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

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**DECIDED ON: 25.04.2014**

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ITA 176/2014

COMMISSIONER OF INCOME TAX DELHI –I ..... Appellant  
Through: Mr. Rohit Madan, Sr. Standing Counsel  
with Mr. P. Roy Choudhuri, Advocate.

versus

AGILE PROPERTIES PVT.LTD. .... Respondent  
Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**  
**HON'BLE MR. JUSTICE R.V. EASWAR**

**MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)**

1. In this case, the Revenue is aggrieved by an order of the Income Tax Appellate Tribunal (ITAT) dated 27.08.2013. It urges that the view expressed by the Tribunal is contrary to Section 69B.

2. The assessee had reported - during the relevant assessment year, i.e., 2007-08 - purchase of agricultural property in Najafgarh, New Delhi; the value of the investment was disclosed to be Rs.5,22,78,280/-. The Assessing Officer (AO) noticed some discrepancies with respect to the investment inasmuch as there was difference of Rs.1,34,130/- which led to his referring the matter with regard to valuation of properties to the District Valuation Officer



(DVO) under Section 142A. In the report, DVO reported the value of the investment of the agricultural property as Rs.10,51,69,640/-. The AO on receiving the report issued notice to the assessee to show cause why the valuation of the investment ought not to be enhanced to the figure indicated by the DVO. In the course of the proceedings before the AO, the statement of one Mr. Naveen Goyal, an official of the assessee was recorded. He expressed the inability to ensure the presence of the sellers of the properties purchased by the assessee. Another individual Mr. Sanjay Mittal, a Director of the company was summoned; he did not comply with the orders. In these circumstances, the AO enhanced the value and confirmed it as Rs.10,51,69,640/-. The assessee appealed successfully to the CIT (A) which accepted its contentions. Feeling aggrieved, the Revenue appealed to the Tribunal which by the impugned order rejected the same.

3. It is argued that the report of the DVO had high evidentiary value given the circumstance that the assessee did not cooperate in the enquiry by the AO. It is contended that the DVO's report took into consideration all the relevant materials such as the value of the surrounding lands and the market value thereof. In view of these circumstances as well as the inability of the assessee to produce the sellers of the land purchased by it, the approach and order of the AO was justified.

4. This Court notices that the Tribunal rejected the Revenue's contentions holding that the onus to prove under valuation through positive evidence is upon the Revenue. The Tribunal had relied upon



the judgments of the Supreme Court reported as *CIT v. Daulat Mal Rawat Mal*, 87 ITR 349 (SC), *K.P. Verghese v. ITO*, 131 ITR 597 (SC) and *CIT v. Bedi & Company*, 230 ITR 580 (SC). The entirety of the circumstances, i.e., the examination of the assessee's representations, the report of the DVO etc. were considered and discussed by the Tribunal in the operative part of its reasoning at paragraph 6-8. The relevant discussion is extracted below: -

*“7. Now, as per Section 69B of the Act, the requirements which need to be satisfied are that the assessee has made investment, or the assessee is found to be the owner of any bullion, jewellery or other valuable article and it is found that the investment exceeds the corresponding amount recorded in the books of account and either the assessee offers no explanation about such excess amount, or the explanation offered is not satisfactory. Thus, the sine qua non u/s 69B of the Act is for the Assessing Officer to reach a findings on the basis of evidence, that the assessee has made investment outside its books of account. Only on the basis of such a finding can an addition be made u/s 69B. So far as regards investment over and above that recorded in the books of account, the onus, rather the burden, is on the department to prove such allegation, as has been held in, inter alia, *CIT v. Daulat Mal Rawat Mal*, 87 ITR 349 (SC), *K.P. Verghese v. ITO*, 131 ITR 597 (SC) and *CIT v. Bedi & Co. (P) Ltd.*, 230 ITR 580 (SC). The department has argued that in the present case, the assessee did not cooperate in the assessment proceedings with the Assessing Officer and so, the onus on the department is deemed to have been discharged. In this regard, it is seen that before making the reference to the DVO, the Assessing Officer examined one of the representatives of the assessee, asking if the sellers could be identified and produced. To this, he expressed his inability. It is seen that in the sale deed (copy at APB 13-36), the name and address of the seller is very much there. This sale deed had been duly produced before the Assessing Officer. The Assessing Officer recorded, u/s 131 of*



*the Act, a statement of Shri Naveen Kumar Goyal, one of the Directors of the assessee company on 20.08.2009. therein, a specific question (Question 12) was asked as to if the deponent could identify and produce the sellers of the land. Shri Goyal responded by saying that he could not produce the sellers. Now, when, undisputedly, the details of the sellers of the land to the assessee were on record before the Assessing Officer and the Assessing Officer had all power to make inquiry under the Act from such sellers and the Assessing Officer, for reasons best known to him, did not make any such inquiry, the onus on the department to prove that the investment made by the assessee was in fact more than that depicted in its books of account, did not get discharged at all. In the following cases, as correctly noted by the Ld. CIT (A), it has been held that the onus is on the revenue to substitute apparent consideration and that addition u/s 69B of the Act can be made only on the basis of positive material or evidence regarding consideration in excess of what is recorded in the books as having been paid and that no addition u/s 69B of the Act can be made simply on the basis of difference of opinion as to the market value of the asset: -*

- i) 'CIT vs. Banwarilal Murwatiya', 2008-TIOL-124-HC-RAJ-IT.*
- ii) 'Sanjay Chawla v. ITO', 89 ITD 586-606*
- iii) 'ITO vs. Satyanarayan Agarwal', 112 TTJ 717 (JD)*
- iv) 'Jai Marwar Co. (P) Ltd. v. ACIT', 79 TTJ 178 (JD)*
- v) 'Dilshad Trading Co. (P) Ltd. vs. ITO', 49 ITD 348 (Bom)*

*8. It is only on the basis of a definite finding of the Assessing Officer to the forgoing effect that a reference can be made to the valuation officer u/s 142A of the Act. It goes without saying that the provisions of Section 142A(1) of the Act are merely machinery provisions and the substantive provisions of Section 69B cannot be overridden by them. IN the present; ;case, on the other hand, undisputedly, the Assessing Officer did not have any such material before him, which could form the basis for reference being made to the DVO u/s 142A of the Act, as has been rightly held by the Ld. CIT (A).”*

- 5. This Court had in the decision reported as CIT v. Dinesh Jain,*



*HUF*, ITA 1667/2010 dated 28.09.2012 and ITA 85/2011 and connected cases occasioned to consider an identical question. After noticing the relevant provision, i.e. Section 69B, the Court noticed in paragraph 9 as follows: -

*“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 his 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.”*

6. In the matter *CIT v. Dinesh Jain (supra)*, this Court also relied upon the ruling in *Lalchand Bhagat Ambica Ram v. Commissioner of Income Tax, Bihar & Orissa*, (1959) 37 ITR 288 (SC) which held that mere suspicion cannot take the place of proof. The Court was of the opinion that mere reliance upon the report of the Valuation Officer expressing his opinion as to the true value would be inadequate material for the AO to constitute evidence in the absence of positive evidence. In the present case too, the approach of the Tribunal is in accord with what has been expressed in *Dinesh Jain*



*HUF's* matter and the other judgments of the Supreme Court noticed earlier. As such no substantial question of law arises.

7. So far as the second question relates, issue of short term capital gain, in this regard the Tribunal had recorded as follows: -

*“11. The assessee, during the year, had sold land measuring 1.26 acres in village Khaira for Rs.12 lac as against purchase cost of Rs.13,75,550/-. The assessing Officer observed that since the purchase cost had been understated by an amount of Rs.29,80,511/-, correspondingly the sale price was also understated by an equal amount of Rs.29,80,511/-, due to which, according to the Assessing Officer the short-term capital gain of Rs.29,80,511/- had also been understated by the assessee in its return of income. The Ld. CIT (A) deleted the addition made by the Assessing Officer.*

*12. In this regard, it has been correctly found that the Assessing Officer had erred in taking the cost of acquisition without considering the stamp duty towards such cost of acquisition. The sale consideration was also taken at a rate higher than the circle rate. Thus, whereas the stamp duty payable and the correct sale consideration, based on the circle rates, as per the provisions of Section 50C of the Act were to be considered. This error has appropriately been rectified by the Ld. CIT (A) while directing the Assessing Officer to recompute the STCG by taking the cost of plot at Rs.12 lac to include the stamp duty towards the cost of acquisition. The Ld. CIT (A) also correctly directed to apply the stamp duty rates to the sale price of the plot for arriving at the STCG in view of the provisions of Section 50C of the Act, while correctly holding addition of various amounts towards sale of land over and above the stamp duty rates, to be not justifiable, as per the provisions of Section 50C of the Act.”*

8. We noticed that the CIT (A) had in fact directed the AO to recompute the short term capital gain by taking the cost of plot at Rs.12



lac and to include the stamp duty towards the cost of acquisition. No fault was found with this order by the Tribunal. We are un-persuaded with the Revenue's contention that the Tribunal fell into error in confirming the CIT (A)'s order.

9. In view of the above findings, the appeal has to fail; it is accordingly dismissed.

**S. RAVINDRA BHAT**  
**(JUDGE)**

**R.V. EASWAR**  
**(JUDGE)**

**APRIL 25, 2014**  
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