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

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ITA 803/2014

Date of decision: 23rd December, 2014

COMMISSIONER OF INCOME TAX (CENTRAL) II

..... Appellant

Through Mr. Rohit Madan, Sr. Standing Counsel
with Mr. Ruchir Bhatia, Advocate.

versus

HOME DEVELOPERS PVT.LTD.

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

This appeal filed by the Revenue pertains to assessment year 2004-05 and impugns the findings recorded by the Income Tax Appellate Tribunal (Tribunal, for short) in their order dated 21st September, 2012.

2. The appeal, it appears, was filed within time, but returned under office objection and there is a prolonged delay of 650 days in re-filing of the appeal. However, before issuing notice on the application for condonation of delay, we deem it appropriate to examine the grounds of appeal on merits.

3. The respondent, a company and persons associated with it,

were subject to search and seizure operations under Section 132 of the Income Tax Act, 1961 (Act, for short) on 28th March, 2006. Notice under Section 153A was issued and return of income for assessment year 2004-05 was filed declaring income of Rs.10,15,899/-. The respondent company had surrendered undisclosed income of Rs.2 crores during the course of search. In addition, disclosure of Rs.2 crores in the name of Yogesh Gupta, Rs.2 crores in the name of Rajiv Bahal and his family members, Rs.9 crores in the name of Realtech Project Pvt. Ltd. and Realtech Construction (P) Ltd. was made. The aforesaid surrender is not in dispute and the amount has been brought to tax.

4. In the order passed under Section 153A of the Act, the Assessing Officer referred to the reply submitted by the assessee in response to the notice for violation of Section 269SS and 269T of the Act, wherein it was mentioned that during the period in question, the assessee had taken advance/loan on certain commitments for buying property, which after the property was sold, was returned with the commitment as agreed. In this way, the transaction of one property was cleared and the surplus fund so generated along with further requirement of funds as arranged on commitments deployed in another property and so on. The surplus income earned by the assessee was used in other properties. The Assessing

Officer observed that the reply was roundabout and was not specific and to the point. He held that the assessee had accepted that they had received cash loan and had repaid the same in cash along with interest. The Assessing Officer referred to one document, which was found at the residence of Yogesh Gupta and observed that the figures mentioned in the said document/register, when decoded, revealed cash loan transactions. This, he held, was indicative of violation of Sections 269SS and 269T as loan was taken in cash and was also returned in cash along with interest. The findings recorded by the Assessing Officer are to be found in paragraphs 8.4 and 2, which for the sake of convenience are reproduce below:-

“8.4 It is seen that Shri Yogesh Gupta is the main person of the group. As the facts and circumstances suggest the loans etc. were used for the purpose of the business of the flagship company M/s Home Developers Private Limited. Further, most of the documents under reference were in the hand writing of Shri Yogesh Gupta (mostly in pencil). In view of the facts, the loan transactions and repayment of loans are considered in the hands of M/s Home Developers Private Limited. The additions to be made on this account would be as per the discussion in the following paragraphs wherein specific documents evidencing the receipt of loan and its repayments has been indicated.

x x x x x x

2. Similar are the facts of Page No. 16 to 18 (Annexure A-11) seized from the residence of Yogesh Gupta. These pages gives details of loans/ deposits and the interest paid/ payable thereon to some Ojhaji & Sharmaji which comes to 75 lacs (8 lacs to 67 lacs) in AY 04-05. It is held that these loans received, have been repaid in AY 04-05 itself. Further, the interest thereon as paid/ payable comes to Rs. 15 lacs. Total addition on account of this page would work out to Rs.90 lacs. (75+15). This page is found mentioned on page No. 22 of Annexure A-11. I am satisfied the assessee has furnish/ concealed particulars of his

income. Penalty proceedings u/s 271(1)(c) is being initiated on this point separately.”

5. The Commissioner of Income Tax (Appeals) in the quantum appeal observed that the addition on account of unaccounted transactions was not justified as the assessee himself had surrendered Rs.2 cores and it would cover all the investments made by the assessee. As per the Assessing Officer, the assessee had also returned the money and, therefore, the amount returned had to be set off. In these circumstances, he directed deletion of principal amount i.e. Rs.2.4 crores and Rs.75 lacs (in all Rs.3.15 crores). However, he sustained the addition made on account of interest of Rs.28.35 crores by holding that the assessee must have paid interest on the loans and in view of Section 69C, payment of interest should be added to the declared income as unaccounted for interest paid. He however reduced the rate of interest from 20% as directed by the Assessing Officer to 18% per annum.

6. The Tribunal has, however, deleted the said addition recording the following reasons:-

“25. From the above, it is evident that a detailed enquiry was made from Shri Yogesh Gupta in respect of various papers seized from him and in respect of not a single paper, he has stated that the noting on the paper is relating to borrowing by the assessee. In respect of each and every paper, he explained the nature of transaction and in most of the cases also explained the name of the group concern to which such paper belonged. In respect of only few papers i.e. page Nos.77 to 84 of the Annexure (see reply to question No.12), he mentioned that these papers belonged to M/s Home Developers (P) Ltd., i.e., the assessee. He stated that these papers are relating to purchase of property No.A- 9/33, Vasant Vihar, New Delhi in

respect of which cash payment of Rs.54 lakhs was made and which was offered as additional income. The Hon'ble Jurisdictional High Court has also considered his statement while deciding the Revenue's appeal for AY 2001-02, 200203 & 2003-4 and has recorded the similar finding that with regard to the loose papers, Shri Yogesh Gupta had stated that these were unaccounted transactions in cash. In his statement, he also surrendered the income of Rs.13 crores in his name and in the name of the group concern. The Hon'ble Jurisdictional High Court had also noted that the Revenue was fully satisfied by the surrender made and closed their investigation. The above finding of the Hon'ble Jurisdictional High Court is squarely applicable to the year under appeal also because we find that in the year under appeal also, the Revenue has brought no other material on record to establish that as per the loose papers, any amount was borrowed by the assessee. They have not even examined the person whose name is claimed to have been mentioned on the loose papers. In the loose papers, nowhere it is mentioned that they belonged to the assessee i.e. M/s Home Developers (P) Ltd. which is a company. Admittedly, the loose papers were found from Shri Yogesh Gupta and not the assessee company. The undisclosed income represented by such loose papers had already been offered by Shri Yogesh Gupta and other group companies which has been accepted by the Revenue. Photocopy of the loose papers have also been produced by the assessee in his paper book. For the sake of brevity, we shall mention herein below only one loose paper i.e. page No.43 in which, according to the Revenue, there is an evidence of loan of 22,40,00,000/- taken by the assessee. We find that the Assessing Officer has considered the entries at the left hand side of the paper which is totaled to 22,40,000/-. On this loose paper, only one name Paliwal is written and there are dates and amounts without any narration. The total of amounts is 22,40,000/-. It is the inference of the Assessing Officer that the assessee is making the entries ignoring '00'/'000' (2/3 zeros). It seems that in 22,40,000/-, he increased '00' (2 zeros) and made it 22,40,00,000/-. As per the Assessing Officer, the entry is for receipt of loan, though in the loose

paper there is no such narration except date and amount. The Assessing Officer further presumes that the assessee has repaid the loan alongwith the interest and he presumed the rate of interest to be 20%. He made the addition in respect of such alleged repayment of loan with interest. The learned CIT(A) has deleted the addition with regard to repayment of loan on the ground that since loan amount itself was available with the assessee out of which this repayment was made, he reduced the interest. Thus, the addition is partly sustained by him. However, after considering the entire facts and arguments of both the sides, we find that the entire addition is based upon the presumption of the Assessing Officer. On the loose papers, there is noting of dates and amounts without any narration. The total of such amount is 22,40,000/-. The first presumption by the Assessing Officer is that it is not 22,40,000/- but 22,40,00,000/-. The second presumption is that the noting is relating to loan taken by the assessee. The third presumption is that the loan was repaid during the accounting year relevant to the assessment year under consideration. The fourth presumption is that the repayment of the loan was along with interest at the rate of 20%. On these series of presumptions, he not only made huge additions running into crores of Rupees but also levied penalties under Sections 271D & 271E. His finding is neither based upon the noting on the loose papers nor any corroborative evidence brought on record during the course of assessment proceedings. On the other hand, material available on record is contrary, i.e., (i) the papers were found from Shri Yogesh Gupta and not the assessee, (ii) statement of Shri Yogesh Gupta was recorded in which he stated that these were unaccounted transactions, (iii) he surrendered the income from such unaccounted transactions in his hands as well as in the hands of group concern, (iv) the income from unaccounted transactions as surrendered by Shri Yogesh Gupta and all the group concerns has been accepted by the Revenue. In view of these facts, if Revenue wanted to take the view that the noting on the loose papers is with regard to loan taken by the assessee, then the burden was upon the Revenue to establish so. However, the Assessing Officer did nothing except to make series of presumptions and then made the

addition and levied the penalty on the basis of his presumptions. We find that similar situation was dealt with by the ITAT while considering the Revenue's appeal for penalty for AY 2001-02, 2002-03 & 2003-04 and the ITAT has held that the document does not indicate that the assessee has accepted loan or deposit from any other person. The name of the assessee is completely absent from the said document. Identical is the situation in the years under appeal before us. None of the documents indicate that the assessee i.e. M/s Home Developers (P) Ltd. has taken any loan or deposit from any other person. The above finding of the ITAT has been upheld by the Hon'ble Jurisdictional High Court. The Hon'ble Jurisdictional High Court held that though there is a doubt but it is not established that the respondent assessee had taken loan/deposit in cash. Their Lordships further observed that there is suspicion but this alone without any further verification and investigation cannot justify the finding that the respondent-assessee had taken loan/deposit in cash. With these observations, their Lordships upheld the finding of the ITAT. In our opinion, the above observation of their Lordships of the Jurisdictional High Court in assessee's own case for AY 2000-01 to 2003-04 would be squarely applicable in the years under appeal also. In these years also, at the most, it can be the doubt of the Assessing Officer that unaccounted transactions are in the nature of the loan taken. However, the doubt or suspicion of the Assessing Officer is not enough to hold that the assessee had taken loan/deposit in cash. Moreover, in the years under appeal, the Assessing Officer made further presumptions that there was repayment of loan in cash though there is no such noting on the loose paper. In our opinion, the finding of the ITAT as well as Hon'ble Jurisdictional High Court in AY 2000-01 to 2003-04 would be squarely applicable to the years under appeal. We further hold that when it is not established that the assessee had taken loan or deposit, the question of further presumption that such loan or deposit was repaid during the year under consideration was without any basis or material on record.

26. In view of the above, we, respectfully following the decision of the ITAT and Hon'ble

Jurisdictional High Court in assessee's own case for AY 2000-01 to 2003-04 (supra), hold that the addition made by the Assessing Officer for unexplained repayment of loan and also interest thereon cannot be sustained. Therefore, the order of learned CIT(A) to the extent he deleted the addition is upheld and the Revenue's appeals in ITA Nos.3312/Del/2008,3577/Del/2008 & 3287/Del/2008 are dismissed. So far as the addition in respect of interest sustained by the learned CIT(A) is concerned, the same is reversed and the addition sustained by the learned CIT(A) in respect of interest is deleted. Accordingly, assessee's appeals in ITA Nos.2954/Del/2008,3101/Del/2008 & 2955/Del/2008 are allowed.”

7. The Tribunal has also referred to the statement of Yogesh Gupta, which was recorded during the course of search and it was observed that Yogesh Gupta had never accepted or agreed that there were any loan transaction in cash or there was payment of interest. It is noticeable that even in the assessment order, the reply quoted by the Assessing Officer refers to real estate transactions and advances/loans received against certain commitments for purchase of properties. The Tribunal noticing the statement made by Yogesh Gupta on oath during the course of search came to the conclusion that the findings of the Assessing Officer that there were loan transactions in cash and interest was paid in cash was merely an assumption. Even on the quantum, the addition made was on mere assumption.

8. The Tribunal in the impugned order has referred to the order passed by this Court on 23rd May, 2012 in ITA Nos. 301, 304 and 305 of 2012

titled *CIT versus Home Developers Pvt. Ltd.* The said order records that substantial surrender was made during the course of search. Reference was made to the statement of Yogesh Gupta wherein he had accepted that there were unaccounted for transactions in cash, but no question was put to him about the details of the writer or the recipient i.e. the details of the person, who had received the said amounts. At that time, the officers were duly satisfied with the investigation and the surrender. It is further recorded that the allegation that loans/deposits must have been taken in cash was a mere suspicion, which could have been a cause for further verification and investigation, but mere suspicion cannot be a ground to hold that loan/deposits were received in cash. The findings of the Tribunal were not perverse.

9. We also notice that the Revenue has not filed before us any document or material to show that in fact loan was taken and interest payment was made. The persons to whom allegedly interest was paid, their details and particulars were not ascertained, verified and examined.

10. The findings of the Tribunal are factual. The reasoning refers to several factual aspects and four different assumptions drawn by the Assessing Officer. The said findings are not shown to be perverse, or contrary to facts, evidence or material.

11. In these circumstances, we are not inclined to issue notice on the application for condonation of delay in re-filing. Consequently, the application and appeal are dismissed.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

DECEMBER 23, 2014
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