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

RESERVED ON: 08.10.2012
DECIDED ON: 05.11.2012

\+ **ITA 776/2011**

THE COMMISSIONER OF INCOME TAX DELHI-II

..... Appellant

Through: Sh. Sanjeev Sabharwal, Sr. Standing Counsel with Sh. Puneet Gupta, Jr. Standing Counsel and Ms. Gayatri, Advocate.

versus

KHOOBSURAT RESORTS PVT. LTD. ..... Respondent

Through: Sh. Vivek Kohli with Sh. Shwetank Tripathi, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

% By this appeal the Revenue challenges an order of the Income Tax Appellate Tribunal (ITAT) dated 12.11.2010 in ITA 3244/Del/2010. The question of law sought to be urged is the correctness of the impugned order in

(i) upholding the deletion of Rs.12,22,000/-, which had been directed to be added back to the income of the assessee, by the A.O. on account of difference between the circle rate and the purchase price of immoveable properties, declared by the assessee, and

(ii) the direction to uphold the setting aside of the addition of Rs.45,87,350/- originally made by the A.O., under Section 68 of the Income Tax Act.

2. The assessee, a private limited company incorporated on 04.01.1992 filed its return of income for assessment year 2007-2008, on 30.01.2008 declaring NIL income after adjusting unabsorbed depreciation of Rs.3,15,666/-. The assessment was taken up under Section 143 (3) by the A.O. The assessee had purchased during the period in consideration six properties. The declared value of the property at Gram Mangupura, Moradabad was Rs.20,00,000/- whereas stamp duty on a value of Rs.20,34,000/- was paid for that acquisition. Similarly for other three properties in the same village the declared consideration was Rs.20.10 lakhs, Rs.9.75 lakhs and Rs.15 lakhs whereas stamp duty was paid on Rs.20.05 lakhs, Rs.9.78 Lakhs and Rs.15.75 lakhs each respectively. For the last item of property at Gram Manoharpur, Moradabad for a declared consideration of Rs.4 lakhs, stamp duty was paid on Rs.9.70 lakhs. In view of these facts the A.O. affirmed the opinion that the market value declared by the assessee for the purpose of stamp duty was more than the consideration alleged by it. The A.O. accordingly, directed adding back of the difference between the consideration mentioned in the sale deed and the consideration for the purpose of stamp duty i.e. Rs.12,22,000/-.

3. The A.O. in his order noticed that the assessee had declared payment of Rs.45,87,350/- as consideration paid on its behalf by one Bright Star International. He therefore asked the assessee to furnish the balance-sheet, profit and loss account etc. of M/s Bright Star International. The assessee by

its letter dated 29.12.2009 stated that the necessary details had been furnished through letters dated 10.08.2009 and 18.12.2009. These were copies of accounts of M/s Bright Star International and Mr. Waseem Ahmad Khan (A Director of the assessee and proprietor of the said concern i.e. Bright Star International) in the books of the assessee. The A.O. concluded that the genuineness of the source of funds made available to the assessee had not been proved and therefore, directed the addition of Rs.45,87,350/- holding as follows :

> *"The details filed by the assessee on 18.08.2009 and 18.12.2009 were nothing but copy of account of M/s. Bright Star International and Mr. Waseem Ahmad Khan in the books of M/s. Khoobsurat Resort Pvt. Ltd. respectively and did not prove the genuineness of sources of funds in respect of land purchase in Moradabad. To know the genuineness of sources of funds, the assessee was specifically asked to furnish copy of balance sheet and profit and loss account of M/s. Bright Star International but the assessee could not furnished the same. It will be worthwhile to mention that M/s. Bright Star International is a proprietorship concern of Mr. Waseem Ahmad Khan who is one of the directors of the assessee company and hence there was no hindrance to provide the copy of balance sheet and profit and loss account of M/s. Bright Star International. As the assessee had failed to prove the genuineness of sources of funds of M/s. Bright Star International amounting to Rs. 45,87,350/- in respect of land purchase of therefore this amount of Rs.45,87,350/- which has been paid by M/s. Bright Star International on behalf of the assessee is added to the income of the assessee."*

4. Feeling aggrieved by the directions of the A.O. to add back the said two amounts, the assessee appealed to the Commissioner (Appeals). The direction to add back Rs.12.22 lakhs on account of difference in

consideration due to the higher valuation for the purpose of stamp duty, was set aside on the following reasoning by the Commissioner (Appeals):

> *"He further points out that the stamp duty is charged by the local authority/sub registrar based on broad parameters fixed by the state government for a particular area from time to time. However, such parameters do not necessarily suggest that any amount over and above the consideration disclosed in the sale deeds has been paid. To buttress his arguments, the Ld. Counsel has invited my attention to the transactions made by the appellant during the year under consideration and pointed out that in some cases the value disclosed in sale deeds is more than the value determined by the Registering Authority. Therefore, the Ld. Counsel submits that the addition in question has been made by the Ld. AO without any credible material and the same needs to be deleted."*

5. As far as the amount of Rs.45,87,350/- was concerned, the assessee argued that Mr. Waseem Ahmad Khan, one of its directors, had paid that amount to the sellers of the land. It was also urged that during the assessment proceedings that confirmation from Mr. Waseem Ahmed Khan, the lender, was forthcoming and that he had signed the balance-sheet of the assessee. The CIT (Appeals) also noted that

> "*the assessee also filed certified copies of his ITR, ledger accounts in proprietorship firms namely M/s S.S. Metal Recycling Industries and M/s Bright Star International and also the copy of bank account of M/s S.S. Metal Recycling Industries from where the payments were made…."*

6. On these basis the Appellate Commissioner held that the such confirmation and further details such as PAN, address and copy of income tax return as well as the disclosure of source of investment of the lender, reveal that the assessee has discharged its onus to prove the genuineness of

the loans. The CIT (Appeals) directed the deletion of amounts on the basis of the following reasons:

> *"3.8 As stated earlier, Shri Waseem Ahmad Khan has mainly arranged purchase of agriculture land for and on behalf of the appellant company and made a total payment of Rs.1,84,99,400/- towards sale consideration and payment of stamp duty etc. A detailed copy of account duly confirmed by the authorized signatory has been filed by the appellant company before the AO. However, while the AO has not raised any objections with respect to the payments made by Shri Waseem Ahmad Khan by pay orders and cheques, he has chosen to disbelieve pay made by him in case. Thus, there is situation where the AO is trying to accept part of the transactions made by Shri Waseem Ahmad Khan on behalf of the appellant company and to ignore the remaining transactions merely because the same have been made in cash….."*

It was also held that:

> *"In my view, even if the cash payments made by Shri Waseem Ahmad Khan were to be held unexplained no addition was liable to be made in the hands of the appellant company in the present fact situation. If the AO had any intentions to find out the source of cash payments in the hands of Shri Waseem Ahmad Khan, he should have made due inquiries from him and taken necessary action against him as per law. Once the transactions have been confirmed by the creditor, Shri Waseem Ahmad Khan in this case and all supporting documents including the source of cash payments made for purchase of agriculture land have been filed by him, no addition was called for in the hands of the appellant company."*

7. The Revenue was aggrieved by the order of the CIT (Appeals) and approached the ITAT. That Tribunal affirmed the order of the CIT (Appeals) noticing that out of the five land purchases the difference which

could be considered were only in respect of two properties and that in the absence of any other evidence, the A.O. could not have concluded that the assessee had paid more than what was shown in the sale deed and its books of accounts. The Tribunal also noticed that Section 50C had been introduced by the Finance Act, 2002 w.e.f. 01.04.2003 and it acted on a limited presumption to work out capital gains in the hands of the seller. So far as the addition of Rs.45,87,350/- was concerned the Tribunal also took into account the fact that all the necessary documents including confirmation PAN and full complete address, copy of return and sources of investment made by Shri Waseem Ahmad Khan had been made available to the Assessing Officer. In these circumstances, the question of adding back amounts under Section 68 as unexplained source of income did not arise.

8. Counsel for the revenue argued that as far as the findings with respect to value of the immovable property purchased is concerned, the AO was justified in determining the true market on the basis of the higher valuation disclosed by the assessee, while paying stamp duty for the two properties. In the two cases selected by the AO, there was and there could be no dispute that the assessee chose a higher cost (as compared to the cost declared in the conveyance or sale deeds for the two properties) and paid stamp duty on such higher value. Therefore, the assessee had a primary duty to explain how that value did not amount to the real price. It was submitted that Section 50C did not apply to the circumstances of the case, and the revenue was free to rely on the facts of each case, and conclude, whether or not the real cost of property is more than what is declared in the sale deeds in question.

9. It was next argued that the CIT (A) and the Tribunal fell into error in not noticing that the burden of proving the source of an amount of Rs. 45 lakhs, paid for acquiring properties, was with the assessee, who did not discharge it. Mere furnishing of address or some documents could not amount to discharging such a duty; in the facts of the case, the addition made by the AO was justified.

10. Counsel for the assessee contended that the provision of Section 50-C was the only part of the Act, which enabled the income tax authorities to raise a presumption in the case of alleged cases of suppression of the true value of property. That provision applied in the case of valuation of capital gains; the deliberate and conscious omission to enact a similar presumption in the hands of a purchaser of the property, meant that the revenue was under a greater burden to show that actual suppression of the value, and concealment of income had taken place. Counsel also relied on the decision of the Madras High Court, in *K.R.Palanisamy v. Union of India*, [2008] 306 ITR 61 (Mad) as well as the judgment of the Supreme Court, in *K.P. Varghese v Income-tax Officer* [1981] 131 ITR 597 (SC).

11. As regards the second question, it was argued by the assesse, that all the necessary documents, such as PAN particulars, ledger extracts, income tax returns, etc, of the individual and his proprietary concern, who paid the cost of the properties, was disclosed. The AO was fully aware of this, despite which, without further investigation or attempting to show if and how that money belonged to the assessee, directed addition of the amounts under Section 68. The CIT (A) and the Tribunal acted within jurisdiction,

and after taking into consideration all material facts; their orders could not be said to be unreasonable, or calling for interference.

Analysis and conclusions

Question No.1

12. As far as the first question is concerned, this Court notices that with the amendment to the Act, and insertion of Section 50-C, a presumption can be drawn that property was sold for a higher value for determining capital gains, in case of the valuation indicated by the assessee to the stamp authorities, being higher than the consideration disclosed in the sale deed or conveyancing instrument. That provision reads as follows:

> ***"50C. Special provision for full value of consideration in certain cases,*** *–*
>
> *(1) Where the consideration received o accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government (hereinafter in this section referred to as the "stamp valuation authority") for the purpose of payment' of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.*
>
> *(2) Without prejudice to the provisions of sub-section (1), where -*
>
> *(a) the assessee claimed before any Assessing Officer that the value adopted or assessed by the stamp valuation authority under subsection (1) exceeds the fair market value of the property as on the date of transfer;*

(b) the value so adopted or assessed by the stamp valuation authority under sub-section (i) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (30, (4), (5) and (6) of section 16A, clause (i) of sub-section {1) and subsections (6) and (7) of section 23A sub-section (5) of section 24, section 34 A A. section 35 and section 37 of the Wealth-tax, Act, 1967 {27 of I957) shall. with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under subsection (1) of section 16A of that Act.

Explanation – For the purposes of this section "Valuation Officer" shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub-section (2) exceeds the value adopted or assessed by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed by such authority shall be taken as the full value of the consideration received on accruing as a result of the transfer."

13. It is apparent from the above provision that a presumption that the sale price is higher can be drawn, if the circumstances spelt out in Section 50-C are fulfilled. This provision was challenged before the Madras High Court, in *K.R.Palanisamy v. Union of India*, [2008] 306 ITR 61 (Mad). The Court repelled the challenge, but nevertheless held that:

"Sub-sections (2) and (3) of Section 50C provides further safeguard to the assessee, in the sense that if the assessee claims before the assessing officer that the value adopted by the stamp duty authorities exceeds the fair market value and the value so adopted or assessed for the purpose of stamp duty has

not been disputed in any appeal or revision before any authority, the Assessing Officer could refer the valuation of the capital asset to the Departmental Valuation Officer. On such reference, if the value determined by the Valuation Officer is more than the value adopted or assessed by the stamp duty authority, the Assessing Officer shall adopt the market value as determined by the Stamp duty authority. Thus, a complete foolproof safeguard has been given to the assessee to establish before the authorities concerned the real value. Thus, what is stated in Section 50C as a real value cannot be regarded as a notional or artificial value and such real value is determinable only after hearing the assessee as per the statutory provisions stated supra. There is no indication either in the provisions of Section 50C of Income-tax Act or Section 47A of the Stamp Act or rules made thereunder about the adoption of the guideline value. Hence, the contention that the Section 50C is arbitrary and violative of Article 14 cannot be accepted."

The fiction created by virtue of Section 50C applies only in respect of escaped income of a seller, for the determination of the true capital gain. Such a special provision has to be construed narrowly, having regard to the subject matter, and the extension of the fiction or presumption in respect of any matter not covered by it is unauthorized by the law. There is a body of judicial authority on this aspect (*Garden Silk Mills Ltd v Union of India* AIR 2000 SC 33; *Union of India v Sampat Raj Dugar* AIR 1992 SC 1417). The principle was propounded pithily by the Supreme Court in *Bengal Immunity Co. Ltd v State of Bihar* AIR 1955 SC 661 as follows:

"a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field.."

14. This Court also recollects the decision in *K.P. Varghese v Income-tax Officer* [1981] 131 ITR 597 (SC) where it was held (in the context of amendment to Section 52 and insertion of Sub-section (2)) that:

> *"…This condition of 15% or more difference is merely intended to be a safeguard against the undue hardship which would be occasioned to the assessee if the inflexible rule of thumb enacted in sub-section (2) were applied in marginal cases and it has nothing to do with the question of burden of proof, for, the burden of establishing that there is an understatement of the consideration in respect of the transfer always rests on the revenue. The postulate underlying sub-section (2) is that the difference between one honest valuation and another may range up to 15% and that constitutes the class of marginal cases which are taken out of the purview of sub-section (2) in order to avoid hardship to the assessee.*
>
> *It is, therefore, clear that sub-section (2) cannot be invoked by the revenue unless there is understatement of the consideration in respect of the transfer and the burden of showing that there is such understatement is on the revenue. Once it is established by the revenue that the consideration for the transfer has been understated or, to put it differently, the consideration actually received by the assessee is more than what is declared or disclosed by him, sub-section (2) is immediately attracted, subject of course to the fulfilment of the condition of 15% or more difference, and the revenue is then not required to show what is the precise extent of the understatement or in other words, what is the consideration actually received by the assessee. That would in most cases be difficult, if not impossible, to show and hence sub-section (2) relieves the revenue of all burden of proof regarding the extent of understatement or concealment and provides a statutory measure of the consideration received in respect of the transfer. It does not create any fictional receipt. It does not deem as receipt something which is not in fact received. It merely provides a statutory best judgment assessment of the consideration actually received by the assessee and brings to tax capital gains on the footing that the fair market value of the*

capital asset represents the actual consideration received by the assessee as against the consideration untruly declared or disclosed by him. This approach in the construction of sub-section (2) falls in line with the scheme of the provisions relating to tax on capital gains. It may be noted that section 52 is not a charging section but is a computation section. It has to be read along with section 48 which provides the mode of computation and under which the starting point of computation is "the full value of the consideration received or accruing". What in fact never accrued or was never received cannot be computed as capital gains under section 48. Therefore, sub-section (2) cannot be construed as bringing within the computation of capital gains an amount which, by no stretch of imagination, can be said to have accrued to the assessee or been received by him and it must be confined to cases where the actual consideration received for the transfer is understated and since in such cases it is very difficult, if not impossible, to determine and prove the exact quantum of the suppressed consideration, sub-section (2) provides the statutory measure for determining the consideration actually received by the assessee and permits the revenue to take the fair market value of the capital asset as the full value of the consideration received in respect of the transfer."

15. This Court is of the opinion that the express provision of Section 50-C enabling the revenue to treat the value declared by an assessee for payment of stamp duty, *ipso facto,* cannot be a legitimate ground for concluding that there was undervaluation, in the acquisition of immovable property. If Parliamentary intention was to enable such a finding, a provision akin to Section 50-C would have been included in the statute book, to assess income on the basis of a similar fiction in the case of the assessee who acquires such an asset. No doubt, the declaration of a higher cost for acquisition for stamp duty might be the starting point for an inquiry in that regard; that inquiry might extend to analyzing sale or transfer deeds executed in respect of

similar or neighbouring properties, contemporaneously at the time of the transaction. Yet, the finding cannot start and conclude with the fact that such stamp duty value or basis is higher than the consideration mentioned in the deed. The compulsion for such higher value, is the mandate of the Stamp Act, and provisions which levy stamp duty at pre-determined or notified dates. In the present case, the revenue did not rely on any objective fact or circumstances; consequently, the Court holds that there is no infirmity in the approach of the lower authorities and the Tribunal, granting relief to the assesse. This question is accordingly answered in favour of the assessee, and against the revenue.

Question No. 2

16. As far as this question is concerned, the Court notices that the findings of the CIT(A) and the Tribunal are concurrent, and the question is purely factual, i.e. whether the assessee had disclosed relevant particulars in respect of the source of funds. The record would reveal that the PAN number and material particulars of the Director (of the assessee) and his proprietorship concern, was made available; even the Income Tax Returns concerned, were filed. The CIT (A) scrutinized this aspect in detail, after considering the record, and held that the assessee had discharged its onus of proving that the funds were received, and revealed particulars of the source. Therefore, the addition made by the AO was held not justified. This finding of fact was affirmed by the Tribunal. This court finds no unreasonableness in regard to such findings, as to call for interference under Section 260-A of the Act. This question too, therefore, is answered in favour of the assessee and against the revenue.

17. As a result of the above discussion, it is held that the appeal is devoid of merit; it is dismissed, without any order on costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

NOVEMBER 05, 2012