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

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Income Tax Appeal 219/2013Date of decision:- 11th October, 2013.

COMMISSIONER OF INCOME TAX DELHI-VI Appellant
Through Ms. Suruchi Aggarwal, Sr.
Standing Counsel.

versus

TYAGI ANAND & CO. PVT LTD. Respondent
Through Mr. Ved Jain, Advocate.

CORAM:**HON'BLE MR. JUSTICE SANJIV KHANNA****HON'BLE MR. JUSTICE SANJEEV SACHDEVA****SANJIV KHANNA, J. (ORAL)**

Revenue in this appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) in respect of assessment year 2005-06, impugns findings recorded by the Income Tax Appellate Tribunal (tribunal) in their order dated 25th July, 2012.

2. Return filed for the aforesaid assessment year was made subject matter of assessment order under Section 143(3) dated 13th December, 2007 and the income was assessed at Rs.18,89,850/-. Subsequently, reassessment proceedings were initiated and additions of Rs.1,69,88,383/- and Rs.1,50,00,000/- were made.

Addition of Rs.1,69,88,383



3. The respondent-assessee vide sale deed dated 25th November 2004 had sold the second and third floor of a property under construction to Uttam Enterprises for consideration of Rs.5,67,70,000/-. For the purpose of computing capital gains, the assessee had taken the cost of construction at Rs.5,65,72,958/- and capital gains of Rs.1,97,041/- was disclosed and accepted in the original assessment.

4. The Assessing Officer in reassessment order observed that as per the valuer's certificate, the total cost of the second and third floor of the building was Rs.3,95,84,575/-, whereas the assessee had shown the cost as Rs.5,65,72,958/-. Thus, addition of Rs.1,69,88,383/- was made.

5. Commissioner of Income Tax (Appeals) reversed the finding of the Assessing Officer, inter alia, recording that figure of Rs.3,95,84,575/- pertained to actual expenditure incurred till 31st March, 2005 on construction of second and third floor of the building and the figure of Rs.5,65,72,958/- was the projected actual cost of construction relating to second and third floor. He accordingly held that as capital gains was being taxed in the year in question and there being no dispute about the projected cost, the figure of Rs.5,65,72,958/- cannot be ignored. The exact reasoning given by the Commissioner (Appeals) reads as under:-

“8.2. During the year under consideration the assessee sold 2nd and 3rd floors. The assessee declared capital gains on



the sale of 2nd and 3rd floors as detailed below.

Sale consideration	Rs.5,67,70,000
Cost of construction of 2nd and 3rd floors	Rs.5,65,72,958

	1,97,041

8.3. According to the AO the cost of construction was

Rs.3,95,84,575/- as per the valuer/architect certificate. Hence there is unexplained investment which is worked out as under.

Cost according to the AO	Rs.5,65,72,958
Less: Cost as per valuer's certificate	3,95,84,575
Difference	-----
	1,69,88,383

8.4. The A.R. has explained that entire sale consideration of Rs.5,67,70,000 was taken into account to declare capital gains. The AR has clarified that the amount actually incurred upto 31.3.05 was Rs.3,95,84,575/-. The projected cost of construction of 2nd and 3rd floors was Rs.5,65,72,958/- as per 2nd valuation certificate. This amount includes the amount of Rs.3,95,84,755/- spent already by 31.3.2005.

8.5. Following the matching principle, the projected cost at Rs.5,65,72,958/- was deducted while computing the capital gains.

8.6. There are two valuation certificates. One certificate dt. 4.4.2005 deals with the actual amount spent on the entire project. The total amount actually spent on the entire project was Rs.12,96,24,057/- which includes cost of Rs.3,95,84,575/- spent on 2nd and 3rd floors.”

8.7. In the second certificate dt. 10.10.2005 the projected cost of the entire project was



Rs.17,69,74,995/- which included projected cost of Rs.5,65,72,958/- in respect of 2nd and 3rd floors.

8.8. The AO presumed that projected cost of construction of Rs.5,65,72,958/- on 2nd and 3rd floors as per the second valuation certificate was actually spent and worked out the excess amount of Rs.1,69,88,383/- to be assessed as unexplained investment. I have gone through the documents brought on record and found the contentions of the AR are tenable and there is no case for addition of Rs.1,69,88,383 u/s 69B.”

6. The said findings have been affirmed by the tribunal after recording that the departmental representative, who was appearing for the Revenue, could not contradict the said findings.

7. The reassessment order which is subject matter of the present appeal is dated 29th December, 2010. Learned counsel for the respondent has stated that by that time, the project was complete.

8. Copy of the valuation certificates have not been filed before us, to question and challenge the factual finding of the appellate authorities. The Assessing Officer in the present case did not go into the question whether the estimated/projected cost of Rs. Rs.5,65,72,958/- was correct or not. He also did not ascertain the actual cost of construction of the second and third floor. Revenue before the tribunal did not dispute or question the projected/estimated cost of construction of second and third floor. Capital gains on transfer



was being taxed in the year in question. Actual cost incurred in construction has to be deducted from the consideration received. This is the basis/foundation of the order of the Commissioner (Appeals) and the tribunal. Addition of Rs.1,69,88,383/- cannot be justified on the ground that as on 31st March, 2005, the assessee had incurred expenditure of Rs.3,95,84,575/-. During the course of hearing we had asked counsel for the Revenue whether the property in question was under construction when the sale deed was executed? Learned counsel for the Revenue states that as per the sale deed, the property in question was under construction. Before us and the tribunal, it is not alleged and argued that the actual cost incurred was different or less. Break-up and details of cost of construction have not been filed or contested.

Addition of Rs.1,50,00,000/-

9. The Assessing Officer invoked Section 69B of the Act after making reference to the 3CD report wherein unsecured loans of Rs.4.6 crores and repayment of Rs.4.52 crores were recorded. The Assessing Officer observed that during the scrutiny proceedings, the respondent-assessee had shown loan amount of Rs.4.25 crores and repayment of Rs.3.32 cores. Commissioner (Appeals), on the other hand, came to the conclusion that the Assessing Officer had made an error in reading the 3CD report and has recorded that the respondent-assessee had



actually received Rs.4.35 crores. The amounts were received from City Entertainment India (P) Ltd. and Taneja Developers & Infrastructures Ltd. Similarly, with regard to repayment, the details/documents was examined and it was held that the respondent-assessee had paid Rs.4,52,40,721/- to E-City Entertainment India (P) Ltd. and Taneja Developers & Infrastructures Ltd. The said finding of fact has been affirmed by the tribunal. In fact, the order of the tribunal records that the departmental representative was not able to demonstrate any factual error. No document has been filed before us to show that the findings recorded by the tribunal are erroneous or wrong.

10. The appeal has no merit and is accordingly dismissed. No costs.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

OCTOBER 11, 2013
NA/VKR