



* HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on : 14th July, 2010
% Judgment Pronounced on: 20th September, 2010

+ ITA 841/2010

COMMISSIONER OF INCOME TAX-VIII Appellant
Through: Ms. Rashmi Chopra, Advocate

versus

VIVEK BIKKY KAICKER Respondent
Through: None

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

The present appeal preferred under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') is directed against the order dated 2nd January, 2009 in ITA No. 1992 (Delhi) 2007 passed by the Income Tax Appellate Tribunal, Delhi Bench-I, pertaining to the assessment year 2003-2004.

2. Though the appellant-revenue has raised number of questions, yet Ms. Rashmi Chopra, the learned counsel for the revenue, restricted to the following questions:



“(a) WHETHER on the facts and in the circumstances of the case, the ITAT erred in law and on merits in upholding the deletion of Rs.34,11,300/- on account of difference between the value of the property estimated by the DVO and the purchase consideration declared by the assessee?

(b) WHETHER the order of the CIT(A) is perverse in law and on merits in admitting additional evidence contrary to Rule 46A of the Income Tax Rules, 1962?

(c) WHETHER the CIT(A) erred in relying on sale instances produced by the assessee without referring them to the AO as per the provisions of Rule 46A of the Income Tax Rules, 1962?”

3. To appreciate whether the questions would give rise to any substantial question of law, it is necessary to refer to the facts in brief. The assessee-respondent filed a return on 2nd December, 2003 declaring an income of Rs.2,47,691/-. His case was selected for scrutiny and thereafter, notice was issued under Section 143(2) of the Act. The assessing officer found that the assessee had purchased half share in the property situated at D-5/19, Vasant Vihar, New Delhi for a sum of Rs.25,42,000/- which included stamp duty and corporation tax. In order to investigate the investments made by the assessee and to estimate the cost of the purchase of half share by the assessee, the assessing officer referred the matter to the valuation cell under Section 142A of the Act and received the report of the valuation officer. The valuation officer valued the property at Rs.59,53,300/-. The same was put to the assessee who filed the objections contending, inter alia, that in the property, the terrace right was also sold and the purchaser of property had been given a right to construct a floor above his flat which is permitted by the bye-laws of the Corporation and the valuation report has taken this fact into consideration and further the assessee also submitted a valuation report



of an approved valuer. The assessing officer did not accept the objec-----
the assessee and added the cost of acquisition amounting to Rs.34,11,300/-
as the income of the assessee under Section 69 of the Act. The assessing
officer also charged interest under Sections 234B and 234C of the Act and
initiated penalty proceeding under Section 271(1)(C) of the Act. That apart,
the assessing officer also made addition of Rs.27,979/- towards difference in
the sundry creditors closing balances as he had found that there are closing
balances in respect of four firms, namely, M/s Aarvee Sales Agencies, M/s
Aarvee Enterprises, M/s East Coast Distributors Pvt. Ltd. and M/s Ken
Agencies.

4. Being dissatisfied with the aforesaid order, the assessee preferred an
appeal before the CIT(A). It was contended before the first appellate
authority that the valuation officer had not given any indication how the
value of land and cost of construction have been determined; that the
valuation report is silent on the issue of transfer of ownership right in the
undivided, indivisible and impartible land out of the total plot area of
property No. D-6/24, Vasant Vihar; that the basis adopted by the valuation
officer is incorrect as he has taken recourse to the method of determining the
capital FMV; that the valuation report does not indicate the extent of
completion/semi finished state of affair of the property; that the comparison
made by the valuation officer in respect of the other properties is
unacceptable as the other properties are situated at a better place than the
property of the assessee; that the property of the assessee has number of



negative factors attached to it, namely, the plot of land on which the assessee's flat is situated is not of regular shape and the plot is of large size, there is an office in the basement of the building, there is a slum area, i.e., Jhuggies and Jhopris in close proximity to the plot, there is no parking facility in the vicinity of the plot, water supply system is very bad and water has to be carried from corporation taps provided at shop and used and one has to rely upon water tanks for daily needs, the building is not even fitted with submersible/booster pump, there is a huge garbage bin of the entire locality of 'D' Block, Vasant Vihar, near the flat which spoils the view from the kitchen and bedrooms and which is the main cause of generation of flies, mosquitoes and lot of foul smell especially in the summer and rainy seasons; that the records of the registering authorities have been searched to find out the FMV of properties of similar description in the same locality which have revealed the facts that even in January, 2004, the FMV was more or less the same as that of the assessee; that the books of account of the assessee had been duly audited and the copy of the audit report had already been submitted; that though the assessing officer had accepted the books of account of the assessee and also resultant profit, yet he rejected the claim of the assessee regarding investment made for acquisition of the property solely on the basis of the report of the valuation officer; that the assessing officer has erroneously come to hold that the differential sum was unexplained investment under Section 69 of the Act; and that the opinion of the assessing officer is absolutely subjective and based upon surmises and conjectures.



5. Be it noted, the first appellate authority rejected the contentio regard to the addition of Rs.27,979/-. As far as the difference in the value of the property acquired by the assessee during the year is concerned, the CIT(A) took note of the fact that the investment was duly accounted for in the books of account and the assessee had not made any construction in the said property and thereafter proceeded to hold as follows:

“...Even the valuation officer has not adopted correct method to arrive the fair market value of that property. The Valuation Officer has taken the property which has certain advantages like terrace rights etc. attached to it. From that value, he started giving weightage and deducted the same from the full value and arrived the fair market value of the instant property. Such a method can not give any reasonable valuation. On the other hand, the assessee has referred certain sale instances of the same locality which shows the fair market value of the property is same as that of these properties. The AO had not brought any material on record to show that the transaction enter into by the assessee was not genuine, whereas the assessee purchased the property by a valid registered document which was followed by payments by way of cheques and these payments were duly recorded in the books of the assessee. In the absence of any finding by the AO that the assessee in relevant previous year had made any investments which were not recorded in the books of account maintained by it, section 69 of the Act could not be invoked. Accordingly, reference to DVO u/s 142A also does not stand as per law. Further, the Hon’ble Delhi ITAT in the case of Sanjay Chawla reported in 89 ITD 586 has held that even if market value of property appears to be higher than declared by the assessee in the sale document, this itself can not be sole ground for treating difference between declared consideration and market value as unexplained investment of assessee. The onus is on the revenue to establish that higher consideration has been paid over and above consideration indicated in the sale document. In the instant case also, the AO has not brought on record any evidence of extra consideration exchanged between the appellant and the buyer.”



After so holding, the first appellate authority deleted the additi
Rs.34,11,300/-

6. Being grieved by the order, the revenue carried an appeal to the tribunal. Before the tribunal, it was urged by the revenue that the comparative instances furnished by the assessee were not shown to the assessing officer. The said stand was resisted by the assessee contending, inter alia, that it was a case of purchase of property and not construction of property and no evidence whatsoever is in existence on record that the assessee had paid any money over and above the consideration declared in the registered sale deed. It was also put forth that the second floor of the property having identical area along with terrace right was sold for a consideration of Rs.50 lakhs as against the consideration of Rs.55 lakhs in the case of the assessee and others out of which half share belonged to him and, therefore, reference to the valuation officer was unnecessary and the valuation report was unacceptable. The tribunal, after hearing both the sides, expressed the view as follows:

“The undisputed fact is that the property was purchased by way of a registered deed and the consideration declared in the deed and in the books of account of the assessee is the same. Section 142A deals with the valuation of any investment, for which a reference may be made to the Valuation Cell. There is a distinction between the terms “purchase consideration” and “the value of any investment”. The latter term refers to the fair market value of the investment while the former represents actual consideration in a concluded contract. Thus, the provision contained in section 142A is not applicable on the facts of the case for the reason that what had to be seen was the purchase consideration and not the fair market value of the investment. Further, the second floor of the property, which had terrace right attached with it was sold for Rs.50 lakhs



while the first floor purchased by the assessee and others was for Rs.45 lakhs. These figures show that comparable instance supports the case of the assessee. In view thereof, we do not find any error in the order of the Id. CIT(A), which requires correction from us as the case of the assessee is supported even by circumstantial evidence.”

7. We have heard Ms. Rashmi Chopra, learned counsel for the revenue. It is urged by her that the orders passed by the CIT(A) and by the tribunal are erroneous inasmuch as the said authorities have not kept the legal position in view that in case of under valuation, the matter can be referred to the valuation cell and further in the case at hand, certain additional evidence contrary to Rule 46A of the Income Tax Rules, 1962 were taken into consideration. To bolster her submissions, she has commended us to the decisions rendered in *Jindal Strips Ltd. v. Income Tax Officer, Central Circle III, New Delhi & Anr.* [1979] 116 ITR 825, *Manjusha Estate Pvt. Ltd. v. Income Tax Officer*, [2009] 314 ITR 263 (Guj.), *Classic Builders and Developers v. Union of India & Ors.*, [2001] 251 ITR 492, *Smt. Kiran Lata v. Income-Tax Appellate Tribunal & Ors.*, [2009] 318 ITR 44, *K.P. Varghese v. Income-Tax Officer, Ernakulam & Anr.*, [1981] 131 ITR 597, *Commissioner of Income-Tax v. Aar Pee Apartments P. Ltd.*, [2009] 319 ITR 276 and *Commissioner of Income Tax v. Smt. Basana Rani Saha*, [2000] 243 ITR 780.

8. In the case of *Jindal Strips Ltd.* (supra), a Full Bench of the Punjab & Haryana High Court was considering whether reference by the Income Tax Officer to the Valuation Officer to ascertain the value of the mill in question



at the relevant time was valid. In the said case, the Full Bench held that the Income Tax Officer can call for a report of the Valuation Officer but it would not bind the Income Tax Officer and the assessee has a say in the matter.

9. In *Manjusha Estate Pvt. Ltd.* (supra), a Division Bench of the Gujarat High Court had held as follows:

“However, even if one examines the matter from a slightly different angle, namely, if one proceeds on the footing that there was no assessment under section 143(1)(a) of the Act, and it was permissible to the assessing officer to obtain an estimate of the value of investments for the purposes of making an assessment, yet the reasons recorded by the Assessing Officer will have to be examined.

The reasons recorded hereinbefore categorically show that there is nothing to indicate therein to establish what part of the cost of construction has not been disclosed fully or truly, which constitutes a material fact, necessary for the assessment. In other words, except for reproducing the language of the provision, the reasons recorded do not even prima facie indicate as to what was not disclosed by the assessee, whether a particular item which went into the construction was not disclosed, or the correct quantity of material consumed was not disclosed, or the quality of material consumed was not correctly disclosed, or the area of construction was not disclosed, etc., nothing is available in the reasons recorded. In fact, when one reads the entire sentence regarding the so-called failure, it becomes clear that after stating that there is non-disclosure, the matter was referred to the Departmental Valuation Officer for valuation of the project. Thereafter, the reasons recorded refer to the report of the District Valuation Officer dated January 23, 2006, and reproduce the difference between expenditure recorded in the books of account and cost of construction estimated by the Departmental Valuation Officer; and then the reasons go on to state that because of such difference the assessee-company has understated the cost of construction. In other words, it indicates that in fact the Assessing Officer had merely made reference to the Valuation Cell only on the basis of a generalized vague statement, which is then sought



to be reinforced by the difference worked out by the Departmental Valuation Officer, without the facts in fact indicating, in the reasons recorded, as to what was the failure on the part of the assessee.”

On a reading of the aforesaid passage, it is clear that the assessing officer is required to ascribe adequate reasons for referring the matter to the departmental valuation officer.

10. In *Classic Builders and Developers case* (supra), the question arose whether the reference to the Departmental Valuation Officer for valuation of the property was just and proper and the learned Single Judge of the Madhya Pradesh High Court opined that the matter could be referred to the Departmental Valuation Officer and the assessee has a right to file objections.

11. In *Smt. Kiran Lata* (supra), a Division Bench of the Uttarakhand High Court, after perusing the factual matrix, came to hold that when the assessing officer had come to know that there was a low investment shown by the assessee, the satisfaction to invite the Departmental Valuation Officer cannot be said to be illegal or unjust. The Bench further observed that reliance on the report of the valuation officer without rejecting the books of account produced by the assessee was not tenable as the assessee himself had admitted at the spot that the accounts were not complete and the valuation report corroborated the said facts. The Bench opined that the rejection of the books of account stood implied.



12. In *K.P. Varghese* (supra), the question that fell for consideration whether understatement of consideration in a transferred property is a necessary condition for attracting the applicability of Section 52, sub-section (2) of the Act or it was enough for the revenue to show that the fair market value of the property as on the date of the transfer exceeds the full value of consideration declared by the assessee in respect of the transfer. Their Lordships of the Apex Court came to hold that sub-section (2) to Section 52 can be invoked only where the consideration for the transfer has been understated by the assessee or, in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such understatement or concealment is on the revenue. Their Lordships further opined that the burden is to be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is a understatement or concealment of the consideration in respect of the transfer. In the aforesaid case, on facts, their Lordships held that the finding of fact reached by the Income Tax Authorities that the transfer of the property by the assessee was a perfectly honest and bonafide transaction where the full value of the consideration received by the assessee was rightly disclosed was correct and there was no reason to hold that there had been understatement or income had escaped assessment.



13. In *Aar Pee Apartments P. Ltd.* (supra), a Division Bench of the High Court, while dealing with the report of the Departmental Valuation Officer, opined thus:

“In the present case, except the report of the DVO on which the Assessing Officer relied upon, there was nothing on record to suggest that there was any other evidence to disbelieve the expenditure shown by the assessee. In fact during the course of arguments, learned counsel for the assessee produced the assessment order which clearly demonstrates that the expenditure shown by the assessee from the time, when it was an on-going project, was examined and accepted by the Assessing Officer.”

14. In *Smt. Basana Rani Saha* (supra), a Division Bench of the Gauhati High Court was dealing with an issue where the tribunal held that the Departmental Valuation Officer cannot be asked to assess the cost of construction for the purpose of assessment proceedings. In that context, the Bench opined that the assessing authority has power to refer the valuation of a capital asset to the valuation officer for the assessment of the cost of construction.

15. The present factual matrix has to be tested on the anvil of the aforesaid enunciation of law. As is seen, the CIT(A) has given adequate reasons that the consideration money under the sale deed was correct. Prima facie the onus was on the revenue to show that it was below the fair market value. Barring the report of the Departmental Valuation Officer, no other material has been brought on record. The CIT(A) has referred to various aspects to come to a conclusion that the valuation report could not have been



pressed into service and the price paid towards consideration for the purchase of the property was just and proper and not less than the fair market value. Ms. Rashmi Chopra, learned counsel for the revenue, submitted that comparative sale deeds were produced before the CIT(A) for the first time. The said aspect is not correct inasmuch as we find from the order of the assessing officer that he has observed that the valuation report of an approved valuer submitted by the assessee at the late stage cannot be accepted and the valuation of sales instances given by the assessee copies of which are enclosed with the sale deeds are entirely unrelated to the property purchased by the assessee during the year under consideration. That apart, the contention that was canvassed by the departmental representative before the tribunal shows that the assessee had also referred to the sale instances in the same locality with a view to show that the fair market value of the property was in the vicinity of the consideration paid by the assessee. On a perusal of the orders, we find that the said contentions were raised before the assessing officer and the sale deeds of the vicinity area were produced. Both the first appellate authority and the tribunal have ascribed cogent and germane reasons that there was no ground to reject the consideration amount in the sale deed and to add the differential sum on the basis of the Departmental Valuation Officer's report. We are inclined to think that the department has not discharged the onus that there was an understatement or concealment in purchase of the property. The assessing officer has not drawn any reasonable inference on the basis of any material except the report of the Departmental Valuation Officer. The CIT(A) and the tribunal



have taken into consideration series of facts showing how the consid.....
amount is just and proper.

16. In view of the aforesaid analysis, we do not perceive any substantial question of law being involved in this appeal and, accordingly, the same stands dismissed.


CHIEF JUSTICE


MAN MOHAN, J

September 20, 2010
pk