue, Kolkata- 700 012. The appellant/assessee had income during the financial year 1999-2000 from

salary from the partnership firm, dividend, interest, director's fees and profit on sale of investment. Search in the office premises of the aforesaid three entities was conducted on 06.08.1999 and a *panchnama* dated 06.08.1999 was prepared in which it is mentioned that the search has been temporarily concluded for the day to be commenced subsequently for which purpose seals were placed on the entire place/ on a1 contents vest in the middle chamber belonging to Smt. Alka Kothari. The aforesaid search was conducted under the authority of the warrant issued by a competent authority in the name of M/s Zenith Finvest (P) Ltd. The aforesaid search was resumed on 12.08.1999 under the same warrant and 17 sets of documents including computerized cash book, journal, bank book, ledger and trial balance etc. relating to M/s. Zenith Finvest (P) Ltd., ARC Finance Ltd., the appellant/assessee and his family members were seized, but the search was not finally concluded and seals were again placed on the entire place. Again, the search was resumed on 22.09.1999 under the same warrant in the name of M/s. Zenith Finvest (P) Ltd. and again seven sets of documents including ledgers, journals, etc. relating to aforesaid business entities were seized and the search was concluded. The aforesaid search conducted with respect to the entities relating to the appellant/assessee shall be referred hereinafter as **the first set of search.**

4. Simultaneous search was conducted in the premises of Sri J. M. Kothari on 6th, 7th and 13th August, 1999 under the search warrant in the name of

GIS Limited, at Ruby House, 6th Floor, 8, India Exchange Place, Kolkata-1 in which cash found of Rs.12,57,150/- in the safe in possession of Mr. J. M. Kothari was stated by him to be belonging to his son Ashok Vardhan Kothari, i.e., the present appellant. This search shall hereinafter be referred as **the second set of search.**

5. On 12.10.1999 the appellant/assessee wrote a letter to the Deputy Director of Income Tax (Inv.) Unit-I(4), Calcutta that the cash seized (Rs.2,30,000 + Rs.60,000 + Rs.9,67,150 = Rs.12,57,150/-) belongs to him which was kept in the strong room/safe of his father's office since he (the appellant herein) does not have any safe facility in his office premises. Similar letter was written on the same day by the aforesaid Sri J. M. Kothari. The statement of the appellant/assessee and Sri J.M. Kothari were recorded by the income tax authorities on the next day i.e., 13.10.1999 under Section 131 of the Act, 1961. In his statement under Section 131 of the Act, 1961, the appellant/assessee has answered question nos.1 and 3 as under:

"Q. 1) . . .

A. Sir, I confirm my position that this cash was given by me to my father on different dates to keep in these safes available at his office at Ruby House since it was felt risky to keep the cash at "Trust House" 32, C.R. Avenue, Kolkata. This cash belongs to my concerns Zenith Finvest Pvt. Ltd., ARC Finance Ltd. and S.K. Investment (Partnership firm).

Q. 3) . . .

A. *Sir, although the books of accounts for our companies other than Zenith Finvest Pvt. Ltd. were maintained up to date I could have explained the cash found from the father's office linking it to my company's accounts in terms of our vouchers etc. but inadvertently I could not do so. Since your seizure includes only the books of different companies up to only 31.03.99, I may not be able to locate the receipt of the aforesaid cash in this seized books. However, I will try to explain my claim in course of block asst. proceedings in future before the assessing officer with spoorting evidence available with us."*

6. The statement of Sri J. K. Kothari under Section 131 of the Act, 1961 was also recorded on 13.10.1999 as under:

*"Q. 1 Mr. Kothari, today I am in the receipt of three letters addressed to me by you in which you have stated that cash of **Rs.9,67,150/-** found from a vault in the 6th floor of office premise of GIS Ltd. at 'Ruby House', 8, India Exchange Place, Kolkata-1 and seized by the search time on 06.08.99 belongs to your son Sri Ashok Vardhan Kothari which had been kept by you in the said vaults you have also stated that further cash of **Rs.60,000/-** seized from another safe from the same premises belongs to your son which was kept by you. Another amount of **Rs.2,30,000/-** which was seized from your office chamber at 8th floor of 'Ruby House' on 11.08.99 as also has been claimed by you to be belonging to your son Sri A.V. Kothari. Please explain given the fact that that you are a Chief Executive of the Kothari Group of Companies, working full time for the Kothari Group of Companies and handling the affairs of different Kothari Group of Companies exclusively. How can you support your claim that you had kept cash allegedly*

belonging to your son in the office premises of the Kothari Group of Companies which are nothing to do with your son what evidence you can produce to support your claim ?

As. 1) ***My son Sri Ashok Vardhan Kothari has his separate business under a separate set of companies having office at 32A, C.R. Avenue, 'Trust House', Kolkata****. Since he did not have adequate safe place to keep cash he had given me the aforesaid cash to keep in my custody. Since the vault and safe in Ruby House are accessible to me I had kept the cash safe there. My son Sri A. V. Kothari has also filed a letter confirming my claim before you today. Other than that I have no evidence to show.*

Q. 2) Do you think that is a credible explanation acceptable to revenue that your son having separate companies separate business premises could ever give so much cash to you to keep in vaults/safes of altogether a difference companies belonging to different group and located at a further place of which you are an employee Director/Executive ?

A. Irrespective of whether you believe or not I have told you the fact which is true to the best of my knowledge."

7. In the assessment order under Section 158BC(c) of the Act 1961 dated 31.08.2001, the assessing officer himself noted that the closing cash balance as on 05.08.1999 in the cash book of M/s. S.K. Investments was Rs.6,33,215.75 and in the cash book of M/s. ARC Finance Limited the closing cash balance as on 05.08.1999 was Rs.6,98,679.30. He further noted that on 18.08.1999, a sum of Rs.6,33,000/- has been shown in the cash book of M/s. S.K. Investments as cash seized and Rs.6,07,150/- has

been shown in the cash of M/s. ARC Finance Limited as cash seized by the Income Tax Department.

8. The assessing officer found from the books of account entries reflecting receipt of cash from various persons, out of which some were outstation parties and some were local parties. He issued notices to all such persons under Section 131 of the Act 1961. Notices under Section 131 to outstation parties were returned unserved with the remarks “not known”, which was clarified by the appellant assessee that non-service was because of errors in the address submitted earlier and therefore he submitted the supporting papers to evidence the identities of the persons and genuineness of the transactions. The notices issued to local parties were served upon them who appeared and confirmed the hire purchase agreements and the payments. However, the assessing officer has disbelieved the evidence of the aforesaid local parties on the ground that “they failed to clearly and specifically evidence the source of the payments.”

9. From the facts as afore-noted, it is evident that there was sufficient cash balance as per books of account of the two entities namely M/s. ARC Finance Limited and M/s. S.K. Investments and the cash seized by the Income Tax Department from the safe of Sri J.M. Kothari was claimed by the appellant assessee as director of the company an also as partner of the partnership firm that it belongs to his aforesaid three entities. The break-up was also given. Thus, the cash found in the search from

possession of Sri J.M. Kothari was established by the appellant assessee before the assessing officer, to be belonging to his three entities, which was supported by the cash-book which was seized by the Income Tax Department during search. The cash balance as was reflected in the cash-book of the entities concerning the appellant assessee was neither doubted nor could be doubted. The parties, who paid the amount under hire purchase agreements to the entities of the appellant assessee, had appeared pursuant to notices issued by the Income Tax authorities under Section 131 of the Act 1961 and they affirmed the agreements and payment of money thereunder. The only ground vaguely taken by the assessing officer to reject was that those persons have failed to specifically evidence the source of payments.

10. Once the payments by such parties to the entities of the appellant assessee pursuant to hire purchase agreements were supported by the books of account and other documents, there was no occasion to doubt the availability of cash in hand as reflected in the books of account, particularly when the books of account were seized during search and the closing cash balance as aforementioned was reflected in the cash-book. Under the circumstances, there was no occasion for the assessing officer or the Tribunal to make addition of Rs.12,57,150/- in the hands of the appellant assessee, in ignorance of the evidences on record, rendering the finding recorded by it to be perverse. The CIT(A) has examined the entire facts and lawfully allowed the appeal of the appellant assessee.

11. So far as the question of entire assessment proceedings to be without jurisdiction is concerned, we do not find from the assessment orders or the order of the Income Tax Appellate Tribunal that satisfaction as required under Section 158BD was recorded by the Assessing Officer either before or along with the assessment proceedings. We asked learned counsel for the respondent to show from the records as to whether any satisfaction under Section 158BD was recorded by the assessing officer before proceeding to determine undisclosed income of the appellant assessee ? Learned counsel for the respondent stated before us that no satisfaction under Section 158BD was recorded by the assessing officer.

12. Section 158BD of the Act 1961 provides as under:-

> *"**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 [under section 158BC] against such person and the provisions of this Chapter shall apply accordingly."*

13. In the case of Commissioner of Income Tax v. Calcutta Knitwears [2014] 362 ITR 673 (SC), Hon'ble Supreme Court has explained the provisions of Section 158BD and the mandatory requirement of recording of satisfaction by the assessing officer and held as under:-

"38. Having said that, let us revert to discussion of section 158BD of the Act. The said provision is a machinery provision and inserted in the statute book for the purpose of carrying out assessments of a person other than the searched person under section 132 or section 132A of the Act. Under section 158BD of the Act, if an officer is satisfied that there exists any undisclosed income which may belong to a person other than the searched person under section 132 or section 132A of the Act, after recording such satisfaction, may transmit the records/documents/ chits/papers etc to the Assessing Officer having jurisdiction over such other person. After receipt of the aforesaid satisfaction and upon examination of the said other documents relating to such other person, the jurisdictional Assessing Officer may proceed to issue a notice for the purpose of completion of the assessments under section 158BD of the Act, the other provisions of Chapter XIV-B shall apply.

39. The opening words of section 158BD of the Act are that the Assessing Officer must be satisfied that "undisclosed income" belongs to any other person other than the person with respect to whom a search was made under section 132 of the Act or a requisition of books were made under section 132A of the Act and, thereafter, transmit the records for assessment of such other person. Therefore, the short question that falls for our consideration and decision is at what stage of the proceedings should the satisfaction note be prepared by the Assessing Officer : whether at the time of initiating proceedings under section 158BC for the completion of the assessment of the searched person under section 132 and section 132A of the Act or during the course of the assessment proceedings under section 158BC of the Act or *after completion of the proceedings under section 158BC of the Act.”*

“41. We would certainly say that before initiating proceedings under section 158BD of the Act, the Assessing Officer who has initiated proceedings for completion of the assessments under section 158BC of the Act should be satisfied that there is an undisclosed income which has been traced out when a person was searched under section 132 or the books of account were requisitioned under section 132A of the Act. This is in contrast to the provisions of section 148 of the Act where recording of reasons in writing are a sine qua non. Under section 158BD, the existence of cogent and demonstrative material is germane to the Assessing Officers’ satisfaction in concluding that the seized documents belong to a person other than the searched person is necessary for initiation of action under section 158BD. The bare reading of the provision indicates that the satisfaction note could be prepared by the Assessing Officer either at the time of initiating proceedings for completion of assessment of a searched person under section 158BC of the Act or during the stage of the assessment proceedings. It does not mean that after completion of the assessment, the Assessing Officer cannot prepare the satisfaction note to the effect that there exists income-tax belonging to any person other than the searched person in respect of whom a search was made under section 132 or requisition of books of account were made under section 132A of the Act. The language of the provision is clear and unambiguous. The Legislature has not imposed any embargo on the Assessing Officer in respect of the stage of proceedings during which the satisfaction is to be reached and recorded in respect of the person other than the searched person.”

"44. In the result, we hold for the purpose of section 158BD of the Act a satisfaction note is sine qua non and must be prepared by the Assessing Officer before he transmits the records to the other Assessing Officer who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages : (a) at the time of or along with the initiation of proceedings against the searched person under section 158BC of the Act; (b) along with the assessment proceedings under section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under section 158BC of the Act of the searched person."

14. Section 158BD is a machinery provision, inserted in the statute book for the purpose of carrying out assessment of a person other than searched person under Section 132 or 132A of the Act, 1961. Under Section 158BD of the Act, 1961, if an officer is satisfied that there exists an undisclosed income which may belong to a person other than the searched persons under Section 132 or Section 132A of the Act, 1961 then after recording such satisfaction, he may transmit records/documents/chits/papers etc. to the Assessing Officer exercising jurisdiction over such other person. After receipt of the aforesaid satisfaction and upon examination of the documents relating to such other person, the jurisdictional Assessing Officer may proceed to issue a notice under Section 158BD for the purposes of completion of assessment under Section 158BC of the Act. Thus, the Assessing Officer who has initiated proceedings for completion of the assessments under Section

158BC of the Act, 1961 should be satisfied that there is an undisclosed income which has been detected in a search under Section 132 or from the books of account requisitioned under Section 132A.

15. Under Section 158BD, the existence of cogent and demonstrative material is germane to the Assessing Officer's satisfaction for initiation of action under Section 158BD **in concluding that the seized documents belong to a person other than the searched person is necessary for initiating action under Section 158BD.** The satisfaction note could be prepared by the Assessing Officer either at the time of initiation of proceedings for completion of assessment of a searched person under Section 158BC or during the stage of assessment proceeding. Even after completion of assessment proceeding of the searched person, the Assessing Officer may prepare satisfaction note that there is undisclosed income of a person other than the searched person which has been traced out when such other person was searched under Section 132 or books were requisitioned under Section 132A of the Act, 1961. Thus, for the purpose of Section 158BD of the Act, a satisfaction note is sine qua non and must be prepared by the Assessing Officer who has jurisdiction over such other person.

16. Since as per admitted case of the respondent, the Assessing Officer has not prepared a satisfaction note either before or along with or even after the assessment proceedings as mandatorily required under Section

158BD of the Act 1961, therefore, the entire proceedings initiated by the Assessing Officer to pass the assessment order under Section 158BC, is patently illegal, particularly when the entire facts and evidences in the form of seizure of books of account including cash book, statement of the appellant assessee and Sri J.M. Kothari under Section 131 of the Act 1961, statement of parties who made the payment to the entities of the appellant assessee recorded under Section 131 of the Act 1961 and the letters of Sri J.M. Kothari and the appellant assessee evidencing sufficient explanation regarding cash seized to be belonging to the aforesaid entities and reflected in their cash book were well available on record.

17. For all the reasons afore-stated, the impugned order dated 23.04.2004 in Income Tax (SS) Appeal No.108(Kol)/2002 relating to block assessment period 01.04.1989 to 09.09.1999 under Section 158BC(c) of the Act 1961, passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata, cannot be sustained and is hereby set aside. The substantial questions of law as framed above are answered in favour of the assessee and against the revenue.

18. **The appeal (ITA/648/2004) is allowed** to the extent indicated above.

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)

As../S.Kumar