REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3704 OF 2012

K.L. Swamy ...Appellant(s)

Versus

The Commissioner of Income Tax & Anr. ...Respondent(s)

WITH

CIVIL APPEAL NO. 3706 OF 2012

CIVIL APPEAL NO. 3705 OF 2012

CIVIL APPEAL NO. 3707 OF 2012

CIVIL APPEAL NO. 3708 OF 2012

CIVIL APPEAL NO. 3709 OF 2012

J U D G M E N T

M.R. SHAH, J.

1. As common question of law and facts arise in this group of appeals, all these appeals are decided and disposed of together by this common judgment and order.

2. In all these appeals, the dispute is with respect to levy of interest under Section 158BFA(1) of the Income Tax Act in respect of assessment completed under Section 158BD of the Act for belatedly filing the return of income for the block period and also the levy of surcharge under Section 113 of the Income Tax Act.

3. For the sake of convenience Civil Appeal No.3706 of 2012 arising out of the impugned judgment and order passed by the High Court in ITA No.277 of 2004, is being treated and considered as a lead matter.

4. The facts leading to the present appeal in nut-shell are as under :

4.1 That the appellant is an individual and Director Partner in Khoday Group of Company concerns. A search under Section 132 was conducted in the residential premises of the family

members of Khoday Group and the warrant was issued in the name of M/s. Khoday India Limited. The appellant was served with the notice under Section 158BD to file the return of income for the block period of 01.04.1986 to 13.02.1997. The appellant filed return for the block period in response to notice under Section 158BD by including the undisclosed income of Rs.45,00,000/- for the block period. The Assessing Officer levied interest under Section 158BFA(1) for the period from 18.01.1998 to 19.01.1999 at the rate of 2% per month for 13 months and levied interest of Rs.7,12,296/- on the tax amount of Rs.27,49,600/-.

4.2 The appellant being aggrieved by the order of the Assessing Officer filed an appeal before the learned CIT (A). It was the case on behalf of assessee that levy of interest under Section 158BFA(1) was not justified. The learned CIT (A) held that Section 158BFA provides for levy of interest for late filing of return of block assessment in response to the notice under Section 158BC similar to the provisions of Section 234A. The CIT(A) also held that levy of interest under Section 234A is compensatory in nature and is attracted the moment there is

a default. The appellant – assessee being aggrieved by the order of CIT(A) filed an appeal before the ITAT, Bangalore. Before the ITAT, it was contended on behalf of assessee that provisions of Section 158BFA(1), the levy of interest would be attracted only in a case where there was a failure or delay in filing the return in response to notice under Section 158BC. It was contended that in absence of any notice under Section 158BC, the Assessing Officer was not justified in levying interest. It was also contended that in Section 158BD after the words "that Assessing Officer shall proceed" the words "under Section 158BC" was inserted w.e.f. 01.06.2002 by the Finance Act, 2002. It was contended that the amendment was specifically brought to cure the anomaly and the fact that it has been made prospective w.e.f. 01.06.2002 and therefore, the interest cannot be validly levied under Section 158BFA(1) in a case where notice under Section 158BD was issued prior to 31.05.2002 and in the present case the notice was issued on 28.11.1997. The learned ITAT allowed the appeal preferred by the assessee by observing that Section 158BFA(1) inserted w.e.f. 01.01.1997, prescribes levy of

interest and never require to pay the self-assessment tax due along with the return of income. Interest is leviable on undisclosed income determined with the assessment. It was observed that 140A requiring to pay self-assessment tax along with the return of income filed under Section 158BC(a) was amended w.e.f. 01.06.1999 only. It was observed that in the present case the return was filed on 19.01.1999 and at the relevant point of time there was no provision to pay self-assessment tax along with the return of income and therefore no interest was leviable under Section 158BFA(1).

4.3 The revenue being aggrieved by the order passed by the ITAT, filed an appeal before the High Court being ITA No.277 of 2004. By the impugned judgment and order, the High Court has reversed the decision of the ITAT. The High Court has observed that the amendment to Section 140A is of no consequence so far as determination of interest under Section 158BFA(1) is concerned. The High Court negatived the submission on behalf of the assessee that in absence of any specific notice under Section 158BC, there shall not be any levy of interest under Section 158BFA(1) on the

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submission that prior to the amendment by including Section 158BC within the scope of Section 158BD by Finance Act, 2002 w.e.f. 01.06.2002. So far as a notice under Section 158BD, provision of Section 158BFA(1) was not attracted. The High Court has observed and held that levy of provisions of Section 158BD prior to the amendment in terms of Finance Act, 2002 i.e. before adding the words "under Section 158BC", section itself indicates the procedure that was required to be followed by the Assessing Officer, is only in terms of the very provisions of Chapter XIV-B of the Act and therefore Section 158BC as well as 158BFA(1) are even otherwise attracted and just because the Legislature thought it fit to add or to mention Section 158BC by way of amendment through Finance Act, 2002, it would not make any difference to the earlier provision of Section 158BD which even otherwise envisages within itself the provisions and applicability of Section 158BD and 158BFA(1). Consequently, the High Court has answered the questions of law in favour of the revenue and against the assessee and consequently allowed the said appeal.

4.4 Now so far as the levy of surcharge under Section 113 of the Income Tax Act, the High Court has held the said question also in favour of the revenue relying upon the decision of this Court in the case of **Commissioner of Income Tax vs. Suresh N. Gupta – (2008) 297 ITR 322 (SC).**

4.5 Being aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the assessee has preferred the present appeals.

5. Shri Preetesh Kapur, learned Senior Advocate has appeared on behalf of the assessee – appellant and Shri Balbir Singh, learned ASG has appeared on behalf of the Revenue.

6. Now, so far as the liability to pay the interest – applicability of Section 158BFA to persons who have not been issued notice under Section 158BC prior to the amendment in Section 158BD by Finance Act, 2002, it is vehemently submitted by Shri Kapoor, learned Senior Counsel appearing on behalf of assessee that in the present case admittedly the present assessee was never issued notice under Section 158BC, but was issued notice only under Section 158BD. It

is submitted that in fact prior to amendment in Section 158BD by Finance Act, 2002, there was no requirement to issue notice to the "other person" under Section 158BC. It is submitted that in view of the above factual position, Section 158BFA applies only where a return "as required by notice under Clause (a) of Section 158BC" has not been furnished within time. It is further submitted that in absence of such notice under Clause (a) of Section 158BC, the fundamental pre-requisite of the section is not fulfilled.

6.1 It is submitted that if on its plain words a section does not apply then liability under that section cannot be imposed. It is submitted that as consistently being held by this Hon'ble Court that for liability to be fastened upon the assessee, it must be shown that he unambiguously falls within the letter of the section. Reliance is placed on the decision of this Court in the case of **Mathuram Agrawal Vs. State of Madhya Pradesh, (1999) 8 SCC 667** (Paras 13 and 14).

6.2 It is submitted that therefore since Section 158BFA does not cover a situation where notice has been issued under Section 158BD, no interest under that section can be recovered from

the present assessee.

6.3 It is further submitted that the department's argument before the High Court was that amendment in Section 158BD vide Finance Act, 2002, introducing the requirement of issuing notice under Section 158BC to the "other person", applied even to pending proceedings is erroneous and against the Constitution Bench decision of this Court in the case of **Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited – 2015 (1) SCC 1** (Para 28), wherein the Constitution Bench has clearly laid down that the presumption is that every amendment is prospective and the amendment applies from the assessment year in which it is introduced.

6.4 It is further submitted that in any event, consequence of the said argument will be that the entire block assessment (not just levy of interest) would be rendered *non-est* inasmuch as this Court in the aforesaid decision has laid down that where a section requires issuance of notice such notice is a jurisdictional pre-requisite and in the absence of such notice, the entire proceedings are liable to be quashed. Reliance is

placed on the decision of this Court in the case of **Assistant Commissioner of Income Tax and Anr. Vs. Hotel Blue Moon, (2010) 3 SCC 259** (Para 22). It is submitted that in other words if the amendment applied retrospectively, then issuance of notice under Section 158BC was mandatory even to the "other person" (being the assessee herein) and in the absence thereof the entire block assessment would fail.

6.5 It is submitted that even the submission on behalf of department that issuance of notice under Section 158BC is a mere formality and that no notice under Section 158BC is required to be issued to "other person" even after the amendment to Section 158BD vide Finance Act, 2002, is concerned, it is submitted that the said submission is also erroneous for the following reasons :

> *"(i) The said argument goes against the specific mandatory language of section 158BD as it stands now namely. ".....and that Assessing Officer shall proceed [under section 158BC] against such other person ....."*
>
> *{As submitted above, in view of the judgment of this Hon'ble Court in Hotel Blue Moon, the issuance of a notice under the specified section, would be a jurisdictional pre-requisite, and hence the entire*

block assessments would be rendered non-est.}

(ii) Furthermore, the argument renders otiose the specific amendment in section 158BD adding the words "under Section 158BC" vide Finance Act, 2002. If the Department's contention is correct then this amendment was unnecessary.

(iii) In any event, this argument does not answer the contention of the assessee that section 158BFA on a plain reading, applies only where a return "as required by a notice under clause (a) of section 158BC" has not been furnished within time. In the present case we are concerned with the limited issue of levy of interest under section 158BFA. Even if {for the sake of argument} notice under section 158BC is not mandatory, that does not change the specific words of section 159BFA and cannot bring within its net a person who has not been issued a notice under section 158BC. On the other hand, the argument being raised by the assessee ensures that post 2002 even the "other person" comes within the purview of section 158BFA.

(iv) This argument of the Department also goes against the specific pari materia provision namely section 153C. as rightly pointed out by the learned ASG, post 31st May, 2003, in case of a search, the provisions of 153A to 153C apply and that section 153C is pari materia with 158BD."

6.6 Making above submissions, it is prayed to hold that in absence of the notice under Section 158BC, served upon the assessee – "other person", the Assessing Officer was not

justified in levying the interest under Section 158BFA.

6.7 Now, so far as the levy of surcharge under proviso to Section 113 of Income Tax Act is concerned, it is vehemently submitted that as such the said question is now covered in favour of the assessee by the Constitution Bench decision of this Court in the case of **Vatika Township Private Limited (supra)** (Para 37 to 40). It is submitted that the decision of this Court in the case of **Suresh N. Gupta (supra)** that has been relied upon by the High Court in the impugned judgment has been specifically overruled by the Constitution Bench in **Vatika Township Private Limited (supra)**.

6.8 Now, so far as chargeability of interest under Section 158BFA prior to 01.06.1999 in the case of persons issued notice under Section 158BC is concerned, it is submitted that interest only follows the principal. In this case the principal being the tax payable. It is submitted that in other words the liability to pay interest cannot arise if there was no liability to pay the tax itself along with the return, at the relevant point of time. It is submitted that interest only being

an element to compensate the revenue for having been deprived of the tax, interest can start running only once a liability to deposit tax arises.

6.9 It is submitted that in the present case it is clear that neither Section 158BC nor Section 158BFA require the assessee to pay tax along with the return. It is submitted that this liability to deposit the tax along with return arises only under Section 140A. However, at the relevant point of time Section 140A did not apply to Section 158BC and hence there was no liability to deposit tax along with the return. It is submitted that this lacuna was noticed by Parliament and by the Finance Act, 1999, the words "Section 158BC" have been inserted in Section 140A w.e.f. 01.06.1999. It is submitted that for the period prior to 01.06.1999 the submission on behalf of the department that Section 158BFA is to be seen independently from Section 140A may not be accepted. It is submitted that therefore at the relevant point of time there being no liability to deposit tax along with the return, there can be no levy of interest" on that tax for mere failure to file return.

6.10 Making above submissions, it is prayed to allow the present appeals and answer the issues / questions of law in favour of the assessee and against the revenue.

7. All these appeals are vehemently opposed by Shri Balbir Singh, learned ASG appearing on behalf of the revenue.

7.1 It is submitted that the present appeals arise out of search conducted on 13.02.1997 in the Khoday Group of companies. All appeals raised one common question regarding the levy of interest under Section 158BFA on the undisclosed income of the assessee. It is submitted that pursuant to the search conducted on 13.02.1997, Section 158BD notice was issued to the assessee ("other person") to file return for the block period 1987-88 to 1997-98, whereafter the Assessing Officer passed the order of assessment under Section 158BD and determined the income. The Assessing Officer also levied interest under Section 158BFA(1) for different periods, depending on the date of filing of return in each case. It is submitted that pursuant to the notice issued to file return, there was delay

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in filing return and Section 158BFA(1) being mandatory in nature as per which the interest became payable and was liable to be paid by the assessee after the due date stipulated in the notice and the date of actual filing of return.

7.2 It is submitted that the interest under Section 158BFA(1) of the Act is levied to compensate the government for delay in filing or non-filing of return by the assessee pursuant to determination under Section 158BC / 158BD of the Act.

7.3 It is further submitted that subsequently, Section 140A (1) of the Income Tax Act was amended by the Finance Act, 1999, w.e.f. 01.06.1999 incorporating Section 158BC making the assessee liable to pay tax before furnishing return under Section 158BC and also file the proof of payment along with return. By insertion of Section 158BC in Section 140A, the Legislature casts an additional onus on the assessee to pay self-assessment tax under Section 140A (1) of the Income Tax Act when the return of income was filed in response to the notice under Section 158BC. It is submitted that therefore it is very clear that when the return was filed by the assessee for the block period under Section 158BC, there

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was no requirement to pay tax under Section 140A (1) of the Income Tax Act and the entire liability was limited to period of delay and not be delayed in payment of tax.

7.4 It is submitted that Chapter XIV-B of the Income Tax is a special provision with respect to "searched person" and "other than searched person". It is submitted that the scope and intent behind introduction of Chapter XIV-B has been explained in detail by the Kerala High Court in the case of **P.P. Umerkutty Vs. ACIT – (2005) 279 ITR 213 Kerala**. It is submitted that as explained by the Kerala High Court in the aforesaid decision, the provision relating to block assessment under Chapter XIV-B are self-contained note, providing for variation of the manner in which the liability for payment of tax is determined and covering a situation where undisclosed income relatable to the block period had not suffered tax only due to non-disclosure coming to light in course of certain search proceedings etc.

7.5 It is submitted that the scheme of block assessment introduced under Chapter XIV-B has been explained and considered by the Constitution Bench of this Court in the

case of **Vatika Township Private Limited (supra)**. It is submitted that as observed by this Court, Chapter XIV-B of the Act deals with block assessment which lays down a special procedure for search cases. It is submitted that as observed, the main reason for adding this provision in the Act was to curb tax evasion and expedite as well as simplify the assessment in such searched cases. It is submitted that even as observed and held by this Court in the aforesaid decision Chapter XIV-B is a complete code in itself providing for self-contained machinery for assessment of undisclosed income for the block period of ten years or six years as the case may be.

7.6 It is submitted that the levy of interest under Section 158BFA(1) is linked to the period of filing of return and that period alone is to be taken into consideration particularly as the levy of interest being only for delayed period of filing return. It is submitted that delay of interest is not linked to delay in payment of taxes but due to delay in filing the return.

7.7 Insofar as the submission on behalf of the assessee that in

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absence of any notice under Section 158BC to the "other person" prior to the amendment in Section 158BD vide Finance Act, 2002 and thereby entire block assessment would be rendered *non-est* and the submission on behalf of the assessee that the amendment vide Finance Act, 2002 in Section 158BD adding the words "under Section 158BC" would become *otiose* it is vehemently submitted that the said contentions are without any merit. Relying upon Notes of Clauses appended to Clause 64 of the Finance Bill, 2002, whereby said words "under Section 158BC" was inserted it is submitted that the words "under Section 158BC" in Section 158BD has been inserted so as to clarify that Assessing Officer shall proceed against such "other person" under Section 158BC. It is further submitted that Chapter XIV-B prescribes a special procedure for computation of income for the block period in search and seizure cases. Section 158BD indicates the procedure that was required to be followed by Assessing Officer when any person other than a person with respect to whom search was made. It is submitted that even bereft of clarificatory amendment brought in vide Finance

Act, 2002, Section 158BD provided that provision of Chapter-XIV-B of the Act would apply accordingly and therefore the provision of Section 158BC and 158BFA was attracted. It is submitted that insertion of "under Section 158BC" only makes it clear what was always existing under Section 158BD.

7.8 It is submitted that if the contention of the assessee that Section 158BFA would not be attracted unless notice under Section 158BC is provided then for the period prior to the clarificatory amendment brought in prior to Finance Act, 2002, is accepted, in that case, the provision of Section 158BD will be rendered nugatory qua Section 158BFA. It is submitted that such an interpretation will result in absurdity and the whole intention behind Section 158BD being on the statute book will be lost.

7.9 Now so far as the chargeability of interest under Section 158BFA prior to 01.06.1999 in case of persons issued notice under Section 158BC and the submission on behalf of assessee that since the interest only follows principal, the liability of payment of interest does not arise as there was no

liability to pay tax along with return, since at the relevant point of time, Section 140A did not apply to Section 158BC , there was no liability to deposit tax along with return, hence, there can be no levy of interest on that tax for mere failure to file return, it is submitted that the said contention runs contrary to the mandatory and compensatory language of Section 158BFA(1). Reliance is placed on Notes on Clauses and the memorandum explaining amendment to Section 140A of the Act more particularly Clause 63 by which it was sought to amend Section 140A of the Income Tax Act. It is submitted that a conjoint reading of the Note on Clauses and the memorandum it is very clear that Legislature originally intended to make assessee liable to pay taxes and interest when the return was filed under Section 139 or under Section 142 or under Section 148. It is submitted by virtue of amendment the Legislature proposed to make those assessees who are filing return under Section 158BC also liable to pay tax and interest under Section 140A. It is submitted that memorandum explaining the provisions of Finance bill further makes it clear that the existing

provisions of Section 140A are not applicable to Chapter XIV-B relating to assessment of income of block period in search and seizure cases. The said memorandum also recognizes that the admitted tax declared in return cannot be collected till the assessment is completed. Therefore, the Legislature intended to amend Section 140A by incorporating Section 158BC so as to make liable those persons who are filing return under Section 158BC also. Thus, by virtue of the amendment, a new class of assessee was brought to the statute book whose income are subject to the assessment under Chapter XIV-B, in Section 140A compelling them to pay self-assessment tax. It is submitted that therefore if the Legislature wanted to apply the provisions of Section 140A, they would have expressly stated so. The very fact that there is no provision in Chapter XIV-B for applying provision of Section 140A, clearly shows that Legislature never intended to apply the provisions of Section 140A before 01.06.1999. This was also made clear in the memorandum explaining the Finance Bill, 1999, by saying that there is no corresponding provision in Chapter XIV-B for payment of self-assessment

tax at the time of filing the return. It is submitted that therefore interest under Section 158BFA is leviable on stand-alone basis for non-filing of return which ceases on the day return is filed. It is submitted that said provision is similar to Section 234A.

7.10 It is submitted that in the impugned judgment and order the High Court has explained the rationale behind introduction of Section 158BC in Section 140A and has specifically held that "the liability of payment of interest does not stop merely on filing of return but it is attracted in terms of Section 140A in payment of tax in terms of Section and even now the provision of Section 158BFA(1) and 140A operate independently". It is submitted that in view of the same, the submission on behalf of assessee to refute its liability to pay interest under Section 158BFA deserves to be negatived.

7.11 Now insofar as the levy of surcharge under proviso to Section 113 of the Income Tax Act is concerned Shri Balbir Singh, learned ASG appearing for revenue has fairly conceded that the said issue has been decided in favour of the assessee in terms of the decision of this Court in the case of **Vatika**

Township Private Limited (supra).

8. Heard the learned counsels appearing on behalf of the respective parties at length. The questions of law posed for the consideration of this Court in the present appeals are: (i) levy of interest under Section 158BFA(1) of the Income Tax Act for late filing of the return for the block period in absence of any notice under Section 158BC of the Act and for the period prior to 01.06.1999? and (ii) the levy of the surcharge under proviso to Section 113 of the Income Tax Act.

9. Now insofar as the levy of the surcharge under proviso to Section 113 of the Income Tax Act is concerned, the said issue is now not *res integra* in view of the decision of this Court in the case of **Vatika Township Private Limited (supra)**. In paragraphs 37 to 40, 44 and 45, it is observed and held as under:

"Answer to the reference

37. When we examine the insertion of the proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as declaratory/statutory or curative in nature.

38. There are various reasons for coming to this conclusion which we enumerate hereinbelow.

Reasons in support

39. The first and foremost poser is as to whether it was possible to make the block assessment with the addition of levy of surcharge, in the absence of proviso to Section 113? In *Suresh N. Gupta* [*CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362] itself, it was acknowledged and admitted that the position prior to the amendment of Section 113 of the Act whereby the proviso was added, whether surcharge was payable in respect of block assessment or not, was totally ambiguous and unclear. The Court pointed out that some assessing officers had taken the view that no surcharge is leviable. Others were at a loss to apply a particular rate of surcharge as they were not clear as to which Finance Act, prescribing such rates, was applicable. It is a matter of common knowledge and is also pointed out that the surcharge varies from year to year. However, the assessing officers were indeterminative about the date with reference to which rates provided for in the Finance Act were to be made applicable. They had four dates before them viz.: (*Suresh N.*

Gupta case [*CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362], SCC p. 379, para 35)

> (*i*) Whether surcharge was leviable with reference to the rates provided for in the Finance Act of the year in which the search was initiated; or
>
> (*ii*) the year in which the search was concluded; or
>
> (*iii*) the year in which the block assessment proceedings under Section 158-BC of the Act were initiated; or
>
> (*iv*) the year in which block assessment order was passed.

39.1. The position which prevailed before amending Section 113 of the Act was that some assessing officers were not levying any surcharge and others who had a view that surcharge is payable were adopting different dates for the application of a particular Finance Act, which resulted in different rates of surcharge in the assessment orders. In the absence of a specified date, it was not possible to levy surcharge and there could not have been an assessment without a particular rate of surcharge. As stated above, in *Suresh N. Gupta* [*CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362] itself, the Court has pointed out four different dates which were bothering the assessees as well as the Department. The choice of a particular date would have material bearing on the

payment of surcharge. Not only the surcharge is different for different years, it varies according to the category of assessees and for some years, there is no surcharge at all. This can be seen from the following table prescribing surcharge for different assessment years:

PART I

Finance Act	*Relevant section of the Finance Act*	*Para A*	*Para B*	*Para C*	*Para D*	*Para E*
		IND, HUF, BOI, AOP	Cooperative society	Firm	Local authority	Companies
1995	Section 2(3)	-	-	-	-	
1996	Section 2(3)	-	-	-	-	15%
1997	Section 2(3)	-	-	-	-	7.50%
1998	Section 2(3)	-	-	-	-	-
1999	Section 2(3)	-	-	-	-	-
2000	Section 2(3)	10%	10%	10%	10%	10%
2001	Section 2(3)	12% or 17%	12%	12%	12%	13%
2002	Section 2(3)	2%	2%	2%	2%	2%
2003	Section 2(3)	5%	5%	5%	5%	5%

39.2. The rate at which tax, or for that matter surcharge is to be levied is an essential component of the tax regime. In *Govind Saran Ganga*

Saran v. *CST* [1985 Supp SCC 205 : 1985 SCC (Tax) 447 : (1985) 155 ITR 144], this Court, while explaining the conceptual meaning of a tax, delineated four components therein, as is clear from the following passage from the said judgment: (SCC pp. 209-10, para 6)

> "*6*. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

It is clear from the above that the rate at which the tax is to be imposed is an essential component of tax and where the rate is not stipulated or it cannot be applied with precision, it would be difficult to tax a person. This very conceptualisation of tax was rephrased in *CIT* v. *B.C. Srinivasa Setty* [(1981) 2 SCC 460 : 1981 SCC (Tax) 119 : (1981) 128 ITR 294], in the following manner: (SCC p. 465, para 10)

> "*10*. … The character of computation of provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section."

39.3. In absence of certainty about the rate, because of uncertainty about the date with reference to which the rate is to be applied, it cannot be said that surcharge as per the existing provision was leviable on block assessment qua undisclosed income. Therefore, it cannot be said that the proviso added to Section 113 defining the said date was only clarificatory in nature. From the aforesaid table showing the different rates of surcharge in different years, it would be clear that choice of date has to be formed as in some of the years, there would not be any surcharge at all.

40. Pertinently, the Department itself acknowledged and admitted this fact which is clear from the manner the issue was debated in a Conference of Chief Commissioners which was held sometime in the year 2001. In this Conference, some proposals relating to simplification and rationalisation of procedures and provisions were noted in respect of block

assessment. The foofaraw made in the Conference by those who had to apply the provision, was not without substance because of the garboil [**Ed.**: From the French word gérable: meaning a confused disordered state; turmoil.] situation which this provision had created and is amply reflected in the proposals which were submitted in the following terms:

> "In the case of a block assessment, there are two problems in relation to the levy of surcharge. The first is that Section 113 does not mention a Central Act. In the absence of a reference to another Central Act in the charging section, it becomes difficult to justify levy of surcharge. Even if it is assumed that reference in the Finance Act to Section 113 is a sufficient authority to levy surcharge, the second problem is that the Finance Act levies surcharge on the amount of income tax on the income of a particular assessment year whereas in the block assessment tax is levied on the undisclosed income of the block period. Absence of a specific assessment year in the block assessment may render the levy suspect. Yet another problem is the rate of surcharge applicable. To illustrate, if the search took place on, say, 4-4-1996, whether the rate of surcharge is to be adopted as applicable to the assessment year 1996-1997 or the assessment year 1997-1998, the rate of surcharge being different for the two years? The provisions

of Section 113 or the provisions of the Finance Act do not offer any guidance on the issue.

Suggestions

The foregoing problem indicates that levy of surcharge on undisclosed income is a matter of uncertainty and is prone to litigation. In the circumstances, it is suggested that Section 113 may be amended retrospectively in order to provide for levy of surcharge at the rate applicable to the assessment year relevant to the financial year in which the search was concluded."

The Chief Commissioners accepted the position, in no uncertain terms, that as per the language of Section 113, as it existed, it was difficult to justify levy of surcharge. It was also acknowledged that even if Section 113 empowered to levy surcharge, since block assessment tax is levied on the undisclosed income of the block period, absence of specific assessment year in the block assessment would render the levy suspect.

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44. The Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in the second proviso to sub-section (3) of Section 2 of

the Finance Act, 2003. This proviso reads as under:

> "Provided further that the amount of income tax computed in accordance with the provisions of Section 113 shall be increased by a surcharge for purposes of the Union as provided in Paras A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under Section 132 or requisition is made under Section 132-A of the Income Tax Act:"

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove "hardships" only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1-6-2002.

> **45.** The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench in *Suresh N. Gupta* [*CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362] treating the proviso as clarificatory and giving it retrospective effect is not a correct conclusion. The said judgment is accordingly overruled."

9.1 While passing the impugned judgment and order, the High Court has relied upon earlier decision of this Court in the case of **Suresh N. Gupta (supra)**. However, the said decision has been specifically overruled by this Court in the case of **Vatika Township Private Limited (supra)**.

9.2 In view of the above, the question of law with respect to levy of the surcharge under proviso to Section 113 of the Income Tax is held in favour of the assessee and against the revenue. It is observed and held that in the present case the assessee is not liable to pay the surcharge under proviso to Section 113 of the Income Tax Act. To that extent the impugned judgment and order passed by the High Court and the assessment order qua the surcharge under proviso to Section 113 of the Income Tax Act deserves to be quashed

and set aside.

10. Now so far as levy of the interest under Section 158BFA(1) of the Income Tax Act in absence of any notice served upon the assessee under Section 158BC of the Act and the liability to pay the interest under said provision for the period prior to 01.06.1999 is concerned, while considering the issue the reason for adding Chapter XIV-B for the block assessment is required to be considered. The reason, object and purpose of Chapter XIV-B has been adequately dealt with and considered by this Court in the case of **Vatika Township Private Limited (supra)**. It is observed and held that Chapter XIV-B which deals with block assessment lays down a special procedure for searched cases. The main reason for adding the said provisions in the Act was to curb tax evasion and expedite as well as simplify the assessment in such searched cases. It is observed and held that the essence of the new procedure under Chapter XIV-B 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 said period. Therefore, a separate return covering the years of the block period is a pre-requisite for making block assessment. It is observed and held that Chapter XIV-B is a complete code in itself providing for self-contained machinery for assessment of undisclosed income for the block period of 10 years or 6 years as the case may be. In paragraphs 22 to 25, it is observed and held as under:

> ***"Scheme of Chapter XIV-B***
>
> **22.** Before we proceed to answer the question, it would be necessary to keep in mind the scheme of block assessment introduced in Chapter XIV-B to the Finance Act, 1995 w.e.f. 1-7-1995.
>
> **23.** As already mentioned in brief by us, Chapter XIV-B of the Act which deals with block assessment lays down a special procedure for search cases. The main reason for adding these provisions in the Act was to curb tax evasion and expedite as well as simplify the assessments in such search cases:
>
> **23.1.** 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 17-1-2001, 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 prerequisite for making block assessment. Under the said procedure, the Explanation is inserted in Section 158-BB, which is the computation section, explaining the method of computation of "undisclosed income" of the block period. It is now well accepted that this Chapter is a complete code in itself providing for self-contained machinery for assessment of undisclosed income for the block period of 10 years or 6 years, as the case may be.

23.2. In case of regular assessments for which returns are filed on yearly basis, Section 4 of the Act is the charging section. However, at what rate the income is to be taxed is specified every year by Parliament in the Finance Act. In contradistinction, when it comes to payment of tax on the undisclosed income relating to the block period, the rate is specified in Section 113 of the Act. It remains static at 60% of the undisclosed income which is the categorical stipulation in Section 113 of the Act. Section 158-BA(2) of the Act clearly states that the total undisclosed income relating to the block period "shall be charged to tax" at the rates specified under Section 113 as income of the block period

irrespective of previous year or years. Under Section 113 of the Act, the undisclosed income is chargeable to tax at the rate of 60%.

24. From the above, it becomes manifest that Chapter XIV-B comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes Section 156-BA(2) as the charging section and even the rate at which such income is to be taxed is mentioned in Section 113 of the Act. No doubt, Section 4 of the Act is also a charging section which is made applicable on "total income of previous year". As per Section 2(45), "total income" means the total amount of income referred to in Section 5, computed in the manner laid down in the Act. Section 5 of the Act enumerates the scope of total income and prescribes, inter alia, that it would include all income which is received or is deemed to be received in India in any previous year by or on behalf of a person who is a resident. No doubt, undisclosed income referred to in Chapter XIV-B is also an income which was received but not disclosed, therefore, in the first blush, the argument of the Department that undisclosed income referred to in Chapter XIV-B is also a part of total income and consequently Section 4 becomes the charging section in respect thereof as well. However, a little closer scrutiny leads us to conclude that that is not the position as per the scheme of Chapter XIV-B. In the first place, income referred to in Section 5 talks of total income of any "previous year". As per Section 2(34) of the Act, "previous year" means previous year as

defined in Section 3. Section 3 lays down that previous year means "the financial year immediately preceding the assessment year". Undisclosed income referred to in Chapter XIV-B is not relatable to the previous year. On the contrary, it is for the block period which may be 6 years or 10 years, as the case may be.

25. Consequently, as already mentioned, while analysing the scheme of Chapter XIV-B, such chapter is a complete code in respect of assessments of "undisclosed income". Not only it defines what is undisclosed income, it also lays down the block period for which undisclosed income can be taxed. Further, it also lays down the procedure for taxing that income. It is very pertinent to note at this stage that for this purpose, specific provision in the form of Section 158-BA(2) is inserted making it a charging section. Thus, a diagnostic of Chapter XIV-B of the Act leads to irresistible conclusion that it contains all the provisions starting from charging section till the completion of assessment, by prescribing a special procedure in relation thereto, making it a complete code by itself. Looking at it from this angle, the character and nature of "undisclosed income" referred to in Chapter XIV-B becomes quite distinct from "total income" referred to in Section 5. It is of some significance to observe that when a separate charging section is introduced specifically, to assess the undisclosed income, notwithstanding a provision in the nature of Section 4 already on the statute book, this move of the legislature has to be assigned some reason,

> otherwise, there was no necessity to make a provision in the form of Section 158-BA(2). It could only be that for assessing undisclosed income, the charging provision is Section 158-BA(2) alone."

10.1 Thus, with respect to assessment of undisclosed income for the block period including the filing of the return etc., the normal assessment proceedings including under Section 140 of the Income Tax Act shall not be applicable. Therefore, the submission on behalf of the assessee that interest under Section 158BFA for the period prior to 01.06.1999 in view of insertion of the words "Section 158BC" in Section 140A w.e.f. 01.06.1999, shall not be chargeable, cannot be accepted. At this stage, it is required to be noted that it is the case on behalf of the assessee that the interest only follows the principal and in this case the principal being the tax payable, there was no liability to pay the tax along with the return prior to 01.06.1999 which came to be introduced by insertion of the words "Section 158BC" in Section 140A and therefore the liability to pay interest cannot arise if there was no liability to pay the tax itself along with the return at the relevant time, has no substance. At this stage, it requires to

be noted that neither Section 158BC nor Section 158BFA required the assessee to pay tax along with the return. Liability to deposit the tax along with return arises only under Section 140A. However, at the relevant point of time Section 140A did not apply to Section 158BC and hence there was no liability to deposit tax along with the return. The said *lacunae* was noticed by the Parliament and by the Finance Act, 1999, the words "Section 158BC" have been inserted in Section 140A w.e.f. 01.06.1999. That does not mean that interest under Section 158BFA would not be leviable in case of late filing of return. The return under Section 158BC was required to be filed as per Chapter XIV-B and on the delay in filing the return, there shall be liability to pay interest leviable under Section 158BFA(1).

10.2 At this stage, the Notes on Clauses and the memorandum explaining the said provision which is reported in **(1999) 236 ITR (St) 141 and 187** are required to be considered and reproduced, which read as under:

> *"Clause 63 seeks to amend section 140A of the Income Tax Act relating to self-assessment.*

Under the existing provisions, if any tax is payable on the basis of any return required to be furnished under section 139 of section 142 or section 148, the assessee shall be liable to pay such tax along with interest payable under the Act before furnishing the return and the return shall be accompanied by proof of payment of such tax and interest.

It is proposed to provide that any person before filing of the return under section 158BC shall also be liable to pay tax and interest in accordance with the provisions contained in sub-section (1) of section 140A.

It is further proposed to provide that after a block assessment under section 158BC has been made, any amount paid under sub-section (1) of section 140A shall be deemed to have been paid towards the block assessment under section 158BC.
These amendments will take effect from 01.06.1999."

Further, the Memorandum Explaining the Provisions reads as follows,

"Under section 140A of the Income Tax Act, the assessee is required to pay tax on the basis of income declared in the return and such tax is required to be paid before the return is furnished and the return is accompanied by the proof of such payment. The existing provisions of section 140A are not applicable to Chapter XIV-B relating to the assessment of the income of the block period in search and seizure cases. There is also no corresponding provision in Chapter XIV-B for payment of self-assessment tax at the time of filing the return. Therefore, the tax on the admitted income declared in the return cannot be collected

till the assessment is completed. In view of the above, it is proposed to amend section 140A of Income Tax Act to provide for the requirement of payment of self-assessment tax at the time of filing the return under section 158BC relating to block assessment of search cases."

10.3 Thus, on conjoint reading of the above Notes on Clauses and Memorandum, it is very clear that the Legislature originally intended to make the assessee liable to pay taxes and interest when the return was filed under Section 139 or under Section 142 or Section 148. By virtue of the amendment, the Legislature thus proposed to make those assessees who are filing the return under Section 158BC also liable to pay tax and interest under Section 140A. The memorandum explaining the provisions of the Finance Bill further makes it clear that the existing provisions of Section 140A were not applicable to Chapter XIV-B relating to assessment of income of the block period in search and seizure cases. It further recognizes that the admitted tax declared in the return cannot be collected till the assessment is completed. Therefore, the Legislature intended to amend Section 140A by incorporating Section 158BC so as to make

liable those persons who are filing return under Section 158BC also. Thus, by virtue of the amendment, a new class of assessee was brought onto the statute-book whose income are subject to be assessed under Chapter XIV-B, in section 140A compelling them to pay self-assessment tax. Thus, the interest under Section 158BFA is leviable on standalone basis for late or non-filing of return, which ceases on the day return is filed. In the impugned judgment and order, the High Court has elaborately and comprehensively explained the rationale behind introduction of Section 158BC in Section 140A and has specifically observed and held that the liability of payment of interest does not stop merely on filing of the return but is attracted in terms of Section 140A till payment of tax in terms of the section and even now the provisions of Section 158BFA(1) and Section 140A operate independently. We are in complete agreement with the view taken by the High Court.

10.4 Now so far as the main submission on behalf of the assessee that in absence of any notice under Section 158BC served upon the concerned assessee and in view of insertion of the

words "Section 158BC" in Section 158BD inserted vide Finance Act, 2002, there shall not be any liability to pay interest under Section 158BFA is concerned, the aforesaid submission is absolutely erroneous and has no substance.

It is required to be noted that prior to amendment in Section 158BD vide Finance Act, 2002 and even thereafter, the provisions of Section 158BC would be applicable in case of "searched persons". Section 158BD would be applicable in case of persons "other than searched persons". Therefore, in case of a person "other than searched person", no notice under Section 158BC which is required to be issued in case of "searched persons" was required to be issued. For a person "other than searched person", notice under Section 158BD is sufficient.

10.5 Now so far as the submission on behalf of the assessee that the words "under Section 158BC" has been inserted in Section 158BD vide Finance Act, 2002 and therefore, in absence of any notice under Section 158BC prior to the amendment, there shall not be any liability to pay interest

under Section 158BFA is concerned, a perusal of the Notes on Clauses appended to Clause 64 of the Finance Bill, 2002, it appears that the same is clarificatory in nature.

Clause 64 of the Finance Bill 2002, provides that:-

> *"In section 158BD of the Income-tax Act, after the words "that Assessing Officer shall proceed", the words, figures and letters "under Section 158BC" shall be inserted with effect from the 1st day of June, 2002."*

The Notes on Clauses appended to Clause 64 of the Finance Bill 2002 states the following:-

> *"It is proposed to insert the words "under section 158BC" after the words "that Assessing Officer shall proceed" so as to clarify that the Assessing Officer shall proceed against such other person under section 158BC".*

10.6 At this stage, it is required to be noted that as observed by this Court in the case of **Vatika Township Private Limited (supra)**, Chapter XIV-B prescribes a special procedure for computation of income for the block period in search and seizure cases. Section 158BD shall be applicable in case of any person other than a person with respect to whom search

was made. As observed Chapter XIV-B is a complete code in itself providing for self-contained machinery for assessment of undisclosed income for the block period. Therefore, in case of the person other than searched person the notice under Section 158BD would be required/sufficient and in case of late filing of the return under Section 158BC, the interest will be leviable under Section 158BFA. Any other interpretation would lead to Section 158BD nugatory. It can be seen that by inserting the words "under Section 158BC" in Section 158BD, the Parliament intended to clarify that the assessment for the block period in case of the persons other than searched persons would also be as per the procedure under Section 158BC of the Income Tax Act. At this stage, it is required to be noted that in the present case as such M/s. Khoday India Limited, and M/s. Khoday Breweries Limited – the persons searched were issued notice under Section 158BC and in case of K.L. Swamy, who is the "other person", the notice under Section 158BD has been issued.

10.7 Therefore, the submission on behalf of the assessee that in absence of any notice under Section 158BC served upon the

assessee – persons other than searched persons for the period prior to the amendment in Section 158BD vide Finance Act, 2002, there shall not be any liability to pay interest under Section 158BFA, has no substance and the same is required to be rejected and the said question is required to be answered in favour of the revenue and against the assessee.

11 In view of the above and for the reasons stated above, the present appeals succeed in part. It is observed and held that the respective assessees are not liable to pay the surcharge under proviso to Section 113 of the Income Tax Act. The impugned judgment and order passed by the High Court is required to be modified to the aforesaid extent. So far as the liability to pay the interest under Section 158BFA of the Income Tax Act for late filing of the return under Section 158BC of the Income Tax Act, in absence of any notice under Section 158BC upon the assessee – persons other than searched persons, the said question is held in favour of the revenue and against the assessee. The impugned judgment and order passed by the High Court is hereby confirmed and

it is observed and held that the assessee – persons other than searched persons shall be liable to pay the interest on late filing of the return under Section 158BC even in absence of a notice under Section 158BC of the Income Tax Act and even for the period prior to 01.06.1999. To that extent, the impugned judgment and order passed by the High Court is hereby confirmed. Present appeals are accordingly disposed of in terms of the above. There shall be no orders as to costs.

.....J.
[M.R. SHAH]

NEW DELHI;
JANUARY 13, 2023.

.....J.
[C.T. RAVIKUMAR]

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