

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

INCOME TAX APPEAL NO.2657 OF 2009

The Commissioner of Income Tax-13 ..Appellant.

Vs.

M/s. J. Gala Builders ..Respondent.

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Ms. Suchitra Kamble for the Appellant.

Mr. F.V. Irani with Mr. Atul K. Jasani for the Respondent.

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**CORAM : DR.D.Y.CHANDRACHUD &
J.P.DEVADHAR, JJ.**

15 June 2010.

P.C. :

1. In this appeal by the Revenue under Section 260-A of the Income Tax Act, 1961 the following substantial question of law would arise :

“a) Whether on the facts and circumstance of the case and in law, the ITAT was right in estimating the on-money earned by the assessee at Rs.5 lacs only without appreciating the fact that the partner of the assessee firm admitted Rs.1 crore during the course of survey u/s. 133 A on 18.11.2002 to cover up the discrepancy in his accounts;”

2. The appeal is admitted on the aforesaid question and is taken up for hearing by consent.

3. The assessee is a partnership firm engaged in the business of builders and developers and was in the process of carrying out a project involving the construction of a multi storeyed building. The dispute in the present case arises out of Assessment Year 2003-04. A survey under Section 133-A was carried out at the office premises of the assessee on 18 November 2002, during the course of which a diary was impounded at the administrative and sales office of the assessee. The statement of one of the partners of the firm, Mr. Bharat Gala was recorded on 18 November 2002. During the course of his statement, the partner furnished the following answers with reference to the contents of the diary :

“I have gone through the contents of the diary. This diary contains the details of unaccounted cash receipts received by my firm during the current year. The cash receipts are mainly against the advance of flat. The expenses against this has all been included in the work in progress and these cash receipts represent my unaccounted profit for the current year. Page No.1 contains and remarks April 2002 onwards. The next page i.e. page no.2 to 7 contains the date and amount of cash receipts for the 1st entry on page 2 is of 05.04.2002 amount of Rs.5,00,000/- is written as follows – 5000,00/- in this figure the coma(,) is to be ignored and the actual amount is Rs.5,00,000/-. I

have totaled the cash receipts from page No.2 to 7 and the cash receipts are amounting to Rs.92.01 lacs. The code written against the figure indicate the persons making the payment. This could be any of the flat owner or the Brokers. The transactions have been completed and unable to recollect any of the codes. Considering the cash receipts of Rs.92.01 lacs as admitted by me above and to cover up any discrepancy in my account, I hereby offer an additional income of Rs.1 crore (Rs.1,00,00,000/- for the current year ending on 31.03.2003 relevant to A.Y. 2003-04 in the hands of the firm.”

4. From the statement therefore it appears that the partner of the assessee stated that the amounts which were mentioned in the diary represented unaccounted cash receipts totally amounting to Rs. 92.01 lacs as advance payments for the flats. Mr. Gala offered an additional income of Rs. 1 Crore for Assessment Year 2003-04. The Assessing Officer noted that thereafter the assessee paid advance tax in the amount of Rs.15 lacs on 31 December, 2002, 28 January 2003 and 3 March 2003 out of Rs.36.5 lacs payable on an additional income of Rs.1 Crore disclosed by the assessee during the course of the survey. Since the assessee did not file a return of income upto 12 January 2004 a notice was issued under Section 142(1) on that date

followed by another notice dated 12 January 2005. Following the notice the assessee filed its return of income on 14 January 2005 together with a tax audit report under Section 44AB.

5. After the lapse of a period of over two years, by a letter dated 25 January 2005 the assessee's representative stated that the notings in the diary were not acceptable and that the statement recorded during the course of the survey could not form the basis of an adverse inference. Subsequently by a letter dated 18 March 2005 the assessee stated that the rough notings contained in the diary which contained some dates and some alphabets such as JS, SMC, JD, PT, SGT, KCS and VAM were of no consequence and that no flats have been sold on any of the dates mentioned in the diary. According to the assessee the notings did not represent the name of any flat purchaser. The Assessing Officer relied on the statement made by the assessee during the course of the survey and was of the view that the parties named in the notings were likely to be investors and benami flat holders. Though their names were no more in the balance sheet,

this exercise according to the Assessing Officer was done within the two years that elapsed after the survey till the filing of the return of income. The Assessing Officer noted that the assessee had sold flats after the survey proceedings without maintaining any uniformity in the rates at which sales took place in the same project and that there was an indication of an involvement of unaccounted money by the assessee. An addition was made of an amount of Rs.1 Crore by the Assessing Officer.

6. In appeal the Commissioner (Appeals) estimated the “on money” earned by the assessee during the period at Rs.5 lacs and consequently ordered a deletion of the addition of Rs.95 lacs made by the Assessing Officer. The order of the Commissioner (Appeals) has been confirmed by the Tribunal. Both the Commissioner and the Tribunal noted that though there were 28 diary entries, the assessee had as a matter of fact sold only five flats since 1 April 2002 until the date of the survey. The Commissioner observed that it was unlikely that a purchaser would pay cash in advance prior to the actual

execution of the deed. The plea of the assessee that it had not sold any flat to anybody having initials mentioned in the diary could not be fully disbelieved but, on the other hand it could not be accepted fully because the assessee had not explained how the coded notings were made. According to the Commissioner, the assessee would have received “on money” in respect of the five buyers to whom flats were sold between 1 April and 18 November 2002. The Commissioner rejected the case of the assessee that the statement that was recorded at the time of the survey action was under pressure and noted that the answers of the assessee were consistent. However, the Commissioner was of the view that if the amounts mentioned in the declaration made by the assessee were taken into consideration the cost of each flat would be astronomical and hence the declaration of Rs.1 Crore as the unaccounted income could not be regarded as the real income for the period. On this foundation the addition was restricted to an amount of Rs.5 lacs while the balance of Rs.95 lacs came to be deleted. This order has been confirmed by the Tribunal.

7. On behalf of the Revenue it has been urged by the learned counsel that the Commissioner (Appeals) has proceeded to reduce the addition from Rs.1 Crore to Rs.5 lacs purely on the basis of surmise and without displacing the findings that were arrived at in the order of the Assessing Officer. Insofar as the order of the Tribunal is concerned, learned counsel submitted that it has only reiterated the findings of the Commissioner (Appeals) without bestowing an independent consideration to the matter. Counsel submitted that the statement which was recorded on 18 November 2002 was not retracted and it was over two years thereafter that the assessee on 25 January 2005 and 18 March 2005 sought to dispute the correctness of the notings contained in the diary.

8. In the circumstances, it is urged that the interference of this Court in the appellate jurisdiction is warranted since both the Commissioner and the Tribunal have ignored important aspects of the documentary material which would have a bearing on the issue.

9. On the other hand, it was urged on behalf of the assessee that whereas the Revenue relies on the statement of its partner, recorded during the course of the survey action on 18 November 2002, several factors some of which have been adverted to by the Commissioner and the Tribunal would sustain the conclusion that the statement could not have been acted upon. These circumstances which were pressed in aid were (i) no unaccounted cash or valuables whatsoever were found at the time of the survey; (ii) Only five flats were sold between 1 April and 18 November 2002, the date of the survey; (iii) Only ten flats were sold during the entire year between 1 April 2002 and 31 March 2003; (iv) Out of the five flats sold prior to the survey, four were sold at rates exceeding those in the stamp duty ready reckoner and (v) If the sum of Rs.1 Crore were added the rate of gross profit would be unrealistic.

10. During the course of the survey action the partner of the assessee, in the course of his statement dated 18 November 2002 explained that 28 notings in the diary which was impounded during

the course of the survey reflected cash receipts towards advance payments for the flats in the project. An amount of Rs.92.01 lacs was stated to be the cash receipts reflected in the diary and a further income of Rs.1 Crore was offered to tax for Assessment Year 2003-04. The Assessing Officer noted that as a matter of fact an amount of Rs. 15 lacs was paid towards advance tax in three installments. The dates on which these payments were made would not prima facie appear to tally with the dates on which payments of the advance tax in respect of the regular income have to be made under the law. Be that as it may, the Assessing Officer, during the course of his findings drew the inference that the parties named in the diary were likely to be investors and benami flat holders whose names were no longer borne on the balance sheet and that this exercise could well have been done in the two years that had elapsed between the making of the statement and the filing of the return. The Assessing Officer also noted that the assessee had not maintained uniformity in the rates at which the flats were sold and that in the same project flats had been sold at rates between Rs.3,000/- to Rs.4,000/- per sq. ft. The

Commissioner (Appeals), while assessing the findings of the Assessing Officer was under a bounden obligation to deal with those findings and to consider as to whether the statement made by the assessee would stand displaced by contemporaneous material available on the record. The statement made during the course of the survey could undoubtedly be displaced upon the assessee pointing out the intrinsic lack of credibility in the statement and of the notings in the diary which was impounded during the course of the survey. The Commissioner rejected the contention of the assessee that the statement was recorded under pressure. Having said so, the Commissioner has proceeded to surmise that a payment towards on - money would not be made by a purchaser in advance and that if the amount disclosed by the assessee in the declaration was taken into consideration, then the cost of each flat will be “having astronomical figure which will be almost unbelievable”. The factual basis on which this finding has been arrived at is not disclosed in the order. In our view, the Commissioner (Appeals) ought to have devoted a careful consideration to all the diverse aspects of the case particularly having

regard to the circumstance that the statement which was made by the assessee during the course of the survey stood ground for a period in excess of two years between 18 November 2002 and January 2005. The circumstance that there was not even a retraction during this period has evidently not been considered by the Commissioner. The Tribunal has simply extracted the findings of the Commissioner and has affirmed the correctness of those findings.

11. Conscious as we are of the parameters of the jurisdiction under Section 260-A of the Income Tax Act, 1961, we are of the view that the interference of this Court is warranted in the circumstances of the case. Firstly, the finding which has been arrived at by the Commissioner and which was sustained in appeal by the Tribunal is without considering the entirety of the material on the record. Important and significant aspects of the material on record have not been considered. Secondly, the findings reflected in the order of the Assessing Officer have not been adequately dealt with by either of the two appellate authorities. Thirdly, the orders of the Commissioner

(Appeals) and of the Tribunal proceed on surmise and conjecture.

12. In the circumstances, it would be appropriate to remand the proceedings back to the Commissioner (Appeals) for a fresh determination. In order to facilitate this, the impugned order of the Tribunal dated 21 November 2008 and the order of the Commissioner (Appeals) dated 29 November 2005 are set aside. The appeal shall stand restored to the file of the Commissioner of Income Tax (Appeals)-XIII, Mumbai for a fresh decision in accordance with law. The appeal shall stand disposed of in these terms. There shall be no order as to costs.

(Dr. D.Y.Chandrachud, J.)

(J.P. Devadhar, J.)