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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 670/2014

Reserved on: January 19, 2016
Date of decision: February 26, 2016

COMMISSIONER OF INCOME TAX, C-I Appellant
Through: Mr. Dileep Shivpuri, Senior standing
counsel with Mr. Zoheb Hossain, Junior

versus

VATIKA LANDBASE PVT. LTD. Respondent
Through: Mr. C.S. Aggarwal, Senior Advocate
with Mr. Prakash Kumar, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T
26.02.2016

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Dr. S. Muralidhar, J.:

1. This appeal under Section 260A (1) of the Income Tax Act, 1961 ('Act') by the Revenue against the impugned order dated 8th March 2013 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 162/Del/2006 for the Assessment Year ('AY') Block Period 1st April 1997 to 8th May 2003.

2. At the outset it requires to be noticed that the impugned order dated 8th March 2013 was common to the appeals filed by both the Revenue [IT (S.S.) A. No. 162/Del/2006] as well as by the Assessee [IT (S.S.) A. No. 117/Del/2006]. Against the said common impugned order, the Assessee had also filed an appeal in this Court bearing ITA No. 2 of 2014 [*Vatika*

Limited (formerly Vatika Land Base Private Limited) v. Commissioner of Income Tax] and that appeal was dismissed by the Division Bench of this Court on 6th April 2015.

Search and Seizure operation

3. The background facts are that the Respondent-Assessee is engaged in the business of real estate development and was incorporated on 2nd July 1998 under the Companies Act, 1956.

4. A search and seizure operation under Section 132 of the Act was carried out at the business premises of the Assessee and residential premises of its Directors on 8th May 2003. For quite some time thereafter no further proceedings took place.

5. During the search and seizure operation, the Revenue seized various materials including *inter alia* the documents stored in the computer of one Mr. Sunil Awasthi, an employee of Vatika Group to which the Assessee belongs. These documents contained the working of the anticipated sale revenue on account of sale of space in the Vatika Triangle ('VT') and Vatika World ('VW') commercial complexes. The construction of these commercial complexes commenced in the financial year ('FY') 2001-02 (relevant to the Assessment Year 2002-03). VT comprised of eight floors (ground plus seven floors) having an aggregate area of 1,30,428 sq.ft. This was constructed on a land measuring 1.47 acres located at Sushant Lok, Phase-I, Gurgaon which was purchased by the Assessee in the year 2001 for an aggregate consideration of Rs. 9,71,92,559. It also has two basements having an aggregate area of 67,272 sq.ft. Thus the total constructed area of the building is 1,97,700 sq.ft. According to the Assessee, till the date of the search it had incurred

a cost of construction of Rs. 24,84,89,829 on the VT complex. The cost of construction was claimed by the Assessee to be financed either from the contributions of the shareholders and their associate companies or as a loan from bank and as also from the sale proceeds. It is stated that subsequent to date of the search the Assessee had incurred further expenditure of Rs. 2,25,85,025 on construction of VT. The Assessee had capitalized a sum of Rs. 2,44,47,535. It is stated that the aggregate cost of construction of VT was Rs. 27,10,74,854.

Notice to the Assessee

6. Notice was issued to the Assessee by the Assessing Officer ('AO') on 23rd July 2004 under Section 158BC of the Act. When no return was filed by the Assessee pursuant thereto, notice under Section 142 (1) of the Act was issued on 3rd March and 4th April 2005.

7. On 25th April 2005 the Assessee filed a Nil return of income. A questionnaire was issued on 10th May 2005 to the Assessee by the AO asking it to explain the undisclosed receipts of sale of spaces/flats in VT. On 25th May 2005 the Assessee filed a reply stating that in respect of the spaces sold in VT, the entire sale consideration received had been disclosed. It was mentioned that a complete sale register marked A-18 was also found in the course of search of the office at First India Place, Gurgaon which was also referred in the notice issued to the Assessee. According to the Assessee, 'the register gives complete details of commercial space to different persons and figures of sale shown in this register are as per regular books of accounts.' The list of persons to whom the sales were made along with their addresses was also part of the register.

The response of the Assessee

8. As regards the allegations in the notice sent by the AO that from the information in the file found in the computer of Mr. Sunil Awasthi the rate of sale of the ground floor space was at Rs. 5,538 per sq.ft. and other floors was at Rs. 4,000 per sq.ft, the Assessee pointed out that Mr. Awasthi had been working as a Junior Executive under Mr. Pankaj Pal, Vice President (Marketing Division) of Vatika Group. The Assessee volunteered that “it is evident from the plain reading of the paper that these are mere projections and do not represent any completed materialized transaction.” It was submitted that the said paper did not reflect that those were the actual sale rates. Attention of the AO was drawn to the footnote on the third page of the print out of the computerized file of Mr. Awasthi which read as under:

“(i) It is presumed that the building will be completed and fully let out in the month of November 2002.

(ii) Sale of building will took place over a period of nine month.

(iii) Advance rent is adjustable in equal instalments over a period of 36 months

(iv) Sale value calculated after adjustment for the security deposits and unadjusted advance Rent Deposit.

(v) No Tax deducted at sources is considered on the rental revenues.”

9. The Assessee in its reply pointed out that the projections “do not refer to any materialized transactions.” It was further pointed out that although print out was titled ‘Cash in flow detail for the revenue’ there was in fact no cash in flow statement and this was “a mere proposal prepared by Mr. Awasthi for a customer in order to attract the investment from such

customer." Further there were two such projection statements prepared by adopting different sale rates and therefore, these were 'mere figment of imagination'. A request was made to summon Mr. Sunil Awasthi from whose computer the document had been retrieved.

10. With reference to the document marked as Annexure A1/60 (page No. 122) seized from the office of the Assessee at First India Place, Gurgaon on 26th May 2003, it was stated that the said papers related to some exchange offer made by the Assessee to some of its existing flat owners and in any case did not have any connection with the sales of the instant project VT. It pertained to sales made in VW.

11. A further detailed explanation offered by the Assessee was that it had acquired the land for the construction of the commercial complex VW in November-December 2002. The Assessee was in dire need of funds to get the VW project moving by beginning to sell some of the areas in VW at the planning stage itself. As the site for VW was in Sector 53, Gurgaon which was away from the main commercial hub, the Assessee was not able to demand a break-even price in the initial bookings. Accordingly, as per the general trade practice, in order to launch a project the Assessee intended to make few block bookings, and announce them in the market. This was intended to be done through a group of flat owners who were already holding certain flats in VT. While the flat owners in VT expressed their interest in the project VW, they insisted that the Assessee should buy back all their existing flats in VT at a higher rate. The Assessee stated that it considered their offer seriously and offered to buy back all their flats in VT at high premium provided that such flat owners invested in VW at the offered rate @ Rs. 2,750 per sq.ft. against the going rate of Rs. 1200-1400 per sq.ft. The Assessee thus sought to

explain that the sale of a total area of 10,000 sq.ft. sold in VW minus purchase of areas of 2829 and 2025 sq.ft. respectively in the 4th and 5th floors of VT at an average rate of Rs. 4,800 per sq.ft. (for fourth floor) and Rs. 4,682 per sq. ft. (for 5th floor) for a total sum of Rs. 1,52,93,217. On this basis the Assessee calculated the net revenue loss at Rs. 17,93,217. According to the Assessee, the hand writings at the bottom of the page and adjoining sheets of A1/60 were dumb workings and mere figures.

12. As regards documents Annexure A-1 and Annexure A-9 seized from the residence of Mr. Anupam Nagalia, Director of the Assessee, it was submitted that they were mere projection sheets prepared by Mr. Anupam Nagalia who would be the best person to explain them. A request was made to summon Mr. Nagalia since the seized documents did not pertain to the Assessee. It was pointed out that the documents seized were not in the handwriting of the Assessee. As far as Annexure A-1 was concerned, it was submitted that it was an estimated working of assumed payments and receipts with the interest thereon.

13. As regards Annexure A-13 seized from the office of Vatika Group at First India Place, Gurgaon, *inter alia* stated to be in handwriting of Mr. Mrinal Nag whose statement was recorded by Deputy Director of Investigation ('DDI'), the Assessee explained that the said papers had nothing to do with the Assessee. They had not been found in the control and possession of the Assessee. It was reiterated that the Assessee "enters into transactions only through cheques and there are no cash transactions."

14. The Assessee also in the above reply referred to another Annexure

(AA S1:No. 7-7) in computer of Mr. Deepak Chakravarty. The document merely showed the details of the commitment charges for various months payable by the Assessee to its flat owners. In any case it could not be inferred therefrom that there was an understatement of the sale consideration.

Block Assessment order

15. The AO passed an assessment order on 31st May 2005, the last date for completion of the block assessment under Section 158BE of the Act. In this assessment order it was noted by the AO that the Assessee had developed two commercial complexes - VT and VW - at Gurgaon. In VT the Assessee had sold 97320 sq.ft. of area and disclosed in the regular books of accounts the total consideration of Rs. 15.70 crore. On this basis the average sale rate worked to Rs. 1600 per sq.ft. As per the books of accounts, a total area of 47550 sq.ft. had been sold in VW for a total consideration of RS. 6,17,40,000 at an average rate of Rs. 1298.42 per sq.ft. According to the AO, during the course of search the evidence discovered revealed that the average sale price was more than what was reflected in the books of accounts. According to the AO, the seized material showed that certain amount of cash was paid over and above the cheque component/payment.

16. The AO negated the plea of the Assessee as regards documents seized from Mr. Nag and Mr. Nagalia who were an employee and Director respectively of the Assessee. It was held that the documents found in their possession could therefore be held to belong to the Assessee. The seized documents proved that the Assessee had received higher consideration in respect of sale of space/flat in the commercial complex VT. The AO categorised the documents seized during the search

into two types. One pertained to the working of anticipated sale revenue on account of sale of space in all floors. The other pertained to specific sale instances. Comparing the rates per sq.ft mentioned in the file stored in the computer of Mr. Sunil Awasthi for the second and third floor of VT with the actual sale figures of five flats by Mr. Rajesh Bhatia and Mrs. Poonam Bhatia it appeared that the figure of purchase of the five flats was higher than the disclosed amount.

17. The AO proceeded to draw the following inferences:

(i) The plots in VT were surrendered by Mr. Rajesh Bhatia and Ms. Poonam Bhatia at the rate ranging from Rs. 4,682 to Rs. 4,800 per sq.ft. in the month of February 2003 which shows that the plots in VT were sold at a rate ranging from Rs. 4600 to Rs. 4800 per sq.ft. in the month of February 2003. The entries mentioned on the reverse of page No. 26 of Annexure A-9 seized from the residence of Mr. Nagalia further strengthened this fact and revealed that Rajesh Bhatia and Poonam Bhatia had purchased their plots in VT at Rs. 4350 per sq.ft. in August 2002 and had further sold their respective plots in VT at Rs. 4682 per sq.ft. in February 2003.

(ii) From the sale register (Annexure A-18), it was revealed that Mr. K.L. Verma and his family members had made a total investment of Rs. 4,11,43,300, out of which an amount of Rs. 1,65,44,740 was paid through cheques and the balance of Rs. 2,45,98,500 was paid in cash. These very flats were repurchased by the Assessee and sold to other persons at much higher rate. This was corroborated by the figure mentioned in the documents seized from the computer operated by Mr. Sunil Awasthi in which the sale rate was mentioned at Rs. 4,000 per sq.ft.

18. The AO proceeded to discuss the sale of flats in VT to Mr. Ramesh Chander Dhawan, Anil Kumar Dhawan, Rita Kakkar, Vidhi Kakkar, Sudha Wadhwan and Lavan Syal. The instances of sale of flats to Rakesh Dewan and Rita Kanwar were also analyzed. On that basis the undisclosed income of the Assessee was determined at Rs. 31,01,09,834 which was then added to the returned income.

19. There were two other additions made by the AO. One was Rs. 13,84,20,000 regarding alleged undisclosed receipt from sale of flats/space in VW. The other was the addition of Rs. 1,04,39,000 on the ground of alleged undisclosed income on account of accommodation entries. Consequently the total addition in terms of the assessment order under Section 158BA/158BC read with Section 143 of the Act was Rs. 45,89,68,830.

Order of the CIT (A)

20. The Assessee filed appeal before the Commissioner of Income Tax (Appeals) [‘CIT (A)’]. By an order the dated 31st March 2006 the CIT (A) granted partial reliefs in respect of the three additions as under:

	Particulars	Amount of addition made (Rs.)	Addition sustained by CIT(A) (Rs.)	Relief granted by CIT(A) (Rs.)
1.	Alleged undisclosed receipt on sale of flats/space in Vatika Triangle	31,01,09,834	5,60,73,380	25,40,35,454
2.	Alleged undisclosed receipt on alleged sale of flats/space in Vatika World	13,84,20,000	2,00,14,904	11,84,05,096

3.	Alleged undisclosed income on account of accommodation entries	1,04,39,000	20,00,000 (implied confirmation covered by the above additions)	1,04,39,000
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21. According to the CIT (A), the AO should have confined himself to the documents found during the search and seizure action instead of making an addition based on estimates. The CIT (A) examined each of eight instances of sale of flats in VT and upheld the addition only to the extent of Rs. 5,60,73,380. He deleted the addition to the extent of Rs. 25,40,35,954.

22. Much of the discussions in the order of the CIT (A) as far as the seized material is concerned, was focused on the print out of the file recovered from the computer of Mr. Sunil Awasthi. There were three sheets, i.e., Sheet Nos. 10, 3 and 4. The other findings of the CIT (A) were as under:

(i) The documents which could be related to the Assessee including those found in the possession/handwriting of Mr. Anupam Nagalia, Mr. Sunil Awasthi or Mr. Deepak Chakraborty cannot be made basis for making any addition in the hands of the Assessee unless a logical conclusion could be drawn from them.

(ii) No adverse view was possible on the basis of entries recorded in Annexure A-13. The author of that document, Mr. Mrinal Nag, clarified that the entries therein were made by him for the purposes of a job at Unitech.

(iii) As far as the print out of the file recovered from the computer

of Mr. Sunil Awasthi was concerned, it established that the rate at which the flats on the second and third floor were sold was Rs. 3,250 per sq.ft. This was in excess of the sale consideration to the extent of Rs. 5,60,73,380.

(iv) Annexure A-1/16 seized from the office of Vatika Group at First India Place, from the computer of Mr. Anupam Nagalia, did not indicate the consideration for the purchase of flats held by the Bhatias in VT. Therefore, no adverse view could be drawn from the said documents.

(v) As regards the sale of flats to Mr. K.L. Verma and family and the group Company M/s. Sunflame at VT, no documents were seized on the basis of which it could be said that some part of the consideration was paid in cash.

(vi) Page 14 of Annexure A-13 maintained by Mr. Mrinal Nag did not substantiate that some amount in respect of sale of flats to Mr. Ramesh Chandra Dhawan and Mr. Anil Dhawan was paid in cash. Likewise there was no evidence that sale of the other flats to Ms. Rita Kakkar, Ms. Vidhi Kakkar, Sudha Madhawan, Mr. Lavan Syal and Mr. Rakesh Dhawan were partially in cash. As regards of sale of flat to Ms. Rita Kanwar no such inference could be drawn on the basis of page 27 of Annexure A-1 seized from the residence of Mr. Anupam Nagalia.

23. In para 8.28 of his order, the CIT (A) observed as under:

“8.28. From the above discussion, it is clear that the only addition possible on the basis of seized material is as per file ‘cash flow/Vatika Triangle/ backup’ found from the computer of Mr. Sunil Awasthi where there is a mention of actual sale of 2nd floor

and 3rd floor of Vatika Triangle. This addition to the undisclosed income has been worked out above in para 8.27 (a) at Rs. 5,60,73,380. No addition is possible on the basis of estimate as done by AO or other seized material referred by the AO. The total addition on account of unaccounted sales is thus, directed to be restricted to Rs. 5,60,73,380. The AO has made an addition of Rs. 31,01,09,834. The difference of Rs. 25,40,36,454 (Rs. 31,01,09,834 minus Rs. 5,60,73,380) is thus deleted.”

Appeals before the ITAT

24. Aggrieved by the above order of the CIT (A), the Revenue and the Assessee filed appeals before the ITAT. The Assessee questioned the order of the CIT (A) to the extent it sustained the addition of Rs. 5,60,73,380 as regards the sale of the second and third floor flats in VT and the two other additions made on account of sale of space in VW and accommodation entries.

25. As far as the Revenue's appeal was concerned, the following questions were urged by it before the ITAT:

"1. The CIT(A) has erred In deleting the addition of Rs. 25,40,36,454 out of total addition of Rs. 31,01,09,834 made by the Assessing Officer because the addition of Rs. 31,01,09,834 was made by the Assessing Officer on the basis of calculation derived from the seized document and not on the basis of estimate.

2. The CIT(A) has erred In deleting the addition of Rs. 11,34,05,096 out of total addition of Rs. 13,84,20,000. The Learned CIT(Appeals) should have upheld the addition as made by the Assessing Officer as he agreed with the findings of the Assessing Officer that there were statement of sale consideration.

3. The CIT(A) has erred in deleting the addition of Rs. 1,04,39,000 on account of addition made for a accommodation entry by the assessee as the additions were made by the Assessing Officer on the basis of discussion and derived from the seized documents during search operation.

Order of the ITAT

26. By the impugned common order dated 8th March 2103, the ITAT dismissed the Revenue's appeal while partly allowing the Assessee's appeal. With regard to issue of the alleged undisclosed receipt on sale of flats/space in VT, the ITAT deleted the additions made by the AO as sustained by the CIT (A) of Rs. 5,60,73,380. It however upheld the additions of Rs. 1,35,00,000/- and Rs. 49,64,904/- aggregating to Rs. 1,84,64,904/- out of Rs. 2,00,14,904/- sustained by the CIT (A) in respect of the alleged undisclosed receipt on sale of flats/space in VW. The ITAT also deleted the implied confirmation of the addition of Rs. 20 lakhs made by the CIT(A). The ITAT held as under:

(i) Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. As the statutory provisions go to show, it is not intended to be a substitute for regular assessment. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of accounts or documents and such other materials or information as are available with the AO. Evidence found as a result of search is clearly relatable to Sections 132 and 132A.

(ii) The CIT (A) ought not to have read the document seized from the computer of Mr. Awasthi piecemeal. If the paper is a projection for the other floors then it could not be used for determining the rate of alleged sold portion. Also, it did not mean that the portions were sold at that rate.

(iii) There was no direct evidence available with the AO indicating the sale of flats @ Rs. 4600 or Rs. 4800 per sq. ft. by the Assessee in VT. On presumptive basis, it cannot be said that assessee has sold all the flats @ Rs. 4,600 or 4,800 per sq.ft.

(iv) On a plain reading of the evidence it cannot be conclusively held that the Assessee had received on money or that the sale was made at a rate higher than the one recorded by the Assessee in the document.

(v) The AO did not call the vendees of the flats. He did not call Mr. Mrinal Nag for examination. He also did not make any other inquiry in order to corroborate his conclusion.

(vi) The CIT(A) erroneously retained the addition at Rs. 5,60,73,380 on the basis of estimated projection made by Mr. Awasthi in the file of "cashflow/Vatika Triangle" at page Nos. 30 & 31.

The present appeal

27. As already noticed both the Revenue and the Assessee filed appeals in this Court. As far as the Assessee's appeal was concerned, as already noticed, this Court by its decision dated 6th April 2015 in ITA No. 2 of 2014 rejected it and upheld the addition of Rs. 1,35,00,000 and Rs. 49,64,904 by the ITAT.

28. In the present appeal, the Revenue urged the following questions:

“1. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in law in deleting the addition of Rs. 25,40,36,454 out of the total addition of Rs. 31,01,09,834

made by the AO on account of undisclosed receipt from sale of space/flats in Vatika Triangle?

2. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in law in deleting of Rs. 11,49,55,096 (i.e. Rs. 11,34,05,096 plus Rs. 15,50,000) out of the total addition of Rs. 13,84,20,000 made by the AO on account of undisclosed income not declared by the Assessee in its books of account?

3. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in law in deleting the addition of Rs. 1,04,39,000 made by the AO on account of accommodation entries taken by the Assessee?

4. Whether on the facts and circumstances of the case, the order of the ITAT is not perverse as it has failed to consider that in this case, the AO made the addition on the basis of the relevant searched material gathered from the Assessee during the course of the search proceedings?"

29. However, by an order dated 20th May 2015 the only question that was framed for consideration by the ITAT was as under:

"Did the ITAT fall into error in holding that the addition of Rs. 5,60,73,380 was unsustainable in law in the circumstances of the case?"

30. Consequently, as far as the present appeal by the Revenue was concerned, its scope is confined to the question framed viz., the sustainability of the deletion by the ITAT of the additions made by the AO as sustained by the CIT (A) of Rs. 5,60,73,380 pertaining to the sale of flats on the second and third floor of VT.

Submissions of counsel for the Revenue

31. It is submitted by Mr. Dileep Shivpuri, learned Senior standing counsel for the Revenue, that the additions made by the AO to the extent of Rs. 31,01,09,834 on account of undisclosed receipt from sale of

space/flats in Vatika Triangle was based on the searched materials. The search material was in the form of documents titled 'cash flow/Vatika Triangle/backup' stored in the computer of Mr. Sunil Awasthi who was an employee of the Vatika Group as well as the actual documents pertaining to sales made of the various flats in Vatika Triangle. This clearly indicated that the declared sale consideration was lower than the actual sale consideration.

32. Relying on the decisions of the Supreme Court in ***Commissioner of Income Tax. v. Durga Prasad More (1971)82 ITR 540 (SC)*** and ***Sumati Dayal v. Commissioner of Income Tax (1995) 214 ITR 801 (SC)***, it was urged by Mr. Shivpuri that the ITAT should have appreciated the documents seized during the search from the standard of preponderance of probabilities. It was submitted that merely because Mr. Sunil Awasthi was not produced for examination and cross-examination, the documents recovered from his computer could not be ignored since he was an employee of the Vatika Group. It was safe to proceed on the basis of the documents recovered from the possession of the Assessee itself. Inasmuch as the documents indicated that two of the flats mentioned therein has already been sold, it could not be said to be mere projections as contended by the Assessee.

33. Mr. Shivpuri further submitted that the burden shifted on the Assessee to show that the other flats in VT were indeed sold only at the rate indicated in the sale register and not for a higher consideration. Mr. Shivpuri submitted that although the question framed by the Court was confined to the deletion made by the ITAT of Rs. 5,60,73,380 as sustained by the CIT (A), the Court could also examine the validity of the deletion by the CIT (A) of the balance sum of Rs. 25,40,35,954 in this

regard.

Submissions of counsel for the Assessee

34. Mr. C.S. Agarwal, learned Senior counsel appearing for the Assessee, sought to support the impugned order of the ITAT. Mr. Agarwal first submitted that the ITAT was right in observing that CIT (A) erred in accepting only one part of document which was otherwise characterized as projections. Merely because the portion that was accepted indicated that flats on the second and third floor had already been sold, it did not mean that the flats were sold at the rates mentioned therein.

35. Mr. Agarwal further submitted that once the sheet is held to be a projection statement, it is to be treated as such for all purposes. He also pointed out that the area stated in the document for the third floor was 17,004 sq.ft whereas the actual area was 16,121 sq.ft. Further up to AY 2003-04, the fourth floor had also been sold but it was not indicated so in this document. The constructed area recorded in the Sheet No. 10 was 1,30,425 sq.ft. whereas the total area sold was 94,671.09 sq.ft. The other figures noted in Sheet No. 3 (corresponding to Sheet No. 10) were only projections. Mr. Agarwal also pointed out the foot note on Sheet No. 3 indicated that “it is presumed that the building will be completed and fully let out in the month of November 2002.” In the note it was observed that on the basis of Sheet No. 4 that “anticipated sale proceeds of seven floors has been worked out at Rs. 47 crores.” All these indicated that these were only projections and were not sale figures. It is submitted that an undated, unsigned and untested printout from the computer of an employee without linking the same with any actual transaction cannot constitute evidence detected as a result of the search which in turn would result in an addition of the undisclosed income under Section 158B (b) of

the Act.

36. Mr. Agarwal pointed out that neither Mr. Sunil Awasthi nor any of the buyers were examined as although a request made was on behalf of the Assessee. Once the Assessee gave an explanation for the documents seized, the burden shifted to the Revenue to show the basis on which it could be said that the flats were sold at Rs. 3250 per sq.ft. Relying on the decision in ***Commissioner of Income Tax v. S.M. Aggarwal (2007) 293 ITR 43 (Del)***, Mr. Agarwal submitted that no adverse inference can be drawn unless the author of the document was examined, particularly since the document did not belong to the Assessee. Reliance was placed on the decision of this Court in ***Commissioner of Income Tax. V. D.K. Gupta (2009)308 ITR 230 (Del)*** to urge that since a remand report of the AO did not rebut the submission of the Assessee, no adverse inference could have been drawn by the CIT (A). Relying on the decision in ***Commissioner of Income Tax v. Ved Prakash Choudhary (2008) 305 ITR 245 (Del)***, it was urged that in the absence of corroborative material, the additions made on the basis of sketchy documents which were unproved cannot be sustained in law. Reliance was also placed on the decision in ***Commissioner of Income Tax v. Vivek Aggarwal 231 Taxman 392*** to urge that unless the amounts stated in the documents were actually paid, it cannot be presumed that the amount mentioned in the sale deed was not correct.

37. Relying on the decision in ***Commissioner of Income Tax v. Ravi Kant Jain (2001) 250 ITR 141 (Del)***, Mr. Agarwal submitted that the purpose of invoking Section 158BC was to bring to tax undisclosed income which was detected as a result of the search. There was no incriminating evidence to show that the Assessee had sold second floor

measuring 1667 sq.ft. area @ Rs. 3250 per sq.ft. as against the actual sale consideration received @ Rs. 1535 per sq.ft. (average rate). There was no basis for the AO to have adopted the unit rate of Rs. 4800 per sq.ft. for determining the actual sale consideration in respect of the flats in VT. Lastly, it was submitted that the ITAT had based its conclusion on an interpretation of the documents in question and the said finding was essentially a finding of fact. Reliance was placed on the decisions in ***Commissioner of Income Tax v. Kantilal Prabhudas Patel (2008) 296 ITR 568 (MP)*** and ***Commissioner of Income Tax v. Manish Buildwell (P) Ltd. (2011) 245 CTR 397 (Del)*** to underscore the point that the additions cannot be made on guess work or estimates.

Discussion and Reasons

38. At the outset the Court would like to recapitulate the scope of search proceedings under Section 158BC under Chapter XIV B of the Act. In ***Commissioner of Income Tax v. Ravi Kant Jain (supra)*** the Court explained:

"The special procedure of Chapter XIV-B is intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. As the statutory provisions go to show, it is not intended to be a substitute for regular assessment. Its scope and ambit is limited in that sense to materials unearthed during search. It is in addition to the regular assessment already done or to be done. The assessment for the block period can only be done on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the Assessing Officer. Evidence found as a result of search is clearly relatable to sections 132 and 132A."

39. Likewise in ***Commissioner of Income Tax v. Vishal Aggarwal (2006) 283 ITR 326 (Del)***, ***Commissioner of Income Tax v. Girish Chaudhary (2008) 296 ITR 619 (Del)*** and ***Commissioner of Income Tax***

v. V.B. Aggarwal 296 ITR 750 (Del) it was emphasized that provisions of Chapter XIV B of the Act are not meant to make an assessment or reassessment of an income but are the provisions which are aimed to make addition of an undisclosed income detected as a result of search. The scope of the block assessment proceedings before the AO was explained by the Rajasthan High Court in **CIT v. Rajendra Prasad Gupta (2001) 248 ITR 350 (Raj)** in the following words:

"...the correctness or otherwise of the returns filed in pursuance of the notice under section 158BC(a) has to be examined with reference to the material in the possession of the assessing authority having nexus to assessment of "undisclosed income" which is with the assessing authority, and premise of such proceedings. If the returns filed by the assessee do not accord with the materials which are already in the possession of the authority, it can be estimated to the best judgment by the assessing authority on the basis of the material in his possession. However, the assessing authority is not conferred with power to make estimation of income *de hors* the material in his possession, while making regular assessment order under section 158BB. It has to be borne in mind that proceedings under sections 158BB and 158BC are that of undisclosed income. Therefore, the proceeding carries with it a presumption that returns filed in pursuance of such proceedings are of undisclosed income and not necessarily in accordance with the books of account. Its verification has to be searched outside regular books with reference to material that has been found during search. That makes it imperative to adjudicate the return with reference to material that has come in the possession of the assessing authority during the course of search proceedings and on which basis the belief about the existence of undisclosed income is entertained by the assessing authority inviting invocation of sections 158BB and 158BC."

40. Turning to the case on hand, the document recovered from the file in the computer of Mr. Awasthi, forms the basis of the addition made by the AO, which was further reduced by the CIT (A). This was in the form of a computer print out of three sheets which were unsigned and undated. The

first sheet was titled 'Cash-in-flow detail for the revenue', the next was titled 'Revenue details' and the third was titled 'Vatika Triangle, Guargaon.' The notes to the documents are indicative of their being projections. Noting (i) states that "it is presumed that the building will be completed and fully let out in the month of November 2002." Another note states "Further, the sale of the building will took place over a period of nine months." Admittedly, as on the date of the search the construction was still in progress. Flats up to the fourth floor had been sold. The view taken by the ITAT that mere fact that the print out states that the flats on second and third floor have been sold, does not necessarily mean that they were sold at the rates indicated therein is definitely a plausible view to take.

41. Considering that the document was recovered from the computer of Mr. Sunil Awasthi, he ought to have been summoned to explain the rates of sale shown therein for the flats on different floors. In fact, the Assessee did make a request for his cross-examination. The other possibility was to examine the purchasers of the flats as they would have confirmed the price paid by them and how much of it was in cheque and what extent in cash. However, that too was not done.

42. In *Commissioner of Income Tax v. S.M. Aggarwal (supra)*, in similar circumstances certain slips of paper were recovered during search and their author was not examined. The Court observed:

"It is well-settled that the only person competent to give evidence on the truthfulness of the contents of the document is the writer thereof. So, unless and until the contents of the document are proved against a person, the possession of the document or handwriting of that person on such document by itself cannot prove the contents of the document. These are the findings of fact recorded by both the authorities, i.e., the Commissioner of Income-

tax (Appeals) and the Tribunal.

13. In *Mahavir Woollen Mills case [2000] 245 ITR 297 (Delhi)*, during the course of search and seizure proceedings, certain slips were found, which, the Assessing Officer concluded, contained details of payment beyond those which were made by cheques and drafts and were duly reflected in the books of account. The assessee's stand before the Tribunal was that the documents were "dumb documents" which did not contain full details about the dates of payment and its contents were not corroborated by any material and could not be relied upon and made the basis of addition. The Tribunal considered this aspect and observed that on comparison of the seized documents and ledger accounts of the parties, the seized documents could not be regarded as "dumb documents".

43. The Revenue has not been able to counter the submission of the Assessee that there are anomalies in the figures mentioned in Sheet Nos. 3 and 4 of the said document. This can be understood in a tabulated form as under:

Floor	Rate as per Sheet No. 3 (Rs. per sq.ft.)	Rate as per Sheet No. 10 (Rs. per sq.ft.)
Ground floor	5,538	4,154
First Floor	4,000	3,360
Second floor	(already sold)	3,250
Third floor	(already sold)	3,250
Fourth floor	4,000	3,250
Fifth floor	4,000	3,350
Sixth floor	4,000	3,360
Seventh floor	4,000	3,360

44. The above projection statement mentions rates for seven floors whereas the construction was still in progress and the seven floors had not been completed. There is another anomaly inasmuch as in para 8.28 of the order of the CIT (A), it is observed that the said document cannot form the basis of determining the actual rate of sales for the remaining floors, and yet, as rightly pointed out by the ITAT, those rates have been

relied upon by the CIT (A) to determine the amount that should be added in respect of the sales of the flats on the second and third floors of VT.

45. As pointed out in *Commissioner of Income Tax v. S.M. Aggarwal* (*supra*) the said document can at best be termed as a 'dumb' document which in the absence of independent corroboration could not possibly have been relied upon as a substantive piece of evidence to determine the actual rates at which the flats were sold. Further as pointed out in *Commissioner of Income Tax v. D.K. Gupta* (*supra*) merely because there are notings of offers on slips of paper, it did not mean that those transactions actually took place. Likewise in *Commissioner of Income Tax v. Girish Chaudhary* (*supra*), the Court termed a loose sheet containing some notings of figures as a 'dumb document' since there was no material to show as to on what basis the AO had reached a conclusion that the figure '48' occurring in one of them was to be read as Rs. 48 lakhs.

46. In the present case, there was again no material on the basis of which the AO could have applied a standard rate of Rs 4,800 per sq ft for all the floors of VT. It was also not open to the AO to draw an inference on the basis of the projection in the document, particularly when the Assessee offered a plausible explanation for the document. The burden shifted to the Revenue to show, on the basis of some reliable and tangible material, how the rate at which the flats on the second and third floors of VT was higher than that indicated in the sales register or the sale deeds themselves.

47. In the circumstances, the Court is of the view that the ITAT was justified in coming to the conclusion that the addition of Rs. 5,60,73,380

made by the CIT (A) was not sustainable in law.

48. For the aforementioned reasons, the question framed by the Court is answered in the negative, i.e., in favour of the Assessee and against the Revenue.

49. The appeal is dismissed but, in the facts and circumstances, with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 26, 2016

Rk

