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

Reserved on : 26th September, 2012.
% **Date of Decision** : 28th September, 2012.

\+ ITA 1667/2010
\+ ITA 85/2011

CIT ..... Appellant

versus

DINESH JAIN HUF ..... Respondent

\+ ITA 1800/2010
\+ ITA 1803/2010
\+ ITA 1805/2010
\+ ITA 1807/2010
\+ ITA 1809/2010
\+ ITA 1811/2010
\+ ITA 1812/2010
\+ ITA 1813/2010
\+ ITA 1967/2010
\+ ITA 1972/2010

CIT ..... Appellant

versus

LATA JAIN ..... Respondent

\+ ITA 1815/2010
\+ ITA 1816/2010
\+ ITA 1817/2010
\+ ITA 1818/2010
\+ ITA 1819/2010
\+ ITA 1968/2010
\+ ITA 1969/2010

+ ITA 1970/2010
+ ITA 1971/2010

CIT ..... Appellant

versus

DINESH JAIN ..... Respondent

Presence : Mr. Sanjeev Sabharwal, sr. standing counsel with Mr. Puneet Gupta, jr. standing counsel and Ms. Gayatri Verma, Adv. for revenue.
Mr. Ajay Vohra, Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advs. for respondent.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

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

R.V. EASWAR, J.:

For order, see ITA No.1814/2010.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

SEPTEMBER 28, 2012
vld

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1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Y
3. Whether the judgment should be reported in the Digest? Y

R.V. EASWAR, J.:

These are appeals filed by the Commissioner of Income-tax under section 260A of the Income Tax Act, 1961 ("Act") against the orders of the Income Tax Appellate Tribunal ("Tribunal"). The following common substantial questions of law were framed by the court on 3-2-2011:

> *"Whether learned ITAT erred in deleting the addition made by the Assessing Officer on account of unexplained investment in rent yielding property by applying the provisions of Rule 3 of Par B of 3rd Schedule to the Wealth Tax Act?"*

2. ITA No.1814/2010 has by consent of the parties been taken as the lead matter. The facts necessary for our purpose in brief are that there was a search operation under sec.132 of the Act in the residential and business premises of the assessee Dinesh Jain on 9-12-2003. The materials seized during the search revealed, *inter alia,* investment in various properties by the assessee. One such property was Flat No.306, Palm Court, Sukharali Chowk, Gurgaon, which was purchased for Rs.17,55,000. The Assessing Officer noticed that this was a commercial property which was fetching a rent of Rs.7.02 lakhs per annum. He was of the view that a property which was fetching such a substantial rental income could not have been acquired for Rs.17.55 lakhs. Almost 40% of the investment was being got back by the assessee by way of rent every year, which was disproportionally high in comparison with the amount invested. According to him, returns on investment were in the range of 10% per annum. He therefore took the view that the assessee must have invested more than what was disclosed in the sale document which attracted the provisions of Section 69B of the Act. He called upon the assessee to explain the position. The assessee denied investing anything over and above the amount declared in the document. The Assessing Officer however concluded that the fair market value of the property should be estimated in accordance with Rule 3 of the Schedule III to the Wealth Tax Act, 1957. He accordingly calculated the "net annualised maintainable rent" of the property at Rs.6,63,000 and multiplying the same by 12.5 as provided in the Rule cited above, arrived at the value of the property at Rs.82,87,500 and held that "that is the valuation or the amount which the assessee must have paid". The difference between value of the property calculated in accordance with the Rule and the amount shown in the sale document came to Rs.65,32,500 which was assessed as unexplained investment under sec.69B.

3. Similar addition was made in respect of another property (Flat No.6 in the same building) acquired by the assessee and the total addition made under sec.69B was Rs.1,38,26,450.

4. The assessee filed an appeal against the assessment and questioned, inter alia, the addition made under section 69B. Besides challenging the adoption of

the value of the properties calculated on the basis of Rule 3 of Schedule III to the Wealth Tax Act for purposes of comparison and for ascertaining the alleged unexplained portion of the purchase consideration, the assessee also adduced evidence in the form of comparable properties in the same building, such as Flat No.511 and several other instances to demonstrate that the price shown to have been paid by the assessee, as per the sale document, represented the real and actual consideration for the properties and nothing was paid as on-monies over and above the stated consideration.

5. The CIT(A) obtained a remand report from the Assessing Officer. The assessee filed rejoinder to the same. On a consideration of all the facts and the evidence, the CIT(A), following his decision taken in the earlier year, held that the amount declared by the assessee as purchase price cannot be taken as sacrosanct and that the Assessing Officer can go behind it and find out the "correct and fair valuations of the immovable properties due to the fact that no direct evidences in these transactions can be gathered". In this view of the matter, he upheld the view taken by the Assessing Officer in principle. However, he reduced the additions to Rs.27,98,268 for Flat No.6 and Rs.22,57,975 for Flat No.306.

6. There were cross-appeals by the assessee and the revenue before the Tribunal. The Tribunal, following its earlier order dated 30-9-2009 in the assessee's case for some earlier years, deleted the entire addition made under sec.69B, following the judgments of the Supreme Court in *K.P. Varghese vs ITO* (1981) 131 ITR 597 and *CIT vs Shivakami Company (P) Ltd.* (1986) 159 ITR 71 and the judgments of this court in *CIT vs Shakuntala Devi* in ITA No.345/2007, *CIT vs Ashok Khetrapal* (2007) 294 ITR 143 and *CIT vs Manoj Jain* (2006) 287 ITR 285.

7. We should have thought that the question is concluded by the judgments cited above, both of the Supreme Court and of this court, but the contention of Mr. Sabharwal for the revenue is that where the facts and circumstances permit an inference of understatement of consideration, it is not necessary to look for direct evidence of understatement which, in the very nature of things, is

impossible to obtain. He points out to what he describes as "disproportionately high returns for the investment" in the properties – the rental income is 40% of the investment in the first year, and that would not have been possible unless a much higher amount than what was declared had been invested by the assessee. The returns, according to him, are so high that they shock the conscience of the court. He contends that judicial notice can be taken note of the fact, under section 57 of the Evidence Act, that notifications have been issued under section 75 of the Stamp Act prescribing circle rates for the properties and rarely do properties get transferred for such rates.

8. These arguments are certainly attractive but the language employed by Section 69B is the first stumbling block which Mr. Sabharwal has to overcome. The section is in the following terms:

> *"SECTION 69B - AMOUNT OF INVESTMENTS, ETC., NOT FULLY DISCLOSED IN BOOKS OF ACCOUNT.*
>
> *Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery, or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year."*

The section in terms requires that the Assessing Officer has to first "find" that the assessee has "expended" an amount which he has not fully recorded in his books of account. It is only then that the burden shifts to the assessee to furnish a satisfactory explanation. Till the initial burden is discharged by the Assessing Officer, the section remains dormant.

9. A "finding" obviously should rest on evidence. In the present case, it is common ground that no incriminating material was seized during the search

which revealed any understatement of the purchase price. That is precisely the reason why the Assessing Officer had to resort to Rule 3 of Schedule III to the Wealth Tax Act. This Rule does not even claim to estimate the "fair market value" of an asset; it merely lays down a procedure for computing the value of an asset for the purposes of the Wealth Tax Act. The Schedule derives its authority from Section 7(1) of the Wealth Tax Act. The section, as it now stands, has dropped all pretensions to ascertaining the fair market value of an asset for the purposes of the Wealth Tax Act. Prior to the amendment made w.e.f. 1-4-1989 the section provided for the estimation of the fair market value of an asset on the principle of what it would fetch if sold in the open market. This involved an assumption of an open market, be it fictional, a willing seller and a willing buyer, all fictional. This fiction facilitated a realistic estimation of the fair market value of the property, and it moved with the ups and downs of the market. Not anymore. From 1-4-1989, the value was frozen. For all times to come, an immovable property that fetches rent shall be valued at 12.5 times the net maintainable rent.

10. There is a fundamental fallacy in invoking the provisions of the Wealth Tax Act to the application of section 69B of the Income Tax Act, notwithstanding that both the Acts are cognate and have even been said to constitute an integrated scheme of taxation. Under the Income Tax Act, we are to find what was the real and actual consideration paid by the assessee and whether the full consideration has been recorded in the books. Under section 7(1) of the Wealth Tax Act as it stood before 1-4-1989, we are to estimate the fair market value of the asset; after this date, it is not even estimation of the fair market value, but computation of the value of the asset on the basis of certain rules prescribed by the statute. If A dies leaving prime property in Connaught Place to his son B, B pays nothing for the property; the property may command a market price of several crores. If "A", because of his love and affection for "B", sells the property for Rupee One to "B"; in this case, the consideration paid is only Rupee One, though the property is worth several millions. If the Assessing Officer having jurisdiction over "B" has to make an addition under section 69B, he can do so only if he "finds" that B has "expended" money which he has not fully recorded in this books of account; he cannot make any

addition merely because the property could fetch several crore of rupees in the market.

11. Section 69B does not permit an inference to be drawn from the circumstances surrounding the transaction that the purchaser of the property must have paid more than what was actually recorded in his books of account for the simple reason that such an inference could be very subjective and could involve the dangerous consequence of a notional or fictional income being brought to tax contrary to the strict provisions of Article 265 of the Constitution of India and Entry 82 in List I of the seventh schedule thereto which deals with "Taxes on income other than agricultural income". This was one of the major considerations that weighed with the Supreme Court in K.P. Varghese (supra) in which case the provisions of sub-section (2) of section 52 fell for interpretation. It was observed that Parliament cannot choose to tax as income an item which in no rational sense can be regarded as a citizen's income or even receipt. Section 52(2) (which now stands omitted) applied to the transferor of property for a consideration that was lesser than the fair market value by 15% or more; in such a case, the Assessing Officer was conferred the power to adopt the fair market value of the property as the sale price and compute the capital gains accordingly. The Supreme Court held that it was the burden of the Assessing Officer to prove that there was understatement of consideration and once that burden was discharged it was not required of him to prove the precise extent of understatement and he could adopt the difference between the stated consideration and the fair market value of the property as the understatement. The sub-section was held to provide for a "statutory best judgment" once actual understatement was proved; it obviated the need to prove the exact amount of understatement. Additional reasons for the result were (a) that the marginal note to the section referred to "cases of understatement"; (b) the speech of the Finance Minister while introducing the provision; and (c) the absurd or irrational results that would flow from a literal interpretation of the sub-section, which could not have been intended by the legislature.

12. While the omitted section 52(2) applied to the transferor of the property, section 69B applies to the transferee – the purchaser – of the property. It refers

to the money "expended" by the assessee, but not recorded in his books of account, which is a clear reference to undisclosed income being used in the investment. Applying the logic and reasoning in *K.P. Varghese (supra)* it seems to us that even for the purposes of Section 69B it is the burden of the Assessing Officer to first prove that there was understatement of the consideration (investment) in the books of account. Once that undervaluation is established as a matter of fact, the Assessing Officer, in the absence of any satisfactory explanation from the assessee as to the source of the undisclosed portion of the investment, can proceed to adopt some dependable or reliable yardstick with which to measure the extent of understatement of the investment. One such yardstick can be the fair market value of the property determined in accordance with the Wealth Tax Act. We however clarify that this Court is not concluding that such yardstick is determinative; in view of the findings arrived at by us that the Assessing Officer did not gather foundational facts to point to undervaluation the adoption of the norms under the Wealth Tax Act is not commented upon by us.

13. The error committed by the income-tax authorities in the present case is to jump the first step in the process of applying section 69B – that of proving understatement of the investment – and apply the measure of understatement. If anything, the language employed in section 69B is in stricter terms than the erstwhile section 52(2). It does not even authorise the adoption of any yardstick to measure the precise extent of understatement. There can therefore be no compromise in the application of the section. It would seem to require the Assessing Officer even to show the exact extent of understatement of the investment; it does not even give the Assessing Officer the option of applying any reasonable yardstick to measure the precise extent of understatement of the investment once the fact of understatement is proved. It appears to us that the Assessing Officer is not only required to prove understatement of the purchase price, but also to show the precise extent of the understatement. There is no authority given by the section to adopt some reasonable yardstick to measure the extent of understatement. But since it may not be possible in all cases to prove the precise or exact amount of undisclosed investment, it is perhaps reasonable to permit the Assessing Officer to rely on some acceptable basis of

ascertaining the market value of the property to assess the undisclosed investment. Whether the basis adopted by the Assessing Officer is an acceptable one or not may depend on the facts and circumstances of the particular case. That question may however arise only when actual understatement is first proved by the Assessing Officer. It is only to this extent that the rigour of the burden placed on the Assessing Officer may be relaxed in cases where there is evidence to show understatement of the investment, but evidence to show the precise extent thereof is lacking.

14. In *Lalchand Bhagat Ambica Ram Vs. Commissioner of Income Tax, Bihar and Orissa* (1959) 37 ITR 288, the Supreme Court disapproved the practice of making additions in the assessments on mere suspicion and surmise or by taking note of the notorious practices prevailing in trade circles. At page 299 of the report, it was observed as follows :

> *"Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf."*

This takes care of the argument of Mr. Sabharwal that judicial notice can be taken of the practice prevailing in the property market of not disclosing the full consideration for transfer of properties.

15. Since the entire case has proceeded on the assumption that there was understatement of the investment, without a finding that the assessee invested more than what was recorded in the books of account, we are unable to approve of the decision of the income-tax authorities. Section 69B was wrongly invoked. The order of the Tribunal is approved; the substantial question of law is answered in the negative, in favour of the assessee and against the CIT.

16. Since the basis of the additions made in all the other cases is the same as in ITA No.1814/2010, the substantial questions of law in those cases are also similarly answered.

17. The appeals filed by the CIT are dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

SEPTEMBER 28, 2012
vld