2010:DHC:3596-DB

'REPORTABLE'

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% DATE OF DECISION: 20.07.2010

\+ **ITSA No.3/1988**

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

versus

M/S. GREEN VALLEY AGRO MILLS LTD.
& ORS. ..... Respondents
Through: Mr. C.S. Aggarwal, Sr. Advocate with Mr. Prakash Kumar, Advocate for the Respondent No.1
Mr. Sandeep Sapra, Advocate for the Respondents No.4 to 6

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment? YES

2. To be referred to the Reporter or not? YES

3. Whether judgment should be reported in Digest? YES

J U D G M E N T (ORAL)
20.07.2010

: **A.K. SIKRI, J.**

1. The respondent No.1 herein had purchased property bearing No.L-7, Green Park Extension, New Delhi from M/s. Shebang Private Limited for the consideration of Rs.16 lakhs vide Sale Deed registered on 19.06.1985. Land area under this property is 187 sq. yards, which is

equivalent to 156 sq. mtrs. Total constructed area on various floors, at the time of purchase, was 445 sq. mtrs., which included basement, ground floor, mezzanine floor, first floor and the barsati floor. The property was three side open.

2. The respondent gave intimation about the purchase of this property to the income-tax authorities in Form No.37G. After receiving this information, the income-tax officer sent preliminary notice dated 22.07.1985 to the respondent calling upon the respondent to furnish certain information and documents in respect of the said sale transaction. These included sale deed, lay-out plan/building plan, valuation report by the approved valuer for the above property and permanent account number, etc. of the respondent. The respondent furnished this information vide reply dated 28th August, 1985. Along with this reply, the respondent also submitted the documents as desired by the competent authority as per its preliminary enquiry notice dated 22.07.1985. As per the valuation report submitted by the respondent, the valuer had arrived at the market value of the land at Rs.6,000/- per sq. mtr., which, according to the valuer, was based on land price for similar area in South Delhi. He also gave valuation to the constructed portion of the property which was Rs.6,22,800/- . In this manner, value of the land was fixed by the valuer at Rs.9,36,460/- and construction costs at Rs.6,23,820/-, thereby fixing fair market value of the property at Rs.15,60,288/-. After examining the matter, the competent authority

provisions of Section 269A of the Income-tax Act and this was done by notice dated 30th January, 1986. For taking such an action, the competent authority had recorded its 'reasons to believe' dated 20th January, 1986. As per this, the value of the property was fixed at Rs.21,39,036/- as against the purchase price shown at Rs.16 lakhs in the Sale Deed. The competent authority, therefore, was of the opinion that the fair market value arrived at was more than 25% than the consideration shown in the Sale Deed. Acquisition proceedings were sought to be initiated under Section 269D(1) of the Act. The respondent objected to this action by submitting a detail reply. However, the competent authority passed orders dated 31st March, 1987 rejecting the objections and passing order of acquisition of the said property. The respondent challenged this order by filing an appeal before the Income-tax Appellate Tribunal. In this appeal, the respondent took as many as sixteen grounds on the basis of which the submission of the respondent was that the order of the competent authority was not legal. One of the grounds taken was that the very action initiated by the competent authority was improper in law and manifestly incorrect inasmuch as there was no basis for determining the fair market value of the property and the 'reasons to believe' as recorded by the competent authority were without any basis and/or material on record. This objection of the respondent has prevailed with the Income-tax Appellate Tribunal. The ITAT, while accepting certain other grounds also, set aside the order

passed by the competent authority vide its order dated 21st December, 1987. It is this judgment of the Tribunal which is in appeal before us.

3. Since there is a challenge to the very initiation of the proceedings on the ground that the approach of the competent authority in its reasons to believe was manifestly incorrect and opposed to law, it would be apposite to refer to and deal with this aspect, in the first instance.

4. Before coming to the reasons recorded by the competent authority, we would like to take note of certain relevant provisions of the Income-Tax Act. Chapter XX-A contains the provisions under which 'acquisition of immovable properties in certain cases of transfer to counteract evasion of tax'. To put in a nutshell, if the competent authority, which is appointed under this Chapter and is defined in clause (b) of Section 269A, is of the opinion that fair market value of the property is more than 15% of the value disclosed in the transaction, action could be initiated for the acquisition of such property by the income-tax authorities by offering the said consideration to the purchaser. If the competent authority forms the opinion that fair market value is more than the consideration fixed in the transaction by more than 25%, the onus is upon the transferee to show that the sale consideration as stated in the Sale Deed is not less than the fair market value. The fair market value is defined in clause (d) of Section 269A of the Act.

5. Section 269D mandates competent authority to initiate

official gazette. Section 269C gives the circumstances under which proceedings for acquisition may be initiated and sub-sections (1) and (2) whereof read as under:-

> *"(1) Where the competent authority has reason to believe that any immovable property of a fair market value exceeding one hundred thousand rupees has been transferred by a person (hereafter in this Chapter referred to as the transferor) to another person (hereafter in this Chapter referred to as the transferee) for an apparent consideration which is less than the fair market value of the property and that the consideration 2081 for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer with the object of-*
>
> *(a) Facilitating the reduction or evasion of the liability of the transferor to pay tax, under this Act in respect of any income arising from the transfer; or*
>
> *(b) Facilitating the concealment of any income or any moneys or other assets which have not been or which ought to be disclosed by the transferee for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act or the Wealth-tax Act, 1957 (27 of 1957),*
>
> *the competent authority may, subject to the provisions of this Chapter, initiate proceedings for the acquisition of such property under this Chapter :*
>
> ***Provided** that before initiating such proceedings, the competent authority shall record his reasons for doing so:*
>
> ***Provided** further that no such proceedings shall be initiated unless the competent authority has reason to believe that the fair market value of the property exceeds the apparent consideration therefor by more than fifteen per cent of such apparent consideration.*
>
> *(2) In any proceedings under this Chapter in respect of any immovable property, -*
>
> *(a) Where the fair market value of such property exceeds the apparent consideration therefor by more than twenty-five per cent of such apparent*

that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer;

(b) Where the property has been transferred for an apparentconsideration which is less than its fair market value, it shall be presumed, unless the contrary is proved, that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer with such object as is referred to in clause (a) or clause (b) of sub-section (1).”

6. It is clear from the bare reading of these provisions that before initiating the action, the competent authority has to record its satisfaction, namely, ‘reasons to believe’ about the fair market value of such property. It is sub-section (2) of Section 269C which stipulates that where the fair market value exceeds the apparent consideration by more than 25%, it shall be a conclusive proof that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer. This scheme of the Act is illustratively explained by the Calcutta High Court in ***Competent Authority, I.A.C. vs. Smt. B.R. Chowdhury, 131 ITR 578*** in the following words:-

“Under Sub-section (1) of Section 269C, before initiating proceedings for the acquisition of any immovable property which has been transferred, the competent authority must have reason to believe in regard to four matters, namely, (i) the immovable property has a fair market value exceeding Rs. 25,000, (ii) the apparent consideration is less than such fair market value by more than 15% of the apparent consideration, (iii) the consideration as agreed to between the parties has not been truly stated in the instrument of transfer, and (iv) such untrue statement has been made with the object of

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(b). Subsection (1) consists of two stages, the first one is for the formation of belief by the competent authority and the second one is for the initiation of proceedings. The second stage is dependent on the first. In other words, if there be no reason to believe in regard to the four matters specified above, there is no question of initiation of - proceedings. It, therefore, follows that in the first stage there is no proceeding, but it relates to preparation for the initiation of proceedings. The boundary between the first stage and the second stage is the existence of materials on the basis of which the competent authority may form his belief and, in order to reach the second stage for the purpose of initiating proceedings for acquisition, the boundary has to be crossed. The presumption under Sub-section (2) of Section 269C can be made in any proceedings under Chap. XX-A under which Section 269C has been placed. So the presumption is applicable to any proceeding that may be initiated at the second stage under Sub-section (1) of Section 269C. It will have no application at the first stage when the competent authority forms his belief on the basis of materials available to him for the simple reason, as stated already, that the first stage is preparatory to the initiation of a proceeding which is yet to be initiated. Really, in the first stage, the competent authority discharges some administrative functions in the matter of formation of belief on the subjective satisfaction on the basis of certain materials. When, however, a proceeding is initiated, he proceeds judicially.

We may consider the question from another point of view. Under Sub-section (1) of Section 269C, the competent authority must have reason to believe certain facts as mentioned in Sub-section (1). The formation of belief must be on the basis of some materials the sufficiency of which cannot be questioned. The competent authority has not to come to any firm finding about any of the matters under Sub-section (1) on evidence. He has only to form his belief on materials that may be available to him for initiating proceedings for acquisition. At that stage, he is alone and has no opportunity to hear the transferor or the transferee or to receive any

transferor or the transferee files objections, valuation of the property is made and evidence is adduced. The competent authority, after considering the evidence as to the fair market value of the property, comes to a finding about such market value. His finding may be in favour of the parties contrary to the formation of his belief. Under Clause (a) of Sub-section (2) of Section 269C, if the fair market value of the property exceeds the apparent consideration by more than 25% of the apparent consideration, it shall be conclusive proof that the consideration for such transfer as agreed to between the parties has not been truly stated in the instrument of transfer. So far as Clause (b) is concerned the presumption of untrue statement of consideration, as agreed to between the parties, in the instrument of transfer, will apply if the fair market value exceeds the apparent consideration."

7. It is clear from the above that the first stage in the proceedings is preparatory to the initiation of proceedings which are yet to be initiated and at that stage competent authority discharges some administrative functions in the matter of formation of belief on the subjective satisfaction on the basis of certain materials. When a proceeding is initiated, he proceeds judicially. In that context, the Calcutta High Court opined that the competent authority must have reasons to believe certain facts as mentioned in sub-section (1) of Section 269. The formation of belief must be on the basis of some materials, the sufficiency of which cannot be questioned. At the same time, some material has to be there. Keeping in view the aforesaid principles in mind, we examine as to whether in the instant case, the 'reasons to believe' as recorded by the competent authority predicated upon some material. These 'reasons to

believe' recorded in the note 20th January, 1986 are reproduced below in their entirety:-

> *"The property under consideration consists of a house built ona plot No.L-7, Green Park Extn. New Delhi. The area of the plot is 187 sq. yds. In response to notice for preliminary hearing Shri A.K.Gupta, CA attended and filed copy of sale deed lay our plan and valuation report from approved valuor. These have been taken into account for working out the FMV of the property.*
>
> *The property has 132.66 sq. mts. Of basement, 113.5 sq. mtr. Of ground floor and 26.62 sq. mtr. Of meazinine floor, 123.26 sq. mtr. Of first floor and 49.50 sq. mtr. Of barsati floor. The construction has been completed only in 1985. Hence no depreciation is being allowed. In the report of the approved valuor also, no depreciation has been allowed. The property is residential cum-commercial in nature and for valuing land. 156.33 sq. mtr. Rate of Rs.9000/- per sq. mtr. Is being adopted. At this rate the value of land itself comes to Rs.14,06,970/- The residential property bearing F-66A, Green Part was sold in September, 1985 at the rate of Rs.4600/- per sq. mtr. It is well known that the rate of land of semi-commercial property almost twice as much as that of residential properties. Considering the time gap with reference to the sale instance mentioned above rate of Rs.9000/- per sq. mtr. is quite reasonable. The value of basement is taken at Rs.1880/- per sq. mtr. the value of ground floor is taken at Rs.1720/- per sq. mtr. the value of ground floor is taken at Rs.1080/- per sq. mtr. and the value of first floor and barsati floor is taken at Rs.1500/-per mtr. At these rates the value of basement floor works out to Rs.2,49,400/- value of ground floor works out to Rs.28758/- and the value of the first floor and the barsati floor mg. 172.86 sq. mtr. works out to Rs.2,59,200/-. Thus FMV of the property works out to Rs.21,39,036/- which exceeds the AC of Rs.16 lacs by more than 25%. Hence acquisition proceedings are being initiated by the issue of notice u/s 269-D(1)."*

8. The aforesaid reasons, *inter alia*, record that the respondent has submitted copies of the Sale Deed, lay-out plan and the valuation report from the approved valuer. Though it is mentioned in the first paragraph of the order that all of these materials have been taken into account for working out the fair market value of the property, as we shall demonstrate hereafter, the valuation report of the approved valuer as submitted by the respondent was not at all looked into in the "reasons to believe" recorded by the competent authority. Instead, competent authority took into consideration following aspects:-

(a) The area of the land and the constructed portion thereupon.

(b) The property was residential-cum-commercial in nature.

(c) Sale Deed of one residential property, bearing, F-66A, Green Park, which was sold in September, 1985 at the rate of Rs.4,600/- per sq. mtr.

9. In fact, the entire conclusion of the competent authority is based on the consideration given in the Sale Deed of said residential property at Green Park, consideration wherein prescribed was Rs.4,600/-. Taking that as the base price, the competent authority has observed that it is 'well known' that the rates of land of semi-commercial properties are almost twice as much as that of residential properties. On this basis and considering the time gap with reference to sale in the instant case, the competent authority fixed the land rate at Rs.9,000/- per sq. mtr., which, according to him, was quite reasonable. The question that falls for

material worthwhile. It is stated at the cost of repetition that what has taken into consideration is the sale consideration in respect of a residential property that too in Green Park area and the rate of which was Rs.4,600/-. The competent authority was of the opinion that rate of residential-cum-commercial property would be twice of the said rates. However, no basis or supporting material in this behalf is either referred to or relied upon. The assessing officer has gone by general impression which is clear from the fact that he has used the expression 'it is well known that the rates of land of semi-commercial property are almost twice as much as that of residential properties'.

10. In ***Asoke Kumar Sen vs. Income-Tax Officer, Special Circle-V, New Delhi and Anr., 132 ITR 707,*** this Court had an occasion to interpret the expression 'if the income-tax officer has reason to believe' appearing in Section 147(a) of the Act. The Court was of the opinion that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the ITO may act under that section on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The powers under that section were treated as not plenary in nature but subject to judicial review. The Court set aside the order when it found that the income-tax officer had merely stated his belief but had not set out any material on the basis of which he formed such belief. In the present case, the nature of exercise carried out by the competent authority is identical.

11. We have already delineated above the scheme contained in Chapter XX-A dealing with the acquisition of the properties. Competent authority gets jurisdiction to initiate the action only when he has reasons to believe that the fair market value of the property is more by 15% than the upper end consideration shown in the Sale Deed. In the instant case, since the consideration shown in the Sale Deed was Rs.16 lakhs, action could be initiated only if the competent authority had reasons to believe that fair market value is Rs.18,40,000/- or above. This itself shows that there has to be some material on the basis of which the competent authority arrives at the conclusion that the fair market value is Rs.18,40,000/- or above. It cannot be mere *ipse dixit* of the competent authority or, to borrow the expression from ***A.K. Sen (supra)***, it cannot be based on surmises or guesses. In a case like this, it would have been more appropriate on the part of the competent authority to have the Sale Deed of similar commercial-cum-residential properties in that very area, i.e., Green Park, else he could have got the property in question valued from the valuer. Insofar as the competent authority is concerned, it has not relied upon or rested its conclusion on the basis of any such report. In this regard, the respondent had submitted the valuation report as per which value of the land was fixed at Rs.6,000/-. As it was pointed out above, this valuation report is not taken into consideration at all. There is no discussion as to why the competent authority chose to ignore or discard the valuation fixed by the approved valuer in the said report.

12. Mr. Aggarwal has also referred to the judgment of this Court in ***CIT vs. Arun Mehra, 157 ITR 308***, wherein the authoritative principle laid down is that there must be material before the competent authority showing that the fair market value was more than 15% above the upper end consideration. The Court also pointed out that the competent authority had acted in a stereotype and routine manner and he should have at least examined the valuation report about the difference between two prices (as in that case the competent authority was confronted with two valuation reports). Following observations from the said judgment may also be usefully quoted:-

> *"Another important aspect in this matter is the fact that when the initiation proceedings depends on the market value of the plot, such initiation should not depend on a theoretical calculation. The market value is not determined by theoretical considerations. What has to be seen is the value in the market and not the value calculated in an abstract manner by applying a multiplier to some unknown sale in July, 1981. Neither the nature of the sale nor the nature of the property is mentioned in either of the valuation reports. It is also not clear as to why any multiplier at all has been applied to the said valuation of Rs.2,500 per sq. yard. The basis of the calculation is, therefore, not apparent at all."*

13. Even the Supreme Court in the case of ***CIT vs. Kelvinator of India Ltd. and Anr., 320 ITR 561*** has approved the aforesaid approach. In fact, the Apex Court went one step further by observing that the material on the basis of which the competent authority has to form an opinion should be 'tangible material' on the basis of which the

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bogus. The Supreme Court was also of the view that the expression 'reason to believe' in Section 147 of the Act (the provision which relates to re-opening of the assessment on the same ground if there are reasons to believe income has escaped assessment) is different from the expression 'opinion'. Following discussion in this behalf contained in that judgment is material:-

> *"Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No. 549 dated 31st October, 1989, which reads as follows:*
>
> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression `has reason to*

recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

14. The very fact that even according to the competent authority, the only reason for doubling the rates of residential property for arriving at the fair market value in respect of residential-cum-commercial property is 'it is well known' and that itself suggests that there was no material much less tangible material and the competent authority was going by general perception. That cannot be the basis of arriving at fair market value. As mentioned above, when the task or the assignment given to the competent authority is to arrive at fair market value as defined in clause (d) of Section 269A of the Act, it becomes his boundant duty to arrive at that value on the basis of some relevant and tangible material and not on the basis of the perceptions.

15. Ms. Rashmi Chopra submitted that reason for making the observation that the value of residential-cum-commercial property is almost twice as much as that of residential properties is based on circle rates. She was not able to point out as to whether these circle rates were published at the time when the impugned reasons to believe were recorded. In any case, she was not able to show the rates of 'residential-cum-commercial properties. What is shown is that the rates of commercial (fully commercial) properties would be twice than that of residential properties. Moreover, a distinctive feature in the present case, which needs to be noted, is that the property in question falls in

the purpose of shop and first floor is approved as residence. Therefore, what can be put to commercial use is only the ground floor, that too as a shop. In a case like this, before coming to the conclusion that rates of such properties would be twice than that of residential property, there has to be some cogent and solid material which is non-existent in the present case.

16. Taking into consideration all these aspects, in our opinion, the Tribunal rightly held that the "reasons to believe" as recorded by the competent authority were manifestly wrong and there was no basis for recording the same. We may note at this stage that as per the judgment of ***Himland Exports P. Ltd. Vs. ITAT, 167 ITR 478***, the question of fixing fair market value is a question of fact. This itself will show that present appeal which can be filed only on the substantial question of law would not be even maintainable.

17. Another contention of Ms. Chopra was predicated on the provision of Section 269C(2) of the Act. Her submission was that as per the reasons to believe, the fair market value of the property was more than 25% of the upper end consideration shown in the Sale Deed and, therefore, according to her, onus was upon the respondent to show that that was not the fair value. This argument lacks substance. When the very basis of fixing the said market value is erroneous and without any foundation, raising such an argument that the value fixed is more than 25% would be clearly preposterous.

18. Since the very initiation of proceedings for acquisition of the property under Chapter XX-A was illegal because of the aforesaid reason, we need not go into other grounds on the basis of which order of the competent authority acquiring the property was challenged.

19. We may, however, would like to note one contention of Mr. Aggarwal at this stage. He pointed out that Chapter XX-A was introduced with effect from 15th November, 1972 and covered the transactions upto 30th September, 1986. This Chapter was deleted and replaced by Chapter XX-C with effect from 1st October, 1986, which also ceased to have existed with effect from 1st July, 2002. On this basis, the submission of Mr. Aggarwal was that the law of acquisition stands abated. Another aspect which also needs to be mentioned is that the respondent had transferred the property in question to seven transferees. Even some of these subsequent purchasers had sold their portions further. On the basis of this, it was also sought to be argued that present appeal has become infructuous. However, since we are dismissing the appeal on merits, we have not gone into the aforesaid pleas raised.

20. The present appeal is dismissed accordingly.

A.K. SIKRI
(JUDGE)

REVA KHETRAPAL
(JUDGE)

JULY 20, 2010