

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **INCOME TAX APPEAL NO. 127/2012**

Reserved on : 1st August, 2014

Date of decision: 11th November, 2014

COMMISSIONER OF INCOME TAX, CENTRAL-1, NEW DELHI

..... Appellant

Through Mr. Rohit Madan, Mr. P. Roychaudhury
& Mr. Akash Vajpai, Advocates.

versus

SHAILENDRA MAHTO

..... Respondent

Through Mr. Ajay Burman & Mr. Aditya
Swarup, Advocates.

INCOME TAX APPEAL NO. 128/2012

COMMISSIONER OF INCOME TAX, CENTRAL-1, NEW DELHI

..... Appellant

Through Mr. Rohit Madan, Mr. P. Roychaudhury
& Mr. Akash Vajpai, Advocates.

versus

SIMON MARANDI

..... Respondent

Through Mr. Ashok Sikka, Advocate.

INCOME TAX APPEAL NO. 131/2012

COMMISSIONER OF INCOME TAX, CENTRAL-1, NEW DELHI

..... Appellant

Through Mr. Rohit Madan, Mr. P. Roychaudhury
& Mr. Akash Vajpai, Advocates.

versus

JHARKHAND MUKTI MORCHA

..... Respondent

Through Ms. Prem Lata Bansal, Sr. Advocate
with Mr. Ram Avtar Bansal & Mr. Naman
Nayak, Advocates.

INCOME TAX APPEAL NO. 133/2012

COMMISSIONER OF INCOME TAX, CENTRAL-1, NEW DELHI

..... Appellant

Through Mr. Rohit Madan, Mr. P. Roychaudhury
& Mr. Akash Vajpai, Advocates.

versus

SHIBU SOREN

..... Respondent

Through Ms. Prem Lata Bansal, Sr. Advocate
with Mr. Ram Avtar Bansal & Mr. Naman
Nayak, Advocates.

INCOME TAX APPEAL NO. 137/2012

COMMISSIONER OF INCOME TAX, CENTRAL-1, NEW DELHI

..... Appellant

Through Mr. Rohit Madan, Mr. P. Roychaudhury
& Mr. Akash Vajpai, Advocates.

versus

SURAJ MANDAL

..... Respondent

Through Ms. Pratiksha Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.:

These appeals by the Revenue, Commissioner of Income Tax, Central-1, New Delhi, are being disposed of by this common judgment as identical and connected issues arise for consideration. The impugned order dated passed by the Income Tax Appellate Tribunal ('Tribunal', for short) is dated 2nd September, 2011 and is a common order to the five cases. By order dated 4th September, 2012, the following substantial questions of law were admitted for hearing:-

“(i) Did the Tribunal fall into error in holding that the amount brought to tax by the AO is not undisclosed income?

(ii) Did the Tribunal fall into error in setting-aside the findings of lower authorities that the amounts deposited by the assessee with the bank were not taxable as income?”

2. These appeals pertain to block assessment periods of ten years beginning from 1st April, 1986 to 26th April, 1996 in the case of Shibu Soren, Suraj Mandal, Shailender Mahto and Simon Marandi. In the case of the said respondent-assessee, notice under Section 158BC of the Income Tax Act, 1961 (‘Act’, for short) was issued. In the case of Jharkhand Mukti Morcha party (‘JMM’, for short), notice under Section 158BD read with Section 158BC was issued and the block assessment period is from 1st April, 1986 to 27th September, 1996.

3. In the block assessment proceedings of the individual assessee, the Assessing Officer had made the following additions:-

ITA No.	Name of Assessee	Block Period	Additions (Rs.)
133/2012	Shibu Soren	01.04.1986 to 26.04.1996	1,16,38,824/-
128/2012	Simon Marandi	01.04.1986 to 26.04.1996	53,53,620/-
127/2012	Shailendra Mahto	01.04.1986 to 26.04.1996	84,12,349/-
137/2012	Suraj Mandal	01.04.1986 to 26.04.1996	1,86,34,834/-

4. In the case of Jharkhand Mukti Morcha, the Assessing Officer assessed the total income for the block period as Rs.2,36,19,160/- on protective basis out of which undisclosed income of Rs.1,29,98,449/- was

assessed on protective basis in the regular assessment proceedings under Section 143(3) of the Act for the Assessment Year 1994-95. The undisclosed income of the assessee for the block period added on protective basis was Rs.1,06,20,711/-. The break-up of the total income computed in the block assessment on protective basis as per paragraph 8 of the impugned order is as under:-

Financial Year	Deposits (Rs.)	Interest (Rs.)	Total (Rs.)
1987-88	Nil	Nil	Nil
1991-92	Nil	Nil	Nil
1992-93	10,27,348/-	16,124/-	10,46,472/-
1993-94	38,15,332/-	74,918/-	38,90,250/-
1994-95	1,33,60,000/-	5,29,016/-	1,38,89,016/-
1995-96	23,95,000/-	10,38,853/-	34,33,853/-
1996-97	Nil	1,60,569/-	10,60,569/-
1997-98	Nil	32,000/-	32,000/-
Upto 27.09.1997			2,36,19,160/-

5. The respondent-assessee preferred appeals before the Tribunal and have succeeded with the block assessment proceedings being annulled or declared void on the ground that the additions made did not represent undisclosed income and should not have been made in the block assessment orders. These additions could have been only made in regular/normal assessment proceedings under Section 143(3) or Section 147 read with Section 148 of the Act, as the amounts/additions made did not represent undisclosed income as defined in Section 158B(b) read with Sections 158BA(2), 158BB(1) etc. of the Act. In the case of JMM, it was held that as no incriminating evidence was found during the course of search in the case of the searched persons, i.e. Shibu Soren, Suraj Mandal, Shailendra Mahto and Simon Marandi, there cannot be any evidence, which justified invoking provisions of Section 158BD of the Act. In the

absence of incriminating evidence, block assessment proceeding against JMM, were a nullity and bad being contrary to law.

6. Search warrants under Section 132(1) of the Act were issued and executed on Punjab National Bank, Naoroji Nagar, New Delhi on 26th April, 1996, in respect of Savings Bank Accounts (SB A/cs, for short) and Fixed Deposit Receipt Accounts (FDRs, for short) which are detailed as under:-

<u>Account Nos.</u>	<u>Name(s) of the Holder</u>
194	Shibu Soren, Rup, Hemant and Basant
19100	Shibu Soren, Rup, Hemant and Basant
197	Simon Marandi and Shushila Hansda
19037	Simon Marandi and Shushila Hansda
196	Shailendra Mahto and Abha Mahto
18983	Shailendra Mahto and Abha Mahto
17108	Suraj Mandal
195/spl	Suraj Mandal, Shibu Soren, Simon Marandi and Shailendra Mahto
18914	Suraj Mandal, Shibu Soren, Simon Marandi and Shailendra Mahto

These SB A/cs and FDRs were in the name of the four individual assesseees, jointly and individually. These accounts were placed under prohibitory orders under Section 132(3) of the Act. Subsequently, jurisdiction of the five respondent-assesseees was transferred to Additional Commissioner of Income Tax (Central), Circle-6, New Delhi under Commissioner of Income Tax, Delhi, Circle-I as per order under Section 127 of the Act dated 2nd December, 1996. Thereafter, notices under Section 158BC were issued to the individual assesseees and notice under Section 158BD read with Section 158BC of the Act was issued to JMM.

Legal Provisions and Interpretation

7. In order to appreciate and decide the legal controversy, it would be appropriate to first reproduce relevant provisions of Chapter XIV-B “Procedure for Assessment and Search Cases”, which would be applicable to the respondent-assessee. These are Sections 158B clause (b), 158BA, 158BB, 158BC and 158BD of the Act. The said provisions post amendment vide Finance Act, 2002 with retrospective effect from 1st July, 1995, read as under:-

“Section 158B. In this Chapter, unless the context otherwise requires, -

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(b) “undisclosed income” includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act, or any expense, deduction or allowance claimed under this Act which is found to be false.

(underlined portion was inserted by
Finance Act, 2002 w.r.e.f. 1st July, 1995)

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158-BA. Assessment of undisclosed income as a result of search.—(1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 1995 a search is initiated under Section 132 or books of account, other documents or any assets are requisitioned under Section 132-A in the case of any person, then, the

Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

(2) 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 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.

Explanation.—For the removal of doubts, it is hereby declared that—

(a) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

(b) the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

(c) the income assessed in this Chapter shall not be included in the regular assessment of every previous year included in the block period.

(3) Where the assessee proves to the satisfaction of the Assessing officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of Section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period.

(underlined portion was inserted by
Finance Act (No.2), 1998 w.r.e.f. 1st July, 1995)

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158-BB. Computation of undisclosed income of the block period.—(1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence], as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined,—

(a) where assessments under Section 143 or Section 144 or Section 147 have been concluded prior to the date of commencement of the search or the date of requisition, on the basis of such assessments;

(b) where returns of income have been filed under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;

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

(A) on the basis of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such entries result in computation of loss for any previous year falling in the block period; or

(B) on the basis of entries as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition where such income does not exceed the maximum amount not chargeable to tax for any previous year falling in the block period;

(ca) where the due date for filing a return of income has expired, but no return of income has been filed, as nil, in cases not falling under clause (c);

(d) where the previous year has not ended or the date of filing the return of income under sub-section (1) of Section 139 has not expired, on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;

(e) where any order of settlement has been made under sub-section (4) of Section 245-D, on the basis of such order;

(f) where an assessment of undisclosed income had been made earlier under clause (c) of Section 158-BC, on the basis of such assessment.

Explanation.—For the purposes of determination of undisclosed income,—

(a) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of this Act without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-section (2) of Section 32:

Provided that in computing deductions under Chapter VI-A for the purposes of the said aggregation, effect shall be given to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-section (2) of Section 32;

(b) of a firm, returned income and total income assessed for each of the previous years falling within the block period shall be income determined before allowing deduction of salary, interest, commission, bonus or remuneration by whatever name called:

Provided that undisclosed income of the firm so determined shall not be chargeable to tax in the hands of the partners, whether on allocation or on account of enhancement;

(c) assessment under Section 143 includes determination of income under sub-section (1) or sub-section (1-B) of Section 143.

(2) In computing the undisclosed income of the block period, the provisions of Sections 68, 69, 69-A, 69-B and 69-C shall, so far as may 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.

(3) The burden of proving to the satisfaction of the Assessing Officer that any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.

(4) For the purpose of assessment under this Chapter, losses brought forward from the previous year under Chapter VI or unabsorbed depreciation under sub-section (2) of Section 32 shall not be set off against the undisclosed income determined in the block assessment under this Chapter, but may be carried forward for being set off in the regular assessments.

(underlined portion was inserted by
Finance Act, 2002 w.r.e.f. 1st July, 1995.

Prior to its substitution, clause (c) read as under,
“(c) where the due date for filing a return of income has expired
but no return of income has been filed, as *nil*”)

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158-BC. Procedure for block assessment.—Where any search has been conducted under Section 132 or books of account, other documents or assets are

requisitioned under Section 132-A, in the case of any person, then,—

(a) the Assessing Officer shall—

(i) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995 but before the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days;

(ii) in respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1st day of January, 1997 serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days,

as may be specified in the notice a return in the prescribed form and verified in the same manner as a return under clause (i) of sub-section (1) of Section 142, setting forth his total income including the undisclosed income for the block period:

Provided that no notice under Section 148 is required to be issued for the purpose of proceeding under this Chapter:

Provided further that a person who has furnished a return under this clause shall not be entitled to file a revised return;

(b) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in Section 158-BB and the provisions of Section 142, sub-sections (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be, apply;

(c) the Assessing Officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and

determine the tax payable by him on the basis of such assessment.

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158-BD. Undisclosed income of any other person.—

Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 or whose books of account or other documents or any assets were requisitioned under Section 132-A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed against such other person and the provisions of this Chapter shall apply accordingly.”

8. Section 158B(b) is a definition provision for the purpose of the said Chapter, which defines the term “undisclosed income”. It is an inclusive definition and is subject to the context otherwise requiring a different interpretation. Undisclosed income for the purpose of the Chapter could include any money, bullion, jewellery or other article, valuable article or thing or even income based on entry in books of accounts and other documents of transactions, which had not been or would not have been disclosed for the purposes of this Act. By retrospective amendment inserted by Finance Act, 2002 with effect from 1st July, 1995, any expense, deduction or disallowance claimed under the Act, which was found to be false was also treated as undisclosed income. An inclusive definition is to be read broadly and in a wide manner and should not be given a restrictive meaning. The expression “undisclosed income” with effect from 1st July, 1995, therefore, would mean and include any false expenditure, deduction or allowance claimed under the Act but was found to be false, or any

money, bullion, jewellery, valuable article or thing, that had not been or would not have been disclosed and also included any income based on entry in the books of accounts or other documents, which had not been disclosed or would not have been disclosed for the purposes of this Act. The crucial and singularly pre-eminent expression used in the said clause is “has not been or would not have been disclosed” for the purposes of this Act. We shall be subsequently referring to, in detail, the judgment of the Supreme Court in ***Assistant Commissioner of Income Tax, Chennai vs. A. R. Enterprises***, (2013) 3 SCC 196, but suffice at this stage, it is to notice and reproduce the following paragraph from ***A. R. Enterprises*** (supra):-

“17. The genesis of the issue before us lies within the folds of this section. Sections 158-BD and 158-BC, along with the rest of Chapter XIV-B, find application only in the event of discovery of “undisclosed income” of an assessee. “Undisclosed income” is defined by Section 158-B as that income “which has not been or would not have been disclosed for the purposes of this Act”. The legislature has chosen to define “undisclosed income” in terms of income not disclosed, without providing any definition of “disclosure” of income in the first place. We are of the view that the only way of disclosing income, on the part of an assessee, is through filing of a return, as stipulated in the Act, and therefore an “undisclosed income” signifies income not stated in the return filed. Keeping that in mind, it seems that the legislature has clearly carved out two scenarios for income to be deemed as undisclosed: (i) where the income has clearly not been disclosed, and (ii) where the income *would* not have been disclosed. If a situation is covered by any one of the two, income would be undisclosed in the eyes of the Act and hence subject to the machinery provisions of Chapter XIV-B. The second category viz. where income *would* not have been disclosed, contemplates the likelihood of disclosure; it is a presumption of the intention of the

assessee since in concluding that an assessee would or would not have disclosed income, one is ipso facto making a statement with respect to whether or not the assessee possessed the intention to do the same. To gauge this, however, reliance must be placed on the surrounding facts and circumstances of the case.”

9. The aforementioned paragraph, interprets Section 158B(b) of the Act and lays core and primary emphasis/stress on the phrase, ‘has not been and would not have been disclosed’. This part of the definition effectuates and underlines the object of the block assessment proceedings is to bring to tax what was not taxed or would not have been taxed including wrong deduction or disallowance claimed and allowed earlier. The retrospective amendment is an indication that even the entries recorded in the books of accounts or other documents of transaction could become subject matter of undisclosed income if found to be false and accordingly deduction or disallowance should not have been allowed or claimed.

10. Section 158BA(1) of the Act begins as a non-obstante provision giving primacy to the procedure prescribed under Chapter XIV-B of the Act to the exclusion of other provisions of the Act where search was conducted after 30th June, 1995 up to 31st May, 2003 (see Section 158BI of the Act), or books of accounts or other documents of the assessee had been requisitioned in the aforesaid period. Sub-section (2) stipulates that the rate of tax as specified in Section 113 shall apply to income calculated for the block period irrespective of the previous years to which the income relates and irrespective of the fact whether regular assessment for any one or more assessment years was pending or not. Explanation which was inserted by the Finance (No. 2) Act, 1998 with retrospective effect from 1st July, 1995 is a cause of some debate, as do the subsequent amendments by

Finance Act, 2002 again with retrospective effect from 1st July, 1995. The amendments incorporated by the Finance Act, 2002 reflect the position that there was a greater clarity and understanding, regarding block assessment proceedings when the Finance Act, 2002 was enacted. It reflects the march of law, as there was greater and better appreciation and the amendments negate the ill effects and problems noticed in practice (This aspect has been also examined below with reference to the decision in ***N.R. Paper and Board Ltd & Ors versus Deputy Commissioner of Income Tax*** (1998) 234 ITR 733 (Guj.)). Coming back to the explanation inserted by the Finance Act (No. 2) Act, 1998 with retrospective effect from 1st July, 1995, it declares for removal of doubt that assessment under Chapter XIV-B shall be in addition to regular assessment for each of the previous year in the block period; total undisclosed income in the block period would not include income included in regular assessment; and income assessed under Chapter XIV-B shall not be included in the regular assessment of previous years. The aforesaid explanation supports in view that there would be two assessments in the cases of search or when Section 132A is invoked, i.e. normal/regular assessments under Section 143(1) or (3) of the Act; and Chapter XIV-B or block assessment. Further, income included in the block assessment would not be included in the normal assessment and similarly income included in the normal assessment would not be included in the block assessment. We shall be referring to several judgments relied upon by the counsel for the respondent assessee which have decided the controversy whether income should be assessed in the normal assessment or block assessment by primarily relying upon the said explanation. This indeed is the correct interpretation accepted by the Courts. Thus there can be regular and block assessments for the same period. The next question is

what could be included or the scope and ambit of block assessment and regular assessment. The answer lies in conjoint and harmonious reading of the Sections 158B(b) and 158BB of the Act.

11. Section 158BB of the Act is a procedural provision which deals with computation of undisclosed income but is also a substantive provision because it seeks to define what is to be included and can be made a subject matter of the block assessment. Sub-section (1) refers to the evidence found as a result of search or requisition of books of accounts or other documents and such other information as was available with the Assessing Officer and relatable to such evidence. It postulates that evidence found as a result of search or requisition of books of accounts or documents as well as other information relatable to such evidence could be taken into consideration for the purpose of undisclosed income for the block period. The income so calculated shall be increased or reduced by the aggregate of total income or loss of previous years which have been determined where assessment under Section 143/144/147 of the Act had concluded prior to the date of commencement of search or date of requisition; but, where returns of income have been filed under Section 139/142(1)/148 of the Act, then such increase or reduction shall be done on the basis of income disclosed in such returns. Section 158BB(2)(b) of the Act is indicative that the returned income, where assessment had not been concluded or made, the returned income would be treated as disclosed income and any other income on the basis of evidence found during the course of search or requisition of books of accounts or documents with other evidence relatable to such evidence would be treated as undisclosed income and accordingly made subject matter of the block assessment. The controversy that would remain is whether in view of the said clause (b) where

assessments were pending, additions in block assessment could still be made where no material or evidence was found in the search relatable to the disclosed income declared in the return, or the addition should be made in regular assessment. Preponderance of the judicial opinion appears to be in favour of the normal or regular assessment and not for additions under the head ‘undisclosed income’ in the block assessment. Of course, this would not apply where material has been found during the course of search or on further enquiry relatable to such material or in cases where expense, deduction or allowance claimed under the Act was found to be false. In such cases, additions could be made under sub-section (1) to Section 158BB of the Act.

12. At this stage, it will be relevant to also refer to Section 158BA(3) of the Act. Sub-section (3) to Section 158BA of the Act relates to a part of the year which had not ended or when the date of the filing of the return under Section 139(1) had not expired. In such cases, income of the transactions recorded on or before the date of search or requisition of books of accounts or other documents, etc., would not be included in the block period. The said sub-section has to be read along with Section 158B(b) which defines, ‘undisclosed income’. On harmonious construction, it follows that said entry in the books of accounts should not be false, otherwise they would be covered under the head ‘expense, deduction or allowance which is found to be false’.

13. ‘False’ or ‘falsehood’ is a strong word and much narrower than the word or term ‘incorrect’ or ‘legally unsustainable’. ‘False’ or ‘falsehood’ refers to element of *mens rea* or bad mental intention and would not relate to claims which might be wrong because of legal interpretation or has to be

disallowed because of technical defect and similar reasons. However, as noticed below, this question does not arise for consideration in the present case.

14. Clause (c) of Section 158BB(1) of the Act as enacted was substituted by Finance Act, 2002 with retrospective effect from 1st July, 1995. The substituted clause (c) deals with cases where due date of filing of returns of income had expired but no return of income had been filed, when either of the two conditions were satisfied. As per sub-clause (A) of clause (c), income for the block assessment would be computed on the basis of entries as recorded in the books of accounts and other documents maintained in normal course where such entries result in computation of loss for any previous year falling in the block period. Sub-clause (B) would only apply in a case where the income, as a result of entries in the books of accounts and other documents maintained in normal course on or before the date of search or requisition did not exceed maximum amount not chargeable to tax. Clause (ca) deals with cases not covered by clause (c) i.e. when no return of income had been filed, but income was taxable. Thus, where the due date of filing of return had lapsed but no return had been filed and computation was not at a loss or below the taxable limit, income as per the books of accounts shall be treated as 'nil', even if as per the books of accounts and other documents maintained in normal course, the income disclosed was above the taxable limit. In such cases, irrespective of the figures in the books of accounts or documents, income has to be by default, taken as 'nil'. Clause (ca) would apply only when the date of filing of return has expired and return of income has not been filed.

15. Clause (d) would apply to cases where previous year has not ended or date of filing of return under Section 139(1) has not expired. In such cases income has to be computed on the basis of entries relevant to such income or transactions recorded in the books of accounts or other documents maintained in the normal course on or before the date of search.

16. We need not, for the purpose of present examination, refer to clauses (e) and (f) which deals with cases where there has been settlement order under Section 245D(4) or an earlier search assessment under Section 158BC under clause (c) has been made. Explanation clauses (a) and (b) are not relevant, but clause (c) of the explanation is of some relevance. The said clause stipulates that assessment under Section 143 includes determination under Section 143(1) or Section 143(1B). Thus, summary assessments are also treated as regular/normal assessment for the purpose of Section 158BB. Sub-section (2) to Section 158BB states that provisions of Section 68, 69, 69A, 69B and 69C shall apply and references to financial year in the said sections will be construed as reference to relevant previous year in the block period including previous year ending with the date of search. Sub-section (3) states that the burden of proving that undisclosed income has already been disclosed in the return filed before the commencement of search, or the date of requisition of documents, shall be on the assessee. We are not concerned and are not required to deal with sub-section (4) to Section 158BB of the Act.

17. Section 158BC of the Act relates to procedure for block assessment and postulates issue of notice for filing of return for block assessment. The first proviso states that in such cases, no notice under Section 148 was required. Thus, it does away with the requirement of notice under Section

148 and recording of reasons for the same. The said proviso is to be read with sub-section (1) to Section 158BA which gives an overriding primacy to Chapter XIV-B. Second proviso states that no revised return for block assessment can be filed. Clause (b) of Section 158BC states that the Assessing Officer shall proceed to determine undisclosed income for the block assessment period and provisions of Sections 142, 143(2), 143(3), 144 and 145 shall apply and as per mandate of clause (c), block assessment order has to be passed and tax payable has to be determined. As per clause (d), the assets seized under Section 132 or requisitioned under Section 132A have to be accordingly dealt with in accordance with Section 132B.

18. Section 158BD of the Act deals with assessment of undisclosed income of a person who has not been searched or person whose books of accounts or other documents or assets were not seized or requisitioned under Section 132A. It requires that the Assessing Officer of the person who was searched or books of accounts or documents requisitioned, should record a satisfaction note that undisclosed income belonging to a third person had been seized or had been uncovered and in such cases the assets, books of accounts, documents etc. should be handed over to the Assessing Officer having jurisdiction over such other person, who shall proceed under Section 158BC and accordingly provisions of Chapter XIV-B shall apply. This provision has been interpreted recently by the Supreme Court in ***Commissioner of Income Tax – III vs. Calcutta Knitwears, Ludhiana***, (2014) 6 SCC 444, where it has been observed as under:-

“38. We would certainly say that before initiating proceedings under Section 158-BD of the Act, the assessing officer who has initiated proceedings for completion of the assessments under Section 158-BC of the Act should be satisfied that there is an

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

Facts of the present case and applicable provisions

19. It would be now relevant to refer to the facts of the present cases, the finding of the Tribunal and contentions of the parties. Shailendra Mahto, Suraj Mandal and Simon Marandi had never filed income tax returns under Section 139 of the Act between 1st April, 1986 and 26th April, 1996. They were never assessed to tax for the said period. Shailendra Mahto, in fact, did not file returns even on issue of notice under Section 158BC of the Act. Shibu Soren filed return for assessment year 1994-95 on 31st March, 1996.

The due date for filing of return for the assessment year 1994-95 was 30th June, 1994. The said return certainly cannot be treated as return under Section 139(1) and, therefore, would be inconsequential for the purpose of computing income earned in a regular/normal assessment. In order to take the said return on record, the Assessing Officer was required to issue notice under Section 147 or 148 of the Act. But the said notice was not required in the factual matrix of the present case because of the search on 26th April, 1996. As far as JMM is concerned, as noticed above, notice was issued under Section 158BD read with Section 158BC and block assessment order was passed for the period 1st April, 1986 to 26th September, 1996. The JMM had not filed returns from 1988 to 1992 and return for assessment year 1992-93 and 1993-94 were filed on 12th July, 1996 and return for the assessment year 1992-93 and 1993-94 was filed on 12th July, 1996 pursuant to notice under Sections 147/148 of the Act and for the assessment year 1994-95 the return was filed on 31st March, 1996. This again was after the due date for filing of return for that assessment year. However, as the case of JMM would fall in a different category, it is being accordingly dealt with.

20. The block assessment orders in the case of individual assessees would show that the major and substantial amount of undisclosed income relates to the period between 1st April, 1993 and 31st March, 1994. It was in this period that substantial deposits were found in the bank accounts. The details and deposits in a bank in each of the four cases of the individual assesses was as under:-

ITA No.	Name of the Assessee	Assessment Year	Amount Deposited (Rs.)
127/2012	Shailendra Mahto	1994-95	46,52,500/-

128/2012	Simon Marandi	1994-95	40,52,500/-
133/2012	Shibu Soren	1994-95	37,52,500/-
137/2012	Suraj Mandal	1992-93	9,00,000/-
		1993-94	6,90,000/-
		1994-95	37,52,500/-
Total			1,78,00,000/-

21. In view of the aforesaid factual position, in the present case sub-clause (ca) of Section 158BB(1) would be applicable as no return of income was filed by the individual assessee before the due date of filing of return. The income returned accordingly would be treated as NIL inspite of the entries, if any, in the books of accounts or documents. It is correct that Shibu Soren had filed return for the assessment year 1994-95 on 31st March, 1996, but this would be a return under Section 139(4) of the Act which permits filing of a belated return, but it would not be a return under Section 139(1) of the Act. Therefore, this return cannot be treated as a return filed before the due date. Possibly, the respondent assessee could have also claimed applicability of clause (c) to Section 158BB in relation to the year of search, but, the onus to prove that benefit of clause (c) would be applicable is on the individual assessee.

22. We would, now, like to reproduce the legal position as elucidated in **A. R. Enterprises**, (supra), wherein the Supreme Court has observed :-

“Hence, the computation of "undisclosed income" for the purposes of Chapter XIV-B has to be construed in terms of the "total income" received, accrued, arisen; or which is deemed to have been received, accrued or arisen in the previous year, and is computed according to the provisions of the Act. According to section 139(1) of the Act, every person who is assessable under the Act, must file a return declaring his or her total income during the previous year on or before the

due date, for assessment under section 143 of the Act. Hence, the 'disclosure of income' is the disclosure of the total income in a valid return under section 139, subject to assessment and chargeable to tax under the provisions of the Act. It is important to bear in mind that total income is distinct from the estimated income, upon the basis of which, advance tax is paid by an assessee. Advance tax is based on estimated income, and, hence, it cannot result in the disclosure of the total income assessable and chargeable to tax.”

It is clearly stated in the aforesaid paragraph that due date of filing of return for the purpose of Section 158BB would be return filed in accordance with Section 139(1) of the Act. This would obviously not include a belated return filed under Section 139(4) of the Act. In the facts of the present case, Section 158BB(1)(d) would not be applicable as it refers to the previous year which has not ended or the date of filing of return under Section 139(1) has not expired. However, clause (d) also supports the construction and interpretation that due date of filing of return refers to Section 139(1) and not Section 139(4). Time for filing of return for assessment year 1994-95 under Section 139(1) had expired on or about 30th June, 1994 and the return filed by Shibu Soren and for that matter by JMM party relating to assessment year 1995-96 was not under Section 139(1) of the Act.

23. In the present case, the block assessment period in the case of individual assessee, as noticed above, is 1st February, 1986 to 27th September, 1996, the date of search being 26th September, 1996. Thus, the date of search was after the application of the retrospective amendments with effect from 1st July, 1995 made by the Finance Act, 2002. Decision of the Supreme court in **A.R. Enterprises (supra)** would indicate that the retrospective amendments w.e.f. 1st July, 1995 made by Finance Act, 2002,

were made applicable, as the search had taken place on 22nd February, 1996 and the undisclosed income pertained to the period relevant to the assessment year 1995-96, the due date for filing of the return of which was on or before 31st October, 1995. However, the question of retrospective amendment and whether it would be applicable even for the period prior to 1st July, 1995, when the search had taken place after 1st July, 1995, was not specifically addressed and answered. Before us also neither the assessee nor the Revenue had raised this contention. The order of the Tribunal is also silent in this regard.

Whether additions made relate to undisclosed income? Reasoning of the Tribunal and the errors made.

24. As has been noticed above, undisclosed income with reference to the bank accounts pertain to entries made during the period relevant to the assessment year 1994-95, i.e. the year ending 31st March, 1994 or even earlier as in the case of Suraj Mandal. However, for these years regular returns of income were not filed. As held in earlier paragraphs in view of earlier clause ‘c’ and substituted clause ‘c’ and ‘ca’ to Section 158BB(1), the failure to file return of income for the relevant year, the due date of which had expired, would have its consequences and if the individual had “undisclosed income” which was taxable, Chapter XIV-B procedure would apply. In view of the earlier discussion, it has to be held that in view of the amended provisions as well as unamended provisions, legal conclusions and finding of the Tribunal are incorrect. In the subsequent paragraphs we will examine and answer whether the findings of the Tribunal can be sustained, on the ground that “undisclosed income” became “disclosed” when the Revenue became aware of the “undisclosed income” as the bank accounts and the entries therein had come to their information and

knowledge. Reliance was placed on the fact that in the statements of individual assessee recorded before the date of search, accounts were acknowledged but it was claimed that the money deposited therein was sourced from and belonged to JMM.

25. This also requires us to examine the contention raised by the respondent assessee, which has been upheld by the Tribunal, that no material or evidence was found during the search and thus there was no undisclosed income relatable to the block assessment period. The Tribunal has upheld the said contention on the basis of statements on oath under Section 131 of the Act, of Suraj Mandal, Shibu Soren and Simon Marandi on 14th March, 1996 and that of Shailendra Mahto on 18th and 19th of March, 1996 wherein the aforementioned individuals had deposed on the amount lying in the various SB A/cs and FDRs maintained in the Punjab National Bank, Nauroji Nagar, New Delhi.

26. Section 132(1) of the Act authorizes search and seizure operations. As per clause (a) search may be authorised when the designated authority in consequence of information in his possession, has reason to believe that a person concerned has not produced or caused to be produced books of accounts or documents, i.e. he has omitted or failed to produce or caused to be produced books of accounts and other documents, in response to notice under Section 131(1) or 142(1) of the Act. Clause (b) expands the scope of clause (a) to enable search of a person to whom summon or notice as aforesaid has been or might be issued would not produce or cause to be produced books of accounts or documents. A further requirement being that the books of accounts or documents should be useful or relevant for the proceedings under the Act. Clause (c) deals with third set of cases

where a person is in a possession of money, bullion, jewellery or any other valuable article or thing which wholly or partly represents income or property which has not been or would not be disclosed. The expression 'would not be disclosed' was added by Taxation Laws (Amendment) Act, 1975 with effect from 1st October, 1975. Clause (c) does not deal with books of accounts or documents but with income and property whereas books of accounts and documents are referred to in sub-clauses (a) and (b). Legality of a search cannot be examined by the Tribunal or during the course of assessment proceedings and this court while exercising jurisdiction as an appellate forum has to assume that the search was valid. Validity of search can be examined under writ jurisdiction as an order or warrant of search under Section 132 is an administrative order and is not amenable to correction or challenge in the appellate proceedings under the Act. Further, the search under Section 132 can be assessee based as well as premises based as is clear from clause (i) to Section 132 (1) which authorizes entry and search in any building, place etc. It is obvious that a search can be assessee based. In the present case, accounts of the respondent individual assessee in Punjab National Bank, Nauroji Nagar, New Delhi (PNB, for short) were subjected to search. In a way, therefore, it was a premises based search relating to the assessee in question. In paragraph 30 of the impugned order, the Tribunal has held as under:-

“In the present case, the search was conducted only on various bank accounts of these assesses with PNB, Nauroji Nagar, New Delhi, and details of such FDR and saving bank account which were subjected to search are noted by the A.O. on page 7 of the assessment order in the case of Shri Shibhu Soren. This table has been reproduced by us in para 2 above. Hence, in our consider opinion, all other additions

made by the A.O., in the Block assessment of these four persons are liable to be deleted for this reason alone that these are not based on evidence count as a result of search and there is no requisition of books of accounts and other documents in the present case. All these other additions are made on the basis of material and information available with the A.O. as per post search enquiry but these other material and information are not shown to be relatable to any alleged evidence found in the course of search and hence, all other additions made by the A.O. in these Block assessment orders are not sustainable. We are taking this view by respectfully following various judgement of Hon'ble High Court of Delhi cited by Ld. AR as has been noted by us in para 14 above...”

27. Before we deal with the said findings we would also like to reproduce paragraphs 32 to 37 of the impugned order passed by the Tribunal:-

“32. Now, regarding the addition made by the A.O. with reference to deposits in various bank accounts and FDRs with PNB, Nauroji Nagar, New Delhi, there are two relevant aspects. One aspect is this that whether the money deposited in the bank is income of the assessee and the second aspect is this that even if it accepted that the money deposited in these bank accounts and FDRs is income of the assessee, whether such income can be added in the Block assessment. Regarding the first aspect, this is the explanation given by the Ld. AR on merits of this addition that the amounts deposited in these bank accounts is the money of the party i.e. Jharkhand Mukti Morcha (JMM) and not of the assessee and hence, no addition is called for on account of these deposits in PNB, Nauroji Nagar, New Delhi also. Before deciding this aspects, we feel that second aspect is needed to be decided first and the first aspect will be require to be decided only if is found that addition can be made in the Block assessment in respect of these deposits in the bank even if it is accepted that it is

income of the assessee. Hence, we proceed to decide the second aspect first and for doing so, we assume that the money deposited in, Nauroji Nagar branch of PNB represents income of the assessee.

33. Regarding this aspect that no addition can be made in Block assessment with respect to various deposits in Nauroji Nagar branch of PNB even if it is an income of the assessee, we first take note of facts of the present case, which are, relevant for deciding this aspect. It was submitted by the Learned A.R. of the assessee that these bank accounts were duly disclosed by the assesses in the statement recorded by ADI (Investigation) under section 131 of the Income Tax Act, 1961 on 14.03.1996 and on other dates of March 1996. It is submitted that a copy of these statements given by these four persons is available on record and an English version of these statement is also furnished in the paper book. It is submitted that in reply to Question No. 3, it was stated by Shri Shibhu Soren that he has two bank accounts out of which one is in PNB, Nauroji Nagar, New Delhi and other is in State Bank of India, Sansad Bhavan, New Delhi. It was also stated by him that his wife has no bank account and he does not know of any bank account of his younger son. The other Question was as to whether he can explain the source of these bank accounts. FDRs and investment in the car and in reply, it was submitted that FDR of Rs. 30 lacs in his name and other FDR of Rs. 30 lacs in the name of himself and three other MPs are out of the funds of JMM Party. It was also submitted that similar statement was recorded of Shri Simon Marandi also by the ADI (Investigation) on the same date i.e. 14.03.1996 and he also stated in reply to Question No. 10 that he has one bank account in his name with PNB, Nauroji Nagar, New Delhi. It was also stated that he does not remember the account number and there is one more account in the same branch of PNB which is in the joint name of himself, Shri Shibhu Soren, MP, Shri Suraj Mandal, MP and Shri Shailandra Mahto, MP and it was also submitted that copies of bank statement of

both these bank accounts will be supplied within one month and if there is any other bank account in addition to these two bank accounts, he will send the copy of such bank accounts also. When this question was raised, as to what are the details of FDRs with PNB, Nauroji Nagar, New Delhi as per Question No. 11, it was submitted in reply that complete details will be provided within one month. One more question was raised as per the information of the department he has deposited on 01.08.1993, Rs. 12 lacs and Rs. 21 lacs with PNB, Nauroji Nagar, New Delhi, in FDR and there is deposit of Rs. 10,000/- in a joint saving bank account number 18914 in the joint name of Shri Shibhu Soren, Shri Simon Marandi and Shri Shailendra Mahto and there is one FDR No. 195, of Rs. 30 lacs in the joint name of these four persons. In reply, it was submitted that these are the money of JMM Party which are lying in the joint saving bank account and joint FDRs in the name of four MPs and also the FD in his personal name.

34. When this query was raised as to why the amount in question was not deposited in the bank account in the account of the party JMM, it was submitted in reply that it was done as per the decision of the party which was taken prior to 01.08.1993. This query was also raised as to from where the money came with the party, and in reply, it was submitted that they are running agitation for separate Jharkhand state and for this purpose, they are getting donation in this respect and as per the decision of the party, the money was deposited in their personal accounts. This query was also raised as to whether they have names and addresses of the persons who have given the donation to the party and in reply, it was submitted that there are coupons and receipts and they have the names of MLAs, MPs, etc. who collected these donations from the general public but they do not have individual names of the public.

35. Statement of Shri Shailendra Mahto was also recorded by ADI (Investigation) under section 131 on 18.03.1996. In that statement, in reply to Question No. 3, it was submitted by Shri Shailendra Mahto that there is one bank account with State Bank of India, Parliament Annexe, New Delhi which is in his name and it was opened in the year 1990 when he was elected as MP. It was also submitted that there is one saving bank account No. 18983 with PNB, Nauroji Nagar, New Delhi and this is in his name and was opened on 27.08.1993. It was also submitted that he has asked for statement from the bank and he can give the details after going through the bank statement. When query was raised regarding FDRs with the bank it was submitted that there is one FDR at PNB, Nauroji Nagar, New Delhi and the FDR No. is 196 dated 01.08.1993 and it was also submitted that an amount of Rs. 39.80 lacs was deposited in the FDR and subsequently on 08.10.1993 an amount of Rs. 20 lacs was transferred from his FDR account to saving bank account No. 18983. When he was regarding the source of the deposits of Rs. 39.80 lacs in the FDR it was replied that this money is belonging to the JMM Party and the same was collected by the party as donation in various public meetings and since he was General Secretary of the party, this amount was deposited in his name in the bank.

36. Similarly, statement of Shri Suraj Mandal was also recorded by ADI (Investigation), New Delhi under section 131 on 14.03.1996. Question No. 4 was regarding details of bank accounts of himself and his family members. In reply he has narrated full details of various bank accounts which include even account with State Bank of India, Karmatand which is in his name and there is one account with State Bank of India at Patna, Vidhan Sabha Branch in which his salary as MLA was being deposited. It was also submitted that there is one account with the State Bank of India, Godda Branch and it was also submitted that there is one account with State Bank of India, Sansad Bhavan

branch where his salary as MP was being deposited. It was also submitted that there is one saving bank account in his name with PNB, Nauroji Nagar, New Delhi in which the money lying was of JMM Party. It was also submitted that there is joint saving bank account with PNB, Nauroji Nagar, New Delhi which is in joint name four JMM MPs. It was also submitted that there is one FDR in his hand and in the name of his wife at SBI Karmatand and 2nd FDR with PNB in the joint name of himself and other three JMM MPs. When the question was raised regarding the balance in various bank accounts, it was stated by him regarding SBI Karmatand, SBI Vidhan Sabha Branch and SBI Godda and SBI Sansad Bhavan Branch. Regarding PNB, Nauroji Nagar, New Delhi, it was submitted that in that account, Rs. 46 lacs was deposited in the year 1993 which may be around Rs. 52 lacs on the date of statement after including interest and this money is belonging to the party, i.e., JMM Party. It was also stated that there is one joint account with same branch of PNB in the joint name of four MPs and Rs. 10,000/- was deposited in the bank account in the beginning.

37.From the above narration of these four statements recorded by ADI (Investigation) in March, 1996, i.e., prior to the date of search, it is clear that all these four MPs have clearly brought out relevant facts and they have duly disclosed the fact of various bank accounts with PNB, Nauroji Nagar, New Delhi and from some of the statements, it is also coming out that even before the statements were recorded, concrete information was available with the department regarding the existence of these bank accounts, amounts and money deposited in these bank accounts along with relevant dates of such deposits because in some of the question itself, details of the bank account along with date and amount of money deposited etc. were stated and query was raised for its source etc. and these facts show that full details were available with the department.”

28. The aforesaid reasoning of the Tribunal is core of the impugned decision and would indicate that the Tribunal has only decided the second aspect, i.e. whether or not the deposits in Punjab National Bank, Naoroji Nagar, New Delhi could have been made subject matter of addition as undisclosed income in the block assessment proceedings. Thereafter, reference was made to statements recorded under Section 131 on 14th March, 1996 and on 18th and 19th of March, 1996. The gists of the statements given by different assesseees have been quoted. What is clearly noticeable is that the assesseees throughout had pleaded and claimed that the money deposited in the bank accounts did not belong to them but was money of JMM. Thus, the Tribunal has come to the conclusion that before the date of search, the full relevant facts had been brought to and duly disclosed and, therefore, the deposits would not and cannot be treated as undisclosed income under Section 158B(b) read with Section 158BB. According to us, the aforesaid conclusion of the Tribunal is clearly fallacious for several reasons which are elucidated below:-

(1) Statements recorded under Section 131 of the Act were pre-cursor to the search and cannot be read in isolation without reference to attending circumstances. The attending circumstances in the present case were that no return of income had been filed by the individual assesseees for the block period except return by Shibu Soren for the assessment year 1994-95 which was filed on 31st March, 1996 under Section 139(4), i.e. beyond the time or due date and a few days before search. Enquiries had then started.

(2) The stand taken by each of the four individual assesseees, was that the money in the FDRs and SB A/cs did not belong to them but

belonged to JMM, a political party. The said factum had to be verified and ascertained. In case the money belonged to four assessees, it would be their undisclosed income. In addition, the legal effect and impact of Section 158BB, when no return of income has been filed, as elucidated by the Supreme Court in the case of **A.R. Enterprises** (supra) is to the contrary.

- (3) If evidence and material found during search and subsequent enquiries established that the money belonged to the individual assessee, and not JMM, the amount would be undisclosed income under Section 158B(b) of the Act.
- (4) A factual impact or consequence of a search is to unearth material/evidence and ascertain true and correct facts. In spite of the statements recorded under Section 131 of the Act, it is not unusual or uncommon for an assessee to change his stand and stance during the course of the assessment proceedings. Further the truth or veracity of the statements, had to be verified i.e. whether the money belonged to the individual assessees or to a political party JMM. This required evidence like examination and verification of entries in the Bank Accounts; the beneficiaries who were recipients/credited money from the bank accounts; how was the money utilized; whether the individual assessees or their family members were also beneficiaries of utilization etc. This required documents and evidence. This aspect was highlighted and was argued on behalf of the Revenue before the Tribunal as is ascertainable from paragraph 24 of the impugned order wherein the contention of the Revenue was noticed. For the sake of convenience we are reproducing paragraph 24 of the impugned order:-

“24. Regarding this contention that the income as already disclosed under section 131 on 14.03.1996 and hence there is no undisclosed income, it was submitted by her that statement made under section 131 of the Income Tax Act, 1961 during pre search inquiry which resulted in issuance of search warrant cannot be deemed to be true and full disclosure of undisclosed income and the same in any case is not true and full disclosure. She submitted that as per Section 158B(b) undisclosed income is gold, bullion, money etc. or income which has not been or would have not been disclosed for the purpose of the act. She submitted that admittedly, no return has ever been filed by these assessee and thus, there is no question of lying disclosed in the present cases. She submitted that mere statement as a part of pre search inquiry cannot amount to disclosure of income possessed by the assessee chargeable to tax. She submitted that the main issue is whether such income was ever disclosed by the assessee at any stage.”

(5) Noticeably, JMM had not filed income tax returns for any of the assessment years subject matter of the block assessment order, except return filed on 12th July, 1996 in response to the notice under Section 148 of the Act that relating to the assessment years 1992-93 and 1993-94. As far as the individual assesseees are concerned, none of them filed the income tax returns under Section 139 apart from Shibu Soren who filed a return for the assessment year 1994-95 on 31st March, 1996 under Section 139(4), i.e. belated return. This return was subsequently revised on 23rd April, 1996 i.e. 3 days before the search at Punjab National Bank, Nauroji Nagar, New Delhi which was made on 26th April, 1996.

29. In continuation of the said searches in the case of individual assessee, search and seizure operations under Section 132(1) of the Act were conducted at the office and residential premises of M/s Anjali Jain &

Associates, Chartered Accountants, located at Ranchi, Patna and other places in Bihar and Jharkhand where books of accounts of the political party JMM were seized. The JMM was issued notice under Section 158BD of the Act on 20th January, 1997. The block assessment order under Section 158BD read with Section 158BC records that JMM's income for block period was protectively assessed at Rs.2,36,19,160/- out of which Rs.1,29,98,449/- was assessed on protective basis in the regular assessment proceedings for the assessment year 1994-95 and the balance amount of Rs.1,06,20,711/- was assessed as undisclosed income for the block period.

30. The assessment order in the case of individual assessee record the basis and reasons that the money in the SB A/cs and FDRs did not belong to JMM, who had claimed that the money was received as donations. Reasons given by the Assessing Officer were based on the search material/evidence which included material/evidence collected during and after the search at M/s Anjali Jain & Associates. These can be crystallised as under:-

- (A) JMM Party did not require money for party activities in Delhi;
- (B) There was no justification in opening bank account in the individual names, if the money belonged to the party;
- (C) Shailendra Mahto in his statement under Section 164 of the Code of Criminal Procedure, 1973 before the Metropolitan Magistrate accepted that money in his SB A/cs and FDRs belonged to him and was received for voting in the Parliament in the no confidence motion moved in July, 1993. He also accepted that Suraj Mandal and Shibu Soren had received similar amounts;

(D) The purported resolution passed by JMM on 11th July, 1993, was disbelieved for various reasons including (a) there was no reason and cause for JMM to give personal loan to individuals; (b) no interest had been paid; (c) alleged resolution for loan was self-serving and belatedly attested thus indicating that it was a sham and was “introduced” subsequently; (d) books of accounts of JMM did not reveal any loan account; (e) in the return filed by JMM on 31st March, 1996 for assessment year 1994-95, Rs.30,00,000/- relating to FDRs in the joint holding of the four ‘individual assesseees’ was not included; (f) Sushil Kumar who had introduced the four ‘individual assesseees’ to the bank, in his statement had confessed that the money was brought in suitcase which carried slips of Canara Bank, Bangalore, hence the money did not represent alleged donations; (g) donation slips as propounded were printed later on and not during the relevant period by M/s. Seth Art Printers. M/s R.R. Papers Stores, Bokaro could not have printed the donation slips as suggested; (h) donation receipts did not mention names of the person who had received the donation or the name of the donor; (i) one S. Bhattacharya who had joined JMM in April, 1994, could not have handled the donations in July, 1993 as was pleaded; (j) Ms. Anjali Jain, CA had accepted and admitted that she did not verify the donation coupons. (k) books of accounts etc. including the cash books allegedly recovered and seized were prepared and written belatedly and were not contemporaneously recorded; (l) cash books for assessment years 1993-94 consisted of three sets, locally bound. It bore signature of S. Bhattacharya dated 2nd April, 1993 whereas he had joined the party in April, 1994. In some entries in the cash book

for the financial year 1993-94, the year mentioned and written was 1995; (m) The Central Forensic Science Laboratory (CFSL) report revealed and opined that the ledger and cash book were interpolated.

31. We would now, like to reproduce paragraph 29 of the impugned order which reads as under:-

“29. We have considered the rival submissions, perused the material on record and have gone through the judgements cited by both the sides. As per the provisions of section 158BA (2) and its Explanation, the Block assessment under chapter XIV-B is in addition to the regular assessment and if any addition is made in such regular assessment or is required to be or is eligible to be made in the regular assessment then such income cannot, be added in the Block assessment . This is by now, a settled position of law that in the case of Block assessment proceedings, addition can be made on the basis of evidence found as a result of search or requisition of books of accounts or other material and such other material or information which are available with the A.O. and are relatable to such evidence found as a result of search- he is also a settled position by now that for the purpose of addition in the block assessment under chapter XIV-B, which will result into levy of higher rate of tax of 60%, incriminating material found in course of search is to be considered and not each and every thing found in course of search. For example, regular books of account maintained by a businessman are also found in course of search but those books are not considered to be incriminating material because existence of regular books is in the knowledge the revenue although its contents are not known to the revenue. But still, in relation to entries in those books, no addition is to be made in the Block assessment and addition, if any, is to be made in regular assessment only. This is also a settled position that whether regular assessment is actually made or not or whether any addition in

regular assessment made or not is also not relevant and if any addition is required to be made in regular assessment, it cannot be added in Block assessment only for this reason that no regular assessment was made or that no addition was made in such regular assessment. In the present case, neither any return of income was filed by the assessee under section 139 nor any notice was issued by the concerned A.O. under section 142(1) or under section 148 asking the assessee to file a return of income and only notice issued was under section 158BC. In the backdrop of this legal and factual position, now we examine the other facts of the present case.”

32. We would like to deal with the said reasoning sentence wise and in detail. Observation that the block assessment is in addition to regular assessment is correct, but the finding that any addition is required to be or is eligible to be made in the regular assessment cannot be added in the block assessment as a universal affirmative proposition is incorrect. It would depend upon whether or not the income concerned is undisclosed income as defined in Section 158B(b) read with applicable subsection to Section 158BB of the Act. We have already dealt with the observations of the Tribunal and highlighted the *ratio decidendi* of the decision of the Supreme Court in **A.R. Enterprises** (supra). As recorded above, Section 158B(b) is to be read along with applicable clause of Section 158BB of the Act. Similarly, the observations with regard to regular books of accounts would depend upon the factual position. In the present case, no books of accounts were maintained by the individual assessee and books of accounts maintained by JMM party have been subject matter of severe adverse comments and observations as to their authenticity. In **A.R. Enterprises** (supra), it has been clearly observed that books of accounts might be relevant with reference to the year in which search had taken place or

where there was still time to file the return of income for the concerned assessment year. It might be relevant were the return of income for the period included in the block assessment stands filed. However, where due date for filing of the return has expired, consequences may be different. Similarly, observation whether the regular assessment was actually made or not, is not uniformly correct and would depend upon the facts whether the due date of filing of return under Section 139(1) has expired but no return of income has been filed, as non-filing of return may have its own consequence. Nature and source of money on how it was earned, explanation offered etc. would also make a considerable difference. In a given case, depending upon the factual matrix, it could represent undisclosed income. This aspect has not been considered and regarded by the Tribunal though it is noticed that no return under Section 139(1) had been filed by the individual assessees.

33. Thus, there is a fundamental fallacy in the reasoning given by the Tribunal to hold that no addition could have been made in the block assessment proceedings for want of undisclosed income. The Tribunal ignored the position that the four individual assessees had not filed returns of income and therefore, Section 158BB(1) clause(ca) of the Act would be attracted. The said clause has to be harmoniously read with Section 158B(b) of the Act. Further statements of the four individual assessees were recorded on 14th March,1996/19th March,1996, but they, i.e. the ‘individual assessees’ had claimed that the money lying in the SB A/cs or the FDRs belonged to JMM and did not belong to them. Thus, the factum that the details of SB A/cs and the FDRs were made available would not make any difference. The search undertaken had revealed several incriminating evidence/material relating to the opening and operation of bank accounts

and on how the money was utilized, etc. These details were relevant to examine and consider the contention of the respondent individual assessee that the money did not belong to them but to the political party, JMM. It would be, therefore, incorrect or improper to state that the search did not reveal or unearth relevant material or evidence relating to undisclosed income as defined under Section 158B(b) of the Act.

34. This takes us to the judgments relied upon by the counsel for the assessee and we would like to examine whether the findings recorded above deviate from the legal position elucidated in these judgments in light of the decision of the Supreme Court in ***A.R. Enterprises (supra)***. We would first begin with the judgment of the Gujarat High Court in ***N.R. Paper and Board Ltd. & Ors.*** (supra). At the outset, we notice that this judgment does not take into consideration the retrospective amendment made by Finance Act 2002 w.r.e.f. 1st July, 1995. In the said case, writ petitions were filed by persons who had been subjected to search and block assessment orders, on the ground that once block assessment orders had been passed, notice under Section 143(2) of the Act, for regular/normal assessment cannot be issued and sustained. The High Court held that there could be both regular or normal assessment and assessments under Chapter XIV B of the Act, recording the reason that Chapter XIV-B was a specific provision in search cases and provides for assessment of undisclosed income as a result of search, and these proceedings do not disturb the regular/normal proceedings already made for previous year. Block assessment proceeding were only intended to sniff out what had remained hidden and had not been disclosed by the assessee. There was no overlapping in the nature of block assessment made of undisclosed income and regular/normal assessment under Section 143 (3) of the Act. Specific

reference was made to sub-section (2) to Section 158BA of the Act. Similarly with regard to the pending regular assessment proceedings, it was stated that they would not be frozen or substituted by block assessment of undisclosed income. The aforesaid observations will be applicable for the period even after 1st July, 1995, subject to the legislative intendment to the contrary on the scope and ambit of the block assessment in view of the amended provisions as has been observed by the Supreme Court in **A.R. Enterprises** (supra). Further, in the case of individual assessees, there were no pending proceedings on the date when the block assessment notice was served and it in this context that the decision of the Supreme Court in **A.R. Enterprises** (supra) is more apposite. **N.R. Paper & Board Ltd.** (supra) did not deal with the situation where no return of income had been filed and due date of filing of return for the said period had expired. It is clear that the Gujarat High Court in the said case was not examining the legal consequence and scope and ambit of undisclosed income in such cases, which is clear from the following paragraphs:

“If the pending regular assessment proceedings were to be frozen and got substituted by the assessment of the undisclosed income of the block period, the Legislature would have been specific on that aspect and would have made it clear that the pending regular assessment proceedings should be dropped. The provisions of this Chapter do not either expressly or by necessary implication even remotely indicate that the regular assessment proceedings of a previous year covered in the block period, were required to be stayed or dropped or substituted by the proceedings of this Chapter.

Under sub-section (3) of section 158BA, where the date of filing the return of income under section 139(1) for any previous year has not expired, and the income of that previous year or the transactions relating to such income are duly recorded, then such income is not

required to be included in the block period. This obviously means that the regular assessment of that previous year which has remained pending, will proceed notwithstanding that it was falling in the block period. The same would be the case where the block period includes only a part of the previous year of which the return is filed for regular assessment, and the regular assessment can proceed notwithstanding that the undisclosed income for a part of that previous year was within the block period.”

35. There is another reason why we have referred to the decision in ***N.R. Paper & Board Ltd.*** (supra) at the first instance. The Tribunal in the impugned order has specifically referred and quoted the following passage from the decision of the Supreme Court in ***L.R. Gupta and Ors. Vs. Union of India & Ors.*** [1992] 194 ITR 32 :-

“Sub-clause (c) refers to money, bullion or jewellery or other valuable articles which, either wholly or partly, should have been the income of an assessee which has not been disclosed for the purpose of the Act. The said sub-clause pertains only to movable and not immovable assets. Secondly, it pertains to those assets which, wholly or partly, represent what should have been his income. The expression income "which has not been, or would not be, disclosed for the purposes of the Income-tax Act" would mean that income which is liable to tax but which the assessee has not returned in his income-tax return or made known to the Income-tax Department. The sub-clause itself refers to this as "undisclosed income or property". In our opinion, the words "undisclosed", in that context, must mean income which is hidden from the Department. Clause (c) would refer to cases where the assessee knows that the movable asset is income or represents income which is taxable but which asset is not disclosed to the Department for the purpose of taxation. Those assets must be or represent hidden or secreted funds or assets.

Where, however, the existence of the money or asset is known to the Income-tax Department and where the case of the assessee is that the said money or valuable asset is not liable to be taxed, then, in our opinion, the provisions of sub-clause (c) of section 132(1) would not be attracted. An assessee is under no obligation to disclose in his return of income all the moneys which are received by him which do not partake of the character of income or income liable to tax. If an assessee receives, admittedly, a gift from a relation or earns agricultural income which is not subject to tax, then he would not be liable to show receipt of that money in his income-tax return. Non-disclosure of the same would not attract the provisions of section 132(1)(c). It may be that the opinion of the assessee that the receipt of such amount is not taxable may be incorrect and, in law, the same may be taxable but where the Department is aware of the existence of such an asset or the receipt of such an income by the assessee, then the Department may be fully justified in issuing a notice under section 148 of the Act, but no action can be taken under section 132(1)(c). An authorisation under section 132(1) can be issued if there is a reasonable belief that the assessee does not want the Income-tax Department to know about the existence of such income or asset in an effort to escape assessment. Section 132(1)(c) has been incorporated in order to enable the Department to take physical possession of those movable properties or articles which are or represent undisclosed income or property. The words "undisclosed income" must mean income which is liable to be taxed under the provisions of the Income-tax Act but which has not been disclosed by an assessee in an effort to escape assessment. "Not disclosed" must mean the intention of the assessee to hide the existence of the income or the asset from the Income-tax Department while being aware that the same is rightly taxable."

36. ***L.R. Gupta's case*** (supra) related to validity of search under Section 132 and whether pre-conditions stipulated in sub-section (1) clauses (a), (b) and (c) were satisfied. While examining clause (c) to Section 132(1) of the Act, the Supreme Court observed that what was disclosed and was known to the department was not hidden and could not be treated as undisclosed income, either wholly or partly. The said observations were made in the context of clause (c) to Section 132(1) of the Act. Search and seizure has serious and deleterious consequences as it impinges on the right of privacy. In ***N.R. Paper and Board Ltd.*** (supra), reference was also made to clause (c) to Section 132(1) and similarity of the two expressions 'undisclosed income or property' mentioned in Section 132(1) clause 'c' and Section 158B(b) of the Act was duly noticed but the Bench clarified that "the concept of undisclosed income as defined in clause (b) to Section 158B of the Act, is however, wider and different as we will later notice" (see page 740 of the ITR publication). The said sentence, however, it appears was not highlighted before the Tribunal and, therefore, not considered. Thus this decision holds that it would not be correct to apply the ratio or reasoning in the aforesaid paragraph of ***L.R. Gupta*** (supra) to the block assessment. This is correct and right as the scope and confines of block assessment has been highlighted by the Supreme Court in ***A.R. Enterprise*** (supra) and is broader and wider. Section 158B(b) has to be read with 158BB(1) harmoniously. Apposite would be to refer to the following observations in ***N.R. Paper & Board Ltd.*** (supra), which read:

"In cases where appeals, revisions and references are decided from regular assessment orders of the previous years included in the block period, the decisions may have the effect of disturbing the assessment made by the Assessing Officer. The provisions of sub-sections (1) and (2) of section 153,

prescribing the time limit for making orders of assessment do not apply to assessments, reassessments or recomputations made in consequence of or to give effect to any finding or direction contained in an order made under section 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference as laid down in section 153(3)(ii) of the Act. Obviously, therefore, the regular assessment already made will have to be brought in tune with such orders or may even have to be done de novo, if so ordered, in which event it would amount to a regular assessment still pending. For example under section 251, the Commissioner of Income-tax (Appeals) may confirm, reduce, enhance or annul the assessment or he may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment. The Tribunal has, in deciding appeals, wide powers to pass orders thereon as it thinks fit, as provided in section 254(1). After decision on the questions of law by the High Court or the Supreme Court, the Tribunal has to pass such orders as are necessary to dispose of the case conformably to such judgment, as provided in section 260 of the Act. The Commissioner also has revisional powers under section 263 to enhance or modify the assessment, or cancel it and direct a fresh assessment. All these may entail changes in the original assessment or fresh regular assessments in respect of the previous years falling in the block period. The fact that block assessment of undisclosed income is pending or is made, will not take away all these statutory powers, the exercise of which would affect the regular assessments already made or may entail fresh regular assessment for a previous year falling in the block period for assessment of undisclosed income. It would produce startling results of denuding all these authorities of their statutory powers in respect of the regular assessments made or to be made for the previous years falling in the block period. That surely is not intended by the Legislature and no such disastrous result is contemplated by introducing special procedure for assessment of searchcases in Chapter XIV-B. The special procedure for assessment of undisclosed income as a result of search, which is intended to target that income or property which has not been or would not have been disclosed for the purposes of the Act, is not meant to provide an

insulation to such assessee from the consequences of regular assessments made or to be made for any previous year falling under the block period. The powers of regular assessment are kept intact and so are all the appellate, revisional and other powers affecting such regular assessment and all the statutory consequences flowing from the exercise of such powers would follow along side of this special assessment procedure devised for dealing with the undisclosed income as a result of search. It, therefore, follows that in the inquiry under section 143(3) for regular assessment which was pending when the block assessment was made, the Assessing Officer who comes across evidence and material which was not found or made available in the process of block assessment, cannot ignore the same and he will be duty bound to make the regular assessment taking into account such evidence and material gathered in the enquiry under section 143(3) to ensure that proper assessment of total income is made and tax determined on the basis of such assessment. An assessee who had not disclosed and did not intend to disclose income or property, which fact is detected in the search, cannot acquire immunity from being assessed to still other income or property which did not come to surface as his undisclosed income from the evidence found and material available at the time of the block assessment, but is now found by virtue of the enquiry made under section 143(2)(iii) of the Act for regular assessment showing that the assessee had understated the income or had computed excessive loss or underpaid tax even after taking into account the fact that his undisclosed income for the block period was separately assessed and taxed at the higher rate of 60 per cent was charged thereon. The immunity from levy of penalties attached to the undisclosed income determined in the block assessment have no relevance to the levy of interest and penalties that may follow the regular assessment in respect of understatement of income or computation of excessive loss made by the assessee, which are not relatable to the undisclosed income determined and taxed in the separate proceedings.”

37. The aforesaid paragraph notices that undisclosed income relating to block period has to be taxed at 60% as per the rate prescribed under

Section 113 of the Act, irrespective of the fact whether regular assessment for any one or more years was pending. Reference was specifically made to the immunity from specified interest and penalty contemplated by Section 158BF but only in respect of undisclosed income determined in the block assessment and had no bearing on the assessment made otherwise i.e. the regular/normal assessment. However, the legal position underwent a change with the enactment of Section 158BFA by way of Income Tax (Amendment) Act, 1997 w.e.f. 1st January, 1997 in respect of searches undertaken under Section 132 or requisition under Section 132A on or after 1st January, 1997, authorising levy of interest and penalty in certain cases. However, Section 158BFA would not be applicable as the search in the present case was prior to 1st January, 1997.

38. At this stage, we would now like to deal with and examine judgments of the Delhi High Court. In ***CIT vs. Ravi Kant Jain*** [2001] 250 ITR 141 (Del), this Court dismissed the appeal filed by the Revenue holding that there was difference between regular assessment and block assessment under Chapter XIV B. The Assessing Officer in the block assessment order had proceeded without enumerating and really addressing himself to the scope of Chapter XIV B and Section 158BB of the Act. He had relied upon report of the special auditor who had given a different colour to the existing facts/details which were already a subject matter of regular/normal assessments of the relevant years. There was no search material to justify and interfere with the regular assessments. It is clear from the said decision that the court was dealing with the situation where regular assessments were made dealing with certain aspects and the block assessment order reversed the said findings recorded in the regular assessments without there being any searched material to justify the

different stance. The only basis for reversing the regular assessment was the report of the special auditor.

39. In ***CIT vs. Vishal Aggarwal*** [2006] 283 ITR 236(Del), it was noticed that the assessee had filed returns disclosing gifts and had furnished necessary documents in support. There was search and seizure operation, (it appears subsequently) in the premises of the assessee's father, but no incriminating material was found relating to the assessee. The Assessing Officer had resorted to Section 158BC (possibly, read with Section 158BD) and treated the gift as concealed income and attempt at laundering money. There was no material or information which was discovered to indicate that the gifts were bogus and/or represented undisclosed income. No such material information or document was found even in the post search enquiry. Further the post search enquiry was unconnected with the searched material or information. Thus, the gifts which had already been declared in the returns filed, it was held were outside the preview of the block assessment. This decision will not help the individual assessee in the present case as we have noticed that they had not filed returns of income. We have already referred to the material found as a result of search and how and in what manner it related to the question whether income/entries lying in bank accounts belonged to and represented undisclosed credit or assets of the individual assessee.

40. In ***CIT vs. Jupiter Builders Pvt. Ltd.*** [2006] 287 ITR 287 (Del), there is a detailed discussion on the provisions of Chapter XIV B, and it has been held that the said chapter was applicable to undisclosed income i.e. income which had not been or would not have been disclosed and such income should be unearthed as a result of search or requisition. The block

period in the said case was from 1987-88 to 1997-98, and the additions related to the assessment years 1993-94, 1994-95, 1995-96 and 1997-98. Addition of Rs.4,00,000/- relating to the assessment year 1993-94 was an expense which had been debited in the Profit & Loss A/c, which was accepted by the Revenue in the regular assessment. The assessee had also produced documents and confirmations of the recipient. Similarly, in the assessment year 1994-95, payments received from buyers and the receipts and documents produced were duly noticed in the regular assessment. For the aforesaid two years, no material was found during the search to show that the accounts or entries of Rs.4,00,000/- each were bogus or were not genuine. With regard to assessment year 1995-96, a wrong addition of Rs.50,000/- was made and the same was deleted. Assessment year 1997-98 was the year in which the search had taken place and in the block assessment order addition of Rs.28,92,000/- was made. With regard to addition of Rs.1,00,000/-, it was noticed that addition had been made in case of a third party and the appellate authorities were justified in deleting the addition in the hands of the assessee. Another addition of Rs.2,20,000/-, it was noticed was deleted primarily on facts. The last addition of Rs.25,00,000/- made on estimate basis towards unexplained investment in immovable properties, was also deleted on the ground that it was based on the report of the valuation officer and the assessee had relied upon proviso to Section 142A that the Assessing Officer could not have referred the matter for valuation. Since no valuation had been ordered, neither the Assessing Officer was competent as an expert to make the assessment and that too in proceedings under Chapter XIV-B. This court in the said case has observed that Chapter XIV B was not concerned with the income which has already been disclosed and in respect of which regular

assessment proceedings stood concluded, were pending or in respect of which time for filing of return on the date of search/requisition had not expired. In the last set of cases, entries should be duly recorded in the books of account before the date of search. Thus block assessment proceedings cannot be used as an opportunity to re-open, the concluded assessment or reassess return of income by a fresh look at disclosed facts and figures unless they were found to be false in the case of search or requisition. In the present case, no return of income under Section 139(1) of the Act was filed by the individual assessees and, therefore, there was no disclosure of income. Further, facts were unearthed during the search and related subsequent enquiries to show that the stand of the individual assessees in the statements recorded under Section 131 of the Act were not correct and rather false as per the assertions made by the Assessing Officer. In ***Jupiter Builders Pvt. Ltd.*** (supra) it has been held that the regular assessment proceedings and block assessment proceedings operate in different fields, a legal ratio which is undisputed and with which we respectfully agree. Further the term ‘undisclosed income’ stands for that income which had not been disclosed or had been concealed and unearthed or has nexus and relatable to information and material gathered in search and subsequent enquiries thereafter. Scope and what should be treated as ‘undisputed income’ has to be determined with reference to Section 158B clause (b) and 158BB of the Act. In the present case, as no return of income had been filed under Section 139(1) and incriminating material was found during the search, as such “the undisclosed entries” would be ‘undisclosed’ in the light of the statutory provisions and as elucidated by the Supreme Court in the case of ***A.R. Enterprise*** (supra).

41. In ***CIT vs. Vivek Dougall*** [2008] 305 ITR 270 (Del.), search was conducted in the premises of a person named Gulati on 8th July, 1999 and certain documents were seized. Subsequently, a notice was issued to the assessee in question under Section 158BC, who filed return declaring NIL undisclosed income. However, much before the date of search, the assessee had filed regular return for assessment year 1988-89 and had disclosed certain amounts received as non-compete fee and claimed that they were not chargeable to tax. In the block assessment proceedings, the Assessing Officer brought the said amount to tax, holding that the same was actually paid for change of shareholding and even otherwise ‘non compete fee’ was a revenue receipt and, therefore, chargeable to tax. The court held that the said addition could not have been made in the block assessment proceedings as the entire facts were disclosed by the assessee well before the search carried out in the premises of Gulati and, therefore, the same could not have been made a subject matter of the block assessment but could be examined only in the regular assessment. In the said case, noticeably regular return of income had been filed disclosing full facts and a position was taken. Nothing to indicate that the position taken or facts stated were false was unearthed during the search. In the present case, no return under Section 139(1) of the Act had been filed. Further, incriminating material as per the Assessing Officer was found during the course of search and has been relied upon in the block assessment order.

42. In ***CIT vs. Mukesh Luthra*** [2011] 337 ITR 41 (Delhi), the Revenue was successful in appeal filed before the High Court, as it was held that the addition should have been made in the regular assessment proceedings and not as ‘undisclosed income’ in the block assessment. In the said case, search had taken place on 30th August, 2001 and the block assessment

order was passed on 31st October, 2003. Subsequently, during the course of assessment proceedings/orders passed in the case of a third person, it was observed and came to the knowledge of the Revenue that a concern stated to be belonging to that third person was in fact a *benami* concern of the searched person i.e. the respondent assessee in the appeal before the High Court. Thereafter in the regular assessment order dated 27th February, 2004, substantive addition on account of income earned from the *benami* concern was made in the hands of the respondent assessee therein and protective assessment was made in the assessment order passed in the case of the third person. On appeal, these additions were deleted by the first appellate authority and the order was confirmed by the Tribunal who held that the issue should have been examined in the block assessment order and not in the regular assessment. The merits of the addition were not examined. This Court observed that during the search no evidence was unearthed relating to the concern in question, to show that the assessee was the *benami* owner and the income earned represented or was his income. The Revenue, therefore, succeeded in the High Court on the basis that the question of *benami* ownership came to the light and their knowledge after passing of the block assessment order. In the said case, in fact proceedings under Sections 147/148 were initiated pursuant to the said new information and facts. The said decision is, therefore, clearly distinguishable and does not support the case of respondent assessee herein.

43. Now we would like to deal with the decisions of other High Courts cited before us by the counsel for the assessee. ***CIT vs. Shambhulal C. Bachkaiwala*** [2000] 245 ITR 488 (Guj.) follows the decision in ***N.R. Paper and Board Ltd.*** (supra) pointing out distinction between undisclosed income which could be made subject matter of block assessment

proceedings and normal income which could be a subject matter of the regular assessment. In **CIT vs. N.T. John** [2003] 259 ITR 224, a Division Bench of the Kerala High Court reversed the judgment of the Single Judge reported as [1997] 228 ITR 214, relying upon **N.R. Paper and Board Ltd.** (supra) and decision of the Calcutta High Court in **Caltradeco Steel Sales (P) Ltd. vs. Deputy CIT** [2000] 243 ITR 643 (Cal), holding that Chapter XIV-B was for assessment of undisclosed income found as a result of search and assessment under Section 143(3) pertains to disclosed income, i.e. income which has already been declared in the return or when it pertains to the period for which due date of filing of return has not expired, income was already included and shown in the books of accounts. This judgment also does not, go against what we have held or support the assessee's contention. The Kerala High Court in **CIT vs. Smt. C. Sabira** [2011] 338 ITR 226 (Ker.), went into several questions including the addition made on estimation towards cost of construction in the block assessment order. The assessee had duly shown the cost of construction in the regular returns. It was observed that the undisclosed income must be determined on the basis of undisclosed income unearthed during the search and also which were relatable to such evidence. During the search, no such material or information came to light to justify the finding about cost of construction that was estimated. In the present case, we have noticed that during the course of the search, as noticed in the block assessment orders, several material/evidence came to light which would show that amounts deposited or entries in the bank accounts belonged to the assessee and not to the party, JMM. Further, individual assessee had not filed returns of income for the relevant period, for which due date under Section 139(1) had long lapsed.

44. In the last, we will deal with three judgments of the Madras High Court. In ***Commissioner of Income Tax versus G.K. Senniappan***, (2006) 284 ITR 220 (Mad), the appeal filed by the Revenue was dismissed on the ground that there was a pre-search survey in which incriminating material was found but this material could not have been utilised in the block assessment proceedings. The reason elucidated being that this material/information was available with the Revenue at the time of search. With all due respect, we have reservations and cannot agree with the aforesaid broad proposition. It is not uncommon or unknown that surveys could and do lead to search operations, when conditions of sub-section (1) to Section 132 of the Act are satisfied. Such water tight compartmentalization and interpretation may not be justified, as search operations are undertaken only when there is information or basis regarding undisclosed income etc. Presence and knowledge of the said perceptible information may well be a pre-requisite for conducting search. Logically and as a sequitur if the ratio in ***G.K. Senniappan*** (supra) is strictly applied, no block assessment can be made in respect of information/material available at the time of search and even when this information/material was the foundation of the search. In fact, when full and complete details/documents are available, search may not be required or necessitated. The expression “undisclosed income” would refer to the disclosures made by the assessee in the form of return of income of the past years or entries in the books of accounts and documents of the current year, when due date has not expired. Something which is hidden and not disclosed by the assessee, would not lose and forego its character as undisclosed income because the Revenue authorities have come to know or have collected some or partial information or details regarding the said

undisclosed income at any time before or prior to the search. However, if the material found during the survey has nothing to do with the material and evidence found during the course of search, the position may be different, depending upon the factual matrix. Moreover, in the present case there was no prior survey resulting in the search and we have already dealt with the contention that statements under Section 131 of the Act were recorded and whether this constituted information and knowledge to comprehend and hold that “income” had been disclosed and have rejected the said contention for the various reasons set out in paragraph Nos.28 to 30 above.

45. ***Commissioner of Income Tax versus S. Ajit Kumar***, (2008) 300 ITR 152 (Mad) was a case of a survey on an interior decorator/builder, who had constructed the assessee’s house. The allegation was that the assessee had paid more than Rs.95 lacs to the contractor/interior decorator in cash, which was duly recorded in his books, but in the books of the assessee only cheque payments were recorded. The search and the survey were conducted on the same day, but the High Court held that at the time of the search the factum that the house was constructed/built was known to the Revenue and the factum that cash payments were made came to the knowledge during the course of survey. It was held that the material or information found during the course of survey operation, was not relatable to any material found during the course of search. The High Court relied upon the decision in the case of ***G.K. Senniappan*** (supra). Again with respect, we have reservations on the ratio recorded in the said judgment on the question of undisclosed income, which can be made subject matter of block assessment. The fact that search and survey were conducted on the same day showed that they were related. Undisclosed income can be

computed also on the basis of such other material or information as are available with the Assessing Officer. This would and should include information and material when search and survey operations are undertaken at the same time, though it may not include survey operations unconnected with the search. There could possibly be other exceptions also. The answer would be case and fact specific. Even otherwise, as noticed while examining the judgment in the case of **G.K. Senniappan** (supra), the position in the present appeals is different as individual assessee had not filed returns of income and hostile and culpable material and information was found during the course of the search. These two decisions were followed by the Madras High Court in **Commissioner of Income Tax versus P.K. Ganeshwar**, (2009) 308 ITR 124 (Mad) though the said judgment also makes reference to decision in **Ravi Kant Jain** (supra) which we have already examined above. The assessee in his block assessment return had declared Rs.36.10 lacs as undisclosed income. However, in the block assessment order, Rs.2.56 crores were added, relying upon investigation that followed the search as a letter was found that led to discovery of fixed deposits in the name of fictitious persons amounting to Rs.2.83 crores. The additions were deleted on the ground that undisclosed income was not detected as a result of search but by investigation which followed the search. In the said decision except for following earlier judgments in **S. Ajit Kumar** and **G.K. Senniappan B** (supra) does not lay down any ratio or observation, which detracts or affects the legal conclusion and the findings recorded by us.

46. In different paragraphs, we have dealt with the appeal in the case of JMM. As noticed above, the Tribunal allowed the appeal of the assessee JMM, asserting that no incriminating material evidence/information was

gathered/found during the course of search in the case of the individual assesseees. This aspect has been dealt with in great detail above. Moreover, in the case of JMM notice under Section 158BD read with Section 158BC of the Act was issued and there was also a search of the premises of M/s Anjali Jain and Associates, Chartered Accountant and Auditor of JMM where books of accounts and other documents were found and seized. Subsequently, during investigation, statements of different persons referred to above, were recorded to ascertain and decipher whether the money deposited in the bank accounts had any connection or belonged to JMM or the said money was undisclosed income of the individual assesseees. Assessment in the hands of JMM was on a protective basis. The Tribunal has not considered and examined the said evidence and has also not gone into the question whether and if in case no addition could be made in the hands of the individual assessee, substantive addition on the basis of the said evidence or material could be sustained in the hands of JMM. Of course, in case substantive addition in the hands of the individual assessee stands finally affirmed, the protective addition in the hands of the JMM would dissipate and would not be sustainable.

47. During the course of hearing, learned counsel appearing for the individual assesseees/JMM had stressed that other points and grounds were raised before the Tribunal but these have not been adjudicated upon and decided, as the appeals were allowed on the preliminary ground; there was no undisclosed income which could be made subject matter of block assessment and additions, if any, could be made only in the regular/normal assessment. Learned counsel for the Revenue accepts the said position. We also notice that the Tribunal has not gone into and examined the merits.

Thus, an order of remand would be justified and is required as other issues on merits etc. have to be examined.

48. At this stage, we also record that it will be open to the Revenue to argue and contend before the Tribunal in case certain additions cannot be made in the block assessment proceedings, liberty should be granted to make the said addition by resort to Section 147 of the Act or the question whether additions can be made in accordance with law in the regular/normal assessment proceedings should be left open. If any such contention is raised by the Revenue, the same will be considered and dealt with in accordance with law.

49. In view of the aforesaid discussion, we answer the substantial questions of law mentioned in the first paragraph of this judgment in favour of the Revenue and against the respondent-assessee. We also pass an order of remand for decision on other issues and merit. Observations made in this decision are for the purpose of deciding the present appeal, and additions and other issues on merits will be examined as per the facts and material on record.

50. To cut short any delay, parties are directed to appear before the Income Tax Appellate Tribunal on 15th December, 2014, when a date of hearing will be fixed.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

NOVEMBER 11, 2014
KKB/VKR/NA/LRs