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

\+ **I.T.A. NO.225 OF 2004**

Judgment reserved on : 28.01.2011

% **Judgment delivered on : 07.02.2011**

THE COMMISSIONER OF INCOME TAX .... **APPELLANT**

Through: Mr.N.P. Sahni, Advocate

Versus

SHRI NARESH KUMAR AGGARWALA .... **RESPONDENT**

Through: Mr.Sandeep Sapra, Advocate

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L.MEHTA

1.	Whether reporters of Local papers be allowed to see the judgment?	Yes
2.	To be referred to the reporter or not?	Yes
3.	Whether the judgment should be reported in the Digest?	Yes

M.L. MEHTA, J.

1. This is an appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") against the order of the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") dated 25th July, 2002. By the impugned order, the Tribunal set aside the order of the Commissioner of Income Tax (Appellate) [hereinafter, referred to as "CIT(A)] to

the extent of addition of Rs.8,84,750/- made by the Assessing Officer (hereinafter, referred to as "the AO").

2. The respondent-assessee is a Stock Broker and also involved in carrying on the broking business in his individual capacity. Apart from this, the assessee is also having other sources of income. A survey action was taken on 16th October, 1992 and search operation was conducted on 23rd October, 1992 resulting into recovery and seizure of some documents. One of such documents was a fax messaged dated 24th February, 1992. The assessee filed return of the assessment year 1992-93 on 6th February, 1993. During the assessment proceedings, it was found from the books maintained by the assessee that he had made payment of Rs.13,40,630/- during the period 1990-91 and 1991-92 for the purchase of property at "Spencer Plaza" at Madras. However, since as per the details mentioned in the aforesaid fax message, the total area of the property, that was purchased by the assessee, was 1327 square feet at the rate of Rs.1,700/- per square feet, the AO calculated the cost of this property at this rate to be Rs.22,55,900/- as against the declared payment of Rs.13,40,630/-. Consequently, he took the difference of Rs.8,84,750/- as unaccounted investment made by the assessee in this property. The assessee was given

opportunity to explain, but the AO being not satisfied made an addition of this amount on account of "undisclosed investment in the property". For arriving at this conclusion, the AO in his order recorded as under:-

> "14. ………… The assessee was confronted on this point vide this office letter dated 27-9-94. In reply dated 28.12.94 the assessee said as under:
>
> " … that the above investment is duly reflected in the assessee's account books. As regards fax message of page 19 of the seized annexure B-45 the same has to be read with letter dated 25.2.92 copy enclosed at page 15, as received from the same person, viz Mr.R. Balajee who has issued the fax as referred at page 19 of annexure B-45. From this letter dated 25.2.92, it is clear that he had wrongly mentioned the prices earlier without verifying the facts. It is also pertinent to point out that same fax message, as seized, is quoting the prevailing market price at Rs.1,200/- per square feet in the same building i.e. "Spencer Plaza" We hereby, specifically deny to have made any investment in the space at "Spencer Plaza" over and above, what is recorded in the accounts books………"
>
> (14.2) From the reply it is seen that the assessee is relying upon the letter, alleged to have been issued on 25.2.92, a copy of which was enclosed. It is surprising that such paper was not found at the time of search when all other papers were seized. This letter is nothing but an after thought and the veracity of this letter cannot be relied upon. A statement of the assessee was recorded on this point also and the assessee during the course of the statement on 4.1.95 replied as under:-
>
> "….. the fax message is from a very junior member of staff who had recently been recruited for general liaison at Madras. The property was infact purchased before the said person joined our company. He, therefore, had no means of knowing the exact purchase consideration paid by us and as you appreciate such matters are highly confidential and access to the same would not be given to junior member of the staff. He was, therefore, mistaken about the purchase cost and the figures mentioned by him in fax, is pure guess work and conjecture on his

> part. I would also point out here that in the same fax, the person also mentions that fresh space in the same building was available at that time at Rs.1,200/- per sq.ft. This would prove that he was either mistaken about the cost of the property or had made an error in drafting the fax.....”
>
> (14.3) The reply of the assessee and the statement is not at all convincing. Accordingly, the undisclosed investment of Rs.8,84,750/- in the property mentioned above, is added in the hands of the assessee as income of the assessee from undisclosed sources. Penalty proceedings u/s 271(1)(c) have been initiated separately.”

3. The assessee preferred an appeal against the order before the CIT(A). The CIT(A) confirmed the order of the AO in this regard and while doing so examined the letter dated 25th February, 1992 purportedly written by the same person, who had admittedly sent the fax message to the assessee on 24th February, 1992. While disbelieving the aforesaid letter dated 25th February, 1992 and confirming the findings of the AO, the CIT(A) recorded as under:

> “... This fax message was found during the course of search operations. The other letter purportedly dated 25.2.92 was later produced in assessment proceedings. If this letter had been written at the relevant time this would have been certainly found and seized at the time of search. Such a vital document could not have escaped the attention of the authorized officers. Secondly the letter itself is tailor made to retrieve the damage caused by the seizure of the earlier fax message. Even if the employee had quoted the wrong rate why should he be so apologetic on the very next day? Why should he give the explanation that he had no knowledge of accounts and documents etc? This letter was concocted to merely corroborate the explanation offered by the appellant. This is certainly not the contemporaneous letter and has been

created at a later date. Under the circumstances, there is absolutely no scope for any doubt in the fact that the appellant paid a consideration of Rs.22,55,900/- (1327 sft x Rs.1700) as against the apparent consideration of Rs.13,40,630/-. The AO has rightly made the addition of Rs.8,84,750/- being unexplained payments in the hands of the appellant. The same is confirmed."

4. Against this order, the assessee preferred an appeal before the Tribunal. The Tribunal relying upon the authenticity of the aforesaid letter dated 25th February, 1992 recorded findings as under:

"3.4 We have given our thoughtful consideration to the facts of the case by perusing not only the written arguments as made by the appellant before CIT(A) placed at pages 23-25 of the paper book but also the other documents placed on record. After considering the rival submissions and perusal of the entire material on record, we find that no addition cold be made u/s 69 of the I.T. Act merely on presumption basis because no documentary evidence has been brought on record to show that the appellant had passed some money outside the account books with regard to the purchase of the above flat. Various Benches of the Tribunal have held that without any concrete evidence on the record, no addition could be made on presumptive basis. In our considered opinion, letters dated 24/2/92 and 25/2/92 written by the same person Mr.R. Balaji have to be read together. The mere fact that letter dated 25/2/92 had not been seized during search does not mean that the said letter was merely an afterthought because the AO had not examined Mr.R. Balaji. Further the very flat having been sold for Rs.15,26,150/- during the assessment year 1994-95 and such sale price having been accepted by the Revenue itself lends support to the appellant's case that the flat had been purchased for Rs.13,40,630/- as reflected in the seized account books. On the above facts as found, we delete the addition of Rs.8,84,750/-"

5. It is against this order of the Tribunal that the appeal has been admitted on the following substantial question of law:

> (i) Whether the I.T.A.T. has erred in law in interpreting the provisions of Section 132(4A) by ignoring the relevant facts on record that the FAX message seized during the course of search showed that the investment made in the flat was Rs.22,50,900/- and not Rs.13,40,630/- as shown by the assessee in the regular books of accounts?"

6. Learned counsel for the respondent-assessee submitted before us that the Tribunal rightly deleted the addition made by the AO since no addition could be made under Section 69 of the Act merely on presumption basis. He submitted that no documentary evidence was brought on record by the Department to show that the assessee had passed more money outside the account books with regard to the purchase of the property in question. He urged that no presumption could have been drawn under Section 132(4A) of the Act against the assessee in the absence of any documentary proof in this regard. He also submitted that the letter dated 25th February, 1992 was by the same person, viz., Shri R. Balajee, who had sent the fax message on 24th February, 1992 and both these are to be read together. He submitted that mere fact that the letter dated 25th February, 1992 was not seized during the search does not mean that the said letter was an

afterthought. He also submitted that Shri R. Balajee was a small-time employee and was not aware of the actual transaction and that is what had been clarified by him vide letter dated 25th February, 1992 that in his fax message of 24th February, 1992 the cost of the property in question was wrongly mentioned at the rate of Rs.1,700/- per square feet. He submitted that the same property was sold subsequently for Rs.15,26,150/- during the assessment year 1994-95 at the rate of Rs.1,150/- per square feet and the same was accepted by the Department while passing the order under Section 143(3) of the Act for the assessment year 1994-95. He lastly submitted that his wife had also purchased a property in Bombay and similar addition was made by the Assessing Officer, which was deleted by the Tribunal and had been confirmed by the High Court.

7. The learned counsel for the assessee has relied upon the case of ***P. R. Metrani Vs. CIT,*** 287 ITR 209 and ***CIT Vs. Rajpal Singh Ram Avtar Vs. CIT,*** 288 ITR 498.

8. On the other hand, the learned counsel appearing for the Department submitted that the fax message dated 24th February, 1992 was admittedly sent by an employee of the

assessee and there was a presumption against the assessee as regards the correctness of the contents of this document and since the assessee has failed to rebut that presumption, the said document was admissible under Section 132(4A) of the Act and also the Evidence Act. He further submitted that it was upon the assessee to rebut the presumption regarding the contents of the said fax message. He submitted that the letter dated 25th February, 1992 was nothing but an afterthought and tailor-made document. He also submitted that it was for the assessee to examine his employee, R.Balaji, if at all he was interested to rebut the presumption and in the absence of the same, adverse inference was to be drawn against the assessee. With regard to the contention of the counsel for the assessee regarding the same property having been sold for Rs.15,26,150/- during the assessment year 1994-95 and the acceptance of the same by the Department, it was submitted by the learned counsel that the said transaction is not reliable and does not have any relevance for the present reference. Likewise, he also submitted that the transaction entered into by his wife in respect of property at Bombay is also of no relevance to the facts and circumstances of the present case.

9. We have given our considered thought to the submissions of the learned counsel for the parties. Admittedly, R. Balajee was an employee of the assessee and had sent a fax message on 24th February, 1992 to the assessee. The assessee has been trying to come out of this fax message under the shelter of letter dated 25th February, 1992 purported to have been written by R. Balajee. As noted above, both the AO and CIT(A) have, with cogent reasons, disbelieved the aforesaid letter dated 25th February, 1992. On the other hand, the Tribunal was of the view that mere fact that the said letter dated 25th February, 1992 had not been seized in the search operation does not mean that the said letter was merely an afterthought especially when AO had not examined R. Balajee. To arrive at a correct decision, it would be useful to reproduce the fax message dated 24th February, 1992 and the purported letter dated 25th February, 1992, which read as under:

Fax Dated: 24.02.1992

"Respected Sri Nareshji;

When I met Mr.Kalyanaraman of Mangaltirth Estates last week regarding our proposed office premises -------------.

During your last visit to Madras you had discussed with Mr.Kalyanaraman that we need additional space in Spencer Plaza --------------.

These is 3683 sq. ft. of space available on the 6th floor of Spencer Plaza at Rs.1200 sq. ft. for outright sale. This will cost Rs.44,19,600 (3683 sq. ft. x 1200).

Mr.Kalyana Raman says he can sell our already procured 1327 sq. ft. at Rs.2300/- sft which will fetch Rs.30,52,100/-. This will fetch us Rs.7,96,100/- more. In fact, we have procured 1327 sq. ft. at Rs.1700/- and now the present price is Rs.2300/ sft.

In case we proposed to buy the 6th floor space of 3683 sft we may have to shell out Rs.44,19,600/- and that means we have to pay additional Rs.13,67,500/- (44,19,600-30,52,100). The net effect is that we are buying 2356 sft (3683 ft – 1327) at Rs.13,67,500/- resulting in Rs.580/sft (Rs.12,67,500/ 2356 sft)".

Letter Dated: 25.02.1992

"Respected Shri Nareshji,

Please refer to my earlier fax of yesterday, I regret that in para 4 I refer to our original cost of procurement at Rs.1,700/- However, when I was discussing the advantages of switching the property with Mr.Kalyana Rama, he clarified that our procurement price was Rs.1,000/- as against the present market price of Rs.2,300/-. The gain we will be making is Rs.17,25,000/- and not Rs.7,96,200/- as started in my earlier fax. The proposal now looks even more attractive than I had thought and I would strongly recommend its acceptance.

Sir, I regret my mistake in the earlier fax and this is because I was not working for the company when the space was procured and all accounts, documents are held in Delhi and I did not even have a copy of the same."

10. Having read the fax message and also the letter, we are of the view that the AO and CIT(A) rightly came to the conclusion that the letter dated 25th February, 1992 was nothing but an afterthought and a created document to come out of the rigor of the fax message of 24th February, 1992. Reading of the fax message would clearly demonstrate that it cannot be believed

that R. Balajee was a junior official, newly recruited by the assessee or that he was not aware of the transaction of the properties of the assessee. Reading the fax message leaves no iota of doubt that Mr.Balaji was not only instrumental in the deal of the property but also was authorised by the assessee to negotiate and finalise the deal with Mr.Kalyana Raman. He was also aware of the present market price of the property to be Rs.2,300/- per square feet and had categorically informed the assessee about the profit that was to be made by procuring this property at the rate of Rs.1700/- per square feet. So much so, he also informed the assessee about the availability of another space measuring 3683 square feet at the rate of Rs.1,200/- per square feet on the 6th floor of the building for outright purchase.

11. When we read the purported letter dated 25th February, 1992, it would lead one to outrightly disbelieve the version of the assessee as there could not have been any occasion for R. Balajee to write such a letter on the very next day to the assessee. Since R. Balalji was none but the employee of the assessee, there could not have been any difficulty to procure such a letter at any time after the search and seizure to wriggle out of the fax message.

12. Section 132(4A) of the Act reads as under:

> "132. (4A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed—
>
> (i) that such books of account other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person ;
>
> (ii) that the contents of such books of account and other documents are true ; and
>
> (iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested."

13. The Hon'ble Supreme Court in the case of ***P.R. Metrani*** (*supra*) has elaborated the scheme of Section 132 of the Act by stating that this Section is a Code in itself. It has its own procedure for search, seizure, determination of the point in dispute, the quantum to be retained and also the quantum of tax etc. Sub Section (4A) was inserted by Taxation Law (Amendment) Act, 1975, which permitted the presumption to be raised in the circumstances mentioned therein. Before the insertion of this sub Section (4A), the onus of proving that the books of account, other documents, money bullion, jewellery etc. found in possession or control of a person in the course of

a search belonged to that person was on the Department. This sub-section enables a searching authority to raise a rebuttable presumption that such books of account, money, bullion etc. belonged to such person; that the contents of such books of account and other documents are true, and, that the signatures and every other part of such books of account and other documents are signed by such person or are in the handwriting of that particular person.

14. In the case of ***Rajpal Singh Ram Avtar*** (*supra*), the Allahabad High Court observed that a paper was found and seized from the debris in the shop premises of the assessee. The AO was of the view that the entries in the paper denoted a principal sum of Rs.1,35,000/- as advance to some person during the financial year 1982-83 and on which an interest of Rs.14,645/- was earned. Accordingly, he added both these amounts to the income of the assessee. The Tribunal set aside the addition taking note of the presumption deemed under Section 132(4A) of the Act and held that the assessee had rebutted the presumption by giving plausible explanation that neither the partners nor their employees knew English and they could not read or write in English and further the said paper was found from the debris in the shop premises and might have been left by someone and it did not belong to

them. He further recorded that when the partners and employees had made a statement that they do not know English, no attempt was made by the AO to cross-examine the partners or the employees to extract the truth and, therefore, the explanation offered by them was to be believed. It was, in these circumstances that the High Court held that the approach of the Tribunal was in accordance with law and could not be interfered with.

15. The facts of the case of ***Mr. Rajpal Singh Ram Avtar*** (*supra*) are distinguishable from the present case. In the said case, the assessee was able to rebut the presumption by giving plausible explanation. However, in the present case, no effort seems to have been made by the assessee to rebut the presumption. R.Balajee was none but his own employee and could have been examined so as to enable the AO to extract the truth. It was on the mis-conception of interpretation of Section 132(4A) of the Act that the Tribunal held that the AO ought to have examined R. Balaji. Once there was a presumption raised on the seizure of the fax message, it was upon the assessee to rebut the presumption by offering plausible explanation. As we have noted above, merely production of letter dated 25th February, 1992 purported to have been written by R. Balajee would not be enough to rebut

the presumption. We fail to understand as to how the AO could have brought evidence to show that the assessee had passed some money outside the account books with regard to the purchase of property in question. We are also of the view that if such a letter dated 25th February, 1992 was in existence at the time of raid, the same could have also been seized or in any case been explained by the assessee to the searching party or the Department at the earliest. It was more than two years later and that too on being confronted by Assessing Officer that the assessee vide reply dated 28.12.1994 came out with this letter of 25th February, 1992 and tried to explain as noted above in para (2).

16. Learned counsel for the assessee also submitted that the same property was sold subsequently for Rs.15,26,150/- at the rate of Rs.1,150/- per square feet during the assessment year 1994-95 and the same was accepted by the Department. It appears that the Tribunal has not cared to examine this aspect of the matter minutely. We have seen copies of the two deeds of assignment dated 18th February, 1994, which would show that the assessee had entered into an agreement with the builder on 8th September, 1990 to buy an apartment F-15B admeasuring 663 square feet and on 28th November, 1990 F-15A admeasuring 664 square feet on the first floor of

the building “Spencer Plaza” and vide these deeds of assignment, the interest in the said two apartments, which were under construction, was transferred to the assignee, Mr.Syed Yassin, at the rate of Rs.1,150/- per square feet on 18th February, 1994. These are the properties which were agreed to be purchased by the assessee from the builder in September and November, 1990 and were sought to be transferred to the assignee on 18th February, 1994. The property, which finds mentioned in the aforesaid fax message, was sought to be acquired in February 1992. If that was so, *prima facie*, it appears that the properties which were sought to be transferred by the aforesaid deeds of assignment and which appeared to be different from the property which was sought to be acquired in February 1992. In any case, even if the Department has accepted the transaction entered into by those deeds of assignment, that is a different matter and not relevant to the present controversy. The contention of the learned counsel for assessee that other property was available in the same building @Rs.1200/- per sq. feet, is untenable in view of the noted fact from the fax message that it was on the sixth floor, whereas the property in question is on the first floor. There cannot be any dispute that the prices on first floor are certainly more than on higher floors.

17. Similarly, if the wife of the respondent-assessee has acquired some property in Bombay, and addition made by the AO was deleted by the Tribunal is also of no relevance to the present case. That was entirely on different set of facts.

18. At last it was also submitted by the learned counsel for assessee that in case addition is maintained, the same may be spread over for assessment year 1991-92 & 1992-93 during which purchase price had been paid. In this regard, it may suffice to say on our part that we do not think it appropriate to comment or go into this aspect in the present appeal proceedings. The assessee may take this plea, if so advised, in some other appropriate proceedings before the concerned authority.

19. In view of the above discussion, we are of the view that the Tribunal has erred in law in interpreting the provisions of Section 132(4A). We accordingly answer the question in the affirmative, in favour of the appellant-Department and against the respondent-assessee. The appeal is disposed of accordingly.

M.L.MEHTA
(JUDGE)

A.K. SIKRI
(JUDGE)

FEBRUARY 07, 2011
'Dev'