

**(2012) 09 GUJ CK 0041**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 12394 of 2002**

Prakash Jewellers

APPELLANT

Vs

Asstt. CIT

RESPONDENT

**Date of Decision : 03-09-2012**

**Acts Referred:**

Income Tax Act, 1961 — Section 127(2), 132, 132(1), 132(4), 132A

**Citation : (2013) 261 CTR 195**

**Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J**

**Bench : Division Bench**

**Advocate : J.P. Shah, for the Appellant; Manav A. Mehta, for the Respondent**

**Final Decision : Allowed**

## **Judgement**

Harsha Devani, J.—The petitioner, a partnership firm, has challenged the notice dated 22-1-2002 issued by the respondent u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act) seeking to reopen its assessment for assessment year 1999-2000. The facts of the case as stated in the petition are that on 27-1-1999, search proceedings were conducted u/s 132 of the Act in the case of the petitioner. The authorised officers seized certain ornaments as also registers which were showing the names of parties who had given these ornaments by way of loan or for remaking. Such registers also showed the weight of the ornaments given by the parties. During the course of block assessment proceedings under Chapter XIV-B, the petitioner filed its return on 30-8-1999 disclosing nil income. The petitioner produced affidavits of various parties who had given these ornaments and also produced such parties before the assessing officer who confirmed the fact of lending or giving of ornaments and also replied the questions put by the assessing officer about the source, ownership, capacity, identity etc. Pursuant to inquiry made by him, the assessing officer did not propose any addition in respect of jewellery. However, when the order was presented for the approval of the Joint Commissioner of Income Tax, he directed such addition. Accordingly, assessment was framed u/s 158BC of the

Act on 27-3-2001 computing the undisclosed income at Rs. 48,49,902 which was the value of the ornaments taken as undisclosed investments of the petitioner. The petitioner carried the matter in appeal before the Commissioner (Appeals), who, by his order dated 9-5-2001 allowed the appeal on almost all points except the point of application of section 40A(3) of the Act. Against the order of the Commissioner (Appeals), the Department went in appeal to the Tribunal. In the said appeal, the petitioner preferred cross-objections against the upholding of the addition u/s 40A(3) of the Act. By an order dated 19-9-2002, the Tribunal disposed of the appeal as well as the cross-objections, wherein it upheld the deletion of addition of Rs. 29,77,726.

2. After the Commissioner (Appeals) had decided the appeals, the assessing officer issued the impugned notice dated 22-1-2002, (that is, before the Tribunal had decided the appeal preferred by the Department) proposing to reopen the petitioners assessment for assessment year 1999-2000. The petitioners Chartered Accountants by a letter dated 28-1-2002 drew the attention of the assessing officer to the fact that all the aspects had been examined by the assessing officer in the assessment u/s 158BC and requested the respondent to furnish copies of the reasons recorded. However, by a communication dated 28-8-2002, the petitioner was informed that all the records were with the Departmental Representative appearing before the Tribunal and that copy of the reasons would be supplied only after he receives back the record. It is at this stage that the petitioner has filed the present petition.

3. In the aforesaid factual background, Mr. J.P. Shah, learned counsel for the petitioner assailed the impugned notice by submitting that the assessing officer seeks to reopen the assessment on issues which have already been decided by the Commissioner (Appeals) in favour of the petitioner as confirmed by the Tribunal. Inviting attention to the reasons recorded, it was pointed out that the assessment was sought to be reopened in relation to the deletion of addition of Rs. 29,77,726 made by the Commissioner (Appeals) during the course of block assessment. Referring to the order of Commissioner (Appeals), it was pointed out that such issue has been dealt with on merits by the Commissioner (Appeals) who on the basis of the evidence on record found that there is no justification for making such addition and had deleted the same. From the order passed by the Tribunal in the appeal preferred by the Department, it was pointed out that the Tribunal has recorded that the assessee was successful in proving to the hilt the genuineness of the transactions encompassing all its aspects. The assessee had duly discharged its onus. Therefore, there was no justification at all for reversing the order of the Commissioner (Appeals) on this issue. The learned counsel submitted that the Commissioner (Appeals) as well as the Tribunal have examined the issue on merits and have held in favour of the petitioner and as such the reopening of assessment in relation to such issue is without authority of law inasmuch when the very same issue has been scrutinised by the Commissioner (Appeals) as well as by the Tribunal, the assessing officer can have no reason to believe that income chargeable to tax has escaped

assessment. It was argued that the reopening of assessment is contrary to the scheme of the Act, in as much as matters detected during the course of search, would be subject matter of block assessment and not regular assessment. Therefore, for this reason also the reopening of assessment is bad in law. Under the circumstances, the impugned notice being without jurisdiction is required to be quashed and set aside.

4. Opposing the petition, Mr. Manav Mehta, learned standing counsel for the respondent reiterated the averments made in the affidavit-in-reply filed by the respondent as well as the reasons recorded by the assessing officer for reopening the assessment u/s 147 of the Act.

5. The undisputed facts of the case are that the assessing officer pursuant to an action u/s 132 of the Act framed block assessment u/s 158BC of the Act wherein he held that the so called customers gold weighing 7396.94 gms. belongs to the assessee and taking the rate of gold at Rs. 402.5 per gram made addition of Rs. 29,77,726 in the hands of the assessee. In the assessee's appeal such addition came to be deleted by the Commissioner (Appeals). Such deletion came to be confirmed by the Tribunal in revenues appeal against such deletion. Thereafter, in respect of the very same item the assessment is sought to be reopened u/s 147 of the Act.

6. Before advertng to the merits of the case, it may be necessary to refer to the reasons recorded by the assessing officer for reopening of assessment which read thus:-

#### REASONS FOR REOPENING THE CASE

M/S. PRAKASH JEWELLERS" Assessment Year 1999-2000.

In this case survey u/s 133A was carried out at the business premises of the assessee on 28-1-1999. This was converted into search u/s 132 of the Act. During the course of search action, gold ornaments and silver articles weighing of 16156.7 grams of old ornaments and 72.649 Kg. of silver articles aggregating total value of Rs. 68,89,252 were found. Out of which 7092.3 grams of gold ornaments were sized and 18.648 Kg of silver and silver ornaments were put under deemed seizure u/s 132(1) - second proviso. The assessee firm is engaged in job work of gold and silver ornaments and also trading thereof. It filed the return of income for the block period declaring total income of Rs. NIL on 30.8.1999 at Mumbai. Subsequently due to order u/s 127(2) of the Act passed by the CIT, Mumbai City-XII dated 22-12-1999, the case is assigned to the erstwhile Investigation Circle-3(1).

The block assessment for the period of Assessment Year 1988-89 to Assessment Year 1997-98 and partial period from 1-4-98 to 28-1-98 was made u/s 158BC(c) of the Act determining total undisclosed income of Rs. 48,49,902 comprising mainly of gold ornaments claimed to belonging to customers of Rs. 29,77,726 on 27-3-2001.

Being aggrieved by the said order the assessee preferred an appeal to the CIT(A)-III, Surat. The Ld. CIT(A) vide order No. CAS/III/51/2000-01 dated 9-5-2001 while deciding assessee's appeal deleted the majority of the additions including the aforesaid addition of Rs. 29,77,726 made by the assessing officer. He directed the A.O. to exclude all recorded materials for the consideration for the purpose of block assessment in view of specific provisions of law because such additions can be made only in the block assessment.

During the course of search, physical stock of gold found was 16153.7 gms. while the stock as per books was 1473.28 grams and the excess stock as per books comes to 7396.94 gms. which claimed to be pertaining to customers given for conversion into new ornaments on job work basis.

During the course of search, as well as assessment proceedings u/s 158BC of the I.T. Act assessee had failed to prove the creditworthiness and identity of the persons to whom the so called jewellery was claimed to be belonging. Following glaring mistake were observed which proves that jewellery found does not belong to outsiders but belongs to assessee himself. It is therefore required to be taxed in the Assessment Year 1999-2000.

I. In the register maintained in Form No. 11, address of customers is not written and it was claimed by the assessee that as customers are known. There is no need of any address to whom the assessee was asked during the course of search and thereafter to provide address by merely seeing register, assessee failed to do so and said that they will contact certain person and then address of these persons.

II. The incoming receipt books kept by the assessee in which the first copy which should have been handed over to the customer is lying with the assessee thereto the column of the signature is blank, whereas in genuine case it should be with the customer or at least should bear the signature of the customer.

III. During the course of search in the case of assessee a bunch of Majuri bills have been found all torn off from bounded book and containing serial numbers hand written. These Majuri bills pertain to period 1-4-97 to 31-3-98 (Seized as per Annexure B-S-1/26). Comparison of the same with register No. 11 of the same period indicate that on every third day i.e. within three days of receipt of old ornament, newly made ornaments are given back to the customer and Majuri bill is drawn on exact weight as received from customer and weight of old and new ornament is exactly the same. In fact, Majuri bill drawn on 31-3-98 has been drawn in respect of old ornaments received on 28-3-98. Thus, last years detail clearly bring out the fact that within 3 days ornaments have been returned. Same is the case with the incoming receipt book. Last years incoming receipt book does not contain first copy i.e. customers copy. If customers do not claim copy what is the need of tearing it. It is nothing but preparing paper work to cover up real transaction. This year due to search action u/s 132, the assessee did not have the time to meticulously plan and complete the paper work and

physically checking of stock altered all calculations.

IV. It is known that if any customer gives old ornaments for conversion into new ornaments he would definitely provide details of items, i.e. whether bangles, necklace etc. to prepared, the designs etc. and jewelers would note the same in the order book but no such order details have been found and order book which have been seized contains details of such persons whose name are not written in register No. 11 etc. Thus, there is no order detail in respect of these huge stock brought in to perform the job work.

V. Once the customer takes back his gold ornament, at the time of delivery the jewelers would ask in normal course, copy of receipt or at least take signature of the person indicating fact of return of jewellery. But in the assessee's case, there is none, neither copy of receipt (which in any way is not issued to customer) nor there is any signature or fact of return mentioned in register. Nor outgoing receipt book contains any such entry.

VI. Loose majuri bills found and seized indicate that within three days of receipt of gold customers took back their gold. Then how in current year, gold is with the assessee for such long period and that too exhibited in show room over the counter and ready for sale.

VII. Certain order books have been seized and inventoried, during the course of search. These order books contain name and address/telephone number of customers and also details of weight of old ornament received. But none of these are mentioned in Register No. 11. Why it is not so is clear because Register No. 11 does not represent record of persons who have given gold for job work, rather, it represents partly introduction of assessee's own unaccounted gold and partly name of persons who have exchanged their old ornaments for new one of same value or have paid difference of greater value.

VIII. In quality wise stock register, nowhere there is indication in regard to incoming items as to whether they belong to customers or whole stock belong to assessee.

IX. During the search proceedings, no record or register was found which contain details of remolding the ornaments including nature of items like bangles, chain design, etc. and when he was asked to explain, it was explained no such records are maintained.

From the foregoing discussion, it is clear that jewellery claim to belong to customers actually belong to assessee himself. Besides, since the Ld. CIT(A)-III, Surat has deleted the additions of Rs. 29,77,726 from the block assessment with the remarks that such additions can be made only in regular assessment u/s 143(3) or 144 of the I.T. Act. Therefore, I have reason to believe that the income chargeable to tax in this case amounting to Rs. 29,77,726 has escaped assessment which is required to be taxed by reopening the assessment u/s 147 of the Act, 1961. Thus, it is fit case for issuing notice u/s 148 of the I.T. Act,

1961.

7. A perusal of the reasons recorded shows that in the block assessment made u/s 158BC(c) of the Act total undisclosed income of the petitioner had been determined at Rs. 48,49,902 comprising mainly of gold ornaments valued at Rs. 29,77,726 claimed to be belonging to customers. It is also amply clear that the assessing officer was well aware of the fact that the Commissioner (Appeals) had, on merits, deleted majority of the additions including the addition of Rs. 29,77,726 made in the block assessment u/s 158BC of the Act. Moreover, it may be significant to note that on a conjoint reading of the assessment order u/s 158BC of the Act and the reasons recorded it is found that from the third unnumbered paragraph to paragraph VII of the reasons, the respondent has, word by word, reproduced either wholly or major portions of the contents of paragraphs 14-2, 14-15, 14-6, 14-7 and 14-9 of the assessment order. In paragraphs VIII and IX of the reasons, the respondent has observed that in quality wise stock register it is nowhere indicated as to whether the incoming items belong to the customers or the whole stock belongs to the assessee and in paragraph DIX he has recorded that during the course of search proceeding no record was found containing details of remolding of ornaments and that the assessee upon being called upon to explain the same had stated that no such records are maintained. After the above discussion, the respondent has observed that it is clear that the jewellery claimed to be belonging to the customers actually belong to the assessee. He has also emphasized that the Commissioner (Appeals) has deleted the addition of Rs. 29,77,726 with the remarks that such additions can be made only in regular assessment u/s 143(3) or 144 of the Act. Based on the above the respondent has stated that he has reason to believe that income chargeable to tax has escaped assessment.

8. Thus two things are apparent. Firstly, that the issue in respect of which the assessment is sought to be reopened was subject matter of the block assessment. Secondly, that the addition of Rs. 29,77,726 made by the assessing officer during the course of block assessment u/s 158BC of the Act had been deleted by the Commissioner (Appeals).

9. At this juncture, it may be germane to refer to leading two decisions of this court on the question of reopening of assessment in the context of block assessment. In *N.R. Paper and Board Limited and Others Vs. Deputy Commissioner of Income Tax*, a Division Bench of this court held that the assessment of undisclosed income is altogether a different matter from the regular assessments. u/s 158BB of the Act, for computing the undisclosed income of the block period, the assessing officer has to compute the total income of the relevant previous years on the basis of the evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the assessing officer. The evidence found as a result of search or requisition would be the evidence that has been gathered by the authorised officer under sections 132 and 132A of the Act, which would

include the statements recorded by the authorised officer during the course of search and seizure u/s 132(4) of the Act. The evidence found and material available is to be the basis for computing the aggregate of the total income of the previous years falling in the block period. The court held that u/s 158BB(1), read with section 158BC of the Act, what is assessed is the undisclosed income of the block period and not the total income or loss of the previous year required to be assessed in the normal regular assessment u/s 143(3), where the assessing officer makes an inquiry to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner and on the basis of the evidence produced by the assessee, the evidence obtained on the specific points and all relevant material which he has gathered assesses the total income or loss and determines the sum payable thereon as per that assessment. This exercise u/s 143(2) and (3) for regular assessment stands in contrast to the exercise of the assessing officer u/s 158BB read with section 158BC(b), where he has to assess only the undisclosed income of the block period on the basis of the evidence found and material available as a result of the search conducted by the authorised officer u/s 132 of the Act. These provisions operate entirely for different purposes, one for assessing undisclosed income of the block period while the other for assessing the total income or loss of the previous year in a regular assessment.

10. In *Cargo Clearing Agency (Gujarat) Vs. Joint Commissioner of Income Tax*, , a Division Bench of this court after an in-depth study of the scheme of Chapters XIV and XIV-B of the Act held that the Legislature does not intend to reopen assessments completed under Chapter XIV-B of the Act assessing the undisclosed income by adopting the special procedure provided in the said Chapter. Observing that the entire Chapter XIV-B of the Act relates to assessment of search cases, viz., undisclosed income found as a result of search, the court expressed the view that one cannot envisage escapement of undisclosed income once a search has taken place and material recovered, on processing of which undisclosed income is brought to tax. Section 147 of the Act itself indicates that the same is in relation to income escaping assessment and applies in a case where either income chargeable to tax has escaped assessment by virtue of non-disclosure by way of non-filing of return, or non-disclosure by way of omission to disclose fully and truly all material facts for the purpose of assessment, or processing of material already available on record, if the same is within the stipulated period of limitation. Therefore, to contend that undisclosed income has escaped assessment despite an assessment having been framed under Chapter XIV-B of the Act by adopting the special procedure by the said Chapter is to contend what is inherently not possible. The court held that once assessment has been framed u/s 158BA of the Act in relation to undisclosed income for the block period as a result of search there is no question of the assessing officer issuing notice u/s 148 of the Act for reopening such assessment as the said concept is abhorrent to the special scheme of assessment of undisclosed income for block period.

11. Examining the facts of the present case in the light of the principles enunciated in the above decisions, admittedly as is apparent on a plain reading of the reasons recorded, the stock of gold ornaments valued at Rs. 29,77,726 was subject matter of block assessment u/s 158BC of the Act. The assessing officer after considering the material on record in fact made an addition of Rs. 29,77,726 as undisclosed income of the petitioner. Such addition was set aside by the Commissioner (Appeals). The order of Commissioner (Appeals) deleting such addition was upheld by the Tribunal. Thus, when the undisclosed income determined by the assessing officer included Rs. 29,77,726 being the value of gold ornaments which the assessee claimed to be belonging to its customers was subject matter of block assessment, the same cannot be made the subject matter of regular assessment under Chapter XIV of the Act. Under the circumstances, the reopening of assessment in relation to a matter which was subject matter of block assessment is evidently without jurisdiction.

12. Another notable aspect of the matter is that in the block assessment the issue regarding gold ornaments valued at Rs. 29,77,726 had been considered by the assessing officer. In the assessee's appeal, the Commissioner (Appeals) had examined the issue on merits and had recorded that in the facts of the present case, the assessee had discharged the onus in respect of the deposits of gold received by it. It was recorded that the assessee had not only filed confirmations of parties but had filed affidavits of the depositors. The genuineness of the affidavits has been verified by the assessing officer through examination of the depositors in person over a few days. The depositors were produced by the assessee for such examination at the instance of the assessing officer. It was further recorded that the assessing officer also sent the Ward Inspector to the area the depositors came from and the Inspector duly submitted a report on these enquiries. Nothing amiss was found in all these enquiries conducted by the assessing officer himself and through Ward Inspector. In not a single case did the assessing officer record any finding that the facts narrated in any affidavit were false. The Commissioner (Appeals), accordingly, was of the view that the onus that lay on the assessee had been amply discharged and if the assessing officer still wanted to make an addition, the onus was on the assessing officer to establish that the claim was not genuine and that the facts stated in the affidavits were false etc. Such onus had not been discharged by the assessing officer to the slightest. Finding that there was no justification in making the addition, the Commissioner (Appeals) had directed deletion of such addition.

13. In appeal by the Department, the Tribunal after re-appreciating the evidence on record has found as a matter of fact that the assessee had successfully proved to the hilt the genuineness of the transactions encompassing all its aspects. The Tribunal found that the assessee had duly discharged its onus, and, therefore, did not find any justification for reversing the order passed by the Commissioner (Appeals) and upheld the deletion of addition of Rs. 29,77,726. Now, the assessing officer seeks to reopen such concluded issue by issuance of the impugned notice. The sole ground appears to be a passing remark made by

the Commissioner (Appeals) in his order wherein the Commissioner (Appeals), while dealing with the contention raised on behalf of the petitioner that what is found recorded at the time of search cannot be treated as undisclosed income for the purpose of Chapter XIV-B and that section 158BA(3) clarifies this position, has agreed with the said contention that what is found recorded is to be excluded for the purpose of block assessment. He has further recorded that it is not that addition cannot be made in respect of recorded material, but such addition can be made only in the regular assessment u/s 143(3) /144 and not in the block assessment u/s 158BC. Thus, such remark of the Commissioner (Appeals) relating to what was found recorded at the time of the search namely, items which were excluded for the purpose of block assessment has been misconstrued by the assessing officer as a licence to reopen the assessment in respect of the very same items which were subject matter of the block assessment.

14. Thus, it is apparent that the assessing officer seeks to reopen the assessment in relation to an item, viz., gold ornaments valued at Rs. 29,77,726 which was already subject matter of block assessment wherein such addition was made in the order u/s 158BC of the Act and was subject matter of appeal before the Commissioner (Appeals) (and subsequently before the Tribunal). The said issue has been treated as being subject matter of block assessment and examined on merits by the Commissioner (Appeals) and has been deleted. Such addition was not deleted on the ground that the same was subject matter of regular assessment. Under the circumstances, once such issue has already been decided by the appellate authority, it is not open for the assessing officer to seek to reopen the assessment on the same grounds as this would tantamount to the assessing officer sitting in appeal over the order of the Commissioner (Appeals). Moreover, as has rightly been contended by the learned counsel for the petitioner, when the Commissioner (Appeals) as well as the Tribunal have examined the issue on merits and have held in favour of the petitioner, the assessing officer can have no reason to believe that income chargeable to tax has escaped assessment. For this reason also, the reopening of assessment u/s 147 of the Act is without jurisdiction. Consequently, the notice u/s 148 of the Act is rendered unsustainable. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dated 22-1-2002 issued u/s 148 of the Act is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.