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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: December 22, 2014

+ ITA 800/2014 & CM Nos. 21134-35/2014
 COMMISSIONER OF INCOME TAX CENTRAL II

..... Appellant

Through: Mr.Rohit Madan,Sr.Standing Counsel
 with Mr.Ruchir Bhatia, Jr.Standing
 Counsel

versus

HOME DEVELOPERS P. LTD.

..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J (ORAL)

CM No. 21134/2014 & ITA 800/2014

There is a delay of 650 days in refiling of this appeal by the revenue under Section 260A of the Income Tax Act, 1961 ('Act' in short). However, before issuing notice on the application for condonation of delay, it would be appropriate to examine the appeal on merits.

2. The impugned order dated 21.09.2012 passed by the Income Tax Appellate Tribunal ('Tribunal' in short) deletes penalty under Section 271D of the Act, recording the following reasons:

"25. From the above, it is evident that a detailed enquiry was made from Shri Yogesh Gupta in respect of various papers seized from him and in respect of not a single paper, he has



stated that the noting on the paper is relating to borrowing by the assessee. In respect of each and every paper, he explained the nature of transaction and in most of the cases also explained the name of the group concern to which such paper belonged. In respect of only few papers i.e. page Nos. 77 to 84 of the Annexure (see reply to question No.12), he mentioned that these papers belonged to M/s Home Developers (P) Ltd., i.e., the assessee. He stated that these papers are relating to purchase of property No.A-9/33, Vasant Vihar, New Delhi in respect of which cash payment of Rs. 54 lakhs was made and which was offered as additional income. The Hon'ble Jurisdictional High Court has also considered his statement while deciding the Revenue's appeal for AY 2001-02, 200203 & 2003-04 and has recorded the similar finding that with regard to the loose papers, Shri Yogesh Gupta had stated that these were unaccounted transactions in cash. In his statement, he also surrendered the income of Rs. 13 crores in his name and in the name of the group concern. The Hon'ble Jurisdictional High Court had also noted that the Revenue was fully satisfied by the surrender made and closed their investigation. The above finding of the Hon'ble Jurisdictional High Court is squarely applicable to the year under appeal also because we find that in the year under appeal also, the Revenue has brought no other material on record to establish that as per the loose papers, any amount was borrowed by the assessee. They have not even examined the person whose name is claimed to have been mentioned on the loose papers. In the loose papers, no where it is mentioned that they belonged to the assessee i.e. M/s. Home Developers (P) Ltd. which is a company. Admittedly, the loose papers were found from Shri Yogesh Gupta and not the assessee company. The undisclosed income represented by such loose papers had already been offered by Shri Yogesh Gupta and other group companies which has been accepted by the Revenue. Photocopy of the loose papers have also been produced by the assessee in his paper book. For the sake of brevity, we shall mention herein below only one loose paper i.e. page NO.43 in which, according to the Revenue, there is an evidence of loan of Rs. 2,40,00,000/- taken by the assessee. We find that the Assessing Officer has considered the entries



at the left hand side of the paper which is totaled to Rs. 2,40,000/-. On this loose paper, only one name Paliwal is written and there are dates and amounts without any narration. The total of amounts is Rs.2,40,000/-. It is the inference of the Assessing Officer that the assessee is making the entries ignoring '00'/'000' (2/3 zeros). It seems that in Rs.2,40,000/-, he increased '00' (2 zeros) and made it Rs.2,40,00,000/-. As per the Assessing Officer, the entry is for receipt of loan, though in the loose paper there is no such narration except date and amount. The Assessing Officer further presumes that the assessee has repaid the loan alongwith the interest and he presumed the rate of interest to be 20%. He made the addition in respect of such alleged repayment of loan with interest. The learned CIT(A) has deleted the addition with regard to repayment of loan on the ground that since loan amount itself was available with the assessee out of which this repayment was made, he reduced the interest. Thus, the addition is partly sustained by him. However, after considering the entire facts and arguments of both the sides, we find that the entire addition is based upon the presumption of the Assessing Officer. On the loose papers, there is noting of dates and amounts without any narration. The total of such amount is Rs.2,40,000/-. The first presumption by the Assessing Officer is that it is not Rs. 2,40,000/- but Rs. 2,40,00,000/-. The second presumption is that the noting is relating to loan taken by the assessee. The third presumption is that the loan was repaid during the accounting year relevant to the assessment year under consideration. The fourth presumption is that the repayment of the loan was alongwith interest at the rate of 20%. On these series of presumptions, he not only made huge additions running into crores of Rupees but also levied penalties under Sections 271D & 271E. His finding is neither based upon the noting on the loose papers nor any corroborative evidence brought on record during the course of assessment proceedings. On the other hand, material available on record is contrary, i.e. (i) the papers were found from Shri Yogesh Gupta and not the assessee, (ii) statement of Shri Yogesh Gupta was recorded in which he stated that these were unaccounted transactions, (iii) he surrendered the income from such unaccounted transactions in his hands as



well as in the hands of group concern, (iv) the income from unaccounted transactions as surrendered by Shri Yogesh Gupta and all the group concerns has been accepted by the Revenue. In view of these facts, if Revenue wanted to take the view that the noting on the loose papers is with regard to loan taken by the assessee, then the burden was upon the Revenue to establish so. However, the Assessing Officer did nothing except to make series of presumptions and then made the addition and levied the penalty on the basis of his presumptions. We find that similar situation was dealt with by the ITAT while considering the Revenue's appeal for penalty for AY 2001-02, 2002-03 & 2003-04 and the ITAT has held that the document does not indicate that the assessee has accepted loan or deposit from any other person. The name of the assessee is completely absent from the said document. Identical is the situation in the years under appeal before us. None of the documents indicate that the assessee i.e. M/s Home Developers (P) Ltd. has taken any loan or deposit from any other person. The above finding of the ITAT has been upheld by the Hon'ble Jurisdictional High Court. The Hon'ble Jurisdictional High Court held that though there is a doubt but it is not established that the respondent assessee had taken loan/deposit in cash. Their Lordships further observed that there is suspicion but this alone without any further verification and investigation cannot justify the finding that the respondent-assessee had taken loan/deposit in cash. With these observations, their Lordships upheld the finding of the ITAT. In our opinion, the above observation of their Lordships of the Jurisdictional High Court in assessee's own case for AY 2000-01 to 2003-04 would be squarely applicable in the years under appeal also. In these years also. at the most, it can be the doubt of the Assessing Officer that unaccounted transactions are in the nature of the loan taken. However, the doubt or suspicion of the Assessing Officer is not enough to hold that the assessee had taken loan/deposit in cash. Moreover, in the years under appeal, the Assessing Officer made further presumptions that there was repayment of loan in cash though there is no such noting on the loose paper. In our opinion, the finding of the ITAT as well as Hon'ble Jurisdictional High Court in AY 2000-01 to 2003-04 would be squarely applicable to the years under appeal. We further



hold that when it is not established that the assessee had taken loan or deposit. the question of further presumption that such loan or deposit was repaid during the year under consideration was without any basis or material on record”.

3. We may note that surrender of Rs. 15 Crores during the course of the search in the case of the respondent assessee and another connected enterprises. The amount surrendered was bifurcated and explained in the statements of Yogesh Gupta recorded under Section 131 of the Act. The Tribunal has also reproduced the said statement in paragraph 24 of the impugned order which for the sake of convenience is also reproduced:

“24. From the above, it is evident that the papers were seized from Shri Yogesh Gupta and as per the Assessing Officer, these papers recorded the transactions of loan received by the assessee. Here, it would be relevant to consider the statement of Shri Yogesh Gupta from whom the papers were seized. The relevant portion of his statement reads as under:-

"Q.4 During the search & seizure operations carried out at your residence on 28/03/2006, you had made a voluntary disclosure of an additional income of RS.13 Crores. Do you confirm the same?

Ans. - Yes, I confirm the above disclosure of Rs.13 Crores of additional income.

Q.5 Please give the assessee wise break up of the above mentioned disclosure.

Ans. I have made a disclosure of RS.13 Crores the break up of which is as under:

1. In my own hands Rs.2 Crores (Two Crores)



2. M/S Home Developers Pvt. Ltd. Rs.2 Crores (Two Crores)
3. M/S Real Tech Projects & Construction Pvt. Ltd. Rs.9 Crores (Nine Crores)

Q.6 Please also give the details regarding the sources of this unaccounted income of Rs.13 Crores and its utilisation.

Ans. The money have been generated by the group over a period of time out of unaccounted transactions of commission, sale, purchase, construction, finishing as well as financing of properties.

The amounts so generated have been utilized in acquisition of assets or introduction in business in the form of stock and cash. The details are as under:

(A) In my own hands

<i>SI.No</i>	<i>Utilisation of Unaccounted money</i>	<i>Amount utilized (Rs.)</i>
<i>1</i>	<i>Advance against property to M/s Home Developers Pvt. Ltd.</i>	<i>25,00,000/-</i>
<i>2</i>	<i>Advance against property no.E-6/13, Vasant Vihar, New Delhi to M/S Kirti Relators Pvt. Ltd.</i>	<i>1,61,00,000/-</i>
<i>3</i>	<i>Investment in proprietary unit "Innovation"</i>	<i>1,95,000/-</i>
<i>4</i>	<i>Stock in Home Developers Pvt. Ltd. (purchased out of regular books of accounts in Cash)</i>	<i>12,05,000/-</i>
	<i>Total</i>	<i>2,00,00,000/-</i>

<i>SI.No</i>	<i>Utilisation of Unaccounted money</i>	<i>Amount utilized (Rs.)</i>
<i>1</i>	<i>Payments made against purchase of property no.A-9/33, Vasant Vihar, New Delhi</i>	<i>1,54,00,000/-</i>
<i>2</i>	<i>Payment made against purchase of property no.2, Sukhdev Market, Kotla, Delhi.</i>	<i>37,80,000/-</i>
<i>3</i>	<i>Cash in hand (Imprest)</i>	<i>7,57,000/-</i>
	<i>Total</i>	<i>1,99,37,000/-</i>



(C) In the hands of Mis Real Tech Projects & Construction Pvt. Ltd.

<i>Sl. No.</i>	<i>Utilization of Unaccounted money</i>	<i>Amount utilized (Rs.)</i>
<i>1</i>	<i>Sale proceeds received in cash in connection with the ongoing & future projects utilized in incurring various expenditure in cash relating to construction of the projects paid outside the regular books of accounts.</i>	

Q.7 I am showing the Annexure A-7 seized from your residence during the search & seizure operations carried u/s 132 on 28/03/2006. Please explain the contents of the same and in whose handwriting these have been written.

Ans. This annexure is in my own handwriting and it contains the details of same unaccounted transactions which are contained in Annexures A-1 to A-6 and have been fully covered under the disclosure made above. Specifically Page no. 7 of this annexure contains details of Investment of Rs.37,80,000/- made in Property at Kotla which is not recorded in the books of accounts. The figure of "29,300" on this page represents the cost of plot and actually means Rs. 29,30, 000/- and similarly the figure of "8.S(C)" represents the cost of construction and means Rs.8,50,000/-. Therefore the total cash amount invested in this property is Rs.37,80,000/- which is being offered for taxation as an additional income.

Q. Please tell the source of this cash investment of Rs.37.80 lakhs.

Ans. The source of this investments is Cash receipts by M/s Home Developers Pvt. Ltd. through the business of sale/purchase of properties and are not accounted for in the regular books of accounts.



Q.8 I am showing the Annexures A-8 & A-9 seized from your residence during the search & seizure operations carried u/s 132 on 28/03/2006. Please explain the contents of the same.

Ans. These annexures contain various day to day miscellaneous notings regarding pending works etc. and have no financial implications.

Q.9 I am showing the Annexures A-10 & A-11 seized from your residence during the search & seizure operations carried u/s 132 on 28/03/2006. Please explain the contents of the same.

Ans. These annexures contain details of various accounted as well as unaccounted transactions which represent receipts in Cash from various persons and expenditure incurred in cash. However the same have been duly considered in making the above disclosure of Rs.13 Crores in my hands and the hands of my companies.

Q.10 I am showing the Annexure A-12 seized from your residence during the search & seizure operations carried u/s 132 on 28/03/2006. Please explain the contents of the same.

Ans. This annexure contains details of various accounted as well as unaccounted transactions which represent receipts in Cash from various persons and expenditure incurred in cash. Specifically pages no. 7 to 9 represent the receipts and payments by the directors of M/s Real Tech Construction Pvt. Ltd. (Shri Yogesh Gupta, Shri Rajiv Behl and Shri Pankaj Dayal). All three of them are entitled to receive and spend money on behalf of the company. The pages no, 7 to 9 represent the amounts received by them in Cash as well as through Cheques from various persons on account of booking of various units of several projects of the company.



Page no.6 of this annexure is the combined summary of the receipts as per pages 7 to 9, The total cash receipts as per these pages are Rs.7.25 Crores.

A disclosure of an additional income of Rs. 7.25 Crores has been made on this account. The pages no.24 to 34 (ledger accounts) represent cash collection made by various agents and their utilization. However, these cash receipts are also reflected in the pages 6 to 9 of this annexure.

Q. Please tell how the above receipts of Rs.7.25 Crores have been utilized?

Ans, This amount has been utilized for incurring various expenditure relating to the construction of the projects being executed by the company paid outside the books of accounts,

Q.11 I am showing you the Annexure A-1 seized from the residence of Shri jatinder Kumar Gupta at 1649, Sector 7E, Faridabad, Haryana during the course of search & seizure operations carried u/s 132 on 28/03/2006.Please explain the contains of the same.

Ans. This annexure contains various business correspondence, copies of cheques, bank statements and some bills etc.

Q.12 I am showing you the Annexure A-2 seized from the residence of Shri Jatinder Kumar Gupta at 1649, Sector 7E, Faridabad, Haryana during the course of search & seizure operations carried u/s 132 on 28/03/2006. Please explain the contents of the same.

Ans. Page no.1 & 2 are receipts issued by Joyce Titus in respect of payments made by me for purchase of property no.F/5/2, Vasant Vihar, New Delhi. Out of this Rs.25 lakhs was paid in cash and the same is being surrendered i.e. offered for taxation.



Pages no.45 to 52 are agreement to sell regarding purchase of property no.E-6/13, Vasant Vihar, New Delhi by M/s Kirti Realtors Pvt. Ltd. A cash payment of Rs.31 lakhs was made by the company to the vendors. I would also like to state that although the agreement to sell is for Rs.3.61 crores, the sale deed of this property was executed for Rs.2 crores i.e. in the sale deed the property was undervalued by Rs.1.61 crores. Therefore an amount of Rs.1.61 crores is being offered for taxation as an additional income in my own hands, since I had made the cash payments of Rs.1.61 crores out of my personal income.

The pages no.77 to 84 of this annexure are receipts of payments made by M/s Home Developers Pvt. Ltd. to various vendors against purchase of property no.A-9/33, Vasant Vihar, New Delhi. As per these pages, cash payments of Rs.54 lakhs were made to the vendors. Therefore, an additional income of Rs.54 lakhs is being offered for taxation in the hands of M/s Home Developers PvtLtd.

The other pages are various sale deeds in r/o several properties which have already been sold.”

(emphasis by underlining provided by the Tribunal)

4. Thus, the finding of the Tribunal is that there was no violation of Section 269SS. The said findings are factual in nature. In these circumstances, we are not inclined to interfere with the impugned order. Consequently, we are not inclined to issue notice on the application for condonation of delay in refileing of the appeal.

SANJIV KHANNA, J

V. KAMESWAR RAO, J

DECEMBER 22, 2014/akb