

(1999) 02 CAL CK 0009
In the Calcutta High Court
Case No : Writ Petition No. 443 of 1998

Shaw Wallace and Co. Ltd.	Vs	APPELLANT
Assistant Commissioner of Income Tax and Another		RESPONDENT

Date of Decision : 23-02-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 113, 139, 143, 143(3), 148

Citation : (1999) 154 CTR 105 : (1999) 238 ITR 13 : (1999) 104 TAXMAN 238

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : R.N. Bajoria, for the Appellant; Mullick and Shome, for the Respondent

Judgement

Ajoy Nath Ray, J.—The writ application in the instant case raises interesting points about the interaction between the special procedure for block assessment introduced by Chapter XIVB of the Income Tax Act, 1961, and the regular procedure for assessment.

2. The new Chapter deals with cases where there has been a search or seizure (as here) or a requisition u/s 132A.

3. Broadly speaking, the provisions of the Chapter are that, once a search and seizure has been made, the assessee's total income shall be computed under Chapter XIVB for the past ten years, irrespective of whether reopening notice has been served u/s 148.

4. This is referred to as block assessment. In the block assessment, the Assessing Officer is to take into account the materials obtained on search and seizure as well as all other materials which are in his possession, like, say, the returns already filed by the assessee.

5. After computation of the block period income, the Assessing Officer should deduct therefrom the income already regularly assessed or the income returned

and then arrive at the figure for assessment of the tax payable on undisclosed income, if any. u/s 113, the undisclosed income is charged to tax at 60 per cent, irrespective of what rates or slabs the Finance Act of the corresponding opened up block years had provided at the material time.

6. The above is a very rough and ready overall view of Chapter XIVB. It is necessary to have this overall view to see the facts of this case in the light of that Chapter. The search and seizure in the instant case took place between August and November, 1996. The block period, therefore, became the 1985-96, ten years period. The block assessment for this period was made by order dated November 28, 1997. Since the block assessment is appealable directly to the Tribunal, and to the Tribunal alone, the assessee went up there. By an order passed on the April 2, 1998, the Tribunal has in effect set aside the order of block assessment and remanded the matter for fresh assessment for the block period.

7. Out of the ten years opened up for block assessment, the regular assessment was outstanding in respect of two assessment years only, viz., 1994-95 and 1995-96, but we are concerned in the present writ with only one assessment year, viz., 1995-96.

8. While the order for block assessment was subsisting, two notices were issued respectively u/s 143(2) and Section 142(1) of the Income Tax Act, respectively, dated December 19, 1997 and February 2, 1998. Pursuant to these notices, the Assessing Officer purported to proceed to make the regular assessment under the regular procedure.

9. This writ application was filed challenging the power of the Assessing Officer to make regular assessments in respect of a financial year which formed the subject-matter of the block period of assessment.

10. As the limitation for making the first assessment u/s 153, for the assessment year 1995-96 would expire two years after the end of that assessment year, viz., with the expiry of March 31, 1998, an interim order was passed in aid of this writ on March 5, 1998, which permitted the regular assessment to be made, keeping in view the facts with respect to limitation, but a direction was also passed that no demand would be enforced thereon except with the leave of court.

11. On the basis of the interim order, the assessment for the single year has been made ; the writ petitioner-assessee has also appealed therefrom departmentally to the Commissioner of Income Tax (Appeals), this appeal being an appeal in the regular manner and not an appeal directly made to the Tribunal from a block order.

12. The arguments on both sides in this writ centred round the validity of the two notices under Sections 142(1) and 143(2) in view of the search and seizure already made and the block assessments being already under way.

13. Both Mr. Bajoria, appearing for the assessee-writ petitioner, and Mr. Mullick,

appearing for the Department, took me through the various provisions of Chapter XIVB as well as other sections regarding regular charging and regular assessment like Sections 4 and 143.

14. On the aspect of the bearing that a block assessment might have on regular assessment, three Indian cases are already on record. Learned counsel on both sides made submissions on those cases. The first in point of time is a decision of the Punjab and Haryana High Court given in the case of Raja Ram Kulwant Rai Vs. Assistant Commissioner of Income Tax, It is a Division Bench decision which rules that block assessment and regular assessment operate in different fields and as such block assessment would rule out the possibility of individual assessments for the assessment years included in the block period. To the same effect is the decision of a learned judge of the Kerala High Court given in the case of N.T. John Vs. Commissioner of Income Tax and Another, . The Kerala case directed as an interim measure that, in view of the operation of Chapter XIVB, the assessment order completed for the year 1993-94 would be kept in abeyance. A somewhat similar interim order was passed in our case also. The Kerala High Court decision has now been taken in appeal before a Division Bench, as S. L. P. has been admitted as from the Punjab and Haryana decision. The other decision of the Gujarat High Court given in the case of N.R. Paper and Board Limited and Others Vs. Deputy Commissioner of Income Tax, , decides on the other hand that the block assessment does not rule out the possibility of a regular assessment for the same assessment years. The report states as to the Punjab decision that their Lordships were not able to discern any reasons for the propositions laid down there (page 750). A similar remark was made in the same page as to the Kerala decision. The Gujarat High Court has, therefore, taken a view different from the other two High Courts and so far as persuasive authorities of different High Courts are concerned, I am left, because of equal pull on both sides, in the same position where I would be without all these decisions.

15. I have to decide the matter afresh, therefore, and refer to the above decisions as and when called for.

16. In giving the decision I might not mention the arguments of Mr. Bajoria and Mr. Mullick separately but mention only my decisions, reached no doubt after hearing both of them and measuring the pros and cons of accepting the arguments of either of them.

17. Chapter XIVB starts from Section 158B and ends with Section 158BH.

18. Section 158B gives the block period of ten years, which is also the period which could at most be opened up if there were no search and seizure and no Chapter XIVB and the regular opening up procedure as u/s 148 (including fraud of the assessee) were involved. This section also defines undisclosed income in an inclusive manner.

19. Section 158BA is the non-obstante section. This section directs that

notwithstanding other provisions, the Assessing Officer shall proceed to assess undisclosed income as per the new Chapter XIVB.

20. Sub-section (2) of this section is the charging section mentioning section 113 and also the flat rate of 60 per cent. Section 158BA(2) has to be read with the ordinary charging Section 4 which gives operation to different Finance Acts for different financial years. Sub-section (2) clarifies that the rate shall be as per Section 113 irrespective of the previous year. In my opinion, Sub-section (2) of Section 158BA has to be interpreted in this manner that whatever the Finance Act the undisclosed income as assessed under Chapter XIVB must be taxed at the rate mentioned in Section 113 notwithstanding the different rates for the different years. There is a three-clause Explanation added to Section 158BA. That has come into operation from July 1, 1995, by reason of retrospective effect given, when introducing it by the Finance (No. 2) Act, 1998. The Department has made a miscellaneous application before the Tribunal on the basis of this Explanation requesting the Tribunal to set aside or modify its order dated April 2, 1998. The Department's application before the Tribunal u/s 256(1) has also been filed in respect of the same order. Thus the Explanation which is the very basis of the Department's miscellaneous application is set out below :

" 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 any previous year included in the block period."

21. The effect of the Explanation is far reaching without going into anything more, it is immediately seen from Explanation (b) and (c) that the Assessing Officer shall not include the block amount of income in the regular assessment and vice versa. Anything like this was unknown prior to the introduction of Chapter XIVB. When the Assessing Officer makes the regular assessment, although he will have in his possession at that time materials, probably obtained on search and seizure, and materials which probably indicate that the income as returned by the assessee should have been much more, yet the Assessing Officer is forbidden to make a regular assessment on the basis of the larger income, if that larger income is to be included in the block assessment. The result is that the Assessing Officer computes an income for a particular assessment year and yet is compelled to leave out undisclosed income, by reason of the provisions contained in the Income Tax Act itself, altogether from the purview of the regular assessment on the computation for that assessment year.

22. Their Lordships of the Gujarat High Court in N.R. Paper and Board Limited and Others Vs. Deputy Commissioner of Income Tax, , have mentioned at the

bottom, page 747 of the above report as follows :

"The special provisions (of Chapter XIVB) are devised to operate in the separate field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period."

23. With the greatest respect, this observation has to be read along with the statutory Explanation (b) and (c). Regular assessment and block assessment operate in different fields altogether, from one point of view, but, then again they operate in the same field when one bears in mind that the block assessment and the regular assessments relate to the same assessment years in respect of the income of one and the same assessee. No doubt assessment of regular income in the regular manner can be made, subject to the limitations and constraints which I shall hereby indicate, but such regular assessment is totally different in the case of block asses-sees than it is in the case of a normal and ordinary assessee who has not been subjected to search and seizure or a Section 132A order.

24. It is important to mention here Section 158BB which deals with computation of undisclosed income for the block period. The first Sub-section of the said Section along with Explanation (a) is set out below :

"158BB. 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 Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer, as reduced by the aggregate of the total income, or, as the case may be, as increased by the aggregate of the losses of such previous years, determined,--

(a) where assessments u/s 143 or Section 144 or Section 147 have been concluded, on the basis of such assessments ;

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

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

(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 245D, on the basis of such order ;

(f) where an assessment of undisclosed income had been made earlier under

Clause (c) of Section 158BC, 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 Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under Sub-section (2) of Section 32."

25. When one is considering the interaction between block assessment and regular assessment one has to read this section along with the most important Sub-section (for our purposes) in the regular assessment Chapter and that is Section 143(3). It is quoted below :

"(3) On the day specified in the notice issued under Sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment."

26. It will be found from Section 158BB that the Assessing Officer is to compute total income twice. I emphasise the combination of words "total income".

27. The first computation of total income u/s 158BB is on an aggregate of materials including returns. The second computation of total income is as per direction and definition given in Section 158BB irrespective of whatever might be contained in the other provisions of the Income Tax Act. That such computation of the second total income is to be made irrespective of other provisions is seen from the words of Section 158BA, which states that the Assessing Officer must proceed to assess the undisclosed income as per Section 158BB notwithstanding any other provision contained in the Act.

28. Once the two total incomes u/s 158BB are computed, no further scope remains for the Assessing Officer to make any further computation for the concerned assessment year either for the purpose of imposition of tax on the undisclosed income or for the purpose of making the regular assessment u/s 143(3).

29. Since this is the crux of the matter it requires further elucidation.

30. Arguments were made before the Gujarat High Court, and there are observations in their Lordships' judgment which seem to indicate that the court was asked to consider the proposition, that the block assessment freezes regular assessment for all purposes. The arguments made seem to go so far as to suggest that if there is block assessment there shall be no regular assessment for the years included in the block period.

31. Their Lordships of the Gujarat High Court have categorically negated this tall claim. With respect I agree with this part of the Gujarat judgment in that it is my opinion also that the assessment for each of the years included in the block period shall also be the subject-matter of regular assessment. This is no more than giving effect to Explanation (a) to Section 158BA which I have quoted in the beginning.

32. But points arise as to in what manner the regular assessment for each of the previous years will be affected by reason of the provisions of Chapter XIVB.

33. In the Gujarat High Court their Lordships have opined that in the regular assessment the Income Tax Officer might have additional materials and thus in cases where returns were filed but assessments were not completed prior to the date of search and seizure, for those assessment years, notwithstanding block assessment, the Assessing Officer would again scrutinise the returned income and make a regular assessment on that, as per Section 143(3).

34. Let us see the implication of this view. Suppose the returned income for one assessment year is Rs. 120 ; suppose in the block assessment the total income for that year being the first total income computation u/s 158BB is found to be Rs. 190, then seventy rupees gets taxed as undisclosed income at 60 per cent.

35. According to the Gujarat view, after this process has been completed for the concerned assessment years included in the block period Section 143(3) assessments could even then be normally made.

36. Suppose it is so made ; suppose on that basis the returned income of Rs. 120 is found to go up to Rs. 130. These ten rupees, let us say, are the result of further materials, labours and scrutiny put in by the Assessing Officer at the stage of regular assessment. Let us suppose these are also partly due to Section 142 and Section 143 notices issued by the Assessing Officer in the regular assessment procedure.

37. The point to note, and note well, is that the powers available u/s 142 and Section 143(2) are also made available to the Assessing Officer while computing total income for the block period under Chapter XIVB. This is clearly provided for in clause (b) of Section 158BC. The Assessing Officer for the block assessment is the same as the Assessing Officer for the assessment years for regular assessment. Had the Assessing Officer taken the same pains for the block assessment which he took subsequently for regular assessment, then and in that event the additional income of Rs. 10 would have been revealed during the block assessment. Had it been so revealed the said Rs. 10 would go to increase the block assessment from Rs. 190 to Rs. 200. This sum of Rs. 10 would then be taxed at 60 per cent., but if the Gujarat view is to be accepted in toto, the Assessing Officer would be free to tax this additional Rs. 10 in the regular assessment by applying the Finance Act applicable to that assessment year. In my opinion and with all due respect, this simply cannot be. Why I say so is as follows.

38. The Assessing Officer is cast with a duty to make block assessment and use all his available jurisdiction and power in that regard. This includes the powers of Sections 142 and 143 for getting information. The Assessing Officer is not permitted to use part of his powers for block assessment and reserve the balance for making regular assessment thereafter. He must use all his powers during the block assessment so that the computation is complete once for all and each rupee of total income which is in excess of the contingencies provided for in (a) to (f) to Sub-section (1) of Section 158BB gets taxed as undisclosed income.

39. The regular assessment relates only to the residuary duty of regular assessment which still vests in the Assessing Officer after completion of the block assessment. If block assessment is completed appropriately, in the manner indicated above, then and in that event, by the time such process is over the Assessing Officer will have concluded all his jobs leading up to and included in Section 143(3) which relate to computation, and all that will remain will be determination of the sum payable by the assessee on regular assessment on the basis of such computation concluded in the block period.

40. To be more explicit, when the block assessment is over, the Assessing Officer has finished all jobs upto the words " an assessment of the total income or loss of the assessee", which are contained in Section 143(3), and all that will remain for him is to do the rest as provided for in Section 143(3), viz., "and determine the sum payable by (the assessee).... on the basis of such assessment (i.e., computation)."

41. What will be the total income for Section 143(3) ? The answer is clear and unequivocal and there can be no doubt about it. For block assessee, the total income for Section 143(3) must be the second total income of Section 158BB, when returns have been filed prior to the date of search and seizure ; the total income for Section 143(3), i.e., for regular assessment for that assessment year must be on the basis of the return filed u/s 139 and on no other basis whatsoever. Even if that return is to be adjusted for arithmetical errors or matters beyond doubt and dispute, even this adjustment has to be made during the block assessment when computing the second total income u/s 158BB. That computation of the second total income binds the Assessing Officer for making the assessment of tax in regular assessment u/s 143(3) and the Assessing Officer has no jurisdiction to arrive at one computation of the second total income u/s 158BB, at least in so far as Clause (b) of Sub-section (1) of Section 158BB is concerned, and arrive at a different computation of total income for the purpose of Section 143(3).

42. Now we come to an even more stark result of allowing regular assessment to proceed unhindered by Chapter X1VB, as appears to be the general view of the Gujarat High Court.

43. If we take the above example of returned income of being Rs. 120, the block income being determined at Rs. 190 and the regular assessment increment being

Rs. 10, making Rs. 120 into Rs. 130, let us consider what will happen if the addition of Rs. 10 is made also during the block assessment, because of regular increases made as unrelated to search and seizure, in addition to the increase of Rs. 70 made because of search and seizure.

44. This sum of Rs. 10 will get included twice and will get taxed twice. In the block assessment the undisclosed income will be Rs. 190 plus Rs. 10 minus Rs. 120. The extra 80 rupees will get taxed at 60 per cent. Even in the regular assessment the income of Rs. 130 as computed will get taxed at the Finance Act percentage, say 30 per cent.

45. In the result the increase of 10 rupees will get taxed once at 60 per cent, and once again at 30 per cent. This is not permissible and even their Lordships of the Gujarat High Court have opined to the effect that double taxation is not the result of their decision. At page 745 of 234 ITR, their Lordships have opined thus :

"The anxiety voiced on behalf of the petitioners that there would be double taxation if the pending regular assessment is allowed to proceed, is baseless. The assessed undisclosed income is taxed at the higher rate of 60 per cent. u/s 113 and in respect of such assessed undisclosed income, there can arise no question of paying the tax again in a regular assessment. All taxes paid by the assessee are required to be taken into account and adjustments given in a regular assessment and there would be no scope in such regular assessment for the assessment of his undisclosed income already assessed in the block assessment."

46. The view is that all tax as per block assessment will be given due credit for by the Assessing Officer in the regular assessment, but no express provision in this respect could be found out. On the other hand, Explanations (b) and (c) to Section 158BA indicate that there should be a strict division of income between the undisclosed and the non-undisclosed part so that the possibility of double taxation should not arise at all. If a taxing officer is giving credit for tax already assessed or paid for the block period in the tax which is being regularly assessed, then it must follow that the same income has been taxed both in the block period and in the regular assessment. This is forbidden by the two Explanations. With respect, the above paragraph of the Gujarat High Court has to be read in the light of the two Explanations which are statutory and binding on the Assessing Officers all over India.

47. Secondly, if the Assessing Officer is to give credit for block assessment tax during the regular assessment then it presupposes that the block assessment has to be made prior to the regular assessment. This is another important issue.

48. Mr. Mullick submitted that there are no express words contained in Chapter XIVB and none specially in Sections 158BA and 158BB that even after search and seizure it is not open to the Assessing Officer to conclude regular assessments which are pending for the assessment years included in the block period before

embarking upon the task of block assessment. If Mr. Mullick's submission is right, then an assessment year will come under Clause (a) or Clause (b) of Sub-section (1) of Section 158BB at the choice of the Assessing Officer. Some very bizarre results would follow therefrom. The first of such results would be that, when making the regular assessment the Assessing Officer would perforce have to take into account all materials available to him on search and seizure also. He would be exactly in the same position as an Assessing Officer who was operating prior to the introduction of Chapter XIVB. He would thus include in the regular assessment all the additional income, in our case let us say Rs. 80. He would charge this additional income to tax at the rate provided for by the Finance Act, let us say 30 per cent. He would collect 24 rupees extra for the Revenue.

49. When thereafter he does the block assessment, he will be estopped from including in the block period the sum of Rs. 80. Had he been able to include that he would have taxed Rs. 80 at 60 per cent, and would have collected for the revenue Rs. 48. This he cannot do because of the Explanations and because, he has already completed an assessment of an unassessed return which was unassessed at the date of such search and seizure. Mr. Mullick continuously emphasised the necessity of reading the taxing statute exactly as it has been made by Parliament. He gave me a decision of the Bombay High Court in *New Shorrock Spinning and Manufacturing Co. Ltd. Vs. N.U. Raval*, Income Tax Officer, Special Circle I, Ward B, Ahmedabad and Another. He also drew my attention to a dictum of Mr. Justice Rowlatt reproduced at page 45 of the said report. Mr. Mullick submitted on this basis that whatever the result, if clear words in a fiscal statute indicate that to be so, the court should not hesitate to construe the plain words in the plain way even if those results, appear to be undesirable from some point of view.

50. It is not possible to permit the Assessing Officer to have free play as regards completion of filed returns in regard to the assessment years included in the block period. If he proceeds in one way one result is reached. If he proceeds in another way another result is reached. If he proceeds to make complete regular assessment by taking into account all materials in regard to all the pending assessments for the assessment years included in the block period then no income from those pending years will ever get included in the block period. He will be able to use Sections 142 and 143 powers and the searched materials and reach the computation of the entirety of the total income for those years in the Section 143 procedure rendering Chapter XIVB completely useless for that particular assessment year in the block period.

51. Although the giving of the plain ordinary meaning to the plain ordinary words in a statute is a perfectly well accepted rule of construction, yet it is also an equally well settled rule of construction that, that construction is not to be adopted by a court which will render a provision of an enactment partially or wholly meaningless. The court should adopt a harmonious construction which gives meaning to all parts of the statute.

52. If it is the law, which in my opinion, it is, that block assessment must precede regular assessment then and in that event the provisions of Chapter XIVB cannot be rendered otiose by any Assessing Officer in regard to any pending assessment. Therefore, that is the appropriate construction. The Assessing Officer must, therefore, in all cases where assessments of returns for assessment years included in the block period are pending on the days of search and seizure proceed first to assess the undisclosed income for the block period and then, and only thereafter make the regular assessment u/s 143(3) on the basis of the returns filed, but not assessed up to the date of search and seizure.

53. Mr. Mullick then raised the point of limitation which arises in our case also. Let us consider it in some detail. The pending assessment with which we are concerned is for the assessment year 1995-96. That assessment year ended on March 31, 1996. u/s 153 the limitation period for making of an assessment will have ended with March 31, 1998. I have already mentioned the interim order which permitted the assessment to be completed (whatever might be the ultimate result of it as per the decision of this writ) so that the period of limitation does not expire for ever without any step having been taken in that regard. Mr. Mullick pointed out that the search and seizure in the instant case having commenced in August, 1996, and having ended in November, 1996, the limitation for the block assessment would be only in November, 1998. The block assessment limitation would, therefore, be at a period of time some eight months later than the latest period of assessment for the regular assessment. According to Mr. Mullick, this was a pointer, and a strong pointer that the block assessment should not in any manner hold up the regular assessment, the time period for finalising which might be first running out, even sooner than the block limitation.

54. We are concerned with the situation of an unassessed return at the date of search, which is the situation of Clause (b) of Sub-section (1) of Section 155BB. One would have to bear in mind that when the Assessing Officer is making the block assessment the second total income of Section 158BB shall always be on the basis of the returns filed if that has not already been assessed. The Assessing Officer, cannot assess that return in any other manner, than, on the basis of the return itself u/s 158BB ; again prior to making of block assessment, regular assessment is ruled out because of the reasons given above, mainly because the Assessing Officer cannot erase out the effect of Chapter XIVB for any included assessment year. The Assessing Officer is then and in that event faced with a choice. He can proceed to make the block assessment as expeditiously as possible leaving him time to make the regular assessment on the basis of the returns filed thereafter, which after all, will be a comparatively small task, as the computations are all over. Or, although this is more practical than logical, the Assessing Officer might convert the return into an assessed return, thereby causing no prejudice either to the Revenue or to the assessee ; no prejudice is caused to the assessee because the return as filed is accepted ; no prejudice is caused to the Revenue because the undisclosed income will remain taxable as

per Section 113, i.e., 60 per cent., and any evidence which goes to increase the income over and above what was filed, (or has been assessed) will yield revenue at the prescribed and desired rate of 60 per cent. I am aware that there is an illogic in this procedure because the Assessing Officer seems to get jurisdiction for converting filed returns into assessment orders if and only if he intends to complete the task for saving limitation and if and only if he takes the step of making the regular assessment on the basis of the return itself without entering into scrutiny. This would not be a normal Section 145(3) procedure. This would be the perfect and correct Section 143(3) procedure after the block assessment is over. After the block assessment is over this and this only would always be the proper Section 143(3) procedure. I find no harm therefore, if the Assessing Officer adopts this course in the case of unassessed but filed returns and, in my opinion, he has jurisdiction in this limited case only to make the regular assessment on the basis of the return filed before the search and seizure, even before the block assessment.

55. The last phase which remains to be considered in regard to the interaction between the regular assessment procedure and the procedure under the Chapter XIVB relates to the points of the levy of penalty and interest.

56. Let us take interest first. Suppose that out of the block period which gets reopened automatically it is found during the block assessment that the assessee had concealed income to the extent of Rs. 1 lakh ; had this been detected under the regular reopening procedure of Section 148 and had assessment been made thereafter under the regular procedure, the Income Tax Officer would have imposed tax on the escaped income at the rate applicable for the concerned financial year ; he would also have levied interest, and if this interest is calculated for nearly ten years, it is likely that the interest would exceed the amount of tax payable. I am leaving aside penalties for the time being.

57. If, however, the identical thing happens in the block assessment, that sum of Rs. 1 lakh which will be determined as undisclosed income for the concerned assessment year included in the block period would attract taxation at the rate of 60 per cent. only. The levy at the rate of 60 per cent, is specifically mentioned as tax u/s 158BA, Sub-section (2). The levy of interest in the case of block assessment could not be made at all. It is possible that under the Chapter XIVB procedure the defaulting assessee would be a gainer in that 60 per cent. of Rs. 1 lakh might be less than the taxation at the rate of the Finance Act applicable on Rs. 1 lakh plus interest thereon.

58. However, the matter is usually not so simple, Not all search and seizure will reveal such simple things as undisclosed bank accounts containing exact dates and figures ; there might be cash money or valuable articles which it would be very difficult to relate to any specific financial year. In that event it might well be possible to relate them en masse to the block period. Thus, finding some wealth which is not disclosed and which must relate to undisclosed income will not face the taxing authorities with this problem as to which year they should relate those

to and which assessment year should be reopened u/s 148 . This is the advantage of Chapter XIVB which might to an extent counter-balance the advantage accruing to the assessee under the very same Chapter.

59. In any event even if the assessee is the gainer because of the application of Chapter XIVB rather than the application of the regular procedure, neither the Income Tax Officer nor the courts of law can help it. Parliament has seen it fit to introduce a new procedure. That is contained in Chapter XIVB. It is not permissible to shelve that procedure either in part or in whole and notwithstanding the existence of that Chapter proceed to make assessments under the regular procedure thereby rendering Chapter XIVB otiose and the undisclosed income zero in every case of calculation under that Chapter.

60. Section 158BC states in the first proviso that no notice u/s 148 is required to be issued for proceeding under Chapter XIVB. This proviso has to be given its meaning. If it is to be given a meaning, that must be that it substitutes the procedure u/s 148, If that is not the meaning given, then one would be faced with the double consequence of there being one block period assessment and may be even several other 148 reopenings in regard to completed assessments. This would render the provisions of Chapter XIVB totally senseless.

61. The conclusion, therefore, is that although 60 per cent, of tax u/s 113 might work out to be a monetary advantage in some cases to some assesseees who become block assesseees, those consequences notwithstanding, Chapter XIVB must be given preferential status and block assessment must both precede and control regular assessment. Why Chapter XIVB assessment must precede, I have already mentioned. The extent of control, which is large, that is caused by the block assessment in regard to the regular assessment, I have also explained. To repeat, after the block assessment the returns filed but not assessed are to be assessed in regular assessment on the basis of the returns alone, exactly like an ex parte assessment, with, may be, correction of arithmetical errors or adjustments about which there are no doubts or disputes like the ones contemplated in Section 143(1).

62. The next phase is penalties. Under the regular procedure penalty could be levied from 100 per cent. to 300 per cent, of the tax which is additionally levied. One might refer to Section 271 of the Income Tax Act in this regard. However, if the block assessment precedes the regular assessment income will not be found to be in excess of the return made by the assessee at the stage of the regular assessment. In that event penalty u/s 271 will not be leviable.

63. This is quite a serious matter. It was even more serious before the introduction of Section 158BFA. Prior to the introduction of that Section, the block assessee would pay only 60 per cent, on the undisclosed income as per the block assessment and would not pay any penalty at all. He would, therefore, pay no penalty and no interest. He would only pay 60 per cent, of the undisclosed income and that would be all. Indeed a block assessee cannot be blamed if he

wants to have the Chapter XIVB procedure to be applied to him in preference to the regular procedure. It is a matter of no small advantage to the block assessee once for all to be cleared in regard to no fewer than ten past assessment years, paying only 60 per cent, of the undisclosed income and nothing else.

64. Even after the introduction of Section 158BFA the situation does not change to any very large extent. That section deals with penalty and interest in case the filing of block return by the assessee as per Section 158BC has flaws or defaults. At the time of search and seizure in the writ petitioner's case there was not even Section 158BFA in the statute book. But it is not possible to alter that situation. It is not possible to rule that because that section was not there in the statute book, the assessee-writ petitioner would have to be subjected to Section 271. That is not and cannot be the law. Once the block return is assessed, and it must be assessed under Chapter XIVB, the liability of the assessee would be limited to 60 per cent, of the undisclosed income and the consequences thereupon as provided in Chapter XIVB must follow. Section 271 could not come in, because, after the block assessment there would be no excess income found in assessing the return on a practically ex parte basis.

65. Their Lordships of the Gujarat High Court in *N.R. Paper and Board Limited and Others Vs. Deputy Commissioner of Income Tax*, have also considered the matter of penalties. This is what their Lordships said in the judgment (see pages 745 and 746 of the report):

"No interest and penalties enumerated u/s 158BF of the Act can be levied or imposed upon the assessee in respect of the undisclosed income determined in the block assessment. However, there is no immunity from other penal provisions such as failure to deduct tax at source [section 271C], failure to comply with Section 269SS [section 271D], failure to comply with Section 269T [section 271E], failure to furnish information, returns or other statements under Sections 94(6), 176(3), 133, 206, 206C, 285B, 134, 139(4A), 197A, 226(2) or 203 [section 272A], failure to pay tax [section 221], failure to pay self-assessment tax [section 140A], etc. There is also no immunity from any prosecution. The penalties and prosecutions may be associated with the orders of the regular assessment. The penalties and prosecutions that may be associated with the orders of regular assessment cannot be pre-empted by a specious suggestion made on behalf of the petitioners that the pending regular assessments are to be omitted if that previous year happens to fall in the block period for assessment of undisclosed income."

66. Their Lordships have mentioned several sections which might invite penal consequences for default and these include also defaults like nonpayment of advance tax, etc.

67. These sections were also considered by me and it appears to me that the precedence given in this judgment to block assessment over regular assessment can in no manner touch these outside penalty sections, if I might so term those.

If the return for an assessment year included in the block period has been filed without payment of advance tax (or better, with insufficient payment of advance tax) then and in that event the assessment of undisclosed income does not relieve the assessee of the consequences of such default in payment of full advance tax. Why ? Because in Section 158BB, computation of the second total income, the Assessing Officer will surely take the return and will knock off the disclosed total income. It does not mean that the assessee is relieved from the obligations attendant upon the filing of that return which are preserved as such in other parts of the Income Tax Act than Chapter XIVB. All that happens is that the disclosed income becomes entrenched after the block assessment and has to form practically the sole basis for regular assessment thereafter.

68. But Section 271 penalties are practically completely taken off the shoulders of an assessee because of the introduction of Chapter XIVB. Parliament has seen it fit to do so. What its motive is, we need not inquire into. This much, however, is quite plain, that after the introduction of Chapter XIVB, the Department is not permitted to feel any hesitation about applying it in its full scope and effect, because it might have the side effect of relieving an assessee from Section 271 penalty or interest on unpaid tax. These are side issues and must not cloud the judgment of the Department which must proceed to make the block assessment of the block assessee under Chapter XIVB on a priority basis and then, regardless of the consequences to the Revenue or the assessee, give full effect to the block assessment in the regular assessment procedure and in all other matters relating to levy of penalty or interest.

69. The writ petition before me went also on the challenge to the constitutionality of certain provisions. But this I have not seen fit to have argued before me nor have I seen to it that appropriate notice prior to these arguments were served on the Union law officers. It appears to me, on the basis of the arguments on the sections, that what troubled the assessee and the Department, was not so much the constitutionality of Chapter XIVB, but how it is to be applied in the practical daily life of making block assessments and also taking of subsequent steps.

70. I have consciously made this judgment limited, if not wholly at least largely, to the contingency covered by Clause (b) of Sub-section (1) of Section 158BB, because that is the main issue before me. There are other clauses too. The very text of clause (c) which deals with the assessment year where the time for filing of the return has expired without its filing might present special problems ; one such problem might be that if such Section 139 extensions permit the return to be filed somehow in the regular procedure even after search and seizure, should the second total income u/s 158BB even then to be taken as nil ? I do not advisedly answer these questions as, in my opinion, Mr. Mullick rightly pointed out that I am not to answer general points arising out of the Income Tax Act but only answer specific issues, which arise in this case.

71. In the result, it appears to me that both the notices issued by the Income

Tax Officer u/s 142 and Section 143(2) are bad in law. Those notices should not have been issued in regard to the regular assessment. But if needed those powers could and should have been used for block assessment as permitted u/s 158BC(b).

72. The block assessment (now being remanded by the Tribunal) would have to be completed. But that is not the core subject-matter of the present writ. I have opined that in a situation like this the Assessing Officer might, to save limitation even before the block assessment make the regular assessment for the unassessed return as a special and exceptional case as the identical thing would have to be made, in any event, after the block assessment. But that is not the direction that I propose to pass on the Assessing Officer in the instant case.

73. What those directions are, will appear hereafter.

74. The regular assessment already made by the Assessing Officer in regard to the assessment year 1995-96 shall stand set aside. The appeal preferred departmentally by the assessee is thus rendered infructuous. This course has to be adopted because the Assessing Officer in making the regular assessment has not proceeded on the basis of making practically an ex parte assessment on the return filed by the assessee for the assessment year 1995-96, accepting it in toto excepting for arithmetical or undisputed adjustments, like those u/s 143(1). This course the Assessing Officer must now take. But he shall take this course within six months of finalisation of the block assessment which should precede regular assessment so as not to create unnecessary legal problems hereafter.

75. The writ application, therefore, largely succeeds. Whether rule has been issued or not, there shall be rule absolute in terms of prayers (a) and (b); there shall also be rule absolute in terms of prayer (c) subject, however, to this that the regular assessment for the assessment year 1995-96 shall be completed by the Assessing Officer within six months of finalisation of the block assessment on the basis of the returns filed by the assessee for that assessment year, the Assessing Officer proceeding ex parte thereon, either accepting the return in toto or making the same arithmetical or other undisputed adjustments like those allowed u/s 143(1), as has already been done (by then) in the block assessment, if any had been done at all.

76. There will be no order as to costs.

77. Mr: Shome prays for stay of operation of this order but the prayer is turned down.

78. All parties and all others concerned to act on a signed xerox certified copy of this dictated order on the usual undertakings.