IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.VIJAYAKUMARAN, JM and SANJAY ARORA, AM

I.T.(SS)A. No. 4/Coch/2009
Block period ending on 09.11.2000

The Deputy Commissioner of Income Tax, Circle-1, Alappuzha	**Vs.**	M/s.Boban Jagannath Shinde & A.Rahim, Palakulam Veliyil, Ashramam Ward, Alappuzha.
(Revenue-Appellant)		**(Assessee-Respondent)**

Revenue by	Ms. S. Vijayaprabha, DR
Assessee by	Shri K.R.Sudhakaran Pillai, Adv.-AR

Date of hearing	27/07/2011
Date of pronouncement	24/08/2011

O R D E R

Per Sanjay Arora, AM:

This is an Appeal by the Revenue arising out of the Order by the Commissioner of Income-tax (Appeals)-IV, Kochi ('CIT(A)' for short) dated 18.12.2008, and the block period under reference is 1.4.1990 to 9.11.2000, the date of search.

2.1 The facts of the case in brief are that there was a search u/s. 132 of the Income-tax Act, 1961 ('the Act' hereinafter) on 09/11/2000 at the business and residential premises of the assessee, one of the suppliers to the A.V.J. Group of Jewellers, dealing in gold ornaments, which was also raided at its various premises on that date, viz. Alappuzha, Mavelikara and Cherthala. The assessee was running a gold refining and ornaments manufacturing unit at Alleppey named 'Durga Gold Works'. Though doing the said business for the last several years, he was not filing any return of income in respect to the same.

2.2 Several documents in relation to the business activities of Sh. Boban Jagannath Shinde were found and seized, and statement of Smt. Nanda B Shinde, his wife, recorded on oath; he being not available. Subsequently, he was also summoned u/s. 131 of the Act and his statement recorded on 20.11.2000. Notice u/s. 158BC of the Act was accordingly issued on 8.3.2001 by Asstt. CIT, Inv. Circle, Kottayam. The assessee did not file any return of income in Form 2B in response thereto, even as the jurisdiction over the case was assigned to Central Circle, Kottayam. The assessee expired on 22.1.2002 and, accordingly, his legal representatives, being his wives, Smt. Nanda B.Shinde (supra) and Smt. Suman B.Shinde, i.e., after bringing them on record, were show caused on 21.10.2002, calling for their objections. The assessee pleaded financial hardship being faced by the late Sh. Shinde's family, consisting of his two wives and seven children. The Assessing Officer (AO) of the person searched, i.e., Asstt. CIT, Central Circle, Kottayam, was of the view that it was apparent from the details available in the seized books marked as MKA-4, MKA-5, MKA-6 up to MKA-18, of the `assessee' being in joint business with Shri A.Rahim, manufacturing and selling gold ornaments on wholesale basis, during the period June, 1998 to Jan, 1999. The same also evidenced the profit being earned from the said business, which was at an average of ₹60,000/- per month, so that an income of ₹4,80,000/- was liable to be brought to tax. So, however, as it was clear that the income was being earned by the assessee in joint business with Shri A.Rahim, the same was hence to be assessed only in the hands of the Association of Persons (AOP) consisting of the two. Accordingly, after seeking prior approval from the Addl. Commissioner on 26.11.2002, the AO concerned, i.e., of the person searched, closed the assessment as a Nil demand case. Fresh proceedings on the assessee-AOP were initiated by the issue of notice u/s. 158BC on 12.3.2003. No return of income was again filed. The AO, after recording the assessee's objections, and considering the same, framed the assessment in the hands of the AOP at an undisclosed income of ₹4.80 lakhs.

2.3 In appeal, however, the same found favour with the ld. CIT(A) on several counts. Firstly, the notice, being issued only on 12.3.2003, was time barred; the search having been conducted on 9.11.2000, the assessment u/s. 158BD ought to have been completed by November, 2002. Secondly, no satisfaction was recorded by the AO concerned, which, along with the transfer of the materials leading to an inference of undisclosed income in the hands of the assessee, would only lead to an assumption of jurisdiction by the assessee's AO. Further, the Revenue had assessed the share of Shri A.Rahim also in the AOP's income, and which stood already assessed in his individual hands. It was, therefore, not open to it to take a different stand and assess the balance income in the hands of the AOP, i.e., the same can only be assessed in the hands of Sh. Boban J. Shinde in his individual capacity. Lastly, there was no basis that the Revenue/AO for estimating the income of the appellant, which, being undisclosed income, had necessarily to be based on the materials found in search, and `estimation' had no place in the computation of undisclosed income. The assesseee's appeal was, accordingly, upheld by the ld. CIT(A). Aggrieved, the Revenue is in appeal.

3. We have heard the parties, and perused the material on record. We shall take up each of the several issues raised per the impugned order, being agitated by the assessee, in seriatim. The assessee's first contention, raised with reference to the copy of the notice dated 12/3/2003 initiating proceedings (PB pg. 1), is that the proceedings are vitiated as it is not a notice u/s. 158BD but only u/s. 158 BC. That is, no notice u/s. 158 BD, in fact, stands issued to it; the notice initiating proceedings issued on 12.3.2003 being only u/s. 158BC. *How could an assessment u/s. 158BD r/w 158BC be framed in the absence of any notice u/s. 158BD*? Further, if it is to be treated as a s. 158BC notice, the same is barred by time, even as held by the ld. CIT(A). The assessee's third objection, and which also found favour with the ld. CIT(A), is the absence of any satisfaction being recorded by the Assessing Officer of the person searched. Reference stands made by the assessee in this context to the decision in the case of *Subhas Chandra Bhaniramka vs. CIT* (2010); 32 ITR 349(Cal.); *Manoj Aggarwal vs. CIT* (Dy.) (2008) 113 ITD 372 (Del.)(SB) and *CIT(Dy.) vs. Flair Builders P. Ltd.* (2010) 3 ITR (Trib.) 158 (Delhi).

3.1 Firstly, the warrant of authorization being admittedly not in the name of the assessee-AOP, the notice dated 12.3.2003 is only a notice u/s. 158BD r/w s. 158BC of the

Act. *The assessment framed under Chapter XIV-B on recourse to s. 158BD is only u/s. s. 158BC, even as provided for s. 158BD itself.* That is, the mention of `sec. 158BC' on the notice is not incorrect as the notice is in fact for framing an assessment there-under, though issued with reference to s. 158BD, so that a more proper description of it would be as a notice u/s. 158BC r/w s. 158 BD. At the maximum, it could be said that there has been an omission to write `sec. 158BD' on the notice, which cannot by any stretch be considered as fatal. It is trite law, as explained by the apex court, as far back as in the case of *Hazari Mal Kuthiala vs. ITO* (1961) 41 ITR 12 (SC), that the exercise of power by the AO would be referable to a jurisdiction that confers validity to it rather than one which renders it nugatory, and that where he has the jurisdiction to assess, a mere mention of a wrong section would not vitiate the proceedings. The statute is to be read in a manner that makes it workable rather than otherwise (refer, *inter alia*, *M.V.ahajan Borewell & Co*. (1998) 230 ITR 1 (SC)). The notice is also saved by s. 292B of the Act, even as pointed out by the ld. DR during the hearing. There is no question of the notice issued to the assessee being one u/s. 158BC, i.e., solely, as contended by the assessee; the same having been done vide notice dated 8.3.2001; the proceedings initiated whereby came to a close vide order u/s. 158BC r/w s. 143(3) of the Act dated 27.11.2002. The question of the notice being time barred, would also, therefore, not arise; the same being only with reference to the notice u/s. 158BC (refer: s. 158BE), with the assessment in the instant case having been completed on 11/3/2004, i.e., within the time available therefor up to 31/3/2005.

The Revenue has followed the correct procedure. Finding that the income reflected per the seized material as being in fact *qua* a different assessee, the AO of the person searched, i.e., Sh. Boban J. Shinde, individual, closed the proceedings already initiated, and fresh proceedings in the case of the assessee, an AOP of the person searched along with another person, were commenced, by the issue of notice thereto, and the former having expired, on the another person, Sh. A. Rahim, as well as the LRs of the late Sh. Boan J. Shinde, as a member/s of the assessee-AOP, requiring filing of a true and correct return of the undisclosed income of the AOP for the block period ending 9.11.2000 There is no ambiguity in the notice, which clearly specifies (from among the different statuses) that the return of income called for is of the AOP (refer the assessment order dated 27/11/2002 in the case of Sh. Shinde (individual); the impugned assessment order; and the `Statement of Facts' before the ld. CIT(A)).There is also no question of any transfer of jurisdiction, for s.127 to have any application in the facts and circumstances of the case and, accordingly, the decision in the case of *Subhas Chandra Bhaniramka vs. CIT* (supra) is not applicable. In that case the proceedings initiated were dropped due to the AO not having the jurisdiction to assess the assessee, an individual, the subsequent notice to whom, by his AO, required him to file the return of the company as well.

3.2 As regards the question of `satisfaction', we are completely at loss to understand as to how the assessee considers its case as covered by the afore-referred decisions. The person searched, i.e., Shri Boban Jagannath Shinde, was subject to search on 9.11.2000, and it was only on the basis of materials seized thereat, as well as his statement recorded u/s. 131, and that of his wife u/s. 132(4), which led to the AO concerned coming to a firm conclusion that the undisclosed income of his business, i.e., manufacture and sale of gold ornaments on wholesale basis, was being carried out jointly with Shri A. Rahim, so that the income of the said business would only be assessable in the hands of the AOP comprising the two. The existence of the AOP is not disputed; the law in the matter being even otherwise settled by the apex court, and reiterated by the hon'ble jurisdictional high court, as in the case of *CIT v. T.V. Suresh Chandran*, 121 ITR 985 (Ker.). It was on this basis alone that proceedings u/s. 158BC were closed on Shri Boban J. Shinde, the person searched, as a Nil demand case by his AO on 27.11.2002. *How could then the assessee plead of there being no `satisfaction' by the AO of the person searched or of the same having not been recorded*? *On the contrary, it is patent, in writing, and manifest on record*. It is only this satisfaction held by the AO of the person searched, i.e., of the undisclosed income under reference being of the assessee that led to the closure of the proceedings on the person searched and initiation of proceedings u/c. XIV-B in the assessee's case. The order dated 27/11/2002 (<u>copy on record/PB pg. 2-6</u>) itself is ample testimony of the same – what is it if not the satisfaction by the concerned AO? *Further, how did, and on what basis, one may ask, the relevant records came to the* *assessee's AO, leading to the issue of notice u/s. 158BC r/w s. 158BD on 12/3/2003*? In fact, there is mention of the correspondence exchanged between the AO of the person searched, the Addl. Commissioner, Central Circle, Kottayam, and the assessee's AO in the latter's remand report dated 18/3/2008, referred to and reproduced at para 4.5 of the impugned order. The hon'ble jurisdictional high court in the case of *CIT vs Panchajanyam Management Agencies and Services* (2011) 239 CTR (Ker.) 424 is squarely on the point, further clarifying the law in the matter. It has, thereby, reversed the decision by the Tribunal, which stands relied upon by it in the case of *Soudha Gafoor vs. ACIT* (in IT(SS)A Nos. 113 & 135/Coch/2004 dated 9.5.2008), being relied upon by the assessee (PB pg. 7). The said decision by the hon'ble jurisdictional high court stands rendered after considering the decision of the apex court in the case of *Manish Maheswari vs.CIT*, 289 ITR 341 (SC). It stands accepted therein that s. 158BD is only an enabling provision for assessment of income (of the person other than the person searched) inferable from the materials or information seized or found as a result of search. There is no requirement under the Act, either u/s. 132 or u/s. 158 BD, for the AO to record his satisfaction in writing. Whenever the Legislature so intended, it made the requirement explicit, as in the case of s. 148(2). The satisfaction is only for the purpose of transfer of the files. That the satisfaction has to be a *prima facie* one, though in the present case it is explicit, is even otherwise trite law, as explained per a number of decisions, as in the case of *Rushil Industries Ltd. v. Harish Prakash*, 251 ITR 609 (Guj.); *Priya Blue Industries (P.) Ltd. v. CIT (Jt.)*, 251 ITR 615 (Guj.); *Harvey Heart Hospitals Ltd. v. CIT (Asstt.)*, 130 TTJ (Chennai) 700.

The issue as regards `satisfaction' has been, and again after considering the decision of the apex court in the case of *Manish Maheswar*i (supra), as well as in the case of *Manoj Aggarwal vs. CIT* (supra), stands considered by the Bangalore Bench of the tribunal in the case of *Subhan Javeed vs. CIT (Asst.)*, 122 ITD 307 (Bang.). When the satisfaction of the AO having jurisdiction over the person raided was clearly inferable from the records, including the assessment order u/s. 158BC and other relevant documents, it could definitely be said that he held the requisite satisfaction, so that there was, on a transfer of the files/record to the AO of the assessee, a sufficient compliance to assume jurisdiction u/s. 158BD. The facts in the instant case are also self-speaking. Assessment u/s. 158BC, which was initiated on Sh. Boban J. Shinde in his individual capacity was closed only on the basis of the finding that the undisclosed income was earned from his joint business with Shri A.Rahim and, consequently, was to be assessed in the status of an AOP comprising the two, i.e., the present assessee (PB pg. 6).

3.3 We, therefore, find no merit in the assessee's legal objections. We decide accordingly.

4. The next grievance raised by the assessee is in relation to the quantum, stating it to be an ad-hoc estimate, and not based on the seized materials. In this regard, we find the Revenue's consistent stand, based on the seized material, as well as the statement of Sh. Boban J. Shinde, particularly answers to Q. Nos. 9 to 14 of his statement recorded u/s. 131 on 20.11.2000 (referred to in the SOF), is of an earning at an average of ₹60,000/- per month during the period June, 1998 to January, 1999, i.e., the period for which the details were available. Accordingly, it is not understood as to how the quantum is being impugned by the assessee. The estimate *per se* is not precluded in the block assessment, but only that the same has to be based on materials or information available with the AO in relation to evidence found in search or relatable thereto. The seized materials referred to at para 2 above, as well as the statements u/s. 132(4) and s. 131, are only evidence found as a result of search. This is again a subject matter of settled law, for which we may refer to some decisions, as: *Hotel Kumar Palace vs. CIT*, 283 ITR 110 (P&H); *Rajnik and Co. vs. CIT (Assistant)*, 251 ITR 651 (A.P.); *CIT vs. Rajendar Prasad Gupta*, 248 ITR 350 (Raj.); *Napar Drugs (P.) Ltd. v. CIT (Dy.)* (2006) 98 ITD 285 (Del.)(TM).

Further on, both during the proceedings u/s. 158BC, as initiated on the person searched, as well as during the current proceedings, the assessee was confronted with the proposed addition (refer para 6 of the assessment order). The assessee's only explanation, we find, besides financial hardship, is that Shri A.Rahim having returned income for A.Y. 1999-2000 in response to notice issued to him by the Investigation Wing of the Department, taxing the same in the assessee's hands would amount to double taxation. In fact, before the ld. CIT(A) it was also agitated, and which also found her favour, that Shri A.Rahim having been assessed on his share of income from the joint business in his individual capacity, the Revenue could not adopt a different stand, so that Shri Boban Jagannath Shinde could only be assessed in respect of his share, and in the individual capacity only. We are not impressed with the assessee's stand. An income can only be assessed in the right hands, and its being taxed in the hands of the other, even if so; it being nowhere proved with any material on record that Shri A.Rahim had returned any part of his share of income from the said joint business, could not be a ground for not assessing the same in the hands of the right person. This is trite law [refer: *I.T.O. vs. Ch. Atchaiah* (1996) 218 ITR 239 (SC)]. In fact, the argument itself proves the Revenue's case of the two being in joint business, with Sh. A. Rahim admitting to his share in the income therefrom, and which we find to be rather for a higher sum, both for AY 198-99 & AY 199-2000. Further, if and to the extent returned, the proper recourse available for Shri A. Rahim would be to seek a modification of his assessment by recalling his assessment of the said share, having been brought to tax in the case of the AOP.

In fact, the instant assessment is u/s. 144, i.e., a best judgement assessment; the assessee having not filed the return of undisclosed income. The same though has been framed following the principles of natural justice, and the assessee granted opportunity of being heard in the matter, prior to being assessed on the basis of the materials gathered and available with the AO. The ld. CIT(A) herself has rejected the assessee's ground in its respect, stating that the AO had resorted to the provision of s. 144 only on account of non-cooperation by the assessee. The assessment u/s. 144 is under the given facts and circumstances of the case, just and valid. This would meet the assessee's reliance on the decision in the case of *T.C.N. Menon vs. CIT*, 96 ITR 148 (Ker.).

So, however, we find, on the basis of the remand report dated 18/3/2008, that the Sh. Shinde, per his statement dated 20/11/2000, has clearly stated that his joint business (with Sh. A. Rahim) continued up to 15.1.1999. Accordingly, the quantification of the undisclosed income could not extend up to January end, as made by the AO; the Revenue having not contested the same, rather basing its case thereon. The assessee gets part relief on quantum. We decide accordingly.

5. In the result, the Revenue's appeal is partly allowed.

sd/-	sd/-
(N.VIJAYAKUMARAN)	(SANJAY ARORA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Ernakulam
Dated: 24th August, 2011
GJ
Copy to:

1. M/s. Boban Jagannath Shinde & A.Rahim, Palakulam Veliyil, Ashramam Ward, Alappuzha.
2. The Asst. Commissioner of Income Tax, Circle-1, Alappuzha.
3. The Commissioner of Income-tax (Appeals)-IV, Kochi.
4. The Commissioner of Income-tax, Kottayam.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.