

(2010) 08 GAU CK 0041**Gauhati High Court****Case No:** Income Tax A. No. 8 of 2008

Commissioner of Income Tax

APPELLANT

Vs

Kamala Devi Jain

RESPONDENT

Date of Decision: Aug. 24, 2010**Acts Referred:**

- Income Tax Act, 1961 - Section 158BC, 260A

Citation: (2010) 6 GLR 5 : (2011) 330 ITR 153**Hon'ble Judges:** Ranjan Gogoi, J; Arun Chandra Upadhyay, J**Bench:** Division Bench**Advocate:** U. Bhuyan, for the Appellant; J.C. Gaur, for the Respondent**Final Decision:** Allowed

Judgement

Ranjan Gogoi, J.

This appeal, by the Revenue, u/s 260A of the Income Tax Act, 1961, ("the Act"), is against the order dated 24.8.2007 passed by the Income Tax Appellate Tribunal, Guwahati Bench, Guwahati in ITA No. 55(Gau.)/2007. The Appellant is aggrieved by the findings recorded in the aforesaid order of the learned Tribunal to the effect that "the excess income disclosed in a particular assessment year falling in the block assessment year can be available to the Assessee for set-off of undisclosed income in subsequent year of the same block period". On the basis of the aforesaid findings, consequential directions have been issued by the learned Tribunal to the Assessing Officer to allow set-off in favour of the Assessee.

2. The facts that will be required to be noticed for the purpose of adjudication of the substantial questions of law framed in the present appeal may be briefly noticed hereunder.

3. A search and seizure operation was conducted in the business and residential premises of the Assessee on 13.3.2003. Search and seizure operations were also conducted in the locker of Andhra Bank, A.T. Road Branch, Guwahati on 24.3.2003

which was in the, joint names of the Assessee and her son one Shri Ajoy Kumar Jain. Thereafter, notice u/s 158BC of the Act was issued and served on the Assessee on 13.8.2004. The Assessee filed return of income for the block period 1.4.1996 to 13.3.2004 disclosing undisclosed income in the following manner:

4. The assessment of the block period was completed by the Assessing Officer u/s 158BC of the Act by order dated 13.3.2005. By the aforesaid order, the Assessing Officer determined undisclosed income for the block period as hereunder:

A.Y.	Total income determined in the block assessment as per para22.1	Income in regular return	Undisclosed income (II-III)
I	II	III	IV
1997-98	96291	96291	Nil
1998-99	112216	112216	Nil
1999-00	89344	89344	Nil
2000-01	88052	88052	Nil
2001-02	816582	252915	563667
2002-03	2019702	289844	1729858
2003-04	4296747	1851368	2445379
		Total undisclosed income	4738904.

5. Aggrieved, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals). By order dated 11.12.2006, the learned Commissioner allowed the appeal filed by the Assessee and set aside certain additions made by the Assessing Officer in the undisclosed income of the Assessee for the block period. Insofar as the claim of set-off is concerned, the appellate authority took the view that "there cannot be set-off of one year's undisclosed income shown in the block return with any other year".

6. In respect of deletion of certain additions made by the Assessing Officer, the Revenue filed an appeal before the learned Tribunal. Insofar as the finding with regard to set-off is concerned, the Assessee filed cross-objection contending that for the assessment years 2001-02; 2002-03 and 2003-04, the undisclosed income or part thereof, as disclosed by the Assessee, not being linked either with the undisclosed investment or unexplained expenditure u/s 158B(b) of the Act, such amount should have been set-off against the undisclosed income of subsequent years falling within the same block period. The learned Tribunal dismissed the appeal filed by the Revenue by holding the deletions made by the learned Commissioner to be justified in law. Insofar as the cross-objection is concerned, the same was allowed by holding

that "the excess income disclosed in a particular assessment year falling in the block assessment year can be available to the Assessee for set-off of undisclosed income in subsequent year of the same block period".

7. Aggrieved this appeal has been filed by the Revenue wherein the following substantial question of law had been framed by order dated 2.4.2008:

Whether on the facts and in the circumstances of the case, the Tribunal was justified and correct in law in directing the Assessing Officer to allow set-off of excess income disclosed in a particular year falling within the block period against the undisclosed income of subsequent year falling within the same block period?

8. We have heard Mr. U. Bhuyan, learned Counsel for the Appellant and Shri J.C. Gaur, learned Counsel for the Respondent Assessee. We have perused the orders of the primary authority as well as the first appellate authority. The impugned order passed by the learned Tribunal has also been duly perused by us.

9. The plea raised by the Assessee with regard to the claim of set off is that certain amounts declared as undisclosed income by the Assessee were not related to any undisclosed investment or unexplained expenditure by the Assessing Officer. Therefore, according to the Assessee, such amount(s) could not have been added to the undisclosed income by the Assessing Officer and the same were liable to be set off against the undisclosed income of subsequent years within the block period.

10. On the face of it, the contention of the Assessee appears to be untenable. In the present case, undisclosed income of the Assessee was found to be more than what had been voluntarily declared in the return filed by the Assessee for the block period. Consequently, additions were made to the undisclosed income declared by the Assessee in the return filed for the block period. If the undisclosed income determined by the Assessing Officer exceeds the declared undisclosed income of the Assessee, there can be no set off of the declared undisclosed income as the same would become a part of the undisclosed income determined by the Assessing Officer. Set off presupposes existence of a surplus, i.e., declared undisclosed income is more than what has been determined by the Assessing Officer. Such a situation cannot be visualized under the Act as the undisclosed income determined by the Assessing Officer cannot be less than what has been voluntarily declared by the Assessee. In the aforesaid circumstances, the findings recorded by the learned Tribunal and the consequential direction issued, as noticed by us, are clearly erroneous. The said directions are, therefore, set aside and the appeal of the Revenue is allowed.