IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.63 of 2000

For Approval and Signature:

HONOURABLE MR. JUSTICE AKIL KURESHI
HONOURABLE MS. JUSTICE HARSHA DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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DY. CIT (ASSTT) - Appellant(s)
Versus
HARISHKUMAR J. GUPTA - Opponent(s)

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Appearance:
MR VARUN K.PATEL for Appellant(s): 1,
MR BANDISH SOPARKAR for MR SN SOPARKAR for Opponent(s): 1,

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CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI

and

HONOURABLE MS. JUSTICE HARSHA DEVANI

Date : 16/07/2012

ORAL JUDGMENT
(Per : HONOURABLE MR. JUSTICE AKIL KURESHI)

1. This appeal filed by the revenue involves the

following substantial question of law which was framed by this court while admitting the appeal:-

> “Whether the Appellate Tribunal was right in law in directing the Assessing Officer to exclude the income of Rs.12,21,105/- from the block period and assess it in accordance with law while framing the regular assessment, and in doing so, ignored the provisions of sec.158BB(c) of the Income-tax Act?”

2. The question arises in the following factual background. The respondent assessee is assessed to tax as an individual. He was subjected to search and seizure operations. He was served with a notice dated 14-9-1996 issued under section 158BC of the Income Tax Act, 1961 (hereinafter to be referred to as 'the Act') for the block period from 1-4-1985 to 31-3-1995. In response to such notice he filed a return on 7-11-1996 declaring total undisclosed income at Rs.50,000/-. While processing such return, the Assessing Officer dealt with several different issues. We are, however, concerned with only one of them pertaining to the salary income of the respondent assessee received by him during the block period. Details of such salary received by the assessee during five years falling within the block period and tax collected at source on such income are as under:

Asstt. Year	Income	Tax Paid
1986-87	52,300	5,437
1987-88	56,205	6,289
1988-89	75,644	11,997
1994-95	4,65,105	1,54,700
1995-96	5,71,851	1,61,124

Total...	12,21,105	3,39,547
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3. The Assessing Officer confronted the assessee with such income received by him and called upon him why such income should not form part of the undisclosed income of the assessee for the block period by virtue of the provisions contained in section 158BB(1)(c). After hearing the assessee, the Assessing Officer formed an opinion that such income would form part of the undisclosed income of the block period. The assessee's contention that on such salary income, the employer had deducted tax at source and also deposited the same with the Department was not accepted. The Assessing Officer was of the opinion that since in case of three assessment years i.e. 1986-87, 1987-88 and 1988-89, the assessee had filed no return and for the assessment years 1994-95 and 1995-96, the assessee had filed returns after the last date for filing regular returns, such income disclosed in the returns filed late cannot be adjusted in terms of clause (c) of sub-section (1) of section 158BB of the Act.

4. The assessee carried the issue in appeal before the Income Tax Appellate Tribunal ('the Tribunal', for short). Before the Tribunal, the assessee contended that such income cannot be treated as undisclosed income of the assessee. The assessee was a salaried employee. TDS on such salary was deducted. In support of such contention, the assessee also produced details of salary certificates in Form 16. The assessee contended that therefore, the income declared in the returns, though filed belatedly, cannot be considered as undisclosed income.

5. The Tribunal was of the opinion that the information contained in the returns was not unearthed by the Department consequent to the search. Such income for the relevant assessment years cannot be considered as undisclosed income of the assessee. The Tribunal was of the opinion that section 158BB of the Act prescribes the method of computing the undisclosed income of a block period, however, before making any such computation, the existence of undisclosed income must be shown.

6. It is this judgment of the Tribunal which the revenue has challenged before us in the present appeal.

7. Appearing for the appellant, learned counsel Shri Varun Patel placed heavy reliance on the statutory provisions contained in section 158BB and in particular, clause (c) of sub-section (1) thereof. He contended that for the years during which the assessee filed no return, no adjustment of the salary income can be made from the total income of the block period for the computation of undisclosed income of the said period. He submitted that even in the later two years when the returns were filed, admittedly the same having been filed beyond the last date for filing such returns, income of salary disclosed in such return cannot be set off for computation of undisclosed income of block period.

8. Learned counsel Shri Bandish Soparkar, however, opposed the appeal. He submitted that undisputably on the salary income received by the assessee, the employer had deducted tax at source and deposited the same with the Government. That being so, such income cannot be treated as

undisclosed income.

8.1 The counsel submitted that section 158BB of the Act only provides the mechanism for computation of undisclosed income and unless and until a certain income falls within the definition of “undisclosed income”, the same cannot be brought within the fold of the block period by virtue of section 158BB of the Act.

8.2 In support of his contentions, the counsel relied on the following decisions:-

(i) Assistant Commissioner of Income-Tax vs. A.R. Enterprises reported in 274 ITR 110
(ii) Commissioner of Income-Tax vs. Kerala Roadways Ltd. reported in 322 ITR 609
(iii) Surendra Kumar Lahoti vs. Assistant Commissioner of Income-Tax reported in 300 ITR 124
(iv) Dr. Mrs. Alaka Goswami vs. Commissioner of Income-Tax reported in 268 ITR 178
(v) Commissioner of Income-Tax vs. Ashok Taksali reported in 257 ITR 352

9. Having thus heard learned counsel for the parties, we may, at the outset, notice the statutory provisions applicable in the present case. Chapter XIV-B of the Act provides for special procedure for assessment of search cases. Section 158B contains definitions. Clause (b) of section 158B defines undisclosed income as under:-

“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."

10. Section 158BA pertains to assessment of undisclosed income as a result of search. Sub-section (1) of section 158BA provides that notwithstanding anything contained in any other provisions of the Act, where after 30th June, 1995 a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in case of any person, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter. Sub-section (2) of section 158BA provides inter alia that the total undisclosed income relating to the block period shall be charged to tax, at the rate specified in section 113, as income of the block period irrespective of the previous year or the years to which such income relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

11. Section 158BB of the Act pertains to computation of undisclosed income of the block period. Relevant portion of such provision as it stood at the relevant time reads as under:-

> "**158BB**. (1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or

information as are available with Assessing Officer, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined,-

(a) where assessments under section 143 or section 144 or section 147 have been concluded, on the basis of such assessments;

(b) where returns of income have been filed under section 139 or section 147 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;

(c) where the due date for filing a return of income has expired but no return of income has been filed, as nil"

12. From the above statutory provisions, it can be seen that section 158BA of the Act makes substantive provision for collection of tax at a uniform specified rate for the entire block period on the undisclosed income. Sub-section (2) of section 158BA, as already noted, provides for the rate at which such tax shall be collected. On the other hand, section 158BB provides for computation of such undisclosed income of the block period. Such provision is thus a machinery provision providing for mechanism for computation of the undisclosed income of the block period. Clause (b) of section 158B defines the term undisclosed income. It would, thus, be clear that to levy tax at a specified rate on an income of a block period, such income must first be established to be undisclosed income. If such income can be treated as undisclosed income, tax at a specified rate as provided under sub-section (2) of section 158BA can be collected. While doing so, the method of computation of undisclosed income is provided in section 158BB of the Act. Essentially therefore, to tax any income in

the block period as an undisclosed income, the same must come within the definition of undisclosed income provided in clause (b) of section 158B of the Act. It would not be appropriate to apply a computation provision to decide whether a certain income is undisclosed income or not. Therefore, even if the bare reading of section 158BB(1) may, at the first blush, seem to be advancing the case of the revenue as put forth by the counsel namely since the assessee filed no returns or filed returns after the last date for filing such returns, no reduction in the gross total income be permitted by virtue of clause (c) of section 158BB(1), looking more closely, it becomes clear that such a provision cannot be read in isolation to categorise an income as undisclosed income of the block period which income otherwise is not undisclosed as defined in section 158B(b) of the Act.

13. The courts have been drawing a clear distinction in taxing statutes between a charging provision and a mechanism provision. In case of **Gursahai Saigal vs. Commissioner of Income-Tax, Punjab** reported in 48 ITR 1, the Apex Court noted the distinction in approach of statutory interpretation of a taxing provision vis-a-vis a mechanism provision contained in a taxing statute. It was observed that the rule of strict construction applies only to a taxing provision and has no application to all provisions in a taxing statute. Such a principle would not apply to a provision not creating a charge over the tax but laying down the machinery for its calculation or procedure for its collection. It was observed that the provisions in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction.

14. In case of **Commissioner of Income-Tax, Central Calcutta vs. National Taj Traders** reported in 121 ITR 535, the Apex Court reiterated this principle that the rule of strict interpretation of a taxing statute does not apply to machinery provisions.

15. In case of **Commissioner of Income-Tax vs. Punjab Financial Corporation** reported in 254 ITR 6, the Full Bench of Punjab & Haryana High Court once again highlighted this aspect that a strict interpretation of taxing statute would apply to charging provision and not to machinery provisions.

16. The distinction between a charging provision in a taxing statute and a procedural or machinery provision is thus a well-recognised distinction. By interpreting a machinery or a computation provision, the scope of the charging provision obviously cannot be enlarged. In that view of the matter, we are of the opinion that unless income in question can be categorised as undisclosed income of a block period, charging tax on such income at the rate specified for the block period by applying computation provision of section 158BB of the Act would not be permissible. With this background in mind, we may peruse the law developed on the issue.

17. At the outset, we may notice that a somewhat similar case came up before a Division Bench of this court in the case of **Commissioner of Income-Tax vs. Vishnu Prasad C. Mehta** in Tax Appeal No.951/2009. In an unreported decision dated 29-11-2010, this court ruled in favour of the assessee. In the said case, the assessee who was

a salaried employee was subjected to block assessment. Before the revenue authorities, he contended that on the salary income which he had received from the employer, tax was deducted at source and was deposited with the Income Tax Department. Such income, therefore, cannot be treated as an undisclosed income. This court taking note of such facts held and observed as under:-

> "11. In the facts of the present case, it is case of the revenue that the salary income of the assessee is undisclosed income. Examining the facts of the present case in the light of the definition of undisclosed income, it is an admitted position that tax had been deducted at source in relation to the salary income of the assessee. It is not the case of the revenue that tax deducted at source had not been disclosed by the employer or that the same had not reached the coffers of the Government. As noted hereinabove, for the purpose of falling within the ambit of the undisclosed income, the income should be such which has not been or would not have been disclosed for the purposes of the Act. When the tax has been deducted at source in respect of the salary income of the assessee and no tax is payable in addition thereof in respect of the said income, it cannot be said that the said income is undisclosed income inasmuch as in the TDS returns filed by the employer before the Income tax Department, the same would have been duly reflected as income of the assessee. Thus, salary income in relation to which tax has been deducted at source cannot be said to be undisclosed income within the meaning of the said term as envisaged under section 158B(b) of the Act.
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> 12. This view finds support from the decision of the Madhya Pradesh High Court in the case of ***Surendra Kumar Lahoti vs. Assistant Commissioner of Income Tax***, 2005 (300) ITR 124 (M.P.) wherein the Court after considering the decisions of various High Courts has held that salary disclosed by the assessee on which tax at source was deducted could not have been treated as undisclosed income. The decision of the Rajasthan High Court in the case of ***Commissioner of Income Tax vs. Ashok Taksali***, 2002 257 ITR 352 also takes the same

view. It has been held that income from salary of the assessee for the block year, after tax deducted at source has been deducted and the same has not been refunded back to the assessee, has to be excluded while computing tax as there is not question of taxing the income when the income tax has been deducted at source. The other decisions on which reliance has been placed on behalf of the assessee also support the aforesaid view.

13. Examining the issue from another angle as is apparent from the table reproduced in the order of the Tribunal, no tax over and above the tax deducted at source was payable by the assessee in relation to the salary income. Thus, though the assessee had not filed his return of income for the years under consideration, the total tax payable in respect of the said income had already been paid. The provisions of the Act, both under Chapter XIV-B as well those providing for assessment and reassessment of income escaping assessment have been introduced for the purpose of taxing untaxed income. The Act does not envisage double taxation in respect of the same income. In the present case, the salary income of the assessee has already been brought to tax, albeit by way of tax deducted at source and not by filing a regular return on income. Nonetheless, the income has been subjected to taxation under the provisions of the Act. In the circumstances, in absence of any additional tax being payable on the salary income of the assessee, the question of taxing the said income once again merely because the assessee had failed to file a return in respect of the same would not arise. The said ground of appeal, therefore, does not merit acceptance."

18. In case of **Assistant Commissioner of Income-Tax vs. A.R. Enterprises** reported in 274 ITR 110, the Madras High Court held that the income on which the assessee had paid advance tax, cannot be treated to be his undisclosed income. The High Court held as under:-

"16. We are, therefore, of the considered opinion, that the observations made in *B. Noorsingh's* case [2001] 249 ITR

> 378 (Mad), would only have a bearing on the point whether the assessee is entitled to file the return after the expiry of the due date, particularly after the conduct of search, but would not eschew the statutory consequence of advance tax paid by the assessee while deciding the income alleged to have been undisclosed by the assessee in spite of the self-assessment made under section 139 read with section 140A of the Act, while paying his advance tax."

19. In case of **Commissioner of Income-Tax vs. Kerala Roadways Ltd.** reported in 322 ITR 609, a Division Bench of Madras High Court dismissed the revenue's appeal where the assessee had suffered tax deduction at source from certain income which was sought to be added by the revenue in the undisclosed income of the block period on the ground that the assessee had filed the return of income after the search was conducted.

20. In case of **Surendra Kumar Lahoti vs. Assistant Commissioner of Income-Tax** reported in 300 ITR 124, the Madhya Pradesh High Court held that when a salaried employee suffers deduction of tax at source, he should be treated to have disclosed his income to the Department. Such income, therefore, cannot be treated as undisclosed income for the purpose of block assessment. The High Court observed as under:-

> "11. In view of the several clear enunciations we are clear in our mind that the salary income disclosed by the assessee on which tax at source was deducted could not have been treated as undisclosed income. We may also pronounce upon the fact in view of the clear enunciations of this court in *Purshottamlal Tamrakar* [2004] 270 ITR 314 that the income which is below the taxable limit cannot be taxed merely because the return has not been

filed before the date of the search and seizure."

21. In case of **Dr. Mrs. Alaka Goswami vs. Commissioner of Income-Tax** reported in 268 ITR 178, a Division Bench of Gauhati High Court held that the income disclosed by the assessee on payment of advance tax cannot be treated as undisclosed income. The Bench held and observed as under:-

> "Under clause (d) of sub-section (1) of section 158BB while assessing the aggregate of the total income, the income recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous year shall be taken into consideration where the previous year has not ended or the date of filing the return of the income under sub-section (1) of section 139 has not expired. When the assessee is required to file the self-assessment for payment of the advance tax before the income-tax authorities the return of assessment would fall within the documents maintained in the normal course by the assessee and as such the income disclosed on payment of the advance tax would fall within clause (d) of sub-section (1) of section 158BB. In any case although there is a difference between the regular assessment and the block assessment, as we have already noticed, unless the provisions of the block assessment specifically bar the assessing authority from taking into consideration the income disclosed by the assessee on payment of the advance tax to be taken into consideration, the income disclosed by the assessee on payment of advance tax would be an income disclosed to the Revenue and cannot be treated as an income undisclosed for the relevant assessment year. Learned counsel for the Revenue could not point out any provision on the basis of which we can hold that the income disclosed on payment of advance tax cannot be treated as disclosure of income, by virtue of a particular statutory provision under Chapter XIV-B of the Act."

22. In case of **Commissioner of Income-Tax vs.**

Ashok Taksali reported in 257 ITR 352, the Rajasthan High Court came across a similar question. The Bench was of the opinion that once a salary income of the block year has been taxed and such tax has been deducted at source, there is no question of holding that the income of the assessee was undisclosed income of the block period. It was observed as under:-

> "In short, the Tribunal is right and justified in holding that from the income from salary of the assessee for the block year if tax deducted at source has been deducted and the same has not been refunded back to the assessee, there is no question to tax that income again when tax deducted at source has already been deducted. The salary income has been excluded from computing the tax, there is no question of accommodation of tax deducted at source amount against any other income of the assessee received, or income other than salary income."

23. From the above, it can be seen that there is unanimity of opinion between different High Courts of the country on the issue. When an assessee is a salaried employee and on such salary income, suffers deduction of tax at source and such tax is also shown to have been deposited by the employer with the Revenue, it can hardly be stated that such income is undisclosed income. Additionally, we also notice that under section 192 of the Act, under certain circumstances, the employer is required to deduct tax at source on salary income. Section 199 of the Act provides for credit of such tax deducted at source. Section 205 of the Act provides for a bar against direct demand of tax where such tax is deductible at source.

24. Upon overall consideration of the statutory

provisions noted hereinabove and the judicial trend brought to our notice, we are of the opinion that in the present case, the salary income of the assessee on which he had been subjected to deduction of tax at source, cannot be categorised as "undisclosed income" as defined in section 158B(b) of the Act. That being the position, bringing such income within the fold of income to be taxed during the block period by virtue of the computation provision of section 158BB would not arise.

25. Before closing, we may record that both sides relied on the decision of the Division Bench of this court in the case of **N.R. Paper and Board Ltd. and other vs. Dy. C.I.T.** reported in 234 ITR 733. To our mind, however such decision would have no direct application in the present case. The decision concerns the question of assessment of block period vis-a-vis the normal assessments. The issue which we are called upon to decide in the present appeal was not before this court in the case of N.R. Paper (supra).

26. In the result, we answer the question in the affirmative i.e. in favour of the assessee and against the revenue and dismiss the appeal.

(Akil Kureshi, J.)

(Harsha Devani, J.)

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