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

+ ITA 811/2010

COMMISSIONER OF INCOME TAX Appellant
Through: Ms. Prem Lata Bansal,
Advocate

versus

SMT. SURAJ DEVI Respondent
Through: Mr. Piyush Kaushik,
Advocate

% Date of Decision: 13th August, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

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

MANMOHAN, J:

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act, 1961") challenging the order dated 8th July, 2009 passed by the Income Tax Appellate Tribunal (in short "ITAT") in ITA No. 3451/Del/2008, for the Assessment Year 2005-2006.

2. The facts relevant to the present case are that the respondent-assessee had made investment in properties bearing No. 101, Ground

Floor, Bangala Sahib Road, New Delhi and a flat on the first floor of that property. The respondent-assessee had duly registered the purchase deed with the Sub-Registrar-VI, New Delhi. The said investment was duly declared in the regular return filed by the respondent-assessee. It is pertinent to mention that the property purchased is a disputed property which is tenanted and whose mutation has not been allowed in the name of the respondent-assessee by the Land and Development Officer. However, the Assessing Officer (in short "AO") made an addition on account of undisclosed payment having been made by the purchaser/respondent-assessee solely on the basis of the report of DVO. On an appeal being filed by the respondent-assessee, the ITAT allowed the appeal by observing as under :-

"3. During the course of search what the Department recovered was only the registered purchase deed. No other incriminating document whatsoever was found on the basis of suspicion that the market value of the property is more can be raised, reference to valuation cell was made u/s 142(1A). On the basis of DVO, the market value of the property has been estimated at Rs. 1,50,07,800/- as against the consideration in terms of registered deed at Rs. 62,50,000/- only resulting in addition of Rs. 43,78,900/- in the hands of the assessee. Because the DVO, various objections were raised besides it was pointed out that vacant possession of the shop was not given as there was already a tenant i.e. Indian Overseas Bank. The DVO failed to consider this vital aspect that due to presence of a tenant, the market value of the property in Delhi is severely diminished. Apart from this, learned counsel vehemently argues that there is no material whatsoever with the department to come to a conclusion that any on money was paid by the assessee, corresponding addition in the case of vendor Shri Ashok Deish has not been made. The collateral instances referred to by DVO are in respect of vacant possession property besides in better locality, therefore, it was claimed that the matter should not have been referred

to valuation cell u/s 141A and in any case, the addition is not sustainable on merits in view of this deficiency.

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5. *We have heard the rival contentions and perused the material on record. Learned DR could not dispute the argument of the assessee that any incriminating material whatsoever was found during the course of search. There is no other corroborating evidence to substantiate the addition in respect of cost of acquisition of assessee's property. The DVO and AO have not considered the vital aspect of property being in possession of a tenant. Since the assessee's arguments remain un-controverted, in our considered view, the arguments of learned counsel deserve merit. The addition has been made on presumption relying only on the report of DVO, which may be binding on AO but we have to examine the intrinsic value of the merits for the addition. In our considered view, the addition made is without any corroborating evidence, proper reasons and an estimate bereft of any corroborating evidence, which is material for making such addition. In the entirety of the facts and circumstances, we delete the additions made by the lower authorities in respect of this property."*

3. Ms. Prem Lata Bansal, learned counsel for the Revenue submitted that ITAT had erred in law in deleting the addition of Rs.48,78,900 made by the AO on account of undisclosed investment in purchase of the aforesaid shop and flat at Bangla Sahib Road. She further submitted that ITAT had failed to appreciate that the DVO's report was admissible evidence for making addition on account of undisclosed investment in the property. Ms. Bansal also relied upon para 3.4.1. of the AO's order to contend that the respondent-assessee had made a statement which suggested undisclosed investment in the aforesaid property .

4. It is settled law that the primary burden of proof to prove understatement or concealment of income is on the Revenue and it is only

when such burden is discharged that it would be permissible to rely upon the valuation given by the DVO. (See *K.P. Varghese Vs. ITO, 131 ITR 597, CIT Vs. Shakuntala Devi, (2009) 316 ITR 46* and ITA No. 482/2010 decided by this Court on 5th May, 2010).

5. In any event, the opinion of the DVO, *per se*, is not an information and cannot be relied upon without the books of account being rejected—which has not been done in the present case. The Supreme Court in its order dated 19th October, 2009 in Civil Appeal No. 6973/2009 has held as under:-

“Delay condoned.

Leave granted.

In the present case, we find that the Tribunal decided the matter rightly in favour of the assessee inasmuch as the Tribunal came to the conclusion that the Assessing Authority (AO) could not have referred the matter to the Departmental Valuation Officer (DVO) without books of accounts being rejected. In the present case, a categorical finding is recorded by the Tribunal that the books were never rejected. This aspect has not been considered by the High Court. In the circumstances, reliance placed on the report of the DVO was misconceived.

For the above reasons, the impugned judgment of the High Court is set aside and the order passed by the Tribunal stands restored to the file. Accordingly, assessee succeeds.

Civil Appeal is allowed. No order as to costs.”

6. Further the Supreme Court in its order dated 16th February, 2010 in Civil Appeal No. 9468/2003 has held as under:-

“Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the District Valuation Officer (DVO). Opinion of the DVO per se is not an information for the

purposes of reopening assessment under Section 147 of the Income Tax Act, 1961. The AO has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the Civil Appeal. The Department was not entitled to reopen the assessment.

Civil appeal is, accordingly, dismissed. No order as to costs.

7. Moreover, in the present case, no evidence much less incriminating evidence was found as a result of the search to suggest that the assessee had made any payment over and above the consideration mentioned in the registered purchase deed. A reading of para 3.4.1. of the AO's order does not disclose that the respondent- assessee had made any admission in her alleged statement under Section 132(4) of Act, 1961. In fact, no such statement has been produced before us. It is also pertinent to mention that no adjustment on account of sales consideration has been made by the Revenue in the case of the seller. Consequently, we find that no substantial question of law arises in the present appeal which, being bereft of merit, is dismissed.

MANMOHAN, J

CHIEF JUSTICE

AUGUST 13, 2010

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