THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.07.2014

\+ **ITA 701/2012**

COMMISSIONER OF INCOME TAX ..... Appellant

versus

RACHNA AGARWAL ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr N.P. Saini, Sr. St. Counsel with
Mr Nitin, Jr. St. Counsel.

For the Respondent: Ms Kavita Jha.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

S. RAVINDRA BHAT, J (ORAL)

1. The revenue is aggrieved by the order of the Income Tax Appellate Tribunal dated 02.05.2012 which upheld the order of the CIT (Appeals). That order had deleted the addition of ₹74 lakhs sought to be deduced by the Assessing Officer as unexplained investment.

2. It is urged by the revenue that in the circumstances of the case, the AO could not be held to have fallen into error in valuing the property at ₹1.25 crores and consequently bringing the amount of ₹74 lakhs to tax.

3. Brief facts of the case are that upon the assessee filing the return for AY 2007-08, pursuant to search and seizure under Section 132 of the Income Tax Act, 1961 in respect of the Gopal Zarda Group including the

assessee on 15.01.2009, proceedings under Section 153A of the Act were initiated. The case of the assessee was centralized by an order and notice was issued under Section 153A of the Act on 30.07.2009 requiring her to file her return. The assessee responded to this and filed a return declaring income of ₹12,76,890/-. The original return in this case was filed on 05.11.2008 declaring income of ₹12,62,699/- . The difference was on account of interest income from bank which was declared at ₹14,846/-; subsequently it was disclosed as ₹29,035/-.

4. The Assessing Officer was of the opinion that property bearing No. 201 to 210, 15, Community Centre, Karkardooma, Delhi-92 shown to have been purchased for a consideration of ₹51 lakhs was not correctly valued. This was because it was let out to one M/s CRR Capital Services Ltd. for a monthly rent of ₹3,10,114/-. The assessee was asked to explain why the purchase price of the property be not determined on the basis of return on investment method and the difference be not treated as unexplained investment. Her response was that the property was acquired for the consideration shown in the sale deed. No other document was found to reflect the payment over and above the consideration disclosed to the authorities. During the course of the assessment, the AO referred the matter for valuation of the property under Section 142(A) of the IT Act. Apparently, the report was not available at the time of completion of assessment. Consequently, the AO estimated the purchase consideration of ₹1.25 crores and added ₹74 lacs as investment from undisclosed sources and sought to tax the same as unexplained investment. The assessee successfully appealed to the CIT (A). Aggrieved, the Revenue preferred an

appeal to the Tribunal which by the impugned order, rejected it.

5. The learned counsel for the Revenue urged that the AO's order could not be faulted under the circumstances because he adopted an reasonable method for arriving at the value of the property. Explaining this, learned counsel submitted that the return of ₹3,10,114/- per month as rent was disproportionate and excessive having regard to the declared cost of acquisition of the property and therefore the adoption of the return on capital method in these circumstances was reasonable. The learned counsel submitted that the AO had no choice because the assessee did not cooperate. It was also submitted that DVO's report subsequently furnished clearly shows that the assessee did not cooperate and care to respond to notices which compelled him to state that he could not complete the valuation exercise. The learned counsel also highlighted the fact that CIT (A) had accepted the assessee's contention even without calling for a remand report.

6. The learned counsel for the respondent submitted that whilst the AO could possibly have entertained a suspicion, that by itself could not have led to adoption of the return on capital method without a finding based upon materials that the cost of acquisition of the property was undervalued. The learned counsel in this regard relied upon the judgment of this Court in ***Commissioner of Income Tax vs. Agile Properties (P.) Ltd*.: (2014) 45 taxmann.com 512 (Delhi**). She also relied upon ***CIT vs. Dinesh Jain HUF***: **(2013) 352 ITR 629**.

7. From the above discussion, it is apparent that what excited the AO's suspicion was that as against the cost of acquisition of ₹51 lakhs or so, the

assessee declared a monthly rent of ₹3,10,114/- for the premises. This is no doubt unusual and the AO's suspicion was perhaps in the circumstances, justified. However, that does not validate the sequitur or the sequence of events which followed. Whilst, the AO referred the matter to DVO and could have relied upon an adverse report after putting it in a manner known to law to the respondent, what is evident is that the AO proceed to add ₹74 lakhs without the benefit of any scientific or reasonable determination as to the value. The fact that the assessee did not cooperate would not absolve the AO from adopting some methodology in arriving at the market value which according to him had not been disclosed by the assessee. The task of the DVO in the circumstances became crucial; he could not have indulged an arm chair exercise by merely issuing notices to the assessee. He could have possibly visited the premises as the address was known and gathered information of the market value at the time of the inspection or even at the time of the acquisition of the property not only by the assessee but by other contemporaneous transactions in properties situated in the vicinity; he could have gathered information about the prevailing circle rate as on the date of acquisition as well as other relevant materials. The DVO's lack of information or inputs only compounded the error in the present case.

8. In ***Dinesh Jain*** *(supra)* this Court observed *inter alia* as follows:-

> *"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."

9. In the present case, there was no basis for the AO to determine that the true value of the property was ₹1.25 crores, by adopting the return on capital method. The AO was under a duty first to ascertain what was according to him the true cost of the property. Not having done so, that error could not have been compounded by adopting a completely different methodology without any positive finding as to the cost of acquisition. The following conclusions of the CIT (A) extracted below, therefore, could not be faulted with:

"On a consideration of the above facts and the legal position as emerging from the decisions relied upon by the

appellant it is seen that the addition made for ₹74 lacs is purely based on estimate and conjecture and there is no substance in the estimate made by the AO, who in any case is not authorized to make any estimate under the provisions of section 142(2A) of the Income-tax Act. Moreover, section 69/69B are deeming provisions and it is trite law that deeming provisions are to be strictly interpreted. AS there is no invoke section 69/69B therefore for this reason too the addition made for ₹74 lacs is not sustainable in law. Accordingly, the Assessing Officer is directed to delete the addition made for ₹74 lacs on account of unaccounted investment made by the assessee out of undisclosed sources of income."

10. For the forgoing reasons, this Court finds that there is no substantial question of law requiring determination in the present appeal. The same is consequently dismissed.

S. RAVINDRA BHAT, J

VIBHU BAKHRU, J

JULY 09, 2014
MK/pkv