Ellenbarrie Industrial Gases Ltd. vs Joint Cit on 20 November, 2001

Equivalent citations: (2002)76TTJ(CAL)841

ORDER

S. Bandyopadhyay, A.M. This appeal filed by the assessee is directed against the order of the Commissioner (Appeals) confirming mostly the additions made in the block assessment completed under sections 143(3)/158BC(c) of the Income Tax Act, 1961.

2. The search and seizure operations took place in the premises of the assessee-company on 22-1-1997 and continued upto 23-1-1997. On the latter date, the search was temporarily concluded. A prohibitory order was passed under section 132(3) on one Shri B.P. Agarwal (stated by the assessee to be unconnected with the assessee-company) in respect of the sealed premises comprising the office-room of the assessee-company, its filing cabinet and certain computer rooms. It may be mentioned in this connection that on the same dates simultaneous searches were carried out by the department in respect of a number of concerns belonging to the same group.

On the same date again, certain documents of the nature of two bunches of loose sheets were found from the office premises of the assessee-company the 3A, Ripon Street, Calcutta-16 and were also seized.

It appears that in continuation of further search proceedings carried on 6-3-1997, a fresh Panchnama was issued in the name of the assessee-company and its premises were searched once more, on 8-4-1997. On this particular date also, the search was temporarily concluded and certain further loose bunches containing complete printout in respect of the assessee-company were seized. From the papers placed on our record, it is not possible to know what happened thereafter and how and when the search was ultimately concluded permanently. In any case, the learned counsel for the assessee strongly contends, in the first place, that continuation of the search from January, 1997 to April, 1997, by passing a prohibitory order under section 132(3) was for collateral purpose and hence completely illegal. It is argued that only one loose bunch was seized on the latter date being 8-4-1997, and that the same could have been seized even on the earlier date of the search January, 1997, itself. It is thus strongly contended by the learned counsel for the assessee that hence the extension of the search being invalid, the search and seizure operation should be considered as having been concluded in the month of January, 1997, itself. It is thus argued that the block assessment order passed on 21-4-1999, is beyond the time-limit and hence invalid. In support of this contention, the learned counsel for the assessee has relied on the following judgments :

(1) Dr. C. Balakrishnan Nair & Anr. v. CIT & Anr. (1999) 237 ITR 70 (Ker);

(2) Late Anant N. Naik, through L/R v. Dy. CIT (2000) 66 TTJ (Pune-Trib) 533;

(3) Microland Ltd. v. Asstt. CIT (1998) 67 ITD (Bang-Trib) 446; and (4) Kirloskar Investments & Finance Ltd. v. Asstt. CIT (1998) 67 ITD 504 (Bang-Trib).

In all these judgments, it has been held that a search cannot be continued without any purpose and apparently for the purpose of making seizure of certain documents which, it was possible to seize even on the first day of the search, with a collateral intention. In the instant case, it is not clear as to who it was not possible for the authorised officers to seize the bunch of loose papers, actually seized on 8-4-1997, when it was perhaps very easels possible to seize the same on 22/23-1-1997. It appears that the office premises of the assessee-company at 3A Rippon Street, Calcutta were searched on both the occasions in January, 1987, as well as in April, 1997. The said office premises cannot be so large that it was not possible for the searching party to conclude their searching operations in January, 1997, itself. However, inasmuch as we do not know the full facts, it might be that one portion of the said office premises could not fully be rummaged on the first occasion of the search and that is why operations had to be kept in abeyance for sometime, and that the rummaging operation was resumed in April, 1997 when the further loose bunch of papers was found out and seized. It may be noted in this connection that Panchnama issued on 22/23-1-1997, does not show that the loose bunch of papers actually seized in April, 1997, had been found out in January 1997, itself, and those loose bunches had been kept in the prohibitory orders without seizing them. Had it been the case that the said loose bunches had been found out in January, 1997 but not seized at that time, we could have definitely endorsed the assessee's standpoint that the search was deferred of a collateral purpose. In the instant case, in the absence of any definite information about the actual state of affairs, we are not in a position to come to the conclusion which the learned counsel for the assessee wants us to draw. The department thus gets a benefit of doubt. We cannot, therefore, exactly say that the search was unnecessarily postponed for a collateral purpose and hence the search must be considered to have been concluded in January, 1997, itself. This preliminary ground taken up by the assessee's counsel against the vapid of the assessment order from the limitation angle cannot, therefore, stand and is hence being rejected.

3. Now coming to the merits of the case, the facts, as discussed by the assessing officer in the assessment order, are that the assessee entered into, in the accounting year relevant to the assessment year 1993-94 included in the block period, an agreement for sale and lease-back of gas cylinders with M/s. Commercial Corporation of India Ltd. (CCI) and Shruta Builders (SB). 750 gas cylinders were sold to both the concern for the total amount of Rs. 16,38,000 in each case comprising of the actual sale price of Rs. 15,75,000 and Central Sales Tax amount of Rs. 63,000. The assessing officer mentions that the agreement with both the parties stipulated making of security deposits of the amount of Rs. 11,20,000 by the assessee with each of the above-two purchaser-cum-lessors in respect of the cylinders. The assessing officer stated that according to the agreement, lease-rents were payable by the assessee to each of the lessors as below :

Assessment year Amount Rs.

1993-94 90,000 1994-95 90,000 1995-96 5,31,665 1996-97 2,56,665 9,68,330 From the details of payments as made by the assessee to both the concerns as well as subsequent treatment of the same, the assessing officer came to the conclusion that

> although the assessee had initially made payments towards security deposits to each of the two lessors, ultimately, however, some part of the said security deposit amounts was converted into lease rent payable and also adjusted against such lease rent payable amount. From the detailed calculations in this regard the assessing officer found out that the assessee had ultimately treated an amount of Rs. 15,75,000 in respect of each of the two parties as lease rent paid to them. The assessing officer also states in this connection that in its balance-sheet, the assessee has treated the security deposits as advances merely.

4. The assessing officer states thereafter that in order to verify the genuineness of the sale and lease-bank transactions in respect of the cylinders, the assessing officer asked the assessee-company to produce the concerned persons, i.e., lessors. The assessing officer also mentions that SB had admitted the transactions between it and the assessee as non-existent under the Voluntary Disclosure Scheme, 1997. In this connection the assessee was supplied with by the assessing officer a copy of the statement of Shri Manmohan Kamath, son of K. Mardappa Kamath, as recorded by the ADI, (Inv.) Mangalore, according to which Shri Manmohan Kamath had not verified the physical existence of the gas cylinders either at the time of purchase of the same or at the time of entry into the lease agreement.

The assessee tried to argue that inasmuch as both the sale of the cylinders as well as the lease-back of the same stand fully established by the sale-cum-lease agreement and inasmuch as the sale proceeds had been received by the assessee through account-payee cheques/drafts which stand reflected in the bank statement of the assessee-company and the security payment as well as lease-rent payment were duly made by the assessee also through account-payee cheques, the question of production of the parties concerned, located at a far-distant place like Mangalore, was not at all germane to the establishment of the assessee's case about the genuineness of the agreement. The assessee also argued that the fact of lease transaction stood reflected in the block assessment in the case of CCI.

So far as the disclosure made by SB is concerned, the assessee refuted any knowledge about the same and argued by referring to the decision of the Supreme Court in Jamnaprasad Kanhaiyalal v. CIT (1981) 130 ITR 244 (SC) that the benefit or amenity (amnesty) under the VDS being available to the declarant only, as a corollary, it would stand that the voluntary declaration cannot be used against any other person, to it disadvantage. The assessee also referred to a decision of the Tribunal, in Karam Chand Thapar & Bros. (Coal Sales) Ltd. v. Dy. CIT (1998) 66 ITD 39 (Cal-Trib), to contend that in such a case the question of physical delivery of the cylinders would be immaterial inasmuch as immediately after the sale the cylinders stood leased back to the assessee and hence it was not necessary to physically handover the cylinders to the purchasers (the lessers) and then again to take physical delivery of the same from the same party. The assessee furthermore contended that there was no allegation by the department that the market price of the cylinders was much less or much higher than what had been charged by the assessee nor that the lease rent fixed was not in the vicinity of the net finance received and interest thereon as per the agreement for 38 months.

5. The assessing officer concluded from certain other facts like that the lease transactions in both the cases were arranged by the same person, i.e., Shri Manmohan Kamath, as mentioned above, that SB did not make any direct payment to the assessee and that the payment in respect of SB had been made on its behalf by CCI, that both the parties were closely connected with each other. The assessing officer then relied on certain portions of the statements made by Shri Kamath before the ADI (Inv), Mangalore, on 20-1-1997, to the effect that there was no distinctive numbers of the gas cylinders, that Shri Kamath had not seen the cylinders and their conditions and had even never verified the physical existence of the cylinders at any point of time. The assessing officer furthermore held that there was a breach in respect of certain terms of the agreement like making payment of full amount of security deposits to the lessors at the time of said agreement, etc. He thus concluded that the assessee-company and the lessors had not actually followed the terms of the lease agreement regarding payment of security deposit amounts of Rs. 1,20,000 in each case. The assessing officer thereafter discussed that although the assessee maintains a register of its fixed assets there is no entry of sale and lease-back of the cylinders in this register. He states that the search at the Kalyani factory of the assessee-company showed that no cylinder was found having distinctive number. The assessing officer furthermore states that the factory manager admitted in his statement that he was not having any knowledge regarding the sale of the cylinders by the assessee-company. The assessing officer furthermore states that from the record of the assessee-company, it is not clear whether the company was in possession of all the cylinders which it claims as having sold and again taken back on lease. The assessing officer also reiterated the point that the whole amount of Rs. 15,75,000 was ultimately considered as lease rental by the assessee.

The assessing officer thereafter refers to certain seized documents which purport to show that those cylinders were repurchased by the assessee from both the lessors by making adjustment of the outstanding amounts of deposits against such purchase considerations.

Ultimately, the assessing officer came to the conclusion that the sale of the cylinders and their lease-back was just a paper transaction by which the lessors were able to claim depreciation and the assessee could claim the expenditure by way of lease rentals. The assessing officer also referred to the correspondences received by him from ADI(Inv), Mangalore, stating that in the case of SB the voluntary disclosure had been made in respect of an amount of Rs 10,54,668 being the excess of the depreciation claimed by that concern over the amount of lease rent stated to have been received by that concern from the assessee and credited to its accounts.

6. Finally, the assessing officer once more raised the issue that the assessee had been given opportunity of producing, the lessors for proving the genuineness of the transactions. He also raises the point that the onus lies on the assessee to prove the genuineness of the transactions and that in the instant case the assessee did not discharge the said primary onus about genuineness of the sale-cum-lease-back transactions in respect of the cylinders. Ultimately, the assessing officer held that there was no genuine sale-cum-lease-back transactions between the assessee and the other two parties of Mangalore. He thus disallowed the claim of lease rental of Rs. 31,50,000 over the four assessment years, as detailed below :

Assessment year Amount Rs.

1993-94 1,80,000 1994-95 1,80,000 1995-96 10,63,330 1996-97 17,26,670 31,50,000 This amount of Rs. 31,50,000 was ultimately added back in the block assessment.

In the appellate stage also, the Commissioner (Appeals) confirmed the additions.

7. At the stage of hearing of the appeal before us, the learned counsel for the assessee stated that all the seized papers were already on the records of the assessing officer and that even after taking into consideration these papers the assessing officer had completed the regular assessment for the assessment year 1993-94 on 22-1-1996, by accepting the genuineness of the sale-cum-lease agreement. For the assessment year 1994-95, the assessment is stated to have been made by way of processing under section 143(1)(a) on 8-8-1995, the regular assessment under section 143(3), accepting the contention of the assessee for the assessment year 1995-96 was made on 31-3-1998, and lastly the regular assessment for the assessment year 1996 also was made on 15-5-1998, in which the issue relating to genuineness of the sale-cum-lease agreement was not raised at all. The learned counsel for the assessee thus strongly contends, by relying on a judgment of the Tribunal, Bombay Bench, in the case of Sunder Agencies v. Dy. CIT (1997) 63 ITD 245 (Mum-Trib), that assessment for the block period can be made only in respect of undisclosed income detected as a result of search and that the revenue is not empowered under section 158BA to make roving enquiry connected with completed assessments unless the assessing officer comes across certain direct evidence as a result of the search which indicates the factum of undisclosed incomes.

In support of the said argument that no undisclosed income has been found out by the department as a result of the search or even enquiries conducted by the department subsequent to the search and hence the addition made in this regard is invalid, the learned counsel for the assessee has relied on the judgment of the Tribunal in the case of Kirloskar Investments & Finance Ltd.'s case (supra) and also on two other judgments viz., in the cases of Smt. Rajrani Gupta v. Dy CIT (2000) 66 TTJ (Mum-Trib) 582 and Agarwal Motors v. Asstt. CIT (2000) 66 TTJ (Jab-Trib) 130. On the other hand, the learned Departmental Representative has raised the same issues as mentioned in the assessment order viz., that serial number of the cylinders were never made available to the assessing officer, that possession of cylinders being subject to Arms and Explosives Act, that the effect of sale-cum-lease-back agreement was never mentioned in the assets registers and finally strongly about the disclosure made by SB under the VDS. On the other hand, the learned counsel for the assessee stated that all the gas cylinders were actually found during the time of search of the factory of the assessee at Kalyani but that only the specific numbers were not found out.

8. There is no doubt about the fact that the regular assessments were, in this particular case for all the four years under consideration, duly completed prior to or even, in some cases, posterior to the search and no issue about the non-genuineness of the sale-cum-lease agreement was raised in any of these regular assessment orders. The Commissioner (Appeals) has referred to the Single Bench judgment in the writ case of Shaw Wallace & Co. v. Asstt. CIT (1999) 238 ITR 13 (Cal) in which it was held that once the search is complete under Chapter XIV-B of the Income Tax Act all additions should be made only in the block assessment and the regular assessment should be completed more or less on the basis of the return filed by the assessee. We have, however, to refer to a later Division

Bench judgment of the jurisdictional High Court in the case of Caltradeco Steel (P) Ltd. v. Dy. CIT (2000) 158 CTR (Cal) 369. In this case it has been held that there is no bar to proceed to assess the income of an assessee under section 143(3) which he disclosed in the return of an year forming part of block assessment while proceedings under the provisions of Chapter XIV-B are pending. The Division Bench of the Calcutta High Court also, in the case of Parag Nivesh (P) Ltd. v. Dy. CIT & Ors. (1999) 240 ITR 419 (Cal), held that section 158BA provides for assessment of "undisclosed income" as a result of search and, therefore, before proceeding to assess the income of any person in case of search in pursuance of notice under section 158BC/158BD, the assessing officer should first see whether there is any "undisclosed income" which can be assessed under Chapter XIV-B. It may be said that the combined effect of these two judgments of the jurisdictional High Court is to overrule in an implied manner the earlier judgment passed by the Single Bench in the case of Shaw Wallace & Co. Ltd. (supra). Thus it has got to be held that even the search is completed under Chapter XIV-B for all the assessment years under consideration, not only the regular assessments under section 143(3)/144 and the block assessment under section 158BC should be made but that their fields of operations are also completely different. Whereas the regular assessment should deal with the disclosed income of the assessee and take into consideration making of addition in respect of disclosed transactions, the block assessment should take care of only the undisclosed income which comes to the knowledge of the assessing officer as a result of the search or enquiries conducted subsequently thereafter.

So far as the present case is concerned, the matter relating to agreement for sale-cum-lease-back of the cylinders and payment of lease rent thereunder was very much a part of the disclosed operation of the assessee and all the information regarding thereto were/must have been within the knowledge of the assessing officer at the time of making the regular assessments. Even if, there was some non-disclosure of any important piece of information the assessing officer was entitled to initiate reassessment proceedings under section 147 for tackling such non-disclosure of material information. From the records it does not appear that the assessing officer got into possession certain materials directly from the search operations or any enquiries conducted thereafter. Even the disclosure made by SB before the ADI (Inv), Mangalore, was not a part of the enquiries pertaining to the search operations in the case of the assessee. Such information should have been passed on to the assessing officer every if no search had been conducted in the case of this assessee.

Hence, we are in agreement with the contentions of the assessee that so far as the instant case is concerned the addition made by way of disallowing the claim of lease rentals in respect of the cylinders cannot be considered to arise out of discovery of any material found out during the course of the search in the case of the present assessee or any subsequent enquiries conducted after the search.

Hence, from this angle, the addition as made by the assessing officer in the block assessment is liable to be deleted. We hold accordingly.

9. Even on merits also, the addition cannot stand. The grounds given by the assessing officer for considering the sale-cum-lease-back agreement to be not a genuine one and just a paper transaction seem to be, more or less, based on conjecture and not firm ones. Firstly, the assessing officer harps

on the refusal on the part of the assessee to produce the purchasers-cum-lessors. The parties being located at Mangalore, a far-distant place, the assessing officer cannot insist on producing the parties before him. At best, he could have issued a commission to the local assessing officer to question the parties concerned on the points at, issue. He has not taken recourse to such proceedings.

Thereafter the assessing officer points out the lack of distinctive numbers in respect of the cylinders and also on the absence of mentioning of the sale-own-lease-back agreement in the assets registers of the assessee. The assessing officer has not been very clear in this respect. If he says that the cylinders were never entered in the fixed assets registers of the assessee, his contention cannot stand. The cylinders must have been purchased by the assessee-company sometime back and the acquisition of the cylinders must have been recorded not only in the financial books of the assessee but also in its fixed assets registers at the time of purchase. If that be not the case (about which the assessing officer does not seem to he sure) then, the genuineness of the purchase itself would not have been challenged in the regular assessment of the assessee in the year of purchase. The assessing officer has not proceeded in that line. On the other hand, it must be that the purchase of the cylinders by the assessee were accepted as genuine and most probably depreciation also must have been granted on the said cylinders in the year of purchase. It is needed to be mentioned in this connection that the assessing officer only states in the assessment order that the cylinders were purchased by the assessee in the accounting year corresponding to the assessment year 1993-94 itself, thereafter sold to the Mangalore based parties and again leased back to it. When the purchases of the cylinders are treated by the assessing officer as genuine, we do not find any point in challenging the sale-cum-lease-back agreement in respect of the cylinders.

The factory manager at Kalyani might not have been aware of the sale-cum-lease-back agreement inasmuch as the factory manager is not supposed to know about all the financial transactions. The net effect of the sale-cum-leaseback agreement so far as the factory is concerned was virtually nil inasmuch as the cylinders which were already there continued to remain in the factory of the assessee. The same logic applies to the position of not mentioning the distinctive numbers of the cylinders in the sale-cum-lease-back agreement and also of not physical delivery of the cylinders by the assessee to the purchasers-cum-lessors and taking back the same. In an agreement like this, it is not at all necessary that the equipments will first be physically delivered to the other party then again taking the same back inasmuch as 'that will involve unnecessary logistic operation.

10. So far as the reliance of the assessing officer on the statement of Shri Manmohan Kamath is concerned, Shri Kamath never said anything going to disprove the genuineness of the sale-cum-lease-back agreement. On the other hand, he merely makes certain statements of facts about non-mentioning of the distinctive number of the cylinders in the agreement, non-witnessing the cylinders and their physical conditions and non-verifying even the physical existence of the cylinders inasmuch as, in the circumstances of the case, the two parties viz. CCI and SB, cannot be considered to be interested in such verification. The sale-cum-lease-back agreement is very much common to the commercial world and there may be various considerations behind such agreements. Simply because the cylinders were sold back by the assessee and taken on lease immediately thereafter cannot lead to the conclusion that an agreement in that regard was bogus.

The non-fulfilment of all the necessary conditions of the agreement, as discussed by the assessing officer, also seems to be rather a trivial issue. The substance of the agreement is required to be taken into account. Some of the conditions mentioned in the agreement need not be complied with very strictly. So far as this case is concerned, the fact that the assessee recorded the security deposit merely as "advances" in its accounts does not make any material difference. Again, the assessing officer himself discusses that the assessee had actually made security deposits of Rs. 11,20,000 with each of the two lessors. Subsequent treatment of a part of these security deposits by way of adjustment against the lease rentals does not make the agreement as invalid in anyway especially when the other parties did not object to such so-called deviation from the agreement.

11. The main reliance of the assessing officer seems to be on the voluntary disclosure made by SB conceding the agreement in respect of that concern to be a non-genuine one. The assessee has rightly argued that any voluntary disclosure made in the income-tax matters would only benefit the declarant. The other party would not be benefited nor also adversely affected by such disclosure simply on the basis of the said disclosure unless there are corroborating evidence. So far as the present case is concerned, there is at all no collaborating evidence to show that even the agreement with SB was also not a genuine one. So far as the agreement with CCI is concerned, not only it is that there is no disclosure, denying the agreement but also the assessing officer himself discusses that CCI contesting the treatment of the agreement as bogus in its assessment by way of further appeals, etc.

12. So far as the further finding of the assessing officer that there were subsequent proposals for resale of the cylinders by the two other parties to the assessee is concerned, there is nothing on record to show that the assessee has accepted such proposals. Furthermore, the finding of the assessing officer about the genuineness of the sale-cum-lease-back agreement is not based on this subsequent finding.

13. The treatment given by the assessing officer to the agreement as a whole suffers from 3 very serious lacuna. The assessing officer has considered the sale-cum-lease-back agreement to be non-genuine and in that way has disallowed the claim of lease rentals to the extent of Rs. 31,50,000. He has, however, completely ignored the point that another immediate result of his finding would be that even the sale itself was non-genuine. In that case, the amount of sale proceeds in respect of the cylinders, already credited to the revenue account of the assessee, will have to be deleted from the total income of the assessee. The assessing officer has not taken any measure in that regard.

14. It is also not possible to agree with the contention of the assessing officer that the assessee did not discharge its primary onus relating to the establishment of the genuineness of the sale-cum-lease-back agreements. The transaction in this regard stands concluded not only by the agreement itself but also by the entries made in the financial books of both the sides. Not only the assessee but one of the other parties also viz., CCI stands for the genuineness of the agreement. There is nothing on record to show that payments made under the agreement viz. the receipt of money by the assessee towards sale and payment towards lease rentals were not genuine financial transactions and that the monies involved therein came back to the original parties in some backdoor ways. Hence, in out view, the assessee must be considered to have discharged its primary

onus of proving the genuineness of the sale-cum-lease-back agreement. The arguments put forward by the assessing officer, as discussed above, cannot, even in a cumulative manner, impeach such genuineness. We are, therefore, of the opinion that the agreement has got to be treated as genuine and the disallowance of lease rentals under the said agreement will not stand. We, therefore, allow the appellate ground in this regard and delete the entire disallowance in respect of the lease rentals, as clamed by the assessee under the agreement.

15. As regards quantification of the amount of lease rentals, the assessing officer himself should refer to the terms of the agreement and allow only as such as is covered by the agreement. This particular direction is given simply because the assessing officer asserts that whereas the total amount of lease rentals payable under the agreement was Rs. 9,68,330 only in each case, the assessee, however, claimed an amount of Rs. 15,75,000 for each of the parties. There is no sufficient material before us to come to any conclusion as to which of the two figures is correct. In any case, we direct the assessing officer to allow that much of the lease rentals which is envisaged in the agreement and which may follow even after the expiry of the agreement provided the assessee continues to remain in possession of the cylinders thereafter.

16. In the result, the appeal filed by the assessee is partially allowed to the above mentioned extent.

N.L. Dash, J.M. 8th May, 2002 The original order in this appeal has been passed by my learned brother A.M. However, I could not persuade myself to agree with my learned brother, AM., as I find the order of the assessing officer to be a quite reasoned one and the order of the Commissioner (Appeals) confirming the assessment is also a speaking one. Therefore, I beg to differ from my learned brother and hence it would be proper to pass a separate order in this case.

2. This appeal has been filed by the assessee and there are five grounds of appeal. Ground No. 5 being general in nature does not require any specific consideration. The other four grounds are as follows :

> "(1) That, on the facts and under the circumstances of the case the Commissioner (Appeals) has erred in holding that the assessment allegedly passed by Joint Commissioner, SR-27 (AO) under section 143(3) 1158BC(c) of Income Tax Act, 1961 on 21-4-1999, is covered by decision in Calcutta High Court case in Shaw Wallace & Co. Ltd. v. Asstt. CIT (1999) 238 ITR 13 (Cal) and hence not bad in law and time-barred as well.
>
> (2) That the Commissioner (Appeals) has further erred in holding that appellant has failed to discharge its prime onus to prove that transaction of sale and lease-back of the gas cylinders was genuine when the very transaction was held to be genuine in proceedings under section 143(3) in original assessment for assessment year 1993-94 on the basis of same set of agreements and documents as were placed on record which were also found in course of search on 22-1-1997, and on basis of which order under section 158BC of the Act (under appeal) was passed by assessing officer.

(3) That on the facts and under the circumstances of the case Commissioner (Appeals) has further erred in confirming the computation of undisclosed income at Rs. 31,50,000 by assessing officer under section 158BB of the Act being lease rent paid in four years as detailed below and which was allowed in original proceeding under section 143(3) for those four years :

Assessment year Amount Rs.

1993-94 1,80,000 1994-95 1,80,000 1995-96 10,63,330 1996-97 17,26,670 (4) That for the facts and under the circumstances of the case Commissioner (Appeals) should have held that no incriminating documents having been found in course of search and the documents on basis of which assessment under section 158BC have been made being already part of assessment records for block period and audited accounts also on record of block period, assessee had no undisclosed income assessable under section 158BC and that sale and lease-back transaction was a genuine transaction as accepted earlier."

3. On a perusal of the assessment order along with the order of the Commissioner (Appeals) it has been duly observed that the assessing officer has quoted the seized materials in different paragraphs of the assessment order basing upon which, he has completed the assessment and treated the income of Rs. 31,50,000 as undisclosed income which according to the assessee's claim is payment of lease rent.

4. On a perusal of para 6 p. 6 of the assessment order it is crystal clear that one person Sri Manmohan Kamath of M/s. Commercial Corporation of India Ltd. and Srutta Builders had come to Calcutta to negatiate with the assessee-company on behalf of the lessors and as per the assessing officer, i.e., very much there in the seized paper in EGL. 6 from pp. 46 to 52.

5. As per para 6(ii) of p. 7 of the assessment order, said Mr. Kamath had admitted before the Investigating Officer of the Income Tax Department (i.e., ADIT) at the Mangalore on 20-1-1997, that :

(a) There was no distinctive number of gas cylinders.

(b) He did not see the cylinders and their conditions.

(c) He never verified the physical existence of gas cylinders either at the time of purchase or at the time of entering into lease agreement.

(d) He just got lease deed as he was instructed by Sri B.N. Ramachandra Rao.

Sri Manmohan Kamath had come to Calcutta on behalf of the lessors in order to negotiate with the assessee-company. He was sent by Mr. Rao.

As per the lease agreement the assessee-company was immediately required to deposit Rs. 11,20,000 as security with the lessors. The assessee-company has not followed this very clause of the agreement and this fact has been highlighted by the assessing officer in the assessment order (seized documents of p. 40 EGI, 34).

6. From the letter quoted on p. 8 of the assessment order, it is noticed that the assessing officer was of the opinion that depreciation was not allowable. Therefore, Sri Manmohan Kamath wrote to Mr. Agarwal (Chief Executive of the assessee-company) asking for preparing certain documents showing fictitious sale so that M/s. Srutta Builders could avail depreciation. It appears, the assessee-company did not oblige M/s. Srutta Builders for the preparation of this document. M/s. Srutta Builders had no alternative but to declare the fictitious claims of depreciation on the gas cylinders.

7. According to assessing officer as per para (v) p. 9 of the assessment order, there was no entry of sale and lease-back cylinders in the register of fixed assets maintained by the assessee-company (EGL/27).

The assessing officer has quoted some further details, i.e., the correspondence between the assessee-company and the two lessors on pp. 9 to 11 of the assessment order.

8. After discussing threadbare in the earlier para 9 p. 13 of his order the assessing officer has arrived at a conclusion that the conditions regarding payment of security and other conditions had not been acted upon by the parties as per the lease agreement. A document has no sanction of law unless it is acted upon. Therefore, the lease-back between the assessee-company and the lessors is a sham one.

9. At para 8 on p. 12 of the assessment order the assessing officer has discussed about the opportunities granted to the assessee-company to produce the lessors and according to him the lessors were not produced by the assessee-company despite several opportunities. On the other hand, the assessee insisted to issue summons under section 131 to ensure the production of the parties.

On one hand the assessing officer insisted personal appearance of the parties in order to enquire regarding the genuineness of the transaction and on the other hand, the assessee attempted to shift the onus on the revenue by requesting the assessing officer to issue summons under section 131.

The assessee has relied upon the clauses of the lease deed despite the fact that it was not acted upon. The seized papers found at the time of search proceedings clearly indicated that the transactions of the lease agreement was not genuine. Therefore, the assessing officer was right in insisting upon the personal appearance of the lessors.

10. The assessing officer has attempted to meet all the points raised by him and opposed by the assessee in the assessment order containing 16 pages along with the Annexures A and B and has given a detailed picture as to the state of affairs in the case. He even has tried to prove that the case laws cited by the assessee are wrong in the facts and circumstances of the case as is apparent from

pp. 6 to 9 of the order of the Commissioner (Appeals).

11. One of the lessors, i.e., Srutta Builders made VDIS. and disclosed the claim of their depreciation as undisclosed income in VDIS. This deduction was made consequent to the search proceedings taken in the case of the assessee. Although it is pertinent to note that in the case of VDIS declarant, the declarant can alone get the benefit, the assessee-company has tried to avail the benefit of the declarant which is not proper and legal according to the assessing officer. The Commissioner (Appeals) has endorsed the view of the assessing officer and I also have no comments against the views taken both by the assessing officer and the Commissioner (Appeals).

12. On a perusal of the order of the learned Commissioner (Appeals) containing 17 pages it was observed that the learned Commissioner (Appeals) has quoted the relevant portion of the order of the assessing officer in verbatim in his appellate order and has justified the confirmation of the assessment. In this connection, pp. 6, 10 and 16 of the order of the Commissioner (Appeals) are pertinent to be noted.

13. Ultimately, the learned Commissioner (Appeals) has agreed with the assessing officer by endorsing his views that the case of the assessee-company is fully covered by the judgment of the Calcutta High Court in the case of Shaw Wallace & Co. Ltd. v. Asstt. CIT (1999) 238 ITR 13 (Cal) and has rejected the first ground taken by the assessee.

14. In my considered opinion objective satisfaction of the assessing officer is the sine qua non of the Income Tax Act and no assessee can shift the primary onus of proving some facts on the revenue to which he asserts. I am also inclined to endorse with the view taken by the Commissioner (Appeals) at para 4 on p. 16 of his order wherein the Commissioner (Appeals) has held that the assessee had failed to discharge its prime onus to prove that the sale of lease-back of the gas cylinders was genuine. The Commissioner (Appeals) has, therefore, rightly rejected the contention of the assessee and sustained the addition of Rs. 31,50,000 as has been made by the assessing officer. I also endorse with the view of the Commissioner (Appeals).

15. Although there are four grounds of appeal but it mainly contains two points as has been discussed above. Case laws always follow the facts and not the vice versa. Hence, without going into the details of the case laws as per the record, considering the totality of the circumstances in the case and on a perusal of the available materials on record, I feel that the assessee has failed in discharging its primary onus to prove the lease-back agreement as is evident from the assessment order and seized materials. The assessee further fails to disprove the principles of law decided in the case of Shaw Wallace & Co. (supra) decided by the jurisdictional High Court wherein the jurisdictional High Court has held that the assessing officer was forbidden from making a regular assessment on the basis of the larger income if that larger income is to be included in the block assessment. Therefore, the order passed by the Commissioner (Appeals) is upheld.

16. In the result, the appeal filed by the assessee is dismissed.

Order under section 255(4) of the Income Tax Act, 1961 16 May, 2000 On hearing of this appeal by the Division Bench of the Tribunal, B-Bench, Calcutta, the Members constituting the Bench have difference of opinion on the following points :

(1) Whether, the single Bench judgment of the Calcutta High Court in the case of Shaw Wallace & Co. v. Asstt. CIT (1999) 238 ITR 13 (Cal) can still be considered to held good even after delivery of subsequent contrary decisions by the Division Benches of the same High Court in the cases of Parag Nivesh (P) Ltd. v. Dy. CIT (1999) 240 ITR 419 (Cal) and Caltradeco Steel Sales (P) Ltd. & Ors. v. Dy. CIT (2000) 14 DTC 347 (Cal-HC) : (2000) 243 ITR 643 (Cal) holding that whereas only "undisclosed income" shall form the subject-matter or 'block assessments' made under section 158BC/158BD, on the other hand all disclosed income shall be treated only in the 'regular assessment' made under section 1430/144 of the Income Tax Act, 1961 ?

(2) Whether, the disallowance of the lease-rentals of the aggregate amount of Rs. 31,50,000 can be considered to have been made out of discovery of any evidence/ materials during the course of the search in the premises of the assessee and/or any enquires conducted by the assessing officer pursuant thereto and in that way the disallowance can be considered to have correctly been made in the block assessment ?

(3) Whether a disclosure made by a third party under the VDIS can be used against the assessee without allowing the assessee an opportunity of cross-examining the other party ?

(4) Whether, on the facts and in the circumstances of the case, the assessee can be considered to rave discharged its primary onus in establishing the genuineness of the sale-cum-lease-back agreements ?

(5) Whether, because of the fact that the assessee could not produce two Mangalore-based parties before the assessing officer and the assessing officer also did not accept the assessee's request of summoning them under section 131 of the Income Tax Act, an adverse view can be taken against the assessee ?

(6) Whether, in the present case, it cannot be said that a substantial compliance of the requirements of the sale-cum-lease-back agreements was made by the parties concerned ?

(7) Whether, on the facts and in the circumstances of the case, and having special regard to the fact that the genuineness of a portion of the sale-cum-lease-back agreements was accepted by the assessing officer by way of not interfering with the inclusion, within the total income of the assessee of the amount of sale proceeds of the cylinders, the action of the assessing officer in treating the sale-cum-lease-back

agreements as non-genuine and in that way in disallowing the lease rentals is correct ?

2. Therefore, by virtue of the provisions of section 255(4) of the Income Tax Act, 1961, we refer the above points of difference to the Hon'ble President of the Tribunal for necessary action.

Jordan Kachchap, J.M. (As Third Member) 10 September, 2001 There being a difference of opinion between the learned members constituting a Division Bench the Hon'ble President, Income Tax Appellate Tribunal in view of provision under section 255(4) of the Income Tax Act has nominated me to decide the point in issue, The following are the points in issue referred to for adjudication :

(1) Whether, the single Bench judgment of the Calcutta High Court in the case of Shaw Wallace & Co. v. Asstt. CIT (1999) 238 ITR 13 (Cal) can still be considered to hold good even after delivery of subsequent contrary decisions by the Division Bench of the same High Court in the case of Parag Nivesh (P) Ltd. v. Dy CIT & Ors. (1999) 240 ITR 419 (Cal) and Caltradeco Steel Sales (P) Ltd. & Ors. v. Dy. CIT (2000) 14 DTC 347 (Cal-HC) : (2000) 243 ITR 643 (Cal) holding that whereas only "undisclosed income" shah form the subject-matter of 'block assessments' made under section 158BC/158BD, on the other hand all disclosed income shall be treated only in the 'regular assessment' made under section 143(3)/144 of the Income Tax Act, 1961 ?

(2) Whether the disallowance of the lease rentals of the aggregate amount of Rs. 31,50,000 can be considered to have been made out of discovery of any evidence/ materials during the course of the search in the premises of the assessee and/or any enquiries conducted by the assessing officer pursuant thereto and in that way the disallowance can be considered to have correctly been made in the block assessment ?

(3) Whether a disclosure made by a third party under the VDIS can be used against the assessee without allowing the assessee an opportunity of cross-examining the other party ?

(4) Whether, on the facts and in the circumstances of the case, the assessee can be considered to have discharged its primary onus in establishing the genuineness of the sales-cum-lease-back agreements ?

(5) Whether, because of the fact that the assessee could not produce two Mangalore based parties before the assessing officer and the assessing officer also did not accept the assessee's request of summoning them under section 131 of the Income Tax Act, an adverse view can be taken against the assessee ?

(6) Whether, in the present case, it cannot be said that a substantial compliance of the requirements of the sale-cum-lease-back agreements was made by the parties

concerned ?

(7) Whether, on the facts and in the circumstances of the case, and having special regard to the fact that the genuineness of a portion of the sale-cum-lease-back agreements was accepted by the assessing officer by way of not interfering with the inclusion, within the total income of the assessee of the amount of sale proceeds of the cylinders, the action of the assessing officer in treating the sale-cum-leaseback agreements as non-genuine and in that way in disallowing the lease rentals is correct ?"

2. To begin with, the assessee is a company and engaged in the business of manufacturing and sale of industrial gases and also in trading in steel items. There was a search and seizure operation under section 132 of the Income Tax Act in the business premises of the assessee, 3-A, Ripon Street, Calcutta on 22-1-1997, which continued till 23-1-1997. There was a simultaneous search and seizure operation in the factory at Kalyan and godown at 194, GIT Road, Salkia, Howrah. The search was not concluded but allowed to be continued till 8-4-1997 after passing prohibitory order under section 132(3) of the Income Tax Act and having sealed some rooms, cabinets, computer, etc. The search and seizure was finally concluded on 8-4-1997. In the course of search and seizure various incriminating documents including loose sheets were found. The assessing officer, therefore, issued a notice under section 158BC of the Income Tax Act requiring the assessee to file return of income for the block period from 1-4-1986 to 22-1-1997. The assessee filed its return of income on 27-2-1998, declaring total undisclosed income at nil.

3. In the course of examination of the seized documents the assessing officer noted that in the accounting period relevant to the assessment year 1993-94 which is part of the block period the assessee had entered into an agreement for sale and leaseback gas cylinders with M/s. Commercial Corporation of India Ltd. (hereinafter referred to as the CCIL) and Shruta Builders (hereinafter referred to as the SB). As per that agreement and the details filed by the assessee the assessee sold 750 gas cylinders each to CCIL and SB for an amount of Rs. 16,38,000 each (Rs. 15,75,000 + Central Sales Tax Rs. 63,000). The assessing officer further noted that as per the agreement and its terms and conditions the assessee-company was to make security deposit of Rs. 11,20,000 with each of the above two purchaser account less or in respect of those cylinders. He further noted that as per the terms of agreement the lease rentals were payable by the assessee to each of the lessors CCIL and SB as below :

Assessment year Amount Rs.

1993-94 90,000 1994-95 90,000 1995-96 5,32,265 1996-97 2,56,065 9,68,330

4. The assessing officer further noted the following payments by way of security deposit by the assessee to CCIL and SB.

(a) Payment to Commercial Corporation of India Ltd.

Date Amount Rs.

5-5-1993 1,80,000 8-6-1993 1,80,000 30-6-1993 1,80,000 2-7-1993 1,80,000 4-8-1993 1,80,000 7-8-1993 1,80,000 10-8-1994 40,000 11,20,000

(b) Payment to M/s. Shruta Builders :

1-12-93 5,00,000 17-2-94 5,00,000 29-3-95 1,20,000 11,20,000

5. Assessing officer further noted the following lease rent payments to CCIL :

(a) M/s. Commercial Corporation of India Ltd.

Date Amount Rs.

30-3-1993 90,000 7-10-1993 90,000 10-9-1994 2,75,000 4,55,000

(b) M/s. Shruta Builders 30-3-1993 90,000 7-10-1993 90,000 10-9-1994 2,75,000 4,55,000

6. From the above figures and facts the assessing officer came to know that although initially the assessee made payments towards security deposit to each of the two lessors but ultimately some part of the sale security deposit was adjusted and converted into lease rent, payable. From the detailed calculations as made by the assessing officer in the assessment order he found that ultimately an amount of Rs. 15,75,000 was paid to each of the lease holders by way of lease rent. The assessing officer noted that the assessee-company in its balance-sheet treated the security deposit as advance.

7. Similarly, for the assessment year 1995-96 the assessee-company paid a sum of Rs. 3,15,500 and Rs. 2,75,000 to CCIL and SB as lease rent charging the head "cylinders retention charges".

8. In the accounting year relevant to assessment year 1996-97 the assessee-company brought forward the balance of Rs. 8,63,335 in the amount of each of the less or and finally transferred to the "cylinder retention charges" account as lease rent on 31-12-1995. The assessing officer in order to verify the genuineness of the lease rent to the tune of Rs. 15,75,000 to each leasor, the details of which are as under :

SI. No. Asst. yr.

Paid to Commercial Corpn. of India Ltd.

Paid to Shruta Builders Rs.

1.

1993-94 90,000 90,000

2. 1994-95 90,000 90,000

3. 1995-96 5,31,665 5,31,665

4. 1996-97 8,63,335 8,63,335 15,75,000 15,75,000 required the assessee to explain the same. He also asked the assessee-company to produce the persons concerned of the aforesaid two companies, namely, M/s. CCEL and SB but the assessee failed to produce. However, the assessee was confronted with the statement of Shri Manmohan Kamath, son of Shri K.M. Kamath recorded by Assistant Commissioner(Inv.), Mangalore. According to the said statement Shri M.M. Kamath did not do the physical verification of the gas cylinders either at the time of purchase or at the time of entering into the lease agreement. In course of hearing the assessee-company exert to explain that in view of the agreements which were legally enforceable there was no need to produce the parties. It was explained that the sale proceeds were received by account payee draft/cheques which were duly accounted for in the books of account as well as they were deposited in the bank. The bank statement could very well be verified. It was also said that security deposits as well as lease rent were also paid to both the lessors by account payee cheques. All those transactions coupled with the legally enforceable agreement proved the genuineness of the transaction. It was emphasised that the sale-cum-leaseback transaction was well known in the commercial world.

9. The assessing officer noted that Shruta Builders, one of the lessors filed VDIS and offered for taxation the wrong claim of the depreciation on cylinders. The assessing officer required explanation. It was clarified and explained by the assessee-company it was not concerned with the action of M/s. SB who made certain disclosures in VDIS Scheme, 1997. It was their outlook as to why and under what compulsions the disclosure was made by them. Referring to the decision of the Hon'ble Supreme Court in the case Jamna Prasad Kanhaiyalal v. CIT (1981) 130 ITR 244 (SC) it was urged that benefit or immunity of VDIS, 1997, was available to declarant only and so corollary to that proposition the benefit to one could not be used as a wrong to the other. It was emphasised that since the assessee-company was not a party or part of such disclosure no adverse inference was to be drawn. It was also said that the assessee was not given any opportunity to have a say on such disclosure of the assessee.

10. Referring to the statement of Shri M.M. Kamath as to physical verification of gas cylinders it was said that since the transaction was that of sale-cum-lease-back there was no reason or necessity to give physical delivery of cylinders and again take back the same. In this connection reliance was placed on the order of the Tribunal, Pune Bench (Calcutta Bench) in the case Karam Chand Thapar & Bros. (Coal Sales) Ltd. v. Dy. CIT (1998) 66 ITD 39 (Cal) It was said that the transaction was genuine and that was why there was movement of the financial transaction only by way of receiving cheques for sale of cylinders by the assessee-company by account payee cheque/draft and vis-a-vis movement of the payment by cheque for payment of security deposit and lease rent by the assessee-company to CCIL and SB.

11. However, those various contentions did not weigh with the assessing officer. According to him M/s. CCIL and M/s. SB were closely connected companies and form part of the same confederation. He noted that before signing of the lease agreement Shri M.M. Kamath had various correspondences with the assessee-company and in that regard the assessing officer referred to for correspondences which were identified as EGL 6 (pp. 46 and 52). He noted that though the commercial transaction involved considerable heavy amount and also agreements were signed but relating to distinctive numbers of gas cylinders there was no mention anywhere. Shri M.M. Kamath also did not see the condition of the cylinders. He even accepted that he never verified the physical existence of gas cylinders either at the time of purchase or at the time of entering into the lease agreement. According to the assessing officer the lease deed was signed at the instructions of Shri A.N. Ramachandran Rao. The assessing officer further found that M/s. SB did not make any payment to the assessee-company for the purchase of cylinders rather from the letter dated 17-11-1998, from M/s SB it was clear that payment to assessee-company was made on 26-3-1993, by M/s. CCIL on their behalf. It was further noted from the letter dated 14-11-1995, that CCIL had taken loan from Maharashtra Apex Corpn. Ltd. for the payment of sale consideration. The assessing officer further noted that the terms and conditions of sale-cum-lease-back agreements were not adhered to. The assessee-company at the time of lease agreement was to pay security deposit as well as lease rent to the lessor but there were violations of that provision. To that regard the assessing officer referred to the seized document which is a letter from Shri M.M Kamath to the assessee-company. The assessing officer further found that though the assessee was maintaining register of the fixed assets which was seized and marked for identification as EGL/27 but there was no entry of the sale and lease-back of the cylinder in that register. From the materials gathered, during the search of Kalyani factory the assessee-company even the factory manager was not knowing about the sale and lease-back of cylinders by the assessee-company. The assessing officer particularly noted that from the records of the company it was not clear as to whether it had all the cylinders in its possession which the assessee-company claimed to have sold and again took back on lease. The assessing officer having further referred to two correspondence kept at pp. 68 and 69 of the seized documents identified as EGL 34 said that ultimately CCIL and SB sold back those cylinders to the assessee-company but the books of account of the assessee did not show the purchase of the cylinders till date of the search. On those various facts finally the assessing officer came to the conclusion that sale of cylinders and their lease-back was a sham transaction. The papers were created only with a view to enable M/s CCIL and SB to claim depreciation and the assessee to claim expenditure of lease rent. The assessing officer emphasised that fact of sham transaction of sale-cum-lease-back was proved from the very fact that M/s SB admitted under Voluntary Disclosure Scheme, 1997 that the transaction of the lease of gas cylinders was not existent. That fact was more clear from the information received from the Assistant Commissioner, Investigation Circle, Mangalore who vide his letter dated S-139/ SCIT(Inv)/MNG-93-94 dated 4-6-1998, informed to that effect. The assessing officer, therefore, disallowed the entire claim of lease rent expenditure of Rs. 31,50,000 of the assessee-company for different assessment years which are includible in the block period and the details of which are as below Asst. yr.

Amount Rs.

1993-94 1,80,000 1994-95 1,80,000 1995-96 10,63,330 1996-97 17,26,670 31,50,000

12. Aggrieved the assessee carried the matter before the Commissioner (Appeals). The Commissioner (Appeals) examined the matter in detail and even called for remand report from the assessing officer, having sent the written reply of the assessee-company to the questionnaire he had issued to the assessee-company. The Commissioner (Appeals) upheld the order of the assessing officer.

So against that order the assessee went in appeal before the Tribunal and there is difference of opinion among the learned Members.

13. The difference of opinions are on various counts as stated above. But they are so closely intertwined and in fact they are the texture of the same fabric do not require separate and independent finding. The questions raised would get answered with the flow of discussion of the entire facts and circumstances o the case itself.

14. The learned authorised representative of the assessee vehemently objected to the order of the Commissioner (Appeals). He submitted that neither the assessing officer nor the Commissioner (Appeals) considered the matter correctly and in right perspective with reference to the facts and law obtained in the present case. He said that the assessment under section 158BC under Chapter XIV-B of the Income Tax Act is a special provision that was the be strictly done relating to the "undisclosed income" resulted due to search an seizure operation under section 132 of the Income Tax Act. The provision of section 158B defines "undisclosed income" which reads as follows :

> "'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."

15. According to him, only those income or property were to be brought for computation under section 158BC of the Income Tax Act which were undisclosed. To elaborate his arguments and particularly to understand the nature and scope of undisclosed income as defined under section 158B of the Income Tax Act, the learned authorised representative of the assessee referred to decision of Bangalore Bench of the Tribunal in the case of Kirlosker Investments & Finance Ltd. v. Asstt. CIT (1998) 67 ITD 504 (Bang). He particularly drew the attention of the Bench to the head notes of the decision which reads as under :

> "The definition of undisclosed income as was redrafted limiting to the entries in the books of account or documents or transactions earlier read any income based on any entry in the books of account or other documents or transactions, where such 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. The bare reading of the above gives the literal meaning of undisclosed income as income which is represented wholly or partly by the entry in

the books or documents or transactions that has not been so disclosed or would not have been disclosed. To put in other words, the undisclosed income is that income which is entered in the books of account and as supported by the documents and the transactions as other than as income while in reality the entries in books, documents and the transactions represent income. The other intent is with reference to some property shown in the books, documents and transactions but the source of its acquisition is not explained or established, the said property is said to represent source of undisclosed income.

The undisclosed income covers any entry in the books of account or other documents or transactions which wholly or partly income or property which has not been or would not have been disclosed for the purposes of the Act. Further, from the reading of the provision contained in section 158BB of the Act that describes the manner of computation of undisclosed income specifically to sub-section (2) of that section which states that in computing the undisclosed income for the block period, the provisions of sections 68, 69, 69A, 69B and 69C shall so far as be, apply and references to 'financial year' in those sections shall be construed as references to the relevant previous year falling in the block period including the previous year ending with the date of search or of the requisition", it gives an impression that the undisclosed income includes those that are treated as deemed incomes like cash credits under section 68; unexplained investments under section 69; unexplained money, etc. not recorded in books under section 69A; investment not fully disclosed in the books under section 69B and unexplained expenditure under section 69C of the Act.

Further, the definition of undisclosed income talks of income based on any entry in the books, documents or transactions that has not been or would not have been disclosed for the purposes of the Act but, it nowhere states that the entry in the books is so made that has the effect of reducing the income that is recorded in the books or documents or transactions would be part of the undisclosed income."

16. He said that the undisclosed income could be unearthed in the cases in which the returns were filed but did not disclose the income or property and similarly completely there was no return or any disclosure of the income or property. He said that in the case of the present assessee though there was a search and seizure operation on 22-1-1997, and 23-1-1997, and even thereafter intermittent search on some of dates but no undisclosed income was found. He said that the authorities below of the revenue made out the case that undisclosed income was the outcome of the bogus transaction relating to sale-cum-lease-back of the cylinders. He said that there was no question of any concealment or not disclosure of the transactions relating to the sale-cum-lease-back of the cylinders by the assessee. Rather there was a complete disclosure about the sale-cum-lease-transaction which was before the assessing officer right before the search as well as even thereafter. He said that the assessment was completed for the assessment year 1993-94 on 22-1-1996, by accepting the genuineness of the sale-cum-lease-agreement. The assessment was a scrutiny assessment under section 143(3) of Income Tax Act. For the assessment year 1994-95 the

return of income was processed under section 143(1)(a) of the Income Tax Act on 8-9-1995, and thereafter even the regular assessment under section 143(3) of the Income Tax Act was made. Further, the assessment for 1995-96 was completed on 31-3-1998, and lastly the regular assessment for the assessment year 1996-97 was also done on 15-5-1998. All these assessment years are constituents of the block period and in none of the assessment years the genuineness of the sale-cum-lease agreement was questioned though all the seized materials were with the assessing officer for some of these assessment years except for assessment year 1993-94. He referred those assessment orders compiled at pp. 26 to 38 of the paper book. According to the learned authorised representative of the assessee in the facts and circumstances of the case, therefore, it could not be said that the assessee had concealed any income or that it had undisclosed income which the revenue unearthed or found on account of search and seizure operation under section 132 of the Income Tax Act. The learned authorised representative of the assessee said that the provision of Chapter XIV-B could be applied only for undisclosed income. Since out of the search nothing was found out excepting some information in the shape of a statement of Mr. Kamath and some information from Assistant Commissioner, Investigation. Circle, Bangalore relating to VDIS made by M/s Shruta Builders which could have been secured otherwise also by the assessing officer it should not be said that if the revenue found out undisclosed income of the assessee.

17. The learned authorised representative of the assessee submitted that the learned Commissioner (Appeals) was not correct to say that since there was an assessment under section 158BC of the Income Tax Act the assessments already completed under section 143(3) should be done afresh. He said that approach of the learned Commissioner (Appeals) which was based on a judgment of a Single Judge of the Hon'ble Calcutta High Court in the case of Shah Wallace & Co. v. Asstt. CIT (1999) 238 ITR 13 (Cal) was not correct because that decision of Single Judge was overruled by subsequent decisions of Division Bench in the said case of Dy. CIT v. Shah Wallace & Co. Ltd. (2001) 248 ITR 81 (Cal) The learned authorised representative of the assessee said that even prior to that decision jurisdictional High Court in the case of Caltradeco Steel (P) Ltd. v. Dy. CIT (2000) 158 CTR (Cal) 369 held that the assessment for disclosed income and assessment for undisclosed income on account of search and seizure could be carried out simultaneously but separately. The learned authorised representative of the assessee added that in the present case also the assessments were already completed could not be reopened to be assessed in view of the provisions under section 158BC of the Income Tax Act under Chapter XIV-B. He reiterated that in the course of search no undisclosed income either in the form of money, bullion, jewellery or other article or thing were found nor was there any material by way of any profit in the books of account or other documents or transaction on the basis of which income or property could be said to have been unearthed. The entire transaction of sale-cum-lease-back of the cylinders were fully disclosed and even assessed in a regular manner. Its genuineness was never doubted. The information or materials which the search party found or collected during the search could at best be utilized by the revenue to question the earlier assessment under section 263 of the Income Tax Act or for reopening of assessment under section 147 of the Income Tax Act. But those materials or information's were not capable or strong enough to give the vent that the assessee-company had concealed income or that undisclosed income or property was garnered in consequence to search and seizure. To elaborate and strengthen his arguments further he relied on some of the following decisions :

1. Smt. Raj Rani Gupta v. Dy. CIT (2000) 66 TTJ (Bom) 582

18. In that case certain gifts were found to have been received from friends and relatives. The assessment was completed treating those gifts as undisclosed income of the assessee that the same were found during search and seizure. The Tribunal disapproved that assessment because such gifts were already considered for addition in the regular assessment. The necessary details relating to those gifts were already there. He referred to the case of Agarwal Motors v. Asstt. CIT (2000) 66 TTJ (Jab) 130. In that case also the cost of construction was computed as undisclosed income under section 158BC of the Income Tax Act. The Tribunal disapproved that assessment also because all the investments were already recorded there in the books of account. Similarly, the learned authorised representative of the assessee further relied on the decision in the case of CIT v. Vinod Danchand Ghodawat (2000) 163 CTR (Bom) 432. In that case also in consequence to search and seizure block assessment was done relating to gold ornaments, silver articles and utensils. The Tribunal disapproved the assessment because those gold ornaments, silver articles and utensils were also declared by the assessee in its earlier return of wealth-tax and that were duly assessed. He further relied in the case of Kairoos M. Bhaya v. Dy. CIT (1998) 100 Taxman 165 (Mum-Trib). In that case commission and brokerage were treated as undisclosed income by the revenue but since they are found to be reflected in the balance-sheet the addition was deleted. In the recent case the Hon'ble Gujarat High Court upheld the order of the Tribunal in the case of N.R. Paper & Board Ltd. v. Dy. CIT (1998) 234 ITR 733 (Guj). In that decision it was clarified that already disclosed income could not be held to be undisclosed income. Even similar was the position in the case of Prag Nivesh (P) Ltd. v. Dy. CIT (1999) 240 ITR 419 (Cal). In this case it was said that when the income of the assessee for the assessment year in question was subject-matter of the Settlement Commission the proceedings under section 158BC/BD was not correct. The learned authorised representative of the assessee on the basis of these various decisions reiterated that once all the facts relating to the sale-cum-lease-back were before the revenue there was no question of any concealment or not disclosing the material facts. At best it could have been the matter for reopening of the assessment under section 147 of the Income Tax Act but could not be the case to be considered under section 158BC of the Act in Chapter XIV-B.

19. Even otherwise and without prejudice to the above, on merits and factual aspects of the case also no addition should be made treating the aforesaid rental payment by the assessee to CCIL and SB as undisclosed income under section 158BC of the Income Tax Act, the learned authorised representative maintained. He said that sale-cum-lease-back transaction is not new phenomenon in the commercial world. That was very familiar and was done or carried out by the business concern in order to accentuate or tone up their commercial and financial position at times within framework of law. In the present case also the assessee sold 750 cylinders each to CCIL and SB for a consideration amount of Rs. 16,38,000 each (cost Rs. 31,50,000 + sales-tax Rs. 1,26,000). It was emphasised that the sale amount was received by account payee cheque by the assessee-company and that was duly credited in the assessee's bank account in bank of Baroda, Barbourne Road Branch, Calcutta on 5-4-1993. In the course of his arguments he referred to the bank statement compiled at pp. 1 to 13 and drew the attention of the Bench towards credit entry. The learned authorised representative of the assessee said that the sale of cylinders could not be doubted and in fact the assessing officer himself at p. 7 of the assessment order recorded the fact that CCIL took

loan from Maharashtra Apex Corpn. Ltd., Syndicate House, Manipur, for the payment of sale consideration to the assessee. The said sales-tax were paid to the Central Government and to that regard the learned authorised representative of the assessee referred to pp. 52 to 54 of the paper book. It was emphasised by the learned authorised representative of the assessee that if the transaction would have been bogus there was no question of making payment of sales-tax to the tune of Rs. 1,63,000. The attention of the Bench was drawn towards the challan making payment of Central Sales Tax that details of the same and also certificate issued by the Central Sales Tax Department as well as correspondence from CCIL to the assessee-company. The learned authorised representative of the assessee further submitted that as per lease agreements the assessee paid Rs. 11,20,000 to each of the buyers/lessor towards security deposit and to that regard the learned authorised representative of the assessee referred to annexure 'E' compiled with the paper book. Complete details of cheque No. with date and the entry in the bank statement were shown. The learned authorised representative of the assessee again referred to bank statement in order to show that from time to time when payment was made towards security deposits the account of the assessee in the bank got detailed. The learned authorised representative of the assessee further said that payment of lease rent were also made by cheque from time to time and to that regard the learned authorised representative of the assessee referred to p. 2 of Annexure E wherein complete details were given. He submitted that in fact the security deposits in due time got adjusted towards the payment of lease rent totalling Rs. 36,50,000. He said that because the assessee made entries of the security deposits as advance towards lease rent did not lead to show that there was a gross violence of covenant or conditions of the lease. It was emphasised that in fact that lease agreement was followed in substance and some minor detraction in following the terms of the lease would not lead that the aforesaid transaction of sale-cum-lease-back was bogus. The learned authorised representative of the assessee, further said that the authorities below of the revenue doubted the genuineness of sale-cum-lease-back transaction on the ground that the assessee did not produce the responsible persons from CCIL and SB. It was said that since there was valid agreement and all transactions were carried out through bank there was no need to doubt the same. The learned authorised representative of the assessee said that even otherwise also since the CCIL and SB were located far away from Calcutta the assessee found it difficult to produce them and that is why the assessee requested the assessing officer through its letter dated 22-3-1999, compiled at pp. 41 to 43 to issue summons under section 131 of Income Tax Act upon CCIL and SB. The learned authorised representative of the assessee said that the assessing officer neither issued summons nor even he felt it desirable to get responsible persons from CCIL and SB examined on commission by the jurisdictional assessing officer. The learned authorised representative of the assessee further said that because no distinctive number was mentioned about the cylinders in the lease papers that failure also could not attribute to come to a conclusion that the sale-cum-lease-back transaction was bad. No doubt during the course of his statement during section 132(5) proceedings Shri M.M. Kamath stated that he did not physically verify the cylinders either at the time of purchase of cylinders or while giving the same on lease to the assessee-company. It could be imprudence on the part of the purchaser/lessor. The learned authorised representative of the assessee said when all the financial transactions were genuine and routed through the banks no such precautions was taken to give the distinct numbers and also verify the distinctive number and conditions of the cylinders. It was emphasised that in fact virtually there was no need for physical movement of the cylinders from assessee-company to the lessors and again from lessors to the assessee. It was said that this minor

or trifle lacuna or disabilities could not be taken for granted that the sale-cum-lease-back transaction was bogus. It was said that since on the cylinders 100 per cent depreciation was claimed and as such in the asset register they were not entered but certainly there were mention of the same in the movement register of the cylinders at factory in Kalyani. It was added by the learned authorised representative of the assessee that manager of the Kalyani factory where the cylinders have actually been used might not be knowing the financial transaction of the company with CCIL and SB because as submitted earlier there was no physical movement of the cylinders from the assessee-company to the purchasers/lessors i.e., CCIL and SB and again back from them to the assessee-company. The learned authorised representative of the assessee submitted that the authorities below of the revenue harked much on the disclosure made by SB under section 68(2) of the VDIS Scheme, 1997. In that regard the learned authorised representative of the assessee referred to copies of the said certificate compiled at p. 46 as well as letter dated 4-6-1998, from Assistant Commissioner, Investigation Circle, Mangalore, compiled at pp. 44 and 45. The learned authorised representative of the assessee said that if a third party did anything for their own benefit the assessee could not be put in jeopardy for their acts. He said that the consequence of VDIS should not be directed towards the assessee and to that regard he referred to the decision of the Hon'ble Supreme Court in the case of Jamuna Prasad Kanaihya Lal v. CIT (supra). He said that any immunity or benefit granted under VDIS was limited to the declarant only and so on the same analogy since the benefit was being limited to the declarant itself negative effect of VDIS should not be stretched to the other party particularly when the other party whose interest was being effected was not given any opportunity to explain the action of that third party. The learned authorised representative of the assessee said that if SB for its benefit made a declaration that should be for its own limited benefit and no adverse inference or effect should be conceived against the assessee. The learned authorised representative of the assessee further said that it might be that since the SB leased back the cylinders of assessee-company in its wisdom it thought that it was not entitled to depreciation and that was why thought VDIS surrendered depreciation already claimed. The learned authorised representative of the assessee submitted that it was not correct that there was an understanding between the assessee-company at one hand and CCIL and SB on the other that after the expiry of the lease period the assessee-company would make such arrangement as though it again purchased back the cylinders. The learned authorised representative of the assessee said that there was no such understanding or any kind of agreement in between the parties. The revenue did not bring any material in appeal record to support such proposition. The learned authorised representative of the assessee, therefore, reiterated that neither in law nor on facts the lease rent should be disallowed 'taking the same as undisclosed income. While parting with his submissions the learned authorised representative of the assessee said that the authorities below of the revenue should not breath hot and cold at the same time. Explaining the matter he said that the assessing officer did not question the sale of cylinders because whatever the assessee disclosed by way of its income through sale of cylinders that assessing officer, readily accepted the same and taxed it. But when the question of making payment of lease rent came he disallowed payments whereas the entire payments were by account payee cheques. When assessing officer should have considered the entire sale-cum-lease-back transaction as bogus, he should not have taken sale amount as income of assessee. Assessing officer should not be allowed to take one part of the whole transaction as genuine and another part as bogus on conjectures and surmises only as there were some minor discrepancies here and there. He reiterated that disallowing the payment of lease rent to the tune of

Rs. 31,50,000 as undisclosed income of the assessee based on bogus sale-cum-lease-back transactions was unjustified and bad in law. He urged to delete the same.

19.1. On the other hand, the learned Departmental Representative of the revenue primarily relied on the order of the authorities below. He said that assessment under section 158BC under Chapter XIV-B of the Income Tax Act was rightly done because the sale-cum-lease-back transaction being bogus, was found out due to the materials gathered during the search and seizure operation under section 132 of the Income Tax Act. He said that regular assessments for assessment year 1993-94, 1994-95, 1995-96 and 1996-97 might have been done holding the said sale-cum-leaseback transaction as genuine because all material facts were not before the authorities below. He reiterated that the said transaction being bogus and sham was the outcome of search and seizure. In course of his arguments having gone through some of the paras of the assessment order as well as the order of the Commissioner (Appeals), the learned Departmental Representative pointed out why and in what manner the sale-cum-lease-back transaction was sham and bogus. Concising his submissions he said that in course of search and seizure various materials were brought to light on the basis of which it could easily be tainted that the said sale-cum-lease-back transaction as bogus or fake. He said that the transaction was bogus as apparent from the fact that one of the so-called lessor Shruta Builders (SB) disowned that if there was any lease transaction of the cylinders by it to the assessee-company in its declaration in VDIS Scheme, 1997 and to that regard he referred to p. 46 of the paper book the assessee in which the certificate issued under section 68(2) of VDIS, 1997, is placed.

He further said that it was very unusual that even those two purchaser-cum-lessor who purchased cylinders from the assessee-company did not inspect or verify the existence of cylinders not even at the time of leasing the same to the assessee-company. In this regard he referred to the statement of Shri M.M. Kamath compiled at pp. 39 to 40 of the paper book. The statement was recorded by Assistant Commissioner (Investigation), Mangalore. He added that even the factory manager at Kalyani who was keeping account of all those cylinders of the assessee-company was not in know of sale-cum-lease-back transaction of the cylinders. The learned Departmental Representative of the revenue emphasised all these factual aspects including other circumstantial evidences were there to establish and prove that actually there was no sale of cylinders by the assessee to CCIL and SB and lease-back of the same by those two buyers to the assessee-company. The learned Departmental Representative of the revenue urged to sustain the order of the authorities below because according to him the block assessment was rightly made relating to undisclosed income of the assessee which was wrongly claimed by way of expenditure incurred towards payment of lease rent of the cylinders.

20. I have heard the rival submissions and gone through the appeal record, material available in the appeal record and in particular the dissenting decision of learned Members. I have also gone through and considered various decisions which were placed before the Bench and also though various points which have been referred to for consideration but as I have already mentioned that all these issues or points are so intractably interlaced and connected that it would be somewhat difficult to take up the same one by one. Rather the answer to those issues will come up from the flow of discussion itself and that is why I am dealing them conjointly excepting that on the issue that whether Single Bench judgment of the Calcutta High Court in the case of Shah Wallace & Co. (supra)

is to be still followed particularly when there are two subsequent decisions giving a contrary view to the decision of Single Bench judgment.

21. It is to be reiterated that in this case assessment has been done under section 158BC/143(3) of the Income Tax Act for the block period from 1-4-1986 to 22-1-1997. The assessment under section 158BC of Chapter XIV-B of the Income Tax Act is a special as assessment particularly dealing with undisclosed income of the assessee which has been unearthed or found during the course of search and seizure operation carried out under section 132 of the Income Tax Act. In order to have a clarity we may refer to provision of section 158B(b) of the Income Tax Act which defines undisclosed income :

> "158B. In this chapter, unless the context otherwise requires,
>
> (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."

22. To understand undisclosed income in a wide perspective perhaps the decision of Special Bench of Tribunal Bangalore Bench in the case of Kirlosker Investment & Finance Ltd. v. Asstt. CIT (supra) is to be referred to. The Special Bench has very elaborately explained the nature and scope of undisclosed income. The extract of the decision is already referred above. That apart following are some of the decisions which also go to explain the nature and scope of undisclosed income under section 158B(b) of the Income Tax Act :

1. Microland Ltd. v. Asstt. CIT (1998) 67 ITD 446 (Bang);

2. Smt. Rajrani Gupta v. Dy. CIT (supra);

3. Dr. C. Balakrishnan Nair & Ors. v. CIT & Anr. (1999) 237 ITR 70 (Ker);

4. Agarwal Motors v. Asstt. CIT (supra);

5. CIT v. Vinod Danchand Ghodwat (supra);

6. Harishkumar J Gupta v. Dy. CIT (2000) 69 TTJ (AD) 440.

7. Sou. Vidya MadanIal Malini v. Asstt. CIT (2000) 74 ITD 341 (Pune);

8. Prakash Tulsidas v. Asstt. CIT (2000) 68 TTJ (Nag) 479;

9. D.N. Kamani (HUF) v. Dy. CIT (1999) 70 ITD 77 (Pat) (TM); and

10. J.K. Narayanan (HUF) v. Asstt. CIT (1999) 69 ITD 104 (Mad) (TM).

23. From the definition of the disclosed income under section 158B(b) and various decisions as referred to it is manifest that undisclosed income may be tangible object as well as intangible which can be found or got apart from tangible object on the basis of any entry in the books of account, documents or transaction. Those undisclosed income of both tangible and intangible can be said to be undisclosed if they are found in course of search and seizure which have not been disclosed or would not have been disclosed for the purpose of this Act and they are unearthed or found on account of search and seizure operation. Here in the instant case, according to the revenue, the undisclosed income of the assessee has been found or unearthed in shape of payment of lease rent on the basis of a bogus sale-cum-lease-back transaction. The payment of lease rent for the cylinders has been claimed as a deduction which the assessee is not entitled. This undisclosed income of the assessee has been found out in course of search. This plea of the revenue, I am afraid, cannot be sustained in view of facts and circumstances of the present case as are obtaining. Has the assessee-company concealed sale-cum-lease-back transaction with the department ? I do not think so. For it is to be noted that the assessee first claimed payment of the lease rent to CCIL and SB for the first time in the assessment year 1993-94. In that year all documents were placed before the assessing officer. Assessee's claim for lease rent was accepted. The regular assessment was done under section 143(3) of the Income Tax Act on 21-1-1996. For the assessment year 1994-95 the return of income initially was processed under section 143(1)(a) of the Income Tax Act but the regular assessment was completed under section 143(3) of the Income Tax Act. Again for assessment year 1995-96 the regular assessment under section 143(3) was made on 31-3-1998, and even for assessment year 1996-97 the regular assessment under section 143(3) of the Income Tax Act was made on 15-5-1998. These assessment years are constituent of the block period and particularly relating to which the lease rent has been considered as undisclosed income of the assessee by the revenue while completing the assessment under section 158BC of the Income Tax Act. For assessment years 1993-94 and 1994-95 which are the prior period of the search and seizure it can be said that all materials were not there before the assessing officer but for the assessment years 1995-96 and 1996-97 the regular assessment under section 143(3) of the Income Tax Act have been done whereas all the seized materials were before the assessing officer. Under these circumstances it cannot be said that the assessee had concealed or muffled by dint of entries in the books of account its income? I do not think that it is a case of concealment of income by the assessee-company which has been found or unearthed due to the search and seizure. No doubt during the search and seizure certain materials have been gathered which render sale-cum-lease deeds as doubtful but certainly those materials are not strong enough to taint the said transaction of the sale-cum-lease-back of cylinders as a bogus transaction. Therefore, I agree with the contentions of the learned authorised representative as well as the decision given by the learned AM that at best on the basis of those materials which have been gathered during the search and thereafter the proceedings under section 147 can at best be resorted to or that the assessment should have been questioned under section 263 of the Income Tax Act but certainly it is not a case where an assessment is to be made under section 158BC of the Income Tax Act. It was be clarified and as the learned Departmental Representative of the revenue has also accepted that in view of the two subsequent decisions of the jurisdictional High Court of Calcutta in the case of Caltradeco Co. Steel. (P) Ltd. v. Dy. CIT (supra) and Dy. CIT v. Shah Wallace & Co. Ltd. (2001) 248 ITR 81 (Cal), now it is

clear that assessment under 158BC in view of Chapter XIV-B of the Income Tax Act can be made for undisclosed income of the block period and at the same time the regular assessment under section 143(3)/144 can also be made independently for disclosed income. So in view of these decisions the observations made by the learned Commissioner (Appeals) that both types of assessment cannot go together is not correct. It is to be reiterated that all the material facts were before the assessing officer right from the assessment year 1993-94 onwards and when the scrutiny assessment have been made under section 143(3) of the Income Tax Act any concealment or withholding the information by the assessee-company cannot be conceived of. It is reiterated that if some materials have been found on the-basis of which the said sale-cum-lease-back transaction can be taken as doubt it case a of assessment under section 158BC of the Income Tax Act. At best on the basis of those seized materials the assessment can be reopened under section 147 of the Act or the same be questioned under section 263 of the Income Tax Act. As has been contended by the learned authorised representative of the assessee that even on the basis of the seized materials the sale-cum-lease-back transaction cannot be said bogus. This contention of the learned authorised representative of the assessee has some merits. The assessee has entered into an agreement for sale of 750 gas cylinders each to CCIL and SB for a consideration of Rs. 32,76,000 (cost of cylinders Rs. 31,50,000 + Central Sales Tax Rs. 1,26,000) and in pursuance of that agreement the assessee-company sold the same to those buyers. The assessee received the amount through account payee cheque/draft which was duly accounted for in the books of account of the assessee and the cheque/draft was deposited in the bank. The bank statement is placed in the appeal record wherein there is entry of the aforesaid amount of Rs. 32,76,000. As per agreement of the lease-back the assessee was to pay Rs. 11,20,000 to each of the buyers/lessor towards security deposits. Those amounts were paid by cheques/drafts the details of which can be seen at annexure 'E'. compiled in the paper book. The DD as well as the cheque No. with dates and amount have been given even the clearance of those DD and cheque with dates are given, highlighting the bank statement with colour. A legal and enforceable agreement has been entered into by the assessee-company with Commercial Corpn. of India Ltd. and Shruta Builders. There is nothing on the appeal record to show that if those agreements are bad in law or not enforceable by dint of any legal lacuna. It is to be noted that the assessee also paid lease rent either by DD or by account payee cheque both to CCIL and SB time to time, the details of which can be seen at p. 2 of annexure 'E'. In view of these bona fide bank transactions and agreement duly enforceable in law I do not think that sale-cum-lease-agreements is a bogus transaction. It is to be noted that assessee paid Central Sales Tax also to the tune of Rs. 1,26,000. The entire documents relating to correspondence, challans, certificate from commercial departments are placed at pp. 52 to 57 of the paper book. If the transaction would have been bogus or spurious there was no question of payment of the Central Sales Tax to the tune of Rs. 1,26,000. The assessing officer himself has recorded that cash loan from M/s. Maharashtra Apex Corpn. Ltd. for making payment of the consideration amount of assessee-company.

24. It is to be further noted that the revenue has questioned the genuineness of sale-cum-lease-back transaction because the assessee failed to produce the responsible persons from CCIL and SB. However, it is to be pointed out that there must have been some genuine difficulty for the assessee-company to produce responsible persons from CCEL and SB because those companies were situated at Bangalore and that is why the assessee made a request to the assessing officer to issue summons under section 131 to both the parties. The request letter of the assessee-company

dated 22-3-1999, is placed at pp. 41 to 43 of the paper book. The assessing officer neither issued summons under section 131 nor even made any request by way of commission to the jurisdictional assessing officer. The assessing officer has wide power to coerce the attendance of the required person but that has not been done and attributed this failure of the assessee to produce the persons as one of the causes to hold that the said sale-cum-lease-back transaction was bogus which cannot be acceptable. Other allegation is that it is very unusual that though a commercial transaction of considerable amount has been carried out for purchase of lease-back but neither physical existence of cylinder was verified nor the distinctive numbers or the existing conditions of the cylinders issued into and to that regard reference has been made to the statement of Shri M.M. Kamath. This plea also of the revenue is not sufficient to render the said sale-cum-lease-back transaction as bogus. It can be an act of imprudence on the part of the purchaser but certainly it has nothing to do with the genuineness of the said sale-cum-lease-back transaction. In sale-cum-lease-back transaction since the goods or material in question remained with the seller itself there does not seem any necessity to go for such a minute detail and for physical verification even there is no need for giving delivery of the same to the purchaser and again taking back. The learned authorised representative of the assessee as well as the learned AM have rightly appreciated the facts and have said that in sale-cum-lease-back transaction there is no need of physical delivery of the goods. This being the state of affairs naturally the manager at Kalyani factory of the assessee-company may not be knowing about the sale of cylinders of the assessee-company and taking the same back on lease and as such his statement showing the ignorance about sale-cum-lease-back transaction cannot be said to be a point to hold that the transaction is bogus. The Tribunal Calcutta Bench in the case of Karam Chand Thapar & Bros. v. Dy. CIT (1998) 66 ITD 39 (Cal) has held that in cases of sale-cum-lease-back transaction the physical delivery is not at all relevant. The revenue has pointed out also that because the transaction was bogus and that is why the conditions of sale-cum-lease-back transaction have not been carried out. The assessing officer noted that as per the terms of the lease the assessee-company as to pay certain amount by way of periodical instalments but instead of paying the instalments it adjusted the security amount towards the lease rent and also in the books of account security deposits have been shown as advance. I do not think that if this infraction of the terms of transaction is so serious. What has to be seen is whether the agreement of sale-cum-lease-back transaction has been complied in substance or not. The learned A.M. has rightly observed that for minor or trifle infraction of the conditions will not tantamount a major disobedience of the conditional or covenant of the agreement. From p. 2 of annexure 'F' it is to be noted that assessee paid lease rent time to time to the tune of Rs. 4,55,000 both the CCIL and SB and finally adjusted Rs. 11,20,000 each from the security deposits and in that way the total lease rent was Rs. 31,50,000. In my considered view and as the learned AM has observed that in fact the conditions of sale-cum-lease-back transaction has substantially been complied with so far as it relates to payment of lease rent.

25. It has also been pointed out by the revenue and much reliance has been placed that SB filed its declaration in VDIS 1997 Scheme offering Rs. 10,54,668 for the assessment years 1993-94 and 1994-95 as income against wrong claim of depreciation on the gas cylinders. According to the letter dated 4-6-1998, from Assistant Commissioner, Investigation, Mangalore, also it is to be seen that according to him the sale-and-lease-back of 750 gas cylinders by the assessee-company was bogus. However, it is to be pointed out that patently this aspect of the case appears to be serious but it is to

be pointed out that it is a matter of third party and one has to accept the contentions of the assessee that no adverse inference should be drawn with respect to the aforesaid VDIS declaration by SB. It is a settled law in view of the decision of Hon'ble Supreme Court in the case of Jamuna Prasad Kanahaya Lal v. CIT (supra) that the benefit or immunity, if any, on account of any declaration made is limited to the declarant only. So on same analogy no adverse effect or wrong can be caused to other party. This contention of the assessee has some force and that has to be accepted. The Hon'ble Supreme Court in the cases 130 ITR 244 (supra) and ITO v. Ratan Lal & Ors. (1984) 145 ITR 153 (SC) and also Delhi High Court in the case of Addl. CIT v. Popular Jewellers (1984) 149 ITR 666 (Del) have also held that for action of a third party without giving opportunity to have its say the same cannot be used adversely.

26. Non-mentioning of question (sic-quantity) of cylinder in assets register is also not a big cause to render the sale-cum-lease-back transaction a sham or bogus transaction. For authorised representative has clarified that since assessee had taken the benefit of 100 per cent of depreciation so there was no mention of these cylinders in fixed assets register for written down value being nil but their whereabouts are always recorded in movement register of the cylinder kept at factory premises at Kalyani.

27. In this case one thing is to be noted that the assessing officer has not been fair and impartial. If according to him the entire sale-cum-lease-back transaction was bogus in that situation he should not have assessed the income the assessee offered on sale of cylinders to CCIL and SB. This action of the assessing officer shows that he himself is not sure as to how to proceed with the whole affair. The assessing officer cannot breathe hot and cold in the same time. In my considered view, therefore, I hold that the sale-cum-lease-back transaction cannot be held to be bogus merely on some minor discrepancies here and there as stated above. I am constrained to point out in fact the learned JM has not recorded his dissenting order having considered the matter analytically dealing with the submissions of both sides. He appears to have simply pointed out some of the paras of the assessment order and has given his final opinion that assessment under section 158BC is correct. To the contrary the learned AM has examined the matter with details considering all the facts and circumstances of the case including the submissions from both sides and various decisions placed before the Bench. I agree with conclusion of learned AM. that it is not a case where assessment under section 158BC of the Income Tax Act is to be made for the block period 1-4-1986 to 22-1-1997. The disallowance of the expenditure on account of lease rent to the tune of Rs. 31,50,000 is a genuine expenditure and that has to be allowed.

28. Let the case, therefore, now be placed before the Division Bench for passing the order in accordance with majority opinion.

Pramod Kumar, A.M. 20 November, 2001 There being a difference of opinion between the learned Members constituting the original Bench, the matter was referred to a Third Member.

2. In accordance with the majority view, we delete the addition of Rs. 31,50,000 on account of disallowance of lease rental payments under the lease agreements entered into between the assessee and M/s Commercial Corpn. of India Ltd. and between the assessee and M/s. Shruta Builders.

3. In the result, the appeal is partly allowed.