

\$~3

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

Date of decision: 19.10.2012

+ ITA 610/2012

CIT

..... Appellant

Through: Mr. Abhishek Maratha, Sr.
Standing Counsel with Ms. Anshul Sharma,
Advocate.

versus

DINESH JAIN HUF

..... Respondent

Through: None.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

R.V. EASWAR,J: (OPEN COURT)

This is an appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (“Act”, for short) and the following substantial questions of law are sought to be raised for our consideration.

“A. Whether the ITAT was correct in the eyes of law in deleting the addition of ₹3,72,86,412/- made by the assessing officer on account of the unexplained investment in the immovable properties?”

B. Whether ITAT was correct in the eyes of law in quashing the order passed by the assessing officer adopting the Fair Market Value as the sale consideration of the property when he had brought on record sufficient reasons to show cause that there was under statements of sale consideration by the assessee?”

C. Whether the impugned order passed by the ITAT is perverse both in facts and law?”

2. The assessee, who is the respondent in this appeal, is a Hindu Undivided Family. There was a search under Section 132 of the Act on 9.12.2003 in the residential/business premises and the related persons/concerns of Begum Gutka group of cases and on the basis of the material seized during the search, a notice under Section 153A of the Act was issued to the assessee calling upon it to file the return of income. The assessee submitted that the original return filed may be taken as the return filed in response to the notice. In the course of the assessment proceedings, the assessing officer noticed that the assessee had acquired immovable properties for prices which according to him were very low considering the rental income yielded by those properties. He accordingly applied the rent capitalization method as provided in rule 3 of Part B of Schedule III to the Wealth Tax Act and estimated the value of the properties at higher figures and treated the difference between the prices shown by the assessee and the value estimated by him as undisclosed investment of the assessee, invoking Section 69B of the Act. The following are the details :

Description of the property	Prices shown by the assessee (₹)	Value estimated by the assessing officer	Difference added as undisclosed investment
Flat No.3 & 9, Palm Court, Sukharali Chowk, Gurgaon	38,49,000/-	1,84,36,910/-	1,45,87,912
Flat No.303 & 309, Palm Court, Sukharali Chowk, Gurgaon	35,10,000/-	1,65,83,500/-	1,30,73,500/-
M-64, G.K.-II, New Delhi	10,00,000/-	1,06,25,000/-	96,25,000/-
		Total	3,72,86,412/-

On the above basis and the reasoning the assessing officer made an addition of ₹3,72,86,412/- under the head “income from other sources” as the unexplained investment made in rent-yielding properties.

3. The assessee preferred an appeal to the CIT(Appeals) and contended that there was no evidence to show that it had in fact paid anything more than the price declared by it for the properties, that the conclusion of the assessing officer to the contrary was based purely on surmises and conjectures and not on any cogent material, that even the search did not yield any material or evidence to show any undisclosed investment by the assessee. It was argued that at any rate the value based on rent capitalization method as prescribed in the Schedule III to the Wealth Tax Act was only a notional figure of fair market value of the property which was different from the price paid for the property and that in these circumstances the addition made by the Assessing Officer based upon the provisions of Section 69B of the Act was arbitrary and had absolutely no basis. It was also submitted on the basis of certain specific instances that even on comparing the market rates for the properties, there was no understatement of the consideration.

4. The CIT(Appeals) examined the contentions of the assessee in detail and held that so far as the flat Nos.3 and 9, Palm Court are concerned, the facts are substantially similar to the facts of the case of P C Jain (HUF), Smt. Lata Jain and Dinesh Jain (individual) which cases had already been adjudicated by him by orders dated 13.3.2008, 13.7.2008 and 18.8.2008 respectively. Following his orders in those cases, which according to him were equally applicable to the present case, he directed the assessing officer to rework the addition. In those earlier cases the CIT(Appeals) had held that the amount declared by the assessee as purchase price was not sacrosanct and that the assessing officer can

go behind the prices declared to find the correct and fair valuation of the immovable properties since no direct evidence (of understatement) in such transactions can be gathered. Adopting a similar line of reasoning the addition made under Section 69B was directed to be reworked.

5. In respect of flat No.303 and 309, Palm Court also a similar line of reasoning was adopted.

6. The result was that in respect of flat Nos.3 and 9, Palm Court, the CIT(Appeals) sustained an addition of ₹52,90,000/- and in respect of flat Nos.303 and 309, Palm Court he sustained an addition of ₹42,90,000/-.

7. So far as the property bearing No.M-64, G.K.-II is concerned, the CIT(Appeals) was of the view that the price of ₹498.57 per sq.ft declared by the assessee was abnormally low and could not by any standards be considered as reasonable compared to the market value of the property. He noted that the property was located in a commercial places and commanded a substantial value in the open market and “merely on the ground that no evidences found during search as regards the real value of investment, could not make the value declared by the assessee is true and correct”. He estimated the value of the property at ₹4,000 per sq.ft. by taking into account the locality and the rental income as was done in the case of Dinesh Jain (individual) for the assessment year 2001-02. Applying this rate the value of the property came to ₹80,20,000/- as against ₹10,00,000/- declared by the assessee and ₹1,06,25,000/- adopted by the assessing officer. The addition sustained was thus reduced to ₹70,20,000/- in respect of this property.

8. Both the assessee as well as the revenue preferred cross-appeals before the Income Tax Appellate Tribunal (“Tribunal”). The Tribunal found that the

facts of the present case were similar to the facts in the cases of Dinesh Jain (individual) and Smt. Lata Jain. It noted that in those cases the matter had already reached the Tribunal and the Tribunal had deleted the entire addition made under Section 69B on the ground that there was no evidence to show any understatement or suppression of the sale consideration/purchase consideration and therefore, no addition can be made on the basis of the estimated market value of the properties. The Tribunal held as follows :

“21. We have heard both the parties and gone through the material available on record. In the instant appeals the AO has estimated the value of investments in the impugned properties by applying provisions of Schedule 3 of Wealth-tax Act. The Id. CIT(A), however, following his decision in the case of Shri Dinesh Jain and in the case of Smt. Lata Jain had estimated the value of the property. The AO had not brought on record any material to suggest that the value shown in the conveyance deeds was lower than the amount passed on by the assessee to the sellers. ITAT, Delhi Bench “B” in the case of Shri Dinesh Jain and Smt. Lata Jain in consolidated order dated 30th September, 2009 in ITA No.3422 (Del) of 2008 etc. has deleted the similar additions by observing, as under :-

“5. We have considered the rival contentions and carefully gone through the orders of the authorities below. From the record, we found that on the basis of sale deed found during the course of search in respect of purchase of various properties, the AO found that assessee was in receipt of rental Income in respect of these properties. As per AO, the disproportionate yield of income from these properties indicates that the amount invested has been suppressed. Accordingly, he applied provision of Rule 3 Part (b) of the 3rd Schedule to the Wealth Tax Rules for the purpose of determining the fair market value of these properties. The assessing officer also make a reference to the DVO, as the reference was made one day prior to the framing of assessment, he was not in receipt of any DVO’s report. It is undisputed fact

that department has not referred any incriminating material having been found during the course of search and investigation made thereafter which indicate that assessee had paid anything more than what has been stated in the sale deeds. It was also not the allegation of the Department that there was any difference in the value of the property as accepted by the Sub Registrar for the purpose of stamp duty valuation. In view of the fact that no material was found indicating anything paid over and above the registered sale price of the property so acquired, keeping in view of the decision of Hon'ble Supreme Court in the celebrated judgment of K P Verghese (supra) wherein it was held that onus lies on the department to prove that some consideration over and above the consideration stated in the sale deed have been invested, no addition can be made on presumptions and suspicions. In the latest case of CU vs. Shakuntala Devi (ITA No.345/2007), Hon'ble Delhi High Court held "it may be relevant to note that a division bench of the court comprising Dr. Arijit Prasayath and Justice D.K.Jain, as their lordships then were retreated that there must be a finding of the revenue that the assessee had received amounts over and above the consideration stated in the sale deed, following the ratio of K.P.Verghese (supra). K P Verghese (supra) has also been followed and applied by the Supreme Court in CIT Vs. Godavari Corporation Limited 200 ITR 567. The division bench of Hon'ble Delhi High Court in CIT Vs. Ashok Khetrpal 294 ITR 143 observed that by referring to the report of valuation officer in the absence of any (sic) incriminating documents found in the course of a search no addition could be made by treating investment as undisclosed on the basis of any DYC's report. The decision in CIT Vs. Mar Jam 287 ITR 285 is also to the same effect. In CIT Vs. Shivakami Company (P) Ltd. 151 ITR 79 (SC), their Lordships have once again reiterated that onus whether the assessee had received more consideration than what was stated in the documents of transfer, rested on the

Revenue and in the absence of that burden having been being discharged, it would be legally impressible to make any inferences against the assessee.”

22. *Since the issue is covered by the decision of the ITAT in the case of Shri Dinesh Jain (supra) and the facts of the case are identical to the facts of Shri Dinesh Jain, respectfully following the precedent, it is held that the Ld. CIT(A) was not justified in estimating the value of the investments in the properties contrary to the amount mentioned in the conveyance deeds. Accordingly, we set aside the order of the ld. CIT(Appeals) and direct the AO to accept the value of the properties as declared in sale deeds.”*

9. It is the correctness of the aforesaid order of the Tribunal that is called in question in the present appeal by proposing the questions of law which we have extracted in the beginning of the order. In the cases of the present assessee itself as well as the Smt. Lata Jain and Dinesh Jain (individual), the correctness of the orders of the Tribunal passed on similar lines was called in question before this Court in ITA Nos.1667/2010, 85/2011 (***CIT Vs. DINESH JAIN HUF***), 1800/2010, 1803/2010, ITA 1805/2010, 1807/2010, 1809/2010, 1811/2010, 1812/2010, 1813/2010, 1967/2010, 1972/2010 (***CIT Vs. LATA JAIN***), 1815/2010, 1816/2010, 1817/2010, 1818/2010, 1819/2010, 1968/2010, 1969/2010, 1970/2010, 1971/2010 (***CIT Vs. DINESH JAIN***). This Court in its order dated 28.9.2012 held that (a) Section 69B in terms requires the assessing officer to first prove that the assessee has actually expended an amount which he has not fully recorded in his books of account; (b) there has to be a finding that such amount was actually paid by the assessee over and above the declared consideration and the extra amount was not recorded in the assessee’s books of account; (c) the provisions of the Wealth Tax Act and Schedule III thereto cannot be imported into the provisions of Section 69B because the enquiry under the Wealth Tax Act is towards estimating the market value of the

property which is different from the actual price paid for the property; (d) 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 this books of account, because such an inference could be very subjective and could lead to the taxation of notional or fictitious income contrary to the strict provisions of Article 265 of the Constitution of India as held by the Supreme Court in the case of *K P Verghese Vs. ITO* (1981) 131 ITR 597.

10. Since admittedly the facts in the present case are the same as in the earlier decision of this Court, we see no infirmity in the decision taken by the Tribunal to delete the entire addition made by the assessing officer under Section 69B. As in the earlier decision of this Court, the first two substantial questions of law are answered in the affirmative, in favour of the assessee and against the revenue. We hasten to clarify that question 'B' is improperly worded inasmuch as it assumes that the assessing officer had brought on record sufficient evidence to show understatement of sale consideration. This is an erroneous assumption and no such evidence has been brought on record, as has been pointed out by us earlier. The third and last question is answered in the negative, against the revenue and in favour of the assessee.

The appeal filed by the revenue is accordingly dismissed with no order as to costs.

R.V.EASWAR, J

S. RAVINDRA BHAT, J

OCTOBER 19, 2012/vld