SUPREME COURT OF INDIA

Commissioner of Income Central II

Vs.

Suresh N. Gupta

C.A.No.32 of 2008

(S.H. Kapadia and B. Sudershan ReddyJJ.)

07.01.2008

JUDGMENT

S.H.Kapadia, J.

1. Leave granted.

2. Whether the AO had erred in imposing surcharge at 17% on the tax amount of Rs. 97,456/- under Section 113 of the Income-tax Act, 1961 (1961 Act) for the block period comprising of previous years relevant to 10 assessment years, i.e., 1991-92 to 2000-01, including the period from 1.4.2000 to 17.1.2001.

3**. Facts:**

> "On 17.1.2001 a search under Section 132 of the 1961 Act was carried out at the premises of the respondent-assesses, an individual. The search unearthed an unexplained investment of Rs. 65,000/- being the value of household valuables and Rs. 97,427/- on account of unexplained marriage expenses (undisclosed income). Accordingly, in the block assessment, the A.O. determined the assessees undisclosed income at Rs. 1, 62,427/-. He computed tax thereon at 60% in terms of Section 113 of the 1961 Act amounting to Rs. 97,456/- on which surcharge was levied at 17%, i.e., Rs.16,504/-. The levy of surcharge was challenged by the assessee in appeal before the CIT (A). The said appeal was allowed. The decision of CIT (A) has been confirmed by the Tribunal and the High Court. Hence, this civil appeal.Points for determination:"

4.Two points arise for determination: Whether on the facts and circumstances of this case, the Finance Act, 2001 (FA for short) was applicable to block assessment under Chapter XIV-B in respect of the search carried out on 17.1.2001; secondly, whether the proviso inserted in

Section 113 by the Finance Act, 2002 is clarificatory? Whether Finance Act, 2001 was applicable to block assessment under Chapter XIV-B up to 1.06.2002:

5 .Chapter XIV-B was inserted by the Finance Act, 1995, w.e.f. 1.7.1995. According to the assessee, the said Chapter is a self-contained chapter as it lays down a special procedure for assessment of undisclosed income found during search for the block period, containing a charging section (158BA), a computation section (158BB), a procedural section for block assessment (158BC), limitation provision for completion of block assessment (158BE) and the provisions for imposition of interest and penalty (158BFA).

6. According to the assessee, the scheme of assessment of undisclosed income under Chapter XIV B is different from scheme of assessment of total income of any person in terms of Section 4(1) of the 1961 Act inasmuch as under Chapter XIV-B assessment is made of undisclosed income as against assessment of total income under Section 4(1) of the Act; that, assessment under Chapter XIV-B is made for the block period as against assessment of income of the previous year under Section 4(1) of the Act; that, under Chapter XIV-B undisclosed income is assessed at 60% in terms of Section 158BA (2) read with Section 113 as against taxation of normal income at the rates prescribed in the relevant Finance Act; that, the provisions of the Finance Act are not found in the block assessment scheme under Chapter XIV-B up to 1.06.2002 and, therefore, according to the assessee, Finance Act, 2001 was not applicable to Chapter XIV-B. According to the assessee, proviso to Section 4(1) of the 1961 Act carves out an exception to the normal rule in Section 4(1) and provides that, where under any provision of the 1961 Act, tax is to be charged in respect of income of a period other than the previous year, such tax shall be levied as may be specifically provided under special provision of the 1961 Act. According to the assessee, Chapter XIV-B is such special provision as it concerns assessment of undisclosed income for the block period which is the period other than the previous year referred to in Section 4(1). Therefore, according to the assessee, block assessment falls not in Section 4(1) but it falls under the aforesaid proviso to Section 4(1) of the 1961 Act. Consequently, it is urged that since there is no reference to the Finance Act under Chapter XIV-B (Section 158BA), which only looks at a fixed rate of 60% stipulated under Section 113, it was not open to the AO to impose surcharge at 17% prior to 1.06.2002.

7. We find no merit in the above arguments. We quote here in below Article 271 of the Constitution of India and Section 4 of the 1961 Act, which read as follows:

> "271.Surcharge on certain duties and taxes for purposes of the Union. Notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.Charge of income-tax".

8. Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in

accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

9. The power to levy a surcharge on income-tax is traceable to Article 271 read with Entry 82 of List I of Seventh Schedule to the Constitution of India. That power is not traceable to Section 4 of the 1961 Act. Every year the Finance Act is enacted by Parliament to give effect to the financial proposals of the Central Government. The rate at which a charge on the total income of the previous year is imposed under Section 4(1) of 1961 Act is not laid down in the Income-tax Act and, therefore, the said section provides that the charge has to be fixed by the Central Act. It is because of this, that income-tax is levied at different rates under the Finance Act. It must be borne in mind that the Income-tax Act deals with tax on income and nothing else. Therefore, in order that the charge should be a legal charge under Section 4, it must be a tax on the income of the assessee. If the charge is the tax on anything else, then it would not be a valid charge. This is the only limitation upon the power or authority of Parliament to fix any rate it pleases. So long as the charge is on total income of the previous year, there is no limitation upon the power or authority of Parliament to fix any rate it pleases. However, if rate is understood to mean the fixing of the tax irrespective of total income and unconnected with total income, then, in our view, Parliament would be travelling outside the ambit of Section 4(1). The Income-tax Act, therefore, contains elaborate machinery for ascertaining total income of an assessee. If Parliament has power to fix tax at a rate which has no connection with the total income, then the machinery set up under the 1961 Act becomes infructuous. In our view, Section 4(1) prescribes the subject matter of the tax and the rate of that tax is prescribed by the Legislature, either under the Act as in the case of Section 113 or vides the Finance Act. As long as the charge is on total income of the previous year and so long as the rate relates to the subject matter of the tax, there is nothing to prevent Parliament from fixing the rate. But the rate must be applied to the total income and the tax that an assessee has to pay must be at the rate in respect of total income of the previous year.

10. Having discussed the scope of Article 271 and Section 4 of the 1961 Act, we have to look at some of the relevant provisions of Chapter XIV-B. The purpose of this Chapter is to lay down a special procedure for assessment of surcharge cases with a view to combat tax evasion and also to expedite and simplify assessments in search cases. Undisclosed incomes have to be related in different years in which income was earned under block assessment. This is because in such cases, the block period is for previous years relevant to 10/6 assessment years and also the period of the current previous year up to the date of the search, i.e., from 1.4.2000 to 17.01.2001, in this case. The essence of this new procedure, therefore,

is a separate single assessment of the undisclosed income, detected as a result of search and this separate assessment has to be in addition to the normal assessment covering the same period. Therefore, a separate return covering the years of the block period is a pre-requisite for making block assessment. Under the said procedure, Explanation is inserted in Section 158 BB, which is computation section, explaining the method of computation of undisclosed income of the block period.

11. We quote here in below Sections 158B, 158BA, 158BB, 158BC and 158BH, which read as follows:158B. In this Chapter, unless the context otherwise requires,

(a) block period means the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted under section 132 or any requisition was made under section 132A and also includes the period up to the date of the commencement of such search or date of such requisition in the previous year in which the said search was conducted or requisition was made. Provided that where the search is initiated or the requisition is made before the 1st day of June, 2001, the provisions of this clause shall have effect as if for the words six assessment years the words ten assessment years had been substituted.

(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. Assessment of undisclosed income as a result of search. 158BA.

> "(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 132A 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 any 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.

12. Computation of undisclosed income of the block period.158BB. (1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with 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 under section 143 or section 144 or section 147 have been concluded, on the basis of such assessments;

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

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

(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;

(b) Of a firm, returned income and total income assessed for each of the previous years falling within the block period shall be the income determined before allowing deduction of salary, interest, commission, bonus or remuneration by whatever name called to any partner not being a working partner: 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 (1B) of section 143.

(2) In computing the undisclosed income of the block period, the provisions of sections 68, 69, 69A, 69B and 69C 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. Procedure for block assessment. 158BC. where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, 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 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 and section 144 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;

(d)The assets seized under section 132 or requisitioned under section 132A shall be retained to the extent necessary and the provisions of section 132B shall apply subject to such modifications as may be necessary and the references to regular assessment or reassessment in section 132B shall be construed as references to block assessment. Application of other provisions of this Act.158BH. Save as otherwise provided in this Chapter, all other provisions of this Act shall apply to assessment made under this Chapter.

13.We also quote here in below Section 113 with and without the proviso inserted vide Finance Act, 2002 w.e.f. 1.6.2002, which read as follows:

(1)Tax in the case of block assessment of search cases.
The total undisclosed income of the block period, determined under section 158BC, shall be chargeable to tax at the rate of sixty per cent.Proviso inserted vide Finance Act, 2002 i.e. 1.6.2002 reads as follows:

(2)Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under section 132 or the requisition is made under section 132A.

14. Reading of the relevant provisions of Chapter XIV-B one finds that Section 158 BA deals with assessment of undisclosed income as a result of search whereas computation of such income falls under Section 158BB. The procedure for block assessment falls in Section 158 BC. Section 158 BA begins with non obstinate clause. It states that nothing contained in any other provisions of the 1961 Act, where search is initiated after 30.6.1995 under Section 132 or in cases of requisition under Section 132A after the cutoff date, the AO shall proceed to assess the undisclosed income in accordance with the provisions of Chapter XIV-B.

15. Relying on Section 158BA(1) assessee claims that Chapter XIV-B is a special procedure for assessment of cases; that it constitutes a self contained mechanism and, hence, it falls outside the scope of Section 4(1) of the 1961 Act, particularly when Section 4(1) imposes a charge on the total income and not on the undisclosed income and, particularly when Section 158 BA(2) is an independent charging section in contrast to Section 4(1) of the 1961 Act, which imposes a charge on the total income of the previous year. According to the assessee, the charge under Section 158BA (2) is on the block period and not on the total income of the

previous year. Therefore, according to the assessee, Chapter XIV-B is a self-contained mechanism.

16. As stated above, these arguments advanced on behalf of the assessee has no merit. Section 158B defines block period to mean the period comprising the previous years relevant to 10/6 assessment years proceeding the previous year in which the search was conducted under Section 132. It also includes the period up to the date of commencement of such search or date of requisition. Under Section 4, the subject of charge is the income of the previous year and not the income of the assessment year. Thus, tax is levied on the actual income of the previous year. Each previous year is a distinct unit of time for the purposes of assessment. However, when we come to Section 158BA, we find that Parliament has taken the block period to mean the period comprising previous years relevant to 10/6 assessment years preceding the previous year in which the search is conducted. In other words, Parliament has in search cases expanded the unit of time for block assessment purposes from 1 year to 10/6 previous years. However, it is important to note that the unit of time remains constant. It is open to Parliament to treat the unit of time as one year in normal assessment cases and, at the same time, it is also open to Parliament to treat 10/6 previous years as a unit of time for block assessment period.

17. The important thing to be noted is that the block assessment computation in Section 158BB does not exclude the concept of previous years as well as the concept of total income. Those concepts are retained. Further, we need to examine the scheme of Chapter XIV-B. The said Chapter has three parts consisting of assessment, computation and procedure for making block assessment. Assessment of undisclosed income as a result of search stands covered by Section 158BA whereas computation of undisclosed income of the block period falls in Section 158BB and procedure for block assessment falls in Section 158BC. In this case, we are mainly concerned with computation of undisclosed income under Section 158BB (1). This section incorporates principle of aggregation of total income of the previous years falling within the block period computed in accordance with the provisions of Chapter IV. The important thing to be noted is that the computation has to be done even under Section 158BB of undisclosed income in the manner provided for in Chapter IV of the 1961 Act which deals with computation of total income. Chapter IV deals with computation in cases of normal assessment. Chapter IV is not ruled out by provisions of Chapter XIV-B. In this connection, we may also take note of Section 158BH which deals with application of other provisions of the 1961 Act to the block assessment procedure in Chapter XIV-B. Section 158 BH makes it clear that save as otherwise provided in Chapter XIV-B, all other provisions of the 1961 Act shall equally apply to block assessment. Therefore, one has to read the non obstinate clause in Section 158BA in juxtaposition with Section 158BH. Keeping in mind the provisions of Section 158BB and keeping in mind the retention of the concepts of previous years and total income in Chapter XIV-B, we are of the view that Chapter IV is not ruled out from block assessment procedure and, therefore, one has to read Section 158BB with Section 4 of the 1961 Act.

18. There is one more fact which needs to be noted. A bare reading of the provisions of Section 158BA and Section 158BB indicates that the searches conducted by the Department are an important means of unearthing black money. However, undisclosed income has to be related to different years in which the income was earned. The essence of the block assessment procedure, therefore, is a separate single assessment of undisclosed income, detected as a result of a search. This separate assessment is in addition to normal or regular assessment covering the same period. A separate return is a pre-requisite for making a block assessment. However, in the matter of computation, the principle of aggregation of total incomes is inbuilt into Section 158BB. We have to subtract one aggregate from the other. Further, while applying the principle of aggregation of the total income, computation is required to be done in accordance with the provisions of Chapter IV. Therefore, in our view, Section 4 has to be read with Section 158BB. That section is not ruled out by Section 158BB. If Section 4 has to be read with Section 158BB for computing undisclosed income then the provisions of the relevant Finance Act have got to be read into the block assessment scheme under Chapter XIV-B, even prior to 1.6.2002.

19. Under Section 158BB, there is the theory of block period. It is based on the principle of aggregation of total incomes. Under that section, the first aggregate to be computed is the total income of the previous years falling within the block period including returned/assessed incomes as per regular returns and regular assessments. The second aggregate to be computed is the aggregate of the total incomes/losses of the previous years determined in terms of clauses (a) to (f) of Section 158BB(1). The difference between first aggregate and the second aggregate is described in Section 158B(b) as the undisclosed income to be taxed under the provisions of Section 113 of the 1961 Act at the special rates prescribed. Further, clause (a) of Explanation to Section 158BB clarifies that the total income/loss of each previous years 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 Section 32(2) of the 1961 Act. Hence, one has to read Section 158BB with Section 4 of the 1961 Act. There is no conflict between the computation machinery under Chapter XIV-B and normal computation machinery under Chapter IV.

20.This is the importance behind enactment of Section 158BH which inter alia states that if there is no conflict between the provisions of Chapter XIV-B and any other provisions of the 1961 Act, then the later will operate. There is a fallacy in the argument of the assessee that the concepts of total income and previous year are given go by in Chapter XIV-B. The above analysis of Section 158BB indicates that both the concepts are retained in Chapter XIV-B. The only difference is that Section 4 of the 1961 Act charges the total income of a person of one single previous year (unit of assessment) whereas Section 158BA(2) levies a charge on the income of a person for the block period of previous years relevant to 10/6 assessment years. In our view, the word block period, as defined in Section 158B (a), comprises previous years relevant to 10/6 assessment years as one unit of time for the purposes of assessment. As stated above, the object behind enactment of Chapter XIV-B is to assess and compute undisclosed incomes relatable to different accounting years in which the income is earned.

Therefore, if the block period comprising of previous years relevant to 10/6 assessment years is treated by Parliament as one unit of time for assessment purposes, one has to correlate undisclosed income to each of the years in which income was earned by the assessee. It is true that under Chapter XIV-B, computation of regular income and computation of undisclosed income has to be worked out separately. However, to arrive at the figure of Undisclosed Income, the said parallel calculations have to converge in order to work out the difference between the first and the second aggregates of the total incomes/losses of the previous year, in which undisclosed income is taxed under Section 113. Therefore, in our view, the concept of a charge on the total income of the previous year under the 1961 Act is retained even under Chapter XIV-B. Therefore, Section 158BB which deals with computation of undisclosed income of the block period has to be read with computation of total income under Chapter IV of the 1961 Act.

21. Once Section 158BB is required to be read with Section 4 of the 1961 Act, and then the relevant FA of the concerned year would automatically stands attracted to the computation under Chapter XIV-B. Section 158BB looks at Section 113. That section fixes the rate of tax at 60%. In the present case, e.g., the AO assigned the value of Rs. 2, 70,000/- to Unaccounted Investment in household valuables. That amount was distributed between three brothers including the assessee after deducting Rs. 75,000/- and that is how a sum of Rs. 65,000/- has been added as undisclosed income for assessment year 2001-02 in the hands of the assessee.

22. In the case of *Govind Saran Ganga Saran v. Commissioner of Sales Tax and Ors*[1] this Court held that, there are four components of tax, namely, character of the imposition, person on whom the incidence of tax falls, the rate at which tax is imposed and lastly, the value to which the rate is applied for computing tax liability.Applicability of the Finance Act, 2001:

23. Applying the law as discussed hereinabove, we find that in the present case, the AO has imposed surcharge of 17% on the tax calculated at 60% on the total undisclosed income of Rs. 1,62,427/-, which tax comes to Rs.97456/-. The AO imposed surcharge of 17% on Rs.97, 456/- amounting to Rs. 16,504/- by placing reliance on the FA of 2001.

24.We quote hereinbelow Section 2(1) r/w Para A of Part I of the First Schedule, which read as follows:

> "Income-tax.
> (1) Subject to the provisions of sub-sections (2) and (3), for the assessment year commencing on the 1st day of April, 2001, income-tax shall be charged at the rates specified in Part I of the First Schedule and such tax as reduced by the rebate of income-tax calculated under Chapter VIII-A of the Income-tax Act, 1961, (43 of 1961) (hereinafter referred to as the Income-tax Act) shall be increased, -"

(a) In cases to which Paragraphs A, B, C and D of that Part apply, by a surcharge for purposes of the Union; and

(b) In the cases to which Paragraph E of that Part applies, by a surcharge, calculated in each case in the manner provided therein.

(3) In cases to which the provisions of Chapter XII or Chapter XII-A or sub-section (1A) of section 161 or section 164 or section 164A or section 167B of the Income-tax Act apply, the tax chargeable shall be determined as provided in that Chapter or that section and with reference to the rates imposed by sub-section (1) or the rates as specified in that Chapter or section, as the case may be:

25. Provided that the amount of income-tax computed in accordance with the provisions of sections 112 and 113 shall be increased by a surcharge for purposes of the Union or surcharge as provided in Paragraph A, B, C, D or E, as the case may be, of Part I of the First Schedule:

26. Provided further that in respect of any income chargeable to tax under sections 115A, 115AB, 115AC, 115ACA, 115AD, 115B, 115BB, 115BBA, 115E and 115JB of the Income-tax Act, the amount of income-tax computed under this sub-section shall be increased, -

(a) by a surcharge for purposes of the Union, calculated, -

(i) In the case of a co-operative society, a first and a local; authority, at the rate of twelve per cent of such income-tax;

(ii) In the case of a person other than a company, a co-operative society, a firm and a local authority, -

(A) At the rate of twelve per cent of such income-tax where the total income exceeds sixty thousand rupees but does not exceed one lakh fifty thousand rupees; or

(B) At the rate of seventeen per cent of such income-tax where the total income exceeds one lakh fifty thousand rupees; and

(b) By a surcharge calculated at the rate of thirteen per cent of such income-tax in the case of a domestic company20. Para a of part i of the first schedule reads as follows:the first schedule [see section 2] part i income-tax paragraph a

27. In the case of every individual or Hindu undivided family or association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred

to in sub-clause (vii) of clause (31) of section 2 of the Income-tax Act, not being a case to which any other Paragraph of this Part applies,-Rates of income-tax

(1)Where the total income does not exceed Rs. 50,000

Nil;

(2)Where the total income exceeds Rs. 50,000 but does not exceed Rs. 60,000

10 per cent of the amount by which the total income exceeds Rs. 50,000;

(3)Where the total income exceeds Rs. 60,000 but does not exceed Rs. 1, 50,000/- Rs. 1,000 plus 20 per cent of the amount by which the total income exceeds Rs. 60,000;

(4)Where the total income exceeds Rs. 1, 50,000Rs. 19,000 plus 30 per cent of the amount by which the total income exceeds Rs. 1, 50,000.

28. Surcharge on income-tax The amount of income-tax computed in accordance with the preceding provisions of this Paragraph or in section 112 or section 113 shall,-

(i) in the case of every individual or Hindu undivided family, or association of persons or body of individuals having a total income exceeding sixty thousand rupees, be reduced by the amount of rebate of income-tax calculated under Chapter VIII-A, and the income-tax as so reduced, be increased by a surcharge for purposes of the Union calculated-

(A) At the rate of twelve per cent of such income-tax where the total income exceeds sixty thousand rupees but does not exceed one lakh fifty thousand rupees; or

(B) At the rate of seventeen per cent of such income-tax where the total income exceeds one lakh fifty thousand rupees;

(ii) In the case of every person other than those mentioned in item (i), be increased by a surcharge for purposes of the Union calculated at the rate of twelve per cent of such income-tax:

29. Provided that in case of persons mentioned in sub-item (A) of item (i) above having a total income exceeding sixty thousand rupees, the total amount payable as income-tax and surcharge on such income shall not exceed the total amount payable as income-tax on a total income of sixty thousand rupees by more than the amount of income that exceeds sixty thousand rupees:

30. Provided further that in case of persons mentioned in sub-item (B) of item (i) above having a total income exceeding one lakh fifty thousand rupees, the total amount payable as income-tax and surcharge on such income shall not exceed the total amount payable as

income-tax and surcharge on a total income of one lakh fifty thousand rupees by more than the amount of income that exceeds one lakh fifty thousand rupees. (Emphasis supplied)

31. The Finance Act, 2001 stood enacted by Parliament to give effect to the financial proposals of the Central Government for the financial year 2001-02. It is important to note that every FA prescribes a graduated scale for payment of tax, i.e., different rates for different slabs of income. As a general concept, income-tax includes surcharge. Under Section 4 of the 1961 Act, income-tax is assessed and paid in the next succeeding year upon the results of the year before. Section 2(1) of the Finance Act, 2001 inter alia stated that, subject to the provisions of sub-sections (2) and (3), for the assessment year commencing on 1.4.2001, income-tax shall be charged at the rates specified in Part I of the First Schedule and such tax shall be increased in cases to which paragraphs A, B, C and D of that part applied, by a surcharge for purposes of the Union. Under sub-section (3), it was expressly stated that in cases falling under Chapter XII (which includes Section 113) the tax chargeable shall be determined as provided in that Chapter. By way of proviso to sub-section (3), it was further stipulated that the amount of income-tax computed in accordance with Section 113 shall be increased by a surcharge as provided in Paragraphs A, B, C, D or E, as the case may be of Part I to the First Schedule. In this case, it is not in dispute that Para A was applicable at the given point of time. Reading Section 2(1) of the Finance Act, 2001, it is clear that the term income-tax as used in Section 2(1) and as used in the proviso to sub-section (3) of Section 2 of the Finance Act, 2001 did not include the amount of surcharge. Surcharge was a separate item of taxation, different from income-tax.

32. This was made clear vide section 2(1)(a), proviso to section 2(3) and Paragraph A of Part I to the First Schedule, which stated that the amount of income-tax computed in accordance with the provisions of Section 112 or Section 113 shall be increased by a surcharge calculated at the rate of 17% of such income-tax. Under the provisions of Section 2(1) of the Finance Act, 2001, which is made subject to sub-section (3) of that section, the assessee is entitled to claim that income-tax on his undisclosed income to be calculated by applying the rate or rates as prescribed in the Finance Act, 2001, but he cannot claim that the amount of income-tax so determined should not be increased by addition of the surcharge. Therefore, in our opinion, the AO has rightly imposed surcharge at 17% on the undisclosed income of the assessee in this case, particularly when the search was carried out on 17.1.2001.

33. As stated above, Section 158BA (2) read with Section 4 of the 1961 Act looks at Section 113 for the imposition rate at which tax has to be imposed in the case of block assessment. That rate is 60%. That rate is fixed by the 1961 Act itself. That rate has been stipulated by Parliament not with a view to oust the levy of surcharge but to make the levy cost-effective and easy. Therefore, a flat rate is prescribed. The difficulty in block assessment is that one has to correlate the undisclosed income to different years in which income is earned, hence, Parliament has fixed a flat rate of tax in Section 113 [See: (1995) 212 ITR (St.) 69]. On the contrary, a bare perusal of various Finance Acts starting from 1999 indicates that Parliament was aware of rate of tax prescribed by Section 113 and yet in the various Finance Acts, Parliament has sought to levy surcharge on the tax in the case of block assessment. In the

present case, the AO has applied the rate of surcharge at 17% which rate finds place in Para A of Part I of the First Schedule to the said FA of 2001, therefore, surcharge leviable under the FA was a distinct charge, not dependant for its leviability on the assessees liability to pay income-tax but on assessed tax.

34. For the aforestated reasons, we hold that even without the proviso to Section 113 (inserted vide FA 2002 w.e.f. 1.6.2002), the FA 2001 was applicable to block assessment under Chapter XIV-B in relation to the search initiated on 17.1.2001 and accordingly surcharge was leviable on the tax amounting to Rs. 97,456/- at 17% amounting to Rs. 16504/-. We accordingly answer the above question in favour of the revenue and against the assessee. Whether insertion of the proviso in Section 113 by the Finance Act, 2002 was applicable to search up to 31.5.2002:

35. In view of our findings on the first point, strictly speaking, we are not required to examine this question. However, it has been vehemently urged on behalf of the assessee that the said proviso cannot operate retrospectively. This argument is founded on the basis that until the amendment in Section 113 w.e.f. 1.6.2002, there was inconsistency with regard to levy of surcharge. According to the assessee, the question which usually bothered both the assessee and the Department was whether surcharge was leviable with reference to the rates provided for in the FA of the year in which the search was initiated or the year in which the search was concluded or the year in which the block assessment proceedings under Section 158BC were initiated or the year in which block assessment order was passed. According to the assessee, there was a conference of Chief Commissioners which had suggested to the Central Government to amend Section 113 with retrospective effect. However, despite such recommendations, the Central Government inserted the proviso in Section 113 only with effect from 1.6.2002. Therefore, according to the assessee, the proviso cannot be interpreted as retrospective.

36. We find no merit in the above arguments. Both, the Finance Acts of 2000 and 2001, indicated that a substantive charge was created in respect of the income-tax to be levied. Both these Acts prescribed the rates of surcharge. The said surcharge did not depend for its leviability on the assessees liability to pay income-tax but on the assessed tax. The assessee has relied upon the above anomalies in support of their contention that such anomalies made the charge ineffective. In our view, such submission amounts to begging the question. According to the assessee, prior to 1.6.2002, the position was ambiguous as it was not clear even to the Department as to which years FA would be applicable. To clear this doubt precisely, the proviso has been inserted in Section 113 by which it is indicated that the FA of the year in which the search was initiated would apply. Therefore, in our view, the said proviso was clarificatory in nature. In taxation, the Legislation of the type indicated by the proviso has to be read strictly. There is no question of retrospective effect. The proviso only clarifies that out of the four dates, Parliament has opted for the date, namely the year in which the search is initiated, which date would be relevant for applicability of a particular FA. Therefore, we have to read the proviso as it stands.

37. There is one more reason for rejecting the above submission. Prior to 1.6.2002, in several cases, tax was prescribed sometimes in the 1961 Act and sometimes in the FA and often in both. This made liability uncertain. In the present case, however, the rate of tax in case of block assessment at 60% was prescribed by Section 113 but the year of the FA imposing surcharge was not stipulated. This resulted in the above four ambiguities. Therefore, clarification was needed. The proviso was curative in nature. Hence, the proviso inserted in Section 113 merely clarifies that out of the above four dates, the relevant date for applicability of the FA would be the year in which the search stood initiated under Section 158BC.

38. In the case of *Allied Motors (P) Ltd. v. Commissioner of Income-tax*[2] this Court observed as follows:

> "A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation, so that a reasonable interpretation can be given to the section as a whole"

39 .For the foretasted reasons, we set aside the impugned judgment of the High Court dated 13.2.2006 in Tax Appeal No. 1042 of 2005 and, accordingly, we allow the Departments civil appeal with no order as to costs.

Cases Referred

[1]*(1985) 155 ITR 144 (SC)*
[2]*(1997) 224 ITR 677 (SC)*