

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SMT. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.736/Ahd/2005 : Asstt Year - 2001-02
ITA No.3487/Ahd/2007 : Asstt Year - 2002-03
ITA No.3488/Ahd/2007 : Asstt.Year - 2003-04
ITA No.3331/Ahd/2010 : Asstt.Year - 2001-02
ITA No.2043/Ahd/2010 : Asstt.Year - 2001-02

Shri Mukesh Rasiklal Shah Prop: Dindayal Associates 11, Rudra Apartment Ahmedabad. PAN : AKTPS 8650 F	Vs.	ITO, Cent.Ward-1(1) Ahmedabad.
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**IT(SS)A No.113/Ahd/2007 : Block Period :
1-4-1996 to 12-7-2001**

Shri Suresh U. Gadhecha 2-Dipawali Centre Opp: Old High Court Ashram Road, Ahmedabad.	Vs.	ACIT, Cent.Ward-1(4) Ahmedabad.
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**IT(SS)A No.108/Ahd/2007 : Block Period :
1-4-1996 to 12-7-2001**

ACIT, Cent.Ward-1(4) Ahmedabad.	Vs.	Shri Suresh U. Gadhecha 2-Dipawali Centre Opp: Old High Court Ashram Road, Ahmedabad.
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(Applicant)		(Responent)
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Assessee by :	Shri Aseem Thakkar, AR
Revenue by :	Shri Jamesh Kurian, CIT-DR and Shri Rakesh Jha, Sr.DR

सुनवाई की तारीख/Date of Hearing : 11/07/2022
घोषणा की तारीख /Date of Pronouncement: 22/07/2022

आदेश/ORDER

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

The above seven appeals relate to two different assessees and have been preferred against separate orders passed by the Ld. Commissioner of Income-Tax (Appeals)-I, Ahmedabad [hereinafter referred to as "CIT(A)"] under section 250(6) of the Income Tax Act, 1961 ("the Act" for short).

2. It was a common ground that the issue involved in the appeals relating to both the assessees was inter-linked. It was pointed out that in the case of Shri Mukesh Rasiklal Shah ("MRS" for short) losses claimed by him on account of an alleged proprietary concern of his, by indulging in share trading transaction, was disallowed by the Revenue on the ground that the same was *benami* of one Shri Sureshbhai Gadecha ("SG" for short), the other assessee before us, and accordingly this business of share trading was assessed in the hands of "SG". In the case of "MRS" initially regular assessment was framed under section 143(3) of the Act denying benefit of losses and order for the Asst. Year 2001-02, 2002-03 and 2003-04 was accordingly passed, which denial of claim of loss was upheld by the Ld. CIT(A) against which the assessee has come up before us in ITA No.736/Ahd/2005, ITA No. 3487 and ITA No. 3488/Ahd/2007 pertaining to Asst. Year 2001-02, 2002-03 and 2003-04 respectively.

3. Further in the case of "MRS", for Asst. Year 2001-02, reassessment was made under section 147 of the Act vide order dated 31.12.2007 which was further rectified by the AO vide order passed under section 154 of the Act dated 12.2.2008. Both these orders of the AO were upheld by the CIT(A), against which the

assessee has come up in appeal before us in ITANo.2043/Ahd/2010 and ITA No. 3331/Ahd/2010. Therefore, to put briefly, out of five appeals filed by the assessee “MRS”, three pertain to Asst.Year 2001-02 in the proceedings relating to regular assessment, re-assessment and rectification, while other two appeals pertain to Asst.Year 2002-03 and 2003-04 in regular assessment proceedings.

4. As for the other assessee before us, “SG”, the business of proprietorship firm allegedly run by “MRS” was assessed in his hands in block assessment proceedings under section 158BD of the Act. The Id.CIT(A) partly allowed the assessee’s appeal against the order passed by the AO, against which both assessee and Revenue have come up appeal before us in IT(SS)A.No.113/Ahd/2007 and 108/Ahd/2007 respectively.

5. As is evident from the above, since issue involved in all the appeals are interlinked, they were all taken up together for hearing and are being disposed by this common consolidated order.

6. We shall first deal with the appeals of “MRS”.It was common ground that the issue involved in the appeals pertaining to the regular assessment framed in the case of the assessee, under section 143(3) of the Act ,were identical being denial of loss claimed on account of share trading transactions, purportedly carried on by the proprietorship concern of the assessee, which concern the Revenue claimed was the *benami* of “SG”. We shall deal with the facts in the case of the assessee viz. “MRS” for Asst.Year 2001-02 and our decision rendered therein, therefore,will apply *mutatis mutandis* to the appeals of the assessee pertaining to Asst.Year 2002-03 and 2003-04 also.

ITA No.736/Ahd/2005 (Asst.Year 2001-02)

7. Solitary ground raised by the assessee reads as under:

“1. The ld.CIT(A) has erred in law and on facts in upholding the disallowance of loss of Rs.4,13,11,931/- as made by the ld.AO on the observation that in absence of any justification to support the incurring of any genuine loss by the appellant in any business carried on in the name and style of M/s.Dindayal Associates.”

8. Brief facts of the case relating to the assessee, as emanating from the order of the Ld.CIT(A) are that the assessee had filed return declaring loss of Rs.4,13,11,931/-, being loss in business of share trading transactions from a proprietary concern, M/s.Dindayal Associates (“DA” for short). During assessment proceedings, the assessee, “MRS”, denied being proprietor of this concern, stating that he was working as salaried employee only and all these transactions were being undertaken by his employer, “SG” in his name. The AO made verification of the share transactions conducted in the said proprietorship concern, from the parties who had conducted such business, as was reflected in the books of “DA”, i.e. K.K. Investments, H.Nyalchand Financial Services Ltd. and Poojan Securities Pvt.Ltd. These parties also stated the transactions being undertaken through “SG” for the business to be carried out with the concern, “DA”. Based on all the facts of the case as revealed in the investigation, the AO held that the claim of loss in the name of “DA”, which was not actually carried on as the business of the assessee, was not the loss of the assessee and therefore, the loss claimed was assessed at NIL.

9. The assessee carried the matter in appeal before the ld.CIT(A) wherein he challenged the disallowance of loss and claimed on the

contrary that the business was actually carried out by him and loss was incurred in the same. He contended that the accounts of the business of the assessee were maintained and duly audited. He further contended before the Ld.CIT(A) that no opportunity of cross-examination was provided with regard to the recorded statement of Shri Krishnavatar Kabra and Dhiren H. Vora of H. Nyalchand Financail Servies Ltd., and Shri Kunal Thakkar of Poojan Securities P.Ltd. The ld.CIT(A) dismissed all the contentions of the assessee, holding that the assessee himself had on three occasions denied having nothing to do with the share trading business conducted in his proprietorship concern, "DA"; that he had admitted to be only an employee of "SG", who he had categorically stated on all three occasions to be actually conducting the business of share transactions. The ld.CIT(A) also noted that this fact was corroborated by the investigation and inquiry conducted by the AO from three parties with whom these transactions were conducted, who had confirmed the involvement of "SG" only in the transaction, and the ld.CIT(A) therefore rejected the retraction of the said admission by the assessee stating that it was just a retraction and no evidence was produced by the assessee to corroborate the same. He further noted that the assessee was man of no-means; that from his personal bank account with Manek Chowk Cooperative Bank in Ghatlodia Branch, Ahmedabad wherein a very few transactions were made, and ld.CIT(A) therefore held that it was not possible for a man of few means to be able to carry on business of share trading transactions to extent of approximately Rs.384 crores. As for cross-examination of three persons who had also stated to have conducted transactions with "SG" only, the ld.CIT(A)held that additions had been made on the basis of statement of the assessee himself and

there was no need for cross-examination of these transactions. The relevant findings of the ld.CIT(A) at para-2.3 of the order read as under:

“2.3 I have carefully considered the facts of the case and the submissions adequate opportunity right from the time of assessment proceedings and even in these appeal proceedings. The conduct of the appellant in assessment proceedings, has been reported in detail by the A.O. in the assessment order and it is very obvious therefrom that the assessee was given repeated opportunities to make his submissions on the nature of the business carried on and on three separate occasions being 20TH Aug., 2001, 3rd Sept., 2003 & 8th Oct., 2003 he had clearly stated in his statement recorded under oath, that he was not carrying on any such business of dealing in shares and that he was totally unaware of the conduct of any such business. He had also clearly stated that he had merely signed the return of income or on bank transactions at the behest of his employer Shri Sureshbhai Gadecha from whom he was in respect of salary of less than Rs.5000/- p.m. It can therefore, not be said that from the date of filing of return i.e. 14th August, 2001 and upto the 3rd statement recorded on 8th October,2003 that the appellant was not given adequate opportunity to make submissions in support of his return of income and admitted to be signed by him. After making such categorical denial of conduct of business from the date of being first administered oath before recording of statement on 20th Oct., 2003, the appellant cannot claim that the AO has not given adequate opportunity to make submissions in support of the return of income filed. In fact the letters submitted dtd.18th Feb.2004. 2nd March,2004, 10th March,2004, 13th March,04 And 24th March,04 besides last letter dtd.29th March,04 which have been perused by me from the paper book tiled, clearly show that the appellant has not given any valid reason for the A.O. to ignore the contents of his statements recorded under oath:

However, a claim has been made as under:

"It is to be taken note of that as I have incurred heavy losses and also having burden of heavy liability in market, I am remaining in severe depression and accordingly as and when the I. T.Authorities put up the question as regards to the losses incurred by me or liability that has to be borne by me in respect of M/s.Dindayal Associates, under depression and menial stress, I have always given the answers whereby I tried to disown my liabilities to be honoured by me in the market."

This claim is not supported by any evidence and is merely a generalised denial of the contents of his statement given on three separate occasions over a period of more than two years which claim cannot be accepted as true.

2.4 In the light of the above, I do not find any justification to accept the generalized claim made by the appellant through representative i.e. his C.A. that he was actually carrying on the business of M/s.Dindayal Associates,

and dealing shares to the extent of approximately 384 crores, when the appellant is clearly a man of no means. He has written even I above referred letters fled before the AO in assessment proceedings that he has no immovable property and that he has only a two wheeler in the name of his wife and that he is the only bread winner of the family having salary of less than Rs.5000/- p.m. It cannot therefore, be accepted that while in receipt of salary income of less than Rs.5000/- p.m., he would be in any manner able to conduct and carry on a business of which had no knowledge and to the extent of approximately Rs.384 crores of purchase and approximately 380 crores of sales of shares and securities. He has personally not attended even when notice u/s.131 was issued to him in assessment proceedings, and has excused himself under pretext of having got his statement recorded earlier. The A.O. cannot be expected to accept such a change of stand between recorded statements on three different occasions, and the totally opposite claim made through C.A. in assessment proceedings.

2.5 The attempt by the appellant and his C.A. to make the issue as one of the lack of adequate opportunity is found to be not at all justified. A simple reading of the assessment proceedings, and submissions made in these appeal proceedings shows that this is but an attempt to side track the crux of the issue which is that appellant is a man of no means and he does not have knowledge or the capacity to carry on the alleged business of M/s.Dindayal Associates. The appellant's own personal bank account as per letter dtd.5/3/04 was S.B.A/c.No.3196 with Manek Chowk Co.op.Bank, Ghatlodia, Ahmedabad, which had a very few transactions and after 31.3.99, he claimed to have not prepared any personal profit & loss account and balance sheet because there were no transactions in individual capacity which crossed the minimum taxable limit. Further the appellant's claim that he was not crossed the minimum taxable limit. Further, the appellant's claim that he was not given opportunity to cross examine Shri K.K.Kabra, Dhiren H.Vora & Shri Kunal Thakkar is found to be yet another attempt to side track the issue of his categorical denial of having conducted any such business in the name and style of M/s.Dindayal Associates. The AO has made the assessment based on the appellant's own statements and has only taken support from the statements of these three persons. As such there was no necessity for cross examination of these parties by the appellant. I also find that the copies of statements given by the AO to the appellant vide letter dtd 19th March,2004 in 42 sheets included 29 sheets of his own statement, contents of which were known to him right from 20th Aug.,2001, 3rd Sept.,2003 & 8th Oct.,2003 when the same were recorded.

2.6 Therefore, I do not find any substance in the arguments advanced and I do not find any justification for appellant's claim that adequate opportunity had not been granted by the A.O. prior to completion of assessment proceedings. I further do not find any substance in the various arguments advanced in support of claim of grant of inadequate opportunity- With due respect to the case laws cited by the appellant, it is not denied that adequate opportunity is to be granted to an assessee by the Assessing Officer but in present case such adequate opportunity had been provided. Under the circumstances, in absence of any justification to support the incurring of any genuine loss by the appellant in any business carried on in

8

the name and style of M/s.Dindayal Associates, the treatment given by the AO is found to be justified. The rejection of the loss and the disallowance of the same is upheld. Ground of appeal Nos.1 & 2 are thus rejected.

10. Aggrieved by the order of the Id.CIT(A), the assessee has come up in further appeal before the Tribunal.

11. Before us, the contentions of the Id.counsel for the assessee was that the fact of share trading business being carried in the proprietorship firm "DA" is not disputed by the AO; only contention is that it was a *benami* business of "SG" and not the assessee, and for this reason, the claim of loss on the business was rejected. The Id.counsel for the assessee contended that independent and separate books of accounts of proprietorship concern carrying on share trading business had been kept and books were duly audited and there is no evidence of fund being flown from "SG" to the assessee. He drew our attention to paper book (PB) page no.112 pointing out that debtors, creditors and trade depositors as duly reflected in the books of accounts were duly furnished during the assessment proceedings. He thereafter drew our attention to page no.19 of the PB being balance sheet of "DA" pointing out that none of the deposits was found to be belonged to "SG". He therefore contended that there was no basis for the authorities below to have come to the finding that business of share trading was carried on by the alleged benami "SG" and not the assessee. He further contended that finding that the business was not actually that of the assessee but of the "SG", the Revenue ought to have made protective addition in the hands of the assessee, which was not done. He therefore contended that the finding of the Revenue authorities that no share trading business was being carried on by the assessee in the proprietorship firm, "DA" was not in accordance with facts and

circumstances of the case and the denial of claim of loss, therefore of Rs.4,13,11,931/- was also not correct. The ld.counsel for the assessee relied on the following case laws in support of his contentions:

- i) Manoharlal v. Income-tax Officer, 37 ITD 96 (Jp)
- ii) Prakash Narain vs. Commissioner of Income-tax And Wealth-tax, 6 Taxman 159 (ALL)
- iii) CIT Vs. Shakti Industries, 217 taxmann 77

12. Alternatively, the ld.counsel for the assessee pleaded that necessary direction be given for assessing the loss in the hands "SG" whose *benami* business it was found to be by the Revenue, being run in the name of the proprietorship firm, "DA".

13. On the other hand, the ld.DR relied on the finding of the authorities below.

14. We have heard contentions of both the parties and have also carefully considered the orders of the authorities below.

15. The issue in dispute before us is related to the claim of loss in the business of Rs.4,13,11,931/- allegedly incurred in the proprietorship firm, "DA" where the assessee purportedly was carrying on share trading business. The claim of the Revenue is that this share trading business was the *benami* of "SG" and not of the assessee, and therefore denied claim of loss.

16. On going through the orders of the authorities below, the documents to which our attention was drawn in the paper book placed before us, and after considering contentions of both the parties, we hold that the ld.CIT(A) has rightly upheld the order of the AO holding that the assessee was not carrying on any share trading

business, and it was the *benami* business of the other assessee before us, i.e “SG” only. It is a fact on record that on three different occasions, ranging from 20-8-2001, 3.9.2003 and 8-10-2003, that is within a span of two years, the assessee had repeatedly stated that this business did not belong to him & that he was only an employee of “SG”. He had also stated that he was man of no means, having no immovable property, and drawing a mere salary of Rs.5000/- per month. This fact was corroborated with the details in his personal bank account with Cooperative Bank wherein the CIT(A) has noted there were very few transactions, showing that he was a man of meager means. In the light of this fact, we agree with the Ld.CIT(A) that being a man of few means, it was impossible for him to conduct share transaction having a volume of over Rs.384 crores. We fully agree with the ld.CIT(A) on this count, and the assessee has not been able to demonstrate otherwise before us. He has not been able to demonstrate that he had sufficient means to have undertaken these transactions. Even a perusal of the balance sheet, which was placed in PB at page no.19 reveals that out of total balance-sheet value of Rs.6.68 crores, Rs.6.61 crores was financed by trade depositors. It is highly improbable that a man of such meager means would have been trusted for being financed by outsiders to such a huge amount of Rs.6.61 Crs. Further, inquiry by the AO from the three major parties with whom share trading transaction was carried on, also corroborated the statement of the assessee that the business actually belonged to “SG”; all the three parties claimed that it was “SG” with whom they had interacted. This fact nails the case against the assessee completely, and we are in complete agreement with the ld.CIT(A) therefore that business carried on in “DA” of share trading transaction, did not relate to the assessee, as

per his own admission, corroborated with the statement of three brokers with whom he had worked, and also set out from the financial status of the assessee as reflected from the meager volume of transactions in his personal bank account.

17. The argument of the ld.counsel for the assessee that his books of accounts were duly audited, and all depositors were duly verified during assessment proceedings, we find that this contention is neither here nor there and in fact does not in any way support the case of the assessee. As we have noted above, the balance sheet of the assessee does not give any picture that the business was being run by the assessee himself, i.e. "MRS". The capital of proprietor is shown as only Rs.15,000/- ,out of total balance sheet value of Rs.6.68 crores. The majority of money has come from trade depositors of Rs.6.61 crores. Therefore, the balance sheet does not at all reflect a position that the business belonged to the assessee, "MRS". In fact the entire business was financed from the deposits from outsiders and having noted that the assessee was man of no-means at all to have attracted such deposits, the business therefore could not be attributed to the assessee. Thus the fact of independent books of accounts having been maintained by the assessee and being audited also is, we hold, of no help to the assessee's case at all.

18. Also, the contention that there is no evidence of fund flowing from "SG" to the assessee is also no assistance to the assessee, since, we have pointed out that funds have come from independent depositors and entire business of share trading transaction was financed by these trade depositors only, and it is not necessary that the funds should come from actual owner of the business in each

and every case. In the present case, the balance sheet does not reflect any fund either coming from the assessee himself also, as personal capital is reflected at Rs.15,000/- out of balance sheet value of Rs.6.68 crores. Therefore, even this argument of the ld.AR, that there is no evidence of funds coming from “SG”, does not help the case of the assessee.

19. The contention of the Ld.Counsel for the assessee that no protective addition was made in the hands of the assessee on the AO finding that the business in “DA” belonged to “SG” ,also we find, merits no consideration since this argument does not by any way effect and dislodge the finding of the fact that the business in “DA” was not that of the assessee. This finding is crucial for disallowing the losses in “DA” in the hands of the assessee, and whether any protective addition is made in the hands of the assessee on this count is of no relevance at all. On the contrary the issue being disallowance of loss in “DA” there arises no question of any addition on this count ,and therefore there is no case for making any “protective” addition also. This argument of the Ld.Counsel for the assessee is also rejected.

20. As for the Ld.Counsel for the assesses alternate contention that direction be given for allowing losses of “DA” in the hands of “SG”, we find that the business in “DA” has been assessed in the hands of “SG” in proceedings u/s 158BD of the Act for the impugned year and against the order of the Ld.CIT(A) in the said year, both the assessee and Revenue are in appeal before us in IT(SS) No.113 & 118/A/2007.No interference therefore is called for on this account.

13

21. The case laws relied upon by the Ld.Counsel for the assessee are all distinguishable on facts and our decision disallowing losses are based entirely on the facts before us clearly leading to the inescapable finding that the assessee had not carried on any business but in fact it was the benami of “SG”

22. In view of the above, we uphold the order of the ld.CIT(A) that the business of share trading transactions carried on in the proprietorship concern, “DA” was not that of the assessee, but of “SG” and denial of claim of business loss to the tune of Rs.4,13,11,931/- is accordingly upheld. Ground No.1 raised by the assessee is dismissed. The appeal of the assessee is dismissed.

23. Since issue, facts and circumstances of the present case are identical to other cases in ITA No.3487 and 3488/Ahd/2007, our above decision shall apply *mutatis mutandis* to these appeals as well. Thus, they stand dismissed.

24. Now we take up the assessee’s appeals against reassessment proceedings under section 147 of the Act in **ITA No.2043/Ahd/2010. A Y 2001-02**

25. We have noted from the facts of the case that original assessment framed under section 143(3) of the Act was passed on 30.3.2004, and thereafter the case of the assessee was reopened under section 147 by issuing notice under section 148 on 4.10.2006. The reasons for reopening were enumerated at para-2 of the order as under:

[1] In the balance for AY 2001-02, the assessee has shown trade balance of Rs. 39 lacs on the asset side in the name of Poonam Corporation. However, in the balance sheet of Poonam Corporation, no liability was appearing in

14

the name of the assessee. Accordingly, as the assessee has created a fictitious debtor, the same represents the unaccounted income of the assessee for the year under consideration.

[2] The assessee has purchased 24300 shares of Zenith Info amounting to Rs. 21,77,280/- which was shown in the balance sheet as closing stock, however, in the profit & loss account the assessee has accounted loss from Zenith Info amounting to Rs. 16,30,530/- as against no opening stock of the shares. Accordingly, the assessee has claimed bogus loss to the tune of Rs.16,30,530/-

[3] During the year the assessee has not accounted in the P&L account the closing stock of shares of worth Rs.4708769/-. Therefore, the assessee has concealed income to that extent.

26. A perusal of the reason would reveal that reopening was resorted to on account of income having escaped assessment relating to the share trading transactions carried on in the proprietorship concern of the assessee. At point no.1, the AO has noted that a trade balance Rs.39 lakhs on the asset side of the balance of the assessee in the name of Poonam Corporation, was not confirmed by the balance sheet of Poonam Corporation, where no liability in the name of the assessee was appearing. The balance sheet for Asst.Year 2001-02 which the AO referred (placed at PB pg.19) was that of "DA" in which the assessee purportedly reported to having carried on business of share trading transactions.

Point No.2 of reasons of reopening pertains to certain share transaction of Zenith Info. As per the AO the assessee has allegedly claimed bogus loans to the tune of Rs.16,30,530/-.

In point No.3, the escapement of income noted by the AO is in relation to stock of shares worth Rs.47,08,769/- not having been recorded in the profit & loss account.

27. The entire income believed by the AO to have escaped assessment pertained to the share trading business carried on by

the assessee in its proprietary concern, "DA". Interestingly, in the order passed under section 143(3) for the impugned year on 30.3.2004 the AO had found the share trading business as not being carried out by the assessee at all, and the entire claim of loss in the same, amounting to Rs.4 crores was denied by the AO in the assessment order. Having so found, we fail to understand how the AO could now attribute escapement of income of the assessee on account of this same share trading business, which as per the AO himself, does not belong to the assessee at all. As on the date of recording reasons for escapement of income i.e. on 4.10.2006, the assessment order passed, which was reopened under section 148 of the Act, dated 30.3.2004 had categorically held that the assessee had not carried on the share trading business. Therefore, this very order passed under section 143(3) of the Act, wherein the assessee was held to have not carried out any share trading transactions, could not possibly have been reopened under section 147 of the Act on account of escapement of income relating to this very share trading business only. Assumption of jurisdiction to frame reassessment under section 147 is clearly invalid. Re-assessment framed, therefore, under section 147 of the Act is set aside. The appeal of the assessee is allowed on this count.

Assessee's appeal in ITA No.3331/Ahd/2010 (Asst.Year 2001-02)

28. This appeal arises from the rectification proceedings conducted on the re-assessment order passed under section 147 of the Act in the case of the assessee, dealt with by us in ITA No.2043/Ahd/2010, above. The aforesaid re-assessment order under section 147 has been held by us in the said appeal, as invalid, the rectification of the said order also therefore does not

survive. For this reason alone, the appeal of the assessee stands allowed.

We shall now take up Cross-appeals (In the case of Shri Suresh U. Gadhecha) for the block period from 1.4.1996 to 12.7.2001)

29. Brief background leading to the present cross appeals, as emanating from the order of the AO passed under section 158BD of the Act, is that search under section 132 of the Act was conducted in the case of Kabra group on 12.7.2001. The assessee was noted by the AO to be proprietor of "DA". In response to the notice issued under section 158BD of the Act and served on the assessee on 24.11.2003, the assessee filed its return of income for the block period ending on 12.7.2001 on 6.2.2004 declaring undisclosed income at NIL. Thereafter, order was passed under section 158BD of the Act by the AO holding that business of share trading transactions carried on in the proprietorship, viz. M/s.Dindayal Associates allegedly belonging to "MRS", was actually that of the assessee, "SG" and further that share trading transactions were speculative in nature. The AO further held that actually the transactions in the bank account showed that they were basically in the nature of *Sharafi* loan where funds were given in round figure to and from different parties, and there was no question of any share trading loss arising from these transactions. Thereafter, the AO noted, on verification of bank account in the name of "DA" that on two dates i.e. on 19.1.2001 and 24.1.2001 amount of Rs.5.00 lakhs and Rs.1crores had been respectively withdrawn for self. Noting that these were *benami* accounts of the assessee and he was direct beneficiary of the cash withdrawn, these amounts were added to the income of the assessee, as its undisclosed income. Thus, the undisclosed income of the assessee was for the block period, was

assessed at Rs.1,05,00,000/- as opposed to NIL returned by the assessee.

30. Before the ld.CIT(A), the assessee had raised legal grounds challenging the validity of the order passed under section 158BD of the Act, as also grounds on the merits of the case. The Ld.CIT(A) dismissed the legal grounds while on merits he allowed the same. Aggrieved by the order of the CIT(A), both the assessee and the Revenue have come up before us.

31. We shall first take up the appeal of assessee in IT(SS)A.No.113/Ahd/2007.

28. The assessee has challenged validity of assessment order passed under section 158BD of the Act raising the following grounds:

Initiation of 158BD proceedings and passing the order u/s.158BD r.w.s. 158BC r.w.s. 143(3) of the I.T.Act 1961 and treating the firm M/s.Dindayal Associates as a concern of appellant.

1. The ld.CIT(A) has erred in law and on facts in dismissing the appeal filed by the appellant in respect of initiating the 158BD proceedings and passing the order u/s.158BD r.w.s. 158BC r.w.s. 143(3) of the Act.”

32. Before us, ld.counsel for the assessee pointed out that it had challenged the validity of order passed u/s 158BD of the Act raising a contention that the satisfaction of the AO of the assessee for assuming jurisdiction u/s 158BD of the Act was recorded subsequent to issue of notice u/s 158BD of the Act. That accordingly the Revenue was directed by the Bench to verify that the satisfaction note as per page no.174 of the PB was made before the

date of notice issued under section 158BD dated 26.11.2007 vide order sheet entry dated 17.4.2012, and the Revenue has remained non compliant since then on account of which , though the appeals were filed in 2007, they were not heard till date.

33. At this juncture, the Id.DR was asked to clarify the position of the Department in this regard, in response to which he stated that communication in this regard had been sent to the AO for his comment, but nothing had been received in response to date. Noting the fact that the Department had been directed by the Bench 10 years back in 2012 and no compliance had been made of the directions till date, the matter was directed to be proceeded to be heard with on the basis of material available on record, and no further opportunity be given to the Department to procure any material in support of their arguments on the issue.

34. Proceeding with the hearing in the matter, the arguments of the Id.counsel for the assessee challenging the validity of the assessment framed in the present case of "SG" under section 158BD of the Act was that -

- (i) the prescribed procedure for initiating the proceedings under section 158BD was not followed since there was no satisfaction of the AO of the searched person that incriminating material relating to the assessee was found during the course of any search, and which accordingly was being handed over to the AO of the assessee. He pointed out that only satisfaction note available with the department was the satisfaction recorded of the AO of the assessee for initiating proceedings under section 158BD in the case of the assessee. Reliance was placed on the

decision of Hon'ble Apex Court in the case of Manish Maheshwari Vs. ACIT, 289 ITR 341 (SC) for the prescribed procedure of recording satisfaction in such cases in block assessment proceedings, more particularly, where the assessment of third person, not subjected to search action, was to be initiated and conducted under section 158BD of the Act;

- (ii) that the satisfaction of the AO of the assessee was recorded subsequent to the issuance of notice under section 158BD of the Act to the assessee. In this regard, he pointed out that while notice under section 158BD of the Act was issued to the assessee on 24.11.2003, in the satisfaction note placed before us at page no.174, the AO recorded the fact of assessment order for Asst.Year 2001-02 passed in the case of "MRS" holding that share trading transaction in the proprietary concern, "DA" belonged to the assessee, "SG" which was dated 30.3.2004. That thus, while notice under section 158BD was issued on 24.11.2003 the satisfaction note by the AO of the assessee was recorded subsequent to 30.3.2004;
- (iii) that the satisfaction note recorded that information during the assessment proceedings under section 158BD in the case of Mukesh Shah revealed business of the assessee being carried on in the name of "MRS". The ld.counsel for the assessee contended that proceedings under section 158BD of the Act could not be conducted on the basis of information procured in the proceedings under section 158BD of the Act on any other assessee; that they could be conducted only on the basis of

material gathered during search on parties, relating to third person in whose case, the proceedings under section 158BD could be initiated.

35. The ld.DR on other hand, relied on the finding of the ld.CIT(A) at para 2.0 to 2.1 of the order as under:

“2. The first ground of appeal is regarding Assessing Officer has erred in law and on facts in initiating the 158BD proceedings and passing the order U/S.153BD r.w.s.158BC rws 143(3) of the IT Act,1961. Ld. Counsel contended that: the Id. Assessing Officer has not identified any search assessee's case on the basis of which the proceedings u/s.158BD of the act has been initiated in the case of appellant. Ld. Assessing Officer has also not identified any seized material/ search material of any assessee for initiation of 158BD proceedings in the case of appellant. However, the id. Assessing Officer without, giving any material evidence as well as the satisfaction passed the order u/s.158BD r.w.s. 158BC r.w.s. 143(3) of the Act which is wholly unjustified, unsustainable and bad in law and requires to be quashed.

2.1 I have carefully considered the contentions of Ld. Counsels as well as gone through the records. The satisfaction was recorded on the basis of seized material and copy was given to the Appellant who has also submitted a photocopy of the same during appellate proceedings alongwith vide pleadings dated 18.12.2006 signed by the Appellant. As per last para of page-4 of the Assesment Order, 158 BD proceedings were validly initiated on the basis that M/s. Dindayal Associates is concern of the Appellant i.e. Shri Suresh U.Gadhecha and not of Shri Mukesh R.Shah, who was only a front man for the Appellant. Further, Shri Suresh U.Gadhecha had made Shri Mukesh R.Shah as proprietor of M/s. Dindayal Associates only on papers for the name sake. Shri Mukesh R.Shah was only a salaried employee of the Appellant. However, appellant had not shown income from M/s. Dindayal Associates in the return of income. The proceedings u/s 158BD were validly initiated on the basis of material indicating undisclosed income in the hands of the Appellant. The Appellant was given repeated opportunities to make his submissions regarding the nature of the business carried on by him. The A.O. has made the assessment based on the statements of four persons as well as information collected from Classic Co-operative Bank, in which Appellant was working as Chairman having full control over all the transactions of the Bank. The copies of the statements recorded were given the Appellant on 05.11.2003 after confronting the statements of all four persons and recording his statement in the Office of the A.O. and once again twice on 28.11.2003 for rebuttal. Hence, there was no requirement to cross examine the persons as statements as well as material likely to be used by the AO against the Appellant was already provided well in advance. On perusal of records, it has been noticed that the Appellant had appeared before AO only on 21.11.2005 and requested for cross examination of witnesses on

24.11.2005. Thereafter, summons were issued by the Assessing Officer. In response to summons, only Shri Dhiren Vora of H.Nyalchand Financial Services Ltd. appeared and he stated during cross examination that all the transactions of IWs Dindayal Associates were made by Shri Suresh Gadhecha and not by Shri Mukesh R Shah as claimed by the Appellant. The Appellant had never co-operated before the A.O. as he appeared only on 21.11.2005 and never owned up the transactions in the name M/s Dindayal Associates. Therefore, the A.O.had to gathered information from Classic Co-operative Bank in which appellant was working as Chairman for the purpose of completion of assessment. Keeping in view of above facts and circumstances of the case, the first ground of appeal is dismissed.”

36. We have carefully considered contentions of the assessee. The assessee has challenged the validity of the assessment framed under section 158BD of the Act basis the satisfaction note recorded by the AO of the assessee on various grounds. It is necessary to reproduce the satisfaction note placed before us at page no.174 as under:

Satisfaction note in the case of Suresh U. Gadhecha.

During the course of assessment proceeding U/S.158BD in the case of Mukesh R. Shah it is noticed that Mukesh R. Shah has shown himself as proprietor of M/s. Dindayal Associates. The bank, account and the seized materiel in the case of Dindayal Associates, Prop. Mukesh R. Shah were perused and statement of Shri Mukesh R. Shah and persons Shri Kunal Thakkar, Dhiren Vora and K.J. Kabra who had undertaken dealings were recorded. They all point to one fact that Shri Mukesh is only a front for Shri Suresh Gadhecha. This is very evident from the statement recorded of Shri Shri Mukesh R. Shah where he has submitted that he is only small salaried person working for his employer Shri Suresh U. Gadheecha. Here it is also worthwhile to mention that in the case of Mukesh R. Shah the assessment for A.Y.2001-02 has been completed and as per finding in the same the transactions have effectively made by Shri Suresh Gadhecha and not by Mukesh R. Shah. CIT(A) has also confirmed the findings of the A.O. in the case of Mukesh R. Shah for the A.Y:2001-02.

In view of the above, I am satisfied that the action U/S.158BD needs to be initiated in the case of Suresh U. Gadhecha

Sd/-
Hemant Leuva
Commissioner of Income Tax
Cent. Cir.1(2), Ahmedabad

37. Admittedly assessment in the present case has been framed under section 158BD of the Act. Provisions of section 158BD are as under:

158BD. Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned under section 132A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed under section 158BC against such other person and the provisions of this Chapter shall apply accordingly.

38. As is evident from a literal reading of the section , it provides for assessment of undisclosed income for block period as prescribed in cases where search action is undertaken, u/s 158BC of the Act, in certain cases where no search is conducted . The circumstance warranting framing of such assessment is incriminating material relating to them being found in search conducted on other persons.

Having said so, we note from the satisfaction note of the AO of the AO of the assessee for initiating proceedings u/s 158BD of the Act in the present case, that he notes information being revealed during assessment proceedings under section 158BD in the case of Mukesh Shah, relating to the assessee to the effect that the alleged proprietary concern of Mukesh Shah of “DA” was actually *benami* of the assessee. The satisfaction note further talks about bank account and seized material of “DA” and statement recorded of Mukesh R. Shah, Kunal Thakkar, Dhiren Vora and K.J. Kabra with whom “DA” had undertaken share trading transaction which revealed that Mukesh Shah was only a front man of the assessee. The satisfaction further notes that assessment of “MRS” for Asst.Year 2001-02 had been completed and it was found that the

proprietorship actually belonged to the assessee, "SG", which finding has been confirmed by the Id.CIT(A) also.

39. We have dealt with the case of "MRS" in the appeal above. In the case of "MRS", we have noted that originally the assessment order under section 143(3) was dated 30.3.2004 wherein it was found that loss claimed by him on account of share trading transactions in his alleged proprietorship concern viz. "DA" were actually *benami* of "SG". All these facts are noted in the assessee's appeal in ITA No.736/Ahd/2005 above. A copy of the order passed under section 158BD in the case of "MRS" is also part of the record before us. We find, the said order was passed on 31.3.2005 wherein the assessee had returned undisclosed income of Rs.96,267/- for the block period and had claimed set off of business loss in Asst.Year 2001-02 which set off have been denied by the AO stating that the undisclosed income could not be NIL, since set off were claimed to the tune of Rs.4.13 crores against undisclosed income of Rs.96,267/- and accordingly undisclosed income of the assessee for the block period was assessed at Rs.96,267/- in the order passed under section 158BD dated 31.3.2005.

What is derived from the above is that firstly the information that proprietorship concern "DA" was *benami* of the assessee was so obtained during the assessment proceedings under section 143(3) of the Act in the case of "MRS", and not in the block assessment proceedings under section 158BD in the case "MRS". Therefore, this fact noted in the satisfaction note that this information was obtained during the course of assessment proceedings under section 158BD of the "MRS" was factually incorrect.

40. Further this information came to the possession of the AO surely not through search conducted on “MRS”, but only in the course of regular assessment framed on him under section 143(3) of the Act. Even as per the satisfaction note also, it has been noted that in the assessment framed in the case of “MRS” it has been found that proprietorship concern is *benami* of “SG”. There is no order passed in search assessment under section 158BC of the Act in the case of “MRS”. On the contrary, order u/s 158BD of the Act is passed in the case of “MRS” and as per the AO’s satisfaction note ,the information was derived in the course of assessment proceedings u/s 158BD of the Act in the case of “MRS”. Therefore, clearly there was no search conducted on “MRS” or on his alleged proprietorship concern, “DA”. Information against the assessee clearly does not emanate from search proceedings.

Ld.DR was unable to controvert any of the above. He was unable to produce any documents before us to controvert the fact that information recorded in the satisfaction note of the AO emanated during assessment proceedings conducted on “MRS”. Nor was he able to demonstrate that the present proceedings were initiated on the basis of any incriminating material relating to the assessee found during search action on any third person .This despite more than sufficient opportunity available with the Revenue to do so considering the period of almost 17 years since the appeal was pending before us ,having been filed way back in 2005.

41. In view of the same therefore, the information against the assessee not emanating from search conducted on any person, the proceedings under section 158BD to assess undisclosed income of the assessee for the block period could not have been conducted as

per law. The order passed therefore u/s 158BD of the Act is, we hold, invalid.

42. Further, we have noted that the satisfaction note records confirmation of the assessment order passed in the case of "MRS" which event took place on 28/12/2004, which is much subsequent to the date of issuance of notice under section 158BD i.e. on 24.11.2003. This goes to show that in any case the satisfaction whatsoever was recorded by the AO after issuance of notice u/s 158BD of the Act.

43. For the reasons stated above viz.

- (i) that the information/ material for recording satisfaction for issuance of notice under section 158BD was not based on any search action,
- (ii) satisfaction in any case was recorded after issuance of notice under section 158BD of the Act,

we hold that present proceedings conducted on the assessee under section 158BD of the Act and consequent assessment order passed under section 158BD of the Act is against the law and hence invalid. The order so passed under section 158BD is therefore set aside. This ground is allowed, and the appeal of the assessee is allowed.

44. We shall now take up Department's appeal in IT(SS)A No.108/Ahd/2007.

45. The Department is aggrieved by the action of the Ld.CIT(A) in deleting the addition of Rs.1,05,00,000/- made by the AO on account of withdrawal of cash from the *benami* accounts, allegedly

by the assessee, and the grounds raised in this regard read as under:

“1. The CIT(A) has erred in law and on facts in directing to delete the addition of Rs.1,05,00,000/- made by the AO on account of withdrawal of cash from benami accounts without considering the facts of the case and allowing relief to the assessee by passing a non-speaking order.”

46. The Ld.CIT(A) deleted the addition holding at para 3.3 of his order as under:

“3.3 I have carefully considered the contentions of Ld. Counsels as well as gone through the records. On the basis of photocopies of the Bank statements showing that entry of Rs. 5,00,000/- dated 19.01.2001 mentioned as 'Yourself in . Bank Account No.2252 was a transfer entry for placing Fixed Deposit with The Classic Co-operative Bank Ltd. in the name of M/s Dindayal Associates. Similarly, entry of Rs. 1,00,00,000/- dated 24.01.2001 mentioned as 'Yourself in Bank Account No.FO-140 was a transfer entry for placing Fixed Deposit with The Classic Cooperative Bank Ltd. in the name of M/s Dindayal Associates. Hence, the Appellant had not withdrawn these two amounts from the Bank Account for himself. The Assessing Officer has not given comments in this regard. Keeping in view of above facts and circumstances of the case, the addition of Rs.1,05,00,000/- is hereby deleted. Therefore, the second ground of appeal is allowed.”

47. The ld.DR was unable to controvert the factual finding of the ld.CIT(A) though he heavily relied on the order of the AO at para-4 of the assessment order. It reads as under:

“4. Unaccounted income:

On verification of bank account No.FO 140 and CD 2252 I the name of Dindayal Associates, it is noticed that on 19.01.01 Rs.5,00,000/- has been withdrawn from the A/c.No.2252 & on 24.01.01 Rs.1,00,00,000/- has been withdrawn for self from the A/c.No.FO 140. Assessee has simply disowned the all the transactions in the name of Dindayal Associates and proprietor of which was shown as Mukesh R. Shah but actually owned, controlled and operated by Shri Suresh U. Gadhecha. Basically these are the benami accounts of the assessee and he is the direct beneficiary of the cash so withdrawn from this account. This is undisclosed income of the assessee.”

48. We have heard contentions of both the parties. Though the appeal of the Revenue is merely academic since we have already held the order passed by the AO under section 158BD in the present case

in the appeal of the assessee in IT(SS)ANo.113/Ahd/2007, but even on merits, we find that the ld.CIT(A) thrashed the very basis of the AO for making addition of Rs.1.05 crores by noting that there was no cash withdrawal from the *benami* account of the proprietorship concern, "DA", but in fact it was kept in fixed deposits in the name of proprietorship concern. The Department was unable to controvert this fact. Therefore, the very basis of the AO for making addition in the hands of the assessee of Rs.1.05 crores does not survive, since the Ld CIT(A) has noted the fact that no cash was actually withdrawn. In view of the same, we see no reason to interfere in the order of the CIT(A) in deleting the addition of Rs.1,05,00,000/-. This ground is dismissed.

Thus, the appeal of the Revenue is dismissed.

49. In the combined result,

- i) Assessee's appeal in ITA No.736/Ahd/2005 and 3487 & 3488/Ahd/2007 are dismissed;
- ii) Assessee's appeal in ITA No.3331 and 2043/Ahd/2010 and that of IT(SS)A.No.113/Ahd/2007 are allowed;
- iii) Revenue's appeal in IT(SS)A.No.108/Ahd/2007 is dismissed.

Order pronounced in the Court on 22nd July, 2022 at Ahmedabad.

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER**

Ahmedabad, dated 22/07/2022

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