

R-73

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

+ ITA 281/2006

CIT

..... Appellant
Through Mr. Deepak Chopra, sr. standing
counsel with Mr. Harpreet Singh
Ajmani, Advocate.

versus

A.K. JAIN

..... Respondent
Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V.EASWAR

ORDER

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19.04.2012

This appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) preferred by the Revenue in the case of A.K. Jain pertains to the block assessment period 1988-1989 to 1998-1999. By order dated 14th May, 2007, the following substantial questions of law were framed for consideration:-

“(a) Whether the Income Tax Appellate Tribunal was correct in law in deleting the addition made by the Assessing Officer on account of undisclosed investment on the ground that in the absence of any other documentary material, a registered sale deed is to be treated as genuine and that no relevant material had been seized during the search of the premises of the

Assessee?

(b) Whether the Income Tax Appellate Tribunal was correct in law in deleting the addition of Rs.5,60,750/-, Rs.4,50,600/- and Rs.8,12,350/- made by the Assessing Officer on the basis of the valuation report?

(c) Whether the Income Tax Appellate Tribunal was correct in holding that the income earned by the Assessee on the sale and purchase of immovable property cannot be treated as his business income?”

2. Respondent has been served. However, there is no appearance on his behalf and accordingly he is proceeded *ex-parte*.

3. As far as question (b) is concerned, the same relates to three transactions entered into by the respondent-assessee in respect of property Nos. 102/C-9, Sector 8, Rohini, 216, Block D, Lok Vihar, Delhi and 117/D-12, Sector 8, Rohini (hereinafter referred to as the first, second and third property).

4. The first property, admeasuring 158.73 square meters, was purchased by the assessee on 5th June 1989 from A.K. Jain and V. K. Jain, s/o S. K. Jain, for Rs. 3,00,000/-. No construction was carried out on this plot. The property was sold in the same year for Rs. 3,01,000/-. A capital gain of Rs. 1,000/- was declared for the Income Tax Return for the Assessment Year 1990-91. The second property was jointly purchased with J. K. Jain for a total consideration of Rs. 8.11 lacs. The assessee paid a sum of Rs. 4,05,500/- for his share. The property was

thereafter sold on 22nd October, 1993 for Rs.8.20 lacs. In respect of the said property, the respondent-assessee had shown and declared capital gain of Rs.4,500/- in the return of income for the assessment year 1994-1995. As far as the third property is concerned, the same was purchased for Rs.1,62,000/- on 12th January, 1991 and was sold on 13th April, 1993 for Rs.1,90,000/-. The gain from sale of this property was declared as capital gain in the return for the year 1994-95.

5. The Assessing Officer referred the matter to the valuation cell and recomputed the purchase price and sale price and on the basis of the figures given by the valuation cell. On the basis of the working done by him, the Assessing Officer made additions towards unexplained investment in properties. We may note that there were 10 transactions relating to properties, including the three properties mentioned above and one more property which are the subject of the present appeal. The total addition made by the Assessing Officer was of Rs.17,46,584/-.

6. The assessee succeeded before the first appellate authority i.e. the CIT (Appeals), who held that the Assessing Officer cannot make addition solely on the basis of the report of the DVO. He also

observed that no material or evidence was found during the course of search to show and establish that the assessee had received undisclosed amount or had earned undisclosed income in the transactions relating to the three properties.

7. Revenue preferred an appeal against the aforesaid finding recorded by the CIT (Appeals). Appeal filed by the Revenue has been dismissed by the tribunal on the two grounds. Firstly, it has been held that no incriminating material was found during the course of search and the transactions were duly reflected in the returns filed by the assessee in the normal course. Secondly, it is pointed out that except for DVO's report, there was no other material to show and establish that the assessee had made investment from undisclosed sources or had received under hand consideration. We may note that the Revenue has not placed on record DVO's report and we do not have advantage of examining and going through the same. In absence of the said data and material, it is impossible for us to verify and decided whether or not the findings recorded by the CIT (Appeals) and the tribunal are perverse. We do not know whether the DVO's report had referred to any sale instance, and if so, whether the properties referred to were similar or identical to the three properties mentioned above. We also note that the sale transactions in respect of the three properties were

within a short period after the assessee had acquired them. In absence of these details and material on record before us, we cannot answer question (b) and the same is returned unanswered. On this aspect, we may note that the order of the Assessing Officer only refers to the DVO's report and not the contents thereof. He is completely silent in that regard.

8. The first question relates to property No. 1028, Sector 15-II, Gurgaon admeasuring 300 square meters. The said property was originally allotted in 1989 to one P.C. Gupta, who had paid consideration of Rs.8,19,310/-. As per the allotment letter dated 23rd November, 1989, price of the said property was Rs.7,63,000/-. Sonali Jain, daughter of the assessee had acquired this property from P.C. Gupta on 28th June, 1994 on payment of Rs.4,00,000/-. On the said date Sonali Jain was a minor and was not earning. Subsequently, the property, a vacant plot, was transferred in the name of the assessee by his daughter on 4th August, 1997 again for a consideration of Rs.4,00,000/-. She had executed the sale deed in favour of the respondent assessee just before her marriage.

9. The Assessing Officer noticed two facts, which are relevant. Firstly, the property was sold by P.C. Gupta in 1994 after a period of five year from the date of acquisition. The price of acquisition was

Rs.8,19,310/-, whereas the purchase price disclosed and stated in sale/purchase documents after five years was Rs.4,00,000/-. In other words, the value of the property had come down in a period of five years by 50%. The Assessing Officer also referred to another sale instance i.e. property No.1000- 15-III, Gurgaon. The documents with regard to sale of the said property were seized from the residence of M.C. Jain and the sale consideration mentioned therein was Rs.8,200/- per square yard. Accordingly, the sale price of the property in question measuring 300 square yards, was taken as Rs. 29,42,160/-.

10. The CIT(A) partly sustained the addition to the extent of Rs.8,00,000/- by relying upon the DVO's report. He further observed that it was hard to believe that P.C. Gupta, who had acquired the property for Rs.8,19,310/-, would have transferred the same property after 5 years for Rs.4,00,000/- only.

11. It appears that the Revenue did not prefer any appeal against the findings recorded and part deletion directed by the CIT (Appeals) in respect of the said property. The assessee filed an appeal. The tribunal in the impugned order has observed that there was no direct evidence regarding purchase of property for Rs. 8,00,000/- and, therefore, addition of Rs. 4,00,000/- was not justified. The exact reasoning given by the tribunal reads as under:-

“17. We have carefully considered the entire material on record and the rival submission made before us. So far as property no.1028, Section 15-II, Gurgaon is concerned, this property was originally allotted to Shri P.C. Gupta in 1989 and from whom Ms. Sonali Jain, the daughter of the assessee purchased the plot on 28.06.1994. It was pointed out during the course of hearing by the Ld. counsel for the assessee that Ms. Sonali Jain was also assessed to tax and he had also filed returns for the block period. In this regard our attention was invited to the acknowledgement which is available at page 229 of the paper book. In the balance sheet available at page 2 & 3 of the paper book. Ms. Sonali Jain has shown investment of Rs.4 lakhs in plot no.1028, Sector 15-II Gurgaon. At pae 238 she has also declared long term capital gain in respect of this plot. Her asstt. Was completed u/s 143(3)/158 BD vide order dated 29.12.2000 available at pages 245 to 247 of the paper book. In her case the undisclosed income was determined at Rs.4 lakhs as declared by the assessee in the block return. It is to be pointed out that no addition has been made in her hands on account of investment in the purchase of plot. If the revenue was going to place reliance on the allotment deed in favour of Shri P.C. Gupta as he paid a sum of Rs.8,19,310/- for purchasing the plot then at the first stage addition on account of undisclosed investment should have been made in the case of Ms. Sonali Jain who was an independent assessee and who had also disclosed the transaction in the return. As no addition was made on account of undisclosed investment in the purchase of plot by her on the basis of allotment in the name of Shri Gupta no addition can be made in the hands of the second transferee on the basis of that document. If may be pointed out that the assertion of the department that the purchase by Ms. Sonali Jain was a benami transaction as the assessee has himself invested the amount through her, cannot be accepted because Ms. Sonali Jain

has been assessed as an independent person and evidence regarding bename transaction has not been adduced by the department.

12. In addition, it has been observed that no evidence or material was found during the course of search to make such addition in the block assessment proceeding. As far as this aspect is concerned, we record that during the course of search, documents with regard to the purchase value in the hands of P.C. Gupta were found and this factum has been specifically referred to by the Assessing Officer in the assessment order. In addition, document with regard to sale of property No.1000, Section 15-II, Gurgaon was found from the residence of M.C. Gupta, who was also searched. Therefore, the findings recorded by the tribunal in this regard are factually incorrect. It's a different matter whether the document seized from the house of M.C. Gupta may not have resulted in any addition. This is a matter of merits and not jurisdiction. However, block assessment should have been initiated. In any case, as noticed above, the document i.e. the allotment letter issued by P.C. Gupta was certainly found at the time of search.

13. With regard to the addition made in the hands of the assessee, the tribunal in the reasoning recorded above has ignored and not given due credence and importance to the purchase price of Rs.8,19,310/- in

1989 and the fact that the property was sold in 1994 to Sonali Jain, who was at that time was a minor and was not earning. She had no source of income. It is not possible to accept and believe that the value of the property in five years would have come down by more than 50% from Rs.8,19,310 to Rs.4,00,000/-. It is also not possible to believe that Sonali Jain could have paid or had earned any undisclosed money, even when she was not working or earning. There is no evidence or material to show that she had an independent source of income. The factum that Sonali Jain had shown income of Rs.4,00,000/- in her return is inconsequential. The issue in question was the addition of Rs.4,00,000/- in the hands of the assessee on account of the undisclosed investment in the property, which was purchased in the name of his minor daughter Sonali Jain. The factum that Sonali Jain had sold the property just before her marriage to the respondent-assessee also shows that the respondent-assessee was practically and *de-facto* the owner of the property. It is well settled that even if income has been assessed in the hands of a third person because of the declaration made in the return, income must be assessed and taxed in the hands of the real owner or recipient or person, who had made the investment.

14. In ***Income-Tax Officer Vs. Ch. Atchaiah*** (1996) 1 SCC 417, the

Supreme Court had observed as under:-

“6. In this appeal, Dr Gauri Shankar, learned counsel for the Revenue, urged that the High Court was clearly in error in holding that under the present Act, the Income Tax Officer has an option to tax either Association of Persons or its members individually. Learned counsel submitted that while such an option was available to the Income Tax Officer under the 1922 Act, no such option is available under the present Act. According to the present Act, the learned counsel says, the right person has to be taxed and merely because a wrong person is taxed, it does not operate as a bar to taxing the right person. In other words, his contention is that if in law the income in question had to be taxed in the hands of Association of Persons, it had to be taxed as such and the mere fact that the said income was taxed in the hands of individual members of Association of Persons does not bar the Income Tax Officer from taxing the Association of Persons. Shri A. Panduranga Rao, learned counsel for the appellant-assessee, contended, on the other hand, that there is no difference between the position obtaining under the 1922 Act and the present Act and that, therefore, the decisions rendered under the 1922 Act hold good equally under the present enactment. The learned counsel supported the reasoning and conclusion of the High Court. Learned counsel also brought to our notice that though the Andhra Pradesh High Court had taken a different view in a subsequent decision in *Choudry Bros. v. CIT*, the said view has since been overruled by the Full Bench of that Court in *CIT v. B.R. Constructions*. The Full Bench, it is stated, has affirmed the correctness of the decision under appeal (which is reported in *Ch. Atchiaiah v. I.T.O.*). The learned counsel has also filed written arguments, which we have perused.

7. In our opinion, the contention urged by Dr

Gauri Shankar merits acceptance. We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By “right person”, we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression “wrong person” is obviously used as the opposite of the expression “right person”. Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taking the right person with respect to that income. This is so irrespective of the fact which course is more beneficial to the Revenue. In our opinion, the language of the relevant provisions of the present Act is quite clear and unambiguous. Section 183 shows that where Parliament intended to provide an option, it provided so expressly. Where a person is taxed wrongfully, he is no doubt entitled to be relieved of it in accordance with law^{*} but that is a different matter altogether. The person lawfully liable to be taxed can claim no immunity because the Assessing Officer (Income Tax Officer) has taxed the said income in the hands of another person contrary to law. We may proceed to elaborate.”

15. In view of the aforesaid reasoning, it is held that the order passed by the tribunal is perverse and an order of remit is passed to the tribunal to re-examine the question of taxability on account of the undisclosed investment in the purchase of property No.1028, Sector 15-II, Gurgaon in the hands of the respondent-assessee. Question (a) is answered in negative i.e. in favour of the Revenue and against the assessee.

16. The question (c) mentioned above, according to us, does not require any answer as undisclosed income in the block assessment proceedings has to be taxed at a flat rate. It does not matter whether the income has been assessed under the head “income from business”, “income from other sources” or “income from property”.

17. The appeal is disposed of. No costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

APRIL 19, 2012
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