Madras High Court
Commissioner Of Income Tax vs Sivabala Devi on 24 June, 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.06.2010

C O R A M:
THE HONOURABLE MR.JUSTICE F.M.IBRAHIM KALIFULLA
and
THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
TAX CASE (APPEAL) No.316 of 2004

Commissioner of Income Tax,
Central II, Chennai. .. Appellant

vs.

Sivabala Devi .. Respondent

Tax Case Appeal is filed under Section 260A of the Income Tax Act, 1961 against the orde

For Appellant : Mr.K.Subramaniam
Senior Standing Counsel for IT Dept.
For Respondent : Mr.C.V.Rajan
for M/s.Subbaraya Aiyer Padmanabhan

- - - - -

J U D G M E N T

F.M.IBRAHIM KALIFULLA, J.

The brief facts which are required to be stated are that the respondent assessee is the wife of Mr.S.D.Rajandran, an officer in M/s.Oriental Insurance Company Limited. She is the younger sister of Mrs.Prema Dyaneswaran, w/o Mr.Dyaneswaran. Mr.Dyaneswaran was an officer belonging to the Indian Administrative Services and was the then Chairman of M/s.Tamil Nadu Minerals Ltd.,

2. There was a search on Mr.Dyaneswaran under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on 19/20.01.1996. In connection with the said search, the residence of Mr.S.D.Rajendran, the husband of the respondent assessee was also searched.

3. According to the appellant, number of documents were seized in the course of the search evidencing the fact that the respondent assessee had 'undisclosed income' assessable to tax under Section 158BD read with Section 158BC. Proceedings were initiated under Section 158BD and notice

under Section 158BC dated 07.03.1997, was issued to the respondent. The Notice was served on 18.03.1997, and the assessee filed her return of income in Form No.2D in response to the notice on 26.05.1997. She admitted an undisclosed income of Rs.2,31,098/- and paid tax of Rs.1,38,659/-.

4. Thereafter, notice under Section 143(2) dated 29.05.1997, was issued calling for details. The respondent represented through an Income Tax Practitioner and submitted the details. In the course of the assessment proceedings, after detailed hearing afforded to the respondent, the block assessment covering the period between 1986-87 to 1996-97 (upto 19.01.1996) was computed. The total undisclosed income was determined in a sum of Rs.1,15,75,840/- and the tax thereon was determined at Rs.69,06,905/-.

5. The respondent filed an appeal before the Income Tax Appellate Tribunal, hereinafter referred to as 'the Tribunal'. By the impugned order dated 14.02.2003, the Tribunal revised the income tax to a sum of Rs.3,82,173/-. Challenging the above said order of the Tribunal, the appellant has come forward with this appeal.

6. The Substantial Question of Law that arises for consideration was framed as under:

"Whether in the facts and circumstances of the case, the Tribunal was right in holding that the particulars furnished by the assessee to the Department otherwise than by filing a return and on the basis of a notice, would amount to disclosure for the purpose of the Act?"

7. Assailing the order of the Tribunal, Mr.K.Subramaniam, learned senior standing counsel for the appellant by referring to Sections 158B(b), 158BB, 158BC, 158BD, Form 2B, as well as a decision of a learned single Judge of this Court, reported in (2001) 249 ITR 378 (B.Noorsingh Vs. Union of India), contended that the claim of the assess that the so-called 'undisclosed income' as held by the department cannot be accepted as the same were already disclosed by the assessee in her reply dated 15.03.1995, to the summons issued under section 131 of the Act is not acceptable unless such disclosure had been made by filing a return. In other words, according to the learned standing counsel, if the assessee were to claim that the department in a block assessment cannot treat certain amounts as undisclosed income, there must have been a valid return filed by the assessee disclosing the said amount in the manner set out under Section 139(1) of the Act.

8. To put it differently, according to the learned standing counsel, the assessee cannot be permitted to rely upon any other material other than a 'valid return' in order to claim that the allegation of 'undisclosed income' of the department in a block assessment cannot be true, in as much as, such undisclosed income had already been disclosed by the assessee in a valid return and that such return was filed within the period for filing such return under Section 139(1) of the Act, even if there was a search prior to the time within which such return could have been filed under Section 139(1) of the Act.

9. The learned standing counsel contended that in the case of the respondent assessee since the materials were unearthed in the course of search on her brother-in-law Mr.Dyaneswaran, Section 158BD was attracted and consequently when notice under Section 158BC came to be issued, unless

there had been a valid return filed by the assessee disclosing the income as per the statutory provisions, the Tribunal was not justified in relying upon the reply filed by the respondent assessee to a summon issued under Section 131 of the Act, to hold that the income was already disclosed and on that footing set aside the order of the assessing authority.

10. The learned standing counsel relied upon the decisions reported in :

(i) (2005) 274 ITR 110 (Assistant Commissioner of Income Tax Vs. A.R.Enterprises)

(ii) (2001) 252 ITR 712 (Lakshmi Jewellary Vs. Deputy Commissioner of Income Tax)

(iii) (2001) 251 ITR 625 (Premjibhai Vs. Joint Commissioner of Income Tax)

(iv) (2007) 289 ITR 341(SC) (Manish Maheswari Vs. Assistant Commissioner of Income Tax)

(v) (2009) 310 ITR 64 (Karn) (Chief Commissioner of Income Tax Vs. Pampapathi)

11. As against the above submissions, Mr.C.V.Rajan, learned counsel appearing for the respondent assessee submitted that the materials which were relied upon by the assessing authority were not found as a result of the search held on 19/20.01.1996, that the taxing Statute should always be strictly interpreted and therefore if there was no material for the assessing authority out of the search to rely upon for making the block assessment under Section 158BB, which is a draconian provision and the tax liability is in the order of 60%, it was incumbent upon the assessing authority to have satisfactorily stated what were the materials which were unearthed in the course of the search of the persons other than the assessee which justify such assessment.

12. According to the learned counsel, the response letter dated 15.05.1995, sent in response to notice issued under Section 131 of the Act was a disclosure for the purpose of the Act as defined under Section 158B(b) of the Act and therefore when the various particulars mentioned in the order of assessment of the original authority were culled out from the said letter and the submissions made therein on behalf of the assessee, there was no scope for the assessing authority to have made the block assessment under Section 158BB of the Act.

13. The sum and substance of the submissions of the learned counsel for the respondent was that there was no materials found in the search, that the assessing authority relied upon the materials furnished by the assessee in her letter dated 15.05.1995, which was her reply to the notice issued under Section 131 of the Act and that under Section 158BB undisclosed income would be computed only on the basis of material evidence unearthed in the search and therefore the findings of the Tribunal was well justified and cannot be interfered with.

14. The learned counsel therefore contended that the statutory conditions imposed under Section 158BB, not having been satisfied to make a block assessment, the order of the Tribunal in having set aside that part of the order of the assessing authority which was not inconsonance with Section 158BB of the Act was fully justified.

15. In support of the above contentions, the learned counsel appearing for the respondent assessee placed reliance upon the following decisions reported in :

(i) (2006) 284 ITR 222 (Commissioner of Income Tax Vs. Premier Tobacco Packers P. Ltd.)

(ii) (2008) 300 ITR 152 (Mad) (Commissioner of Income Tax Vs. S.Ajit Kumar)

(iii) (2009) 308 ITR 124 (Mad) (Commissioner of Income Tax Vs. P.K.Ganeshwar)

(iv) (2010) 321 ITR 362 (SC) (Assistant Commissioner of Income Tax Vs. Hotel Blue Moon)

(v) (2005) 274 ITR 110 (Assistant Commissioner of Income Tax Vs. A.R.Enterprises) and

(vi) (2006) 282 ITR 349(MP) (Dr.Brijesh Lahoti Vs. Commissioner of Income Tax)

16. Having heard the learned standing counsel for the appellant as well as the learned counsel for the respondent, to appreciate the contention of the parties, it is worthwhile to make a detailed reference to the relevant provisions of the Income Tax Act. Sections 158B to 158BI have been set out in Chapter XIV-B of the Act. We are concerned with the definition of 'undisclosed income' under Section 158B(b), the procedure prescribed for computation of undisclosed income of the block period as set out in Section 158BB and procedure for block assessment as set out in Section 158BC. In the case on hand the block assessment came to be made based on a search held on the person other than the respondent assessee and therefore Section 158BD also gets attracted.

17. The definition of undisclosed income is defined under Section 158B(b), which reads as under:

"Section 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."

***** Under Section 158BB(1) the computation of undisclosed income of the block period is set out, which is to the following effect:

Computation of undisclosed income of the block period:-

"Section 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 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 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, determined,--

(a) where assessments under section 143 or section 144 or section 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 section 139 or in response to a notice issued under sub-section (1) of section 142 or section 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;

(2).....

(3) The burden of proving to the satisfaction of the Assessing Officer 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)....."

***** Procedure for block assessment:-

"Section 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--

(i) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995, but before 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;

(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, section 144 and section 145 shall, so far as may be, apply;

(c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;

(d)....."

***** Undisclosed income of any other person:-

"Section 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 other person and the provisions of this Chapter shall apply accordingly."

18. Keeping the above statutory provisions in mind, when we examine the facts relating to the respondent assessee, the following undisputed facts emerge:-

(a) There was a search under Section 132 of the Act on Mr.Dyaneswaran, brother-in-law of the respondent assessee, as well as, the premises of her husband Mr.S.D.Rajendran.

(b) In the course of the search number of documents and other materials were seized.

(c) The respondent assessee was issued with a notice under Section 131 of the Act on 01.03.1995, and that the respondent sent two replies dated 11.03.1995 and 15.05.1995.

(d) There was no valid return of income filed by the assessee in the prescribed format for any of the years of the block period.

(e) By virtue of the search made on Mr.Dyaneswaran and the premises of the assessee's husband and based on the seizure of number of documents Section 158BD was invoked based on which a notice under Section 158BC came to be issued on 07.03.1997, to the respondent assessee which was served on her on 18.03.1997.

(f) In response to the notice under Section 158BC, the respondent assessee submitted the return of income in Form No.2B on 26.05.1997, admitting an undisclosed income of Rs.2,31,098/- and paid tax of Rs.1,38,659/-.

19. In the above stated background, when we analyse the contentions of the parties, in the foremost, it was contended on behalf of the respondent assessee that the appellant was not legally justified in invoking the provisions contained in Chapter XIV-B of the Act in the premise that there was undisclosed income on the part of the respondent assessee.

20. The sole basis for the said contention was that in response to the summons issued under Section 131, when the respondent submitted a detailed reply dated 15.05.1995, which contained all her transactions, the said conduct of the respondent would fall within the excluded category of undisclosed income as defined in Section 158B(b) of the Act.

21. Mr.C.V.Rajan, learned counsel for the respondent, in his submissions contended that the definition of undisclosed income specifically excluded such of the income "which has not been or would not have been disclosed for the purposes of this Act" and that when the reply dated 15.05.1995, of the respondent assessee was in response to the summons issued under Section 131 of the Act which contained all the details, the said conduct and the act done would squarely fall within those set of expressions and whatever details disclosed in the said letter of the respondent would be covered by that exempted part of the definition of 'undisclosed income' and therefore the appellant could not have ignored the very many details furnished in the said communication while proceeding against the respondent under Chapter XIV-B of the Act.

22. Based on the above submissions, the learned counsel placed reliance upon the following decisions reported in:-

(i) (2005) 274 ITR 110 (Assistant Commissioner of Income Tax Vs. A.R.Enterprises)

(ii) (2008) 300 ITR 152 (Mad) (Commissioner of Income Tax Vs. S.Ajit Kumar)

(iii) (2009) 308 ITR 124 (Mad) (Commissioner of Income Tax Vs. P.K.Ganeshwar) and

(iv) (2006) 282 ITR 349(MP) (Dr.Brijesh Lahoti Vs. Commissioner of Income Tax)

23. Though in the first blush such a contention appears to be sound, on a close scrutiny of the other provisions contained in the said Chapter XIV-B, we are not persuaded to accept such a contention raised on behalf of the respondent.

24. In the first place, the submission made on the set of expression contained under Section 158B(b) cannot be considered in isolation. The various provisions contained in Chapter XIV-B has been specifically captioned under the head 'Special Procedure for Assessment of Search Cases'. The contention that the various disclosures in the letter dated 15.05.1995, should be construed as one disclosed for the purpose of this Act, if has to be accepted as an abstract proposition, then the

various other procedures and prescriptions set out in the rest of the provisions of the said Chapter would become otiose. For instance, under Section 158BB(1), while prescribing the method of computation of undisclosed income of the block period, it is stipulated that it should be on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence. The main thrust is the evidence found as a result of search which should form the basis and all other situations should be relatable to such evidence. Therefore, the main ingredient while computing the 'undisclosed income' of any block period to be satisfied is the evidence found as a result of a search which should form the basis.

25. Further under Section 158BB(1)(c), such determination of undisclosed income for the block period can be made where the due date for filing the return of income has expired, but no return of income has been filed.

26. Under Section 158BB(1)(ca), such determination can also be made even in respect of cases not falling under Section 158BB(1)(c) and where the due date for filing the return of income has expired, but no 'nil' return has been filed.

27. A conjoint reading of the substantial part of Section 158BB(1) and the other sub-clauses in the said Section, in particular sub-clause (c) and (ca), makes it clear that the determination of the 'undisclosed income' of the block period based on evidence found in the course of search can be made where no return had been filed within the due date and where a search has been conducted after the expiry of the due date and any material evidence came to be unearthed in the course of such search. Conversely, once the return has been filed within the due date, the scope of determining the 'undisclosed income' would be to a very limited extent of such income which had been failed to be disclosed in the return and which came to be deducted in the course of search based on any materials gathered in the form of evidence as a result of such search.

28. Therefore, if one were to contend that the allegation of undisclosed income based on Section 158BB cannot be accepted, one who takes such a stand has to necessarily show that alleged 'undisclosed income' had already been disclosed in the return filed before the expiery of the due date. Therefore, the set of expression "income or property which has not been or would not have been disclosed for the purposes of this Act"., contained in the definition clause of 'undisclosed income' under Section 158B(b) will have to be read and understood as explained under Section 158BB(1) of the Act. The expression 'for the purposes of this Act' cannot have the expanded meaning to the whole of the Act, but in our considered opinion, should be read in the context in which it is used in the various provisions contained in Chapter XIV-B of the Act. For this proposition of law, reference can be made to the decision reported in 107 IC 161 (Mirch Vs. Russel) where it has been held as under"

"By the application of the maxim ejusdem generis, which is only an illustration or specific application of the broader maxim noscitur a sociis, general and specific words which are capable of an analogous, meaning being, associated together, take colour from each other, so that the general words are restricted to a sense, analogous, to the less general."

29. The above statement of ours based on Sections 158B(b) and 158BB(1) of the Act is further strengthened by a specific provision contained in Section 158BB(3) of the Act, which specifically mandates that the burden of proving to the satisfaction of the Assessing Officer 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. Such a stringent stipulation by way of casting the onus on the assessee to discharge the burden makes it amply clear that one cannot claim the disclosure of any income, much less, 'undisclosed income' based on any other material other than the return filed before the expiry of the due date and where after any search takes place.

30. A reading of Section 158BC(b), further makes it clear that the determination of undisclosed income for the block period can be made by the assessing officer only in the manner laid down under Section 158BB. Once the sub-clause 158BC, reinforces the fact that Chapter XIV-B will have to be treated as a separate code by itself for the purpose of making a determination of the undisclosed income of the block period, in as much as, the said sub-clause 'c' makes it clear that the Assessing Officer, on determination of the undisclosed income for the block period in the said Chapter, pass an order of assessment and determine the tax payable based on such assessment.

31. Therefore, a conjoint reading of Sections 158B(b), 158BB(1) & (3), 158BC, second proviso to Section 158BC(a) and 158BC(b) & (c), leaves no room for doubt that if one were to claim that there was a prior disclosure of income in order to contend that there cannot be any determination by way of block assessment under Chapter XIV-B of the Act, it will be his/her bounden duty to establish that such undisclosed income had already been disclosed in his/her return filed before the expiry of the due date for filing such return.

32. Once we steer clear of the said legal position and examine the case on hand, we are unable to accept the contention of the learned counsel for the respondent assessee that disclosure made in the letter dated 15.05.1995, should be taken as a disclosure of the 'undisclosed income' spelt out in the assessment order. In the present case on hand as discussed earlier admittedly the assessee did not file any return before the proceedings under 131 and thereafter the search made under Section 132 of the Income Tax Act, 1961. The only action on the part of the assessee before the said proceedings was by way of sending a reply to the notice issued to her under Section 131 of the Act. Admittedly, the assessee kept quite after the reply by not complying with the provisions of the Income Tax Act by filing a return. What is submitted by way of a reply was certain incorrect particulars as found by the assessing officer on a consideration of the materials placed before him. Therefore for the inaction on the part of the assessee in disclosing the income by way of filing the return, she cannot take advantage of the mere reply sent to the notice issued under Section 131 of the Act and thereafter contend that she has disclosed the income.

33. Going by the admitted facts which shows that there was a search made under Section 132 and thereby Section 158BD was attracted which empowered the Assessing Authority to proceed under Chapter XIV-B, the question for consideration is whether in the course of such search any material was seized, which form the required evidence for proceeding against the respondent assessee under Section 158BB and 158BC of the Act. It is relevant to note and stress that it was not the case of the

respondent assessee that in the course of the search no materials were seized. In the elaborate order passed by the Assessing Authority, while we find a specific reference to the seizure of materials as per the Panchanama dated 20.03.1996, as stated in paragraph 2.4.2, in no part of the order of the Assessing Authority, there was any reference to any contentions raised on behalf of the respondent assessee that nothing was seized in the course of search.

34. The various reference to different transactions of the respondent assessee in the block period makes no reference to the respondent assessee's replies dated 11.03.1995 and 15.05.1995, claimed to have been submitted to the summons issued under Section 131 of the Act. In fact the respondent was represented by its Income Tax Practitioner and several of the contentions made on behalf of the respondent assessee have been specifically referred by the assessing authority in the order while recording his conclusions. Even while preferring the appeal before the Tribunal while there was no specific allegation to the effect that there was no incriminating materials seized in the course of the search.

35. The contentions recorded in the order of the Tribunal makes it clear that the assessment was solely based on the materials seized and the reply of the respondent assessee had no role to play. In paragraph 19 of the order of the Tribunal, the Tribunal itself has recorded the contentions made on behalf of the assessee to the following effect:

"19.....The assessee submits that the details of the borrowings were already available in the notings found in the seized documents on 19.01.1996 and 20.01.1996. When the notings are available against the loan credits disclosed by the assessee, there is no basis for the assessing officer to treat the same as the undisclosed income of the assessee. It is the case of the assessee that the information available from the seized records should be read in its entirety and in a logical manner. The assessing officer cannot accept a portion of the seized material and reject another portion of the seized materials. The assessee also contends that confirmation letters were filed before the assessing officer in respect of those loan credits and affidavits were filed, and therefore absolutely there is no basis to treat the loan credits as the undisclosed income of the assessee.....The assessee also submits that there is no basis for the assessing officer to treat Rs.30,000/- as the undisclosed income out of the sum of Rs.32,150 found in the course of search."

36. In fact in the present impugned order of the Tribunal, major part of the order of the assessing authority came to be set aside. The Tribunal entertained three additional grounds raised by the respondent assessee.

37. According to the respondent assessee, there was no proper notice served on the assessee to invoke the jurisdiction under Section 158BD and consequently the entire block assessment was not justified. The second additional ground was that under Section 158BD necessary reasons should have been recorded before making the block assessment and on that ground also the assessment was invalid. Both the above first two additional grounds were rejected by the Tribunal and the respondent has not made any challenge to the said part of the order of the Tribunal by way of raising substantial questions of law. The last of the additional ground was to the following effect:

"22(iii). The information and materials used by the assessing officer to complete the impugned block assessment under sec.158BD had in fact already been furnished to the Asstt.Director of Investigation, Madurai as early as on 15.05.1995 itself, who sought relevant information from the assessee. In the course of search, no documents, materials or information other than those documents, materials or information furnished to the Asstt.Director of Investigation, Madurai on 15.05.1995, have been recovered. Therefore, there is no "undisclosure" as far as the case of the assessee is concerned and therefore the impugned assessment is void ab initio."

In which the specific contention raised was that all the information where already disclosed in the reply dated 15.05.1995, itself and that in the course of search no document or materials was recovered or information gathered other than what was disclosed in the reply dated 15.05.1995.

38. Therefore, it was for the first time that too by way of an additional ground, the contentions based on the letter dated 15.05.1995, came to be made. Having regard to the fact that prior to the raising of the said additional ground, the respondent assessee never raised the contention viz., about the absence of any materials seized in the course of search and the fact that while on the other hand a specific reference to the seizure of materials based on the Panchanama dated 20.03.1996, as well as the reference to various contentions made on behalf of the assessee in the order of the Tribunal itself making specific reference to the seized materials, we wonder how a contention could have been entertained as has been made in the additional grounds to the effect that no materials were seized other than what was available in the letter dated 15.05.1995. On that very ground, we find no substance in the submission made on behalf of the respondent assessee in stating that there was no material evidence found in the course of the search.

39. It was unfortunate that in the light of the above facts specifically noted by us, in the order of the assessing authority as well as in the Tribunal's order itself, there was no scope for the Tribunal to conclude that the entirety of the information was only based on the letter dated 15.05.1995 and consequently major part of the order of assessment under Section 158BD of the Act cannot be sustained.

40. In other words, having regard to the uncontroverted statements found in the assessing authority's order about the seized materials covered in the Panchanama dated 20.03.1996 and the various submissions made on behalf of the assessee by the authorised representative before the Tribunal making specific reference to the seized materials, the ultimate conclusion of the Tribunal in stating that the assessing authority's order of assessment about the 'undisclosed income' were all relatable to the reply dated 15.05.1995, of the respondent assessee was wholly unjustified and un-called for.

41. It is unfortunate that the Tribunal was twined by the feeble contention raised in the third additional ground by stating that no materials were seized in the course of the search and that all the information found in the order of assessment were disclosed in the reply dated 15.05.1995.

42. While such a contention of the respondent assessee found favour with the Tribunal as noted by us earlier, in the very same order, the Tribunal had itself recorded the submission of the authorised

representative of the assessee herself wherein the contentions were raised questioning the assessment based on 'undisclosed income' with particular reference to several seized materials as untenable. Apparently the Tribunal completely lost sight of those related factors when it entertained the third additional ground and chose to accept the same. Of course, in that process, the Tribunal has not considered the merits of the conclusions made by the assessing authority in respect of various items of 'undisclosed income' and the correctness of those evidence made by the assessing authority.

43. Having regard to our above conclusions, we are not able to countenance the plea of the learned counsel for the respondent assessee that there was no materials found in the search and that what was relied upon by the assessing authority were based on the information furnished in the letter dated 15.05.1995. We are not also able to appreciate the contention that there was no material evidence unearthed in the course of the search in order to satisfy the stipulation contained in Section 158BB(1) of the Act. We also do not find any support in the contention of the learned counsel for the respondent assessee that all information were already disclosed and that therefore there was no scope to make an assessment of undisclosed income.

44. When we examine the various decisions relied upon by the learned counsel for the respondent assessee, the decision reported in (2005) 274 ITR 110 (Assistant Commissioner of Income Tax Vs. A.R.Enterprises) was a case where the Division Bench distinguished the decision of the learned Single Judge reported in (2001) 249 ITR 378 (B.Noorsingh Vs. Union of India). While distinguishing the decision, the Division Bench has held as under in paragraph 16:

"16. We are, therefore, of the considered opinion, that the observations made in B.Noorsingh's case (2001) 249 ITR 378 (Mad), would only have a bearing on the point whether the assessee is entitled to file the return after the expiry of the due date, particularly after the conduct of search, but would not eschew the statutory consequence of advance tax paid by the assessee while deciding the income alleged to have been undisclosed by the assessee in spite of the self-assessment made under section 139 read with section 140A of the Act, while paying his advance tax."

45. In the above decision the assessee though did not file a return for the relevant assessment year, had paid the advance tax and the assessing authority however opined that since the assessee failed to file the return as on the date of the search, there was income which remain undisclosed. The Division Bench taking note of the advance tax paid by the assessee held that the said circumstance cannot be lightly disregarded as it had its own statutory consequence. Having regard to such a specific circumstance of payment of advance tax noted by the Division Bench in that case, which demonstrate that the assessee had no idea of withholding disclosure of any income, the Division Bench held that the non-filing of the return before the due date and as on the date of search cannot be held against the assessee. The Division Bench held that the very payment of advance tax by the assessee would show that the assessee by making a self assessment under Section 139 read with Section 140A of the Act paid the advance tax and therefore the proceedings under Chapter XIV-B was not justified.

46. The learned Senior Standing Counsel appearing for the Income Tax Department submitted that the judgment of the Division Bench is pending consideration before the Hon'ble Apex Court. However, we only venture to consider the applicability of the judgment as discussed above.

47. In any case, having regard to the distinguishable feature namely the assessee in that case paid advance tax based on its own self assessment under Section 139 read with Section 140A of the Act, the said case is clearly distinguishable.

48. Chapter 17 of the Act speaks about Collection and Recovery of Tax. Part-C of the said Chapter speaks about the Advance Payment of Tax. Section 207 of the Act speaks about liability for payment of advance tax of the Act. Section 208 and 209 speaks about conditions of liability to pay advance tax and the consequential computation. Similarly Section 210 provides for the payment of advance tax by the assessee of his own accord or in pursuance of order of Assessing Officer and Section 234B deals with interest for defaults in payment of advance tax. A conjoint reading of the above said provisions would clearly show that an assessee can pay the advance payment tax either of his own or at the instance of the assessing officer as the case may be. An advance tax is the payment of tax. Therefore an action which involves a payment of tax indicating the source of income cannot be treated on par with any intimation given on the part of the assessee. In the former case, the action is voluntary or as per the directions of the officer whereas in the later case it is only by way of an explanation. Therefore, we are of the considered view that the judgment reported in (2005) 274 ITR 110 (ASSISTANT COMMISSIONER OF INCOME TAX v. A.R.ENTERPRISES) is not applicable to the present case on hand and is distinguishable. We also make it clear that we express no opinion of the ratio laid down in the said judgment.

49. The above decision was relied upon by the Madhya Pradesh High Court-Indore Bench in the decision reported in (2006) 282 ITR 349(MP) (Dr.Brijesh Lahoti Vs. Commissioner of Income Tax), in paragraph 10, the Division Bench held as under:

"10.We agree with Mr.Chaphekar, learned senior counsel for the appellant, that where the assessee discloses his income to the Department before the date of search in some manner or the other, it may be difficult to hold that such income is to be treated as undisclosed income for the purpose of assessment in accordance with Chapter XIV-B of the Act....."

Having regard to the implications of the relevant provisions of Chapter XIV-B as discussed by us in this order in paragraphs 23 to 31, with great respect, we are not inclined to subscribe to such a wide proposition stated in the said decision to the effect that the disclosure by the assessee of his income before the date of search in some manner or the other would defeat the assessment being made under Chapter XIV-B of the Act.

50. It is further to be seen that the facts involved in the said judgment of the Division Bench of the Madhya Pradesh High Court are totally different. In the said case the assessee has not filed any return or advance tax before the search. Therefore the Hon'ble Division Bench was pleased to observe in the absence of the material the income will have to be treated as 'undisclosed income'. Further the scope of Chapter XIV-B has not been gone into in the said case. It is well established

principle of law that for a judgment to be treated as a precedent will have to involve a conscious consideration of the issue raised in the case to which it is sought to be applied. In other words, a passing remark or observation made cannot be a binding precedent unless the issue is taken into consideration and decided by applying the provisions of law.

51. It is also a well established principle of law that a judgment cannot read like a statute and the ratio laid down therein will have to apply in the facts of the case. In (2008) 306 ITR 277 (UNION OF INDIA v. DHARMENDRA TEXTILES PROCESSORS), the Hon'ble Supreme Court in paragraph 52 has observed as follows:

"52....It is a well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.

Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the Legislature enacting it. (See Institute of Chartered Accountants of India v. Price Waterhouse (1997) 6 SCC 312). The intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in Crawford v. Spooner (1846) 6 Moo PC 1, the courts cannot aid the legislature s defective phrasing of an Act, they cannot add or mend, and by construction make up deficiencies which are left there. (See State of Gujarat v. Dilipbhai Nathjibhai Patel (1998) 3 SCC 234). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See Stock v. Frank Jones (Tipton) Ltd. (1978) 1 All ER 948 (HL). Rules of interpretation do not permit the courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. The courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn, L.C. in Vickers Sons)"

The question is not what may be supposed and has been intended but what has been said. Statutes should be construed not as theorems of Euclid , Judge Learned Hand said, but words must be construed with some imagination of the purposes which lie behind them . (See Lenigh Valley Coal Co. v. Yensavage, 218 FR 547). The view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama (1990) 1 SCC 277 (SCC page284, paragraph 16).

In D.R. Venkatachalam v. Transport Commissioner (1977) 2 SCC 273, it was observed that the courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See Commissioner of Sales Tax v. Popular Trading Co. (2000) 5 SCC 511). The legislative casus omissus cannot be supplied by judicial interpretative process...."

Hence applying the said ratio to the facts of the present case on hand, we are of the opinion that the judgments relied upon by the assessee reported in (2005) 274 ITR 110 (ASSISTANT COMMISSIONER OF INCOME TAX v. A.R.ENTERPRISES) and (2006) 282 ITR 349(MP) (DR.BRIJESH LAHOTI v. COMMISSIONER OF INCOME TAX) are not applicable to the present case on hand.

52. The reliance placed upon the decision reported in (2008) 300 ITR 152 (Mad) (Commissioner of Income Tax Vs. S.Ajit Kumar), is also not helpful to the assessee in as much as there was a categorical finding in paragraph 5 which is as follows:

"5.....Admittedly, no material was found during the course of search operation in respect of the amount said to be paid in cash over and above the cheque payment. Hence, the Tribunal correctly come to the conclusion that the information or material found during the course of survey operation at the premises of M/s.Elegant Constructions were not relatable to any material found during the course of search operation. Therefore, the Tribunal is right in its view that material or information found at the premises of M/s.Elegant Constructions, in the course of survey proceeding, could not be a basis for making any addition in the block assessment....."

Having regard to the peculiar facts noted above in the said decision, it can have no application to the facts of this case.

53. In the decision reported in (2009) 308 ITR 124 (Mad) (Commissioner of Income Tax Vs. P.K.Ganeshwar) the facts disclosed that based on a search carried out on the assessee under Section 132 of the Act, certain items were seized and assessment was made for the block period. Thereafter, in an investigation, certain fixed deposits in fictitious names were found which were treated as undisclosed income. The Tribunal held that since the fixed deposit amounts were not detected as a result of search but by the investigation which followed the search, the same could not be included in the 'undisclosed income' of the block period. Having regard to the uncontroverted fact that the fixed deposits were not materials seized in the course of the search, the same was not treated as evidence unearthed in the course of the search. In the said circumstances, the said decision is also not helpful to the respondent assessee.

54. On the other hand, the decision of the learned Single Judge reported in (2001) 249 ITR 378 (B.Noorsingh Vs. Union of India), in our considered opinion is inconsonance with the specific stipulation contained in the provisions of Chapter XIV-B of the Act. In the penultimate paragraph at page 382, the learned Single Judge has held as under:

"The payment of advance tax by itself does not establish an intent to disclose the income. The disclosure is to be made by filing the return. Even in search cases were the time for filing the return under section 139(1) has not expired, income disclosed in the books of account is not treated as undisclosed income. All that is denied to the assessee in search cases is the opportunity to file a return after the period specified in section 139(1) and to claim that the income that he would have disclosed in a belated return is not to be regarded as undisclosed income. The reason for denying such opportunity in search cases is obvious. After having suffered a search, the assessee is not to be enabled to escape the consequences of his failure to disclose all his income by filing a return after the search and after the expiry of the time prescribed under section 139(1) and by disclosing therein income which had remained undisclosed upto the date of the search. Section 158BB(1)(c) is not in any way unconstitutional."

The above statement of law of the learned Judge is fully inconsonance with the provisions contained in Sections 158BB(1)(c) and 158BB(3) of the Act. We fully endorse and approve the above said proposition of law laid down by the learned Judge.

55. It will be worthwhile to refer to the principles laid down by the Hon'ble Supreme Court while working out the provisions under Chapter XIV-B of the Act for making block assessment of 'undisclosed income'. In the decision reported in (2010) 321 ITR 362 (SC) (Assistant Commissioner of Income Tax Vs. Hotel Blue Moon), where the Hon'ble Supreme Court has held as under in paragraph 12:

"12. Chapter XIV-B provides for an assessment of the undisclosed income unearthed as a result of search without affecting the regular assessment made or to be made. Search is the sine qua non for the block assessment. The special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period. 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. It is not intended to be substituted for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. 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 account or documents and such other materials or information as are available with the Assessing Officer. Therefore, the income assessable in block assessment under Chapter XIV-B is the income not disclosed but found and determined as the result of search under section 132 or requisition under section 132A of the Act." (underlining is ours)

56. Similarly in the decision reported in (2007) 289 ITR 341(SC) (Manish Maheswari Vs. Assistant Commissioner of Income Tax), it has been held as under in paragraph 11:

"11. The 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 precedent wherefor 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." (Emphasis added) All the three ingredients have been satisfied by the Assessing Authority while passing the order of assessment.

57. The decision relied upon by the learned standing counsel for the appellant reported in (2009) 310 ITR 64 (Karn)(Chief Commissioner of Income Tax Vs. Pampapathi) though a converse case, fully supports the case of the appellant. The Division Bench has held as under in para 11:

"11.When the said letter cannot be made use of against the assessee, then the question to be considered by this court is whether such letter can be treated as a return filed under the provisions of the Income-tax Act to enable the Assessing Officer to pass an order of assessment. The learned counsel for the Revenue fairly submits that the letter dated January 25, 1995, cannot be treated as a return. It is also not in dispute that return has to be filed in the proforma prescribed under the Income-tax Act. The letter dated January 25, 1995, is not in such proforma. After a perusal of the letter dated January 25, 1995, it is clear to us that there is no unconditional disclosure of income by the assessee....."

58. Applying the above principles to the facts of this case, we find the necessary ingredients set down therein have been satisfactorily complied with by the assessing authority while passing the order of assessment under Chapter XIV-B of the Act and in the absence of any illegality or irregularity in making such assessment of individual items pointed out by the Tribunal, the interference with the order of the assessing authority by the Tribunal was not justified.

59. As pointed out by us earlier since the Tribunal had proceeded on the footing that except such of those items noted by it in paragraph 46, in respect of the rest of items, the information was already disclosed by the respondent assessee in her communication dated 15.05.1995, and on that ground, the assessing authority's order was set aside, we are of the view, while setting aside the order of the Tribunal and as rightly stated by the learned standing counsel for the appellant it calls for a remittal of the matter back to the Tribunal for passing fresh orders on various items of 'undisclosed income' found by the assessing authority other than what has been found by the Tribunal in paragraph 46 of its order.

60. Therefore, while setting aside the order impugned in this appeal, the matter is remitted back to the Tribunal only to consider the order of the assessing authority on merits with reference to each of the items based on which the assessing authority determined the undisclosed income as held in paragraph 4.11.13 of its order and pass appropriate orders in accordance with law. This appeal is allowed and the matter is remitted back. The question of law is answered in favour of the appellant. All M.Ps are closed. No order as to costs.

kk To The Income Tax Appellate Tribunal 'A' Bench, Chennai