(2013) 02 DEL CK 0065

In the Delhi High Court

Case No : ITA 1303 of 2011

CIT APPELLANT

Vs

Vinod Kumar Gupta RESPONDENT

Date of Decision : 07-02-2013

Acts Referred:

Citation : (2013) 2 AD 685 : (2013) 351 ITR 253

Hon'ble Judges : R.V. Easwar, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : N.P. Sahni, for the Appellant; V.K. Sabharwal, for the Respondent

Judgement

Badar Durrez Ahmed, J.—The question framed for our consideration in this appeal by an order dated 03.09.2012 was as under:-

Whether the Tribunal fell into an error in upholding the deletion of a sum of Rs. 1,51,27,450/-, directed by the CIT(A) on account of long term capital gain, assessed by the AO on sale of shares in respect of AY 2006-07 in the facts of the case?

However, on hearing counsel for the parties we feel that the actual question pertains to the Tribunal rendering a decision contrary to the record. Consequently, we reframe the question as under :-

Whether the impugned order passed by the Income Tax Appellate Tribunal affirming the deletion of a sum of Rs. 1,51,27,450/- by the CIT(Appeals) on account of long term capital gains, is not contrary to the record and/or perverse?

The facts of the case are that in respect of the assessment year 2006-07, 48,100 shares of R.S. Builtwell Pvt. Ltd. were sold by the assessee to M/s Samiah International Builders Pvt. Ltd., Mr Jamil A. Khan and Ms Tabassum Jamil. The apparent consideration for the transfer of these shares was shown as Rs. 125/- per share. There is no dispute that this amount of Rs. 125/- per share was received through cheques from the aforesaid persons by the respondent/

assessee.

2. A survey operation was carried out u/s 133A of the Income Tax Act, 1961 insofar as M/s Samiah International Builders Pvt. Ltd. was concerned on 15.1.2008. In the course of the survey operations certain documents were found to which the Managing Director of M/s Samiah International Builders Pvt. Ltd., namely, Mr Jamil A Khan had no explanation. In a statement given by the said Mr Jamil A Khan on 16.1.2008, in response to a question as to whether he was associated with R.S. Builtwell Pvt. Ltd., he answered that he and his wife were directors in it and the main activity of the project of Singapore Residency, Sector-36 at Greater Noida was looked after by M/s Samiah International Builders Pvt. Ltd. and only the land title of the project was in the name of R.S. Builtwell Pvt. Ltd. When he was questioned as per question 30 with regard to the documents which were found and impounded at the premises at A-35, Sector 63 Noida during the survey operation, he answered and he was unable to explain the transactions recorded in the said transactions. However, he stated that to avoid litigation and to buy peace of mind he would voluntarily offer for taxation an amount of Rs. 10 crores as additional income of M/s Samiah International Builders Pvt. Ltd. He also handed over post dated cheques totaling Rs. 3,39,90,000/- representing the tax amount on the surrender of Rs. 10 crores made by him. This was followed by a letter, the contents of which read as under :-

We have surrendered an additional income of Rs. 10 crores subject to the non-initiation of any penal action on dated 15.1.2008 during the course of survey proceedings but due to mental pressure on the date, we have written current financial year instead of relevant financial year regarding the period to which the surrender related. Moreover, on the day of survey we have not gone through the seized documents and now after going through the seized documents, we affirm that we have surrendered an additional income of Rs. 10 crores subject to the non-initiation of any penal action on dated 15.1.2008 during the course of survey proceedings in the relevant financial year of the documents seized. We, however, now give details of the surrender and the same includes additional income of Rs. 6.29 crores being amount paid by Ms/ Samiah International Builders Pvt. Ltd. for the purchase of shares during the financial year 2005-06 and the balance amount of Rs. 3.71 crores related to the relevant year of remaining documents seized during the survey.

This is for your information and record please.

Thanking you,

Yours faithfully,

Sd/-

For Samiah International Builders P. Ltd.

(Er. Jamil A. Khan)

Director.

(underlining added)

From the above, the assessing officer computed the value of each share at Rs. 439.5. This was based on the fact that the said Mr Jamil A. Khan had admitted that the additional income of Rs. 10 cores surrendered by him included an income of Rs. 6.29 crores being the amount paid by M/s Samiah International Builders Pvt. Ltd. for the purchase of the shares during the financial year 2005-06. It is an admitted position that in that year two lakh shares were purchased by M/s Samiah International Builders Pvt. Ltd. and/or by Mr Jamil A. Khan and Ms Tabassum Jamil. The breakup was that 48,100 shares were purchased from the respondent-assessee whereas the remaining shares were purchased from other members of the assessee''s family. What the assessing officer did was to divide the consideration of Rs. 6.29 crores by the total number of shares (two lakh shares) to arrive at the value per share. According to this calculation the value per share was computed at Rs. 439.50. Since the apparent consideration was only Rs. 125 per share, it was deduced that the remaining consideration of Rs. 314.50 per share was paid in cash. On the basis of this, the capital gains in the hands of the respondent-assessee for sale of 48,100 shares was assessed at Rs. 2,11,39,950/- which led to an addition of Rs. 1,51,27,450/-.

3. The assessment was completed on the above basis.

4. The respondent-assessee being aggrieved by the said assessment, preferred an appeal before CIT (Appeals) who deleted the said addition of Rs. 1,51,27,450/-. The CIT(Appeals) was impressed by the fact that during the course of assessment proceedings the respondent-assessee had filed documentary evidence before the assessing officer which included the confirmations/affidavits of the buyers, income tax returns of the buyers, the valuation report of the independent valuer in support of price of shares and that the assessing officer had not pointed out any defects or deficiency in them. The CIT(Appeals) was of the opinion that the assessing officer had erred in making the addition on the basis of the statement made by Jamil A. Khan particularly when Jamil A. Khan had confirmed to the assessing officer, by filing an affidavit, that no cash payment was made to the appellant for purchase of shares. It was also observed that the assessing officer had not brought on record the author of the documents impounded during the course of survey and that despite the request of the respondent-assessee, the assessing officer had not provided an opportunity of cross-examining Jamil A. Khan or the author of the impounded documents. Consequently, the CIT(Appeals) concluded that the addition could not be made at the hands of the respondent-assessee on the basis of documents/ papers found from the premises of third parties and on the basis of the statement recorded by the third parties behind the back of the assessee.

5. The revenue went up in appeal before the Tribunal which, we feel, has merely parroted the conclusions of the CIT(Appeals). This would be apparent from the

paragraph 6 of the impugned order which is as under :-

6. We have heard the rival contentions in light of the material produced and precedent relied upon. We find that during the assessment proceedings in this case assessee has filed before the affidavit of the buyers and the income tax return of the buyers and Valuation Report of independent valuer in support of the price of shares. The Assessing Officer has not pointed out any defect or deficiency in any of them. Assessing officer made the addition on the basis of statement of Shri Jamil A Khan, but it is noted that Sh. Jamil A. Khan himself confirmed to the Assessing Officer by filing an affidavit that no cash payment was made to the assessee for the purchase of shares. The Assessing Officer has not brought on record the author of documents impounded during the course of survey. Despite the request of the appellant, the Assessing Officer has not provided the opportunity of cross examination of Jamil A Khan or the author of impounded documents. In these circumstances, Ld. Commissioner of Income Tax (Appeals) held that additions cannot be made in the hands of the assessee on the basis of documents found from the premises of third parties and on the basis of statement recorded of third parties behind the back of the assessee. Furthermore, the company shares were sold, was a unquoted company, the sale price were arrived at on the basis of valuation report of independent valuer and the Assessing Officer has erred in ignoring such report without pointing out any defects in this regard. Case laws referred by the Ld. Commissioner of Income Tax (Appeal)''s are also germane and support the case of the assessee.

6. We may point out that the assessment of the respondent-assessee was getting time barred on 31.12.2008. The last hearing in the matter was conducted by assessing officer on 29.12.2008, on which date, the respondent-assessee submitted a reply and along with the reply he annexed affidavits of Jamil A. Khan and Tabassum Jamil in their individual capacities and also an affidavit of Jamil A. Khan as a director of M/s Samiah International Builders Pvt. Ltd. It is in these affidavits that it has been stated that no cash was paid for the purchase of the shares of R.S. Builtwell Pvt. Ltd. from the respondent-assessee.

7. We find that both the Commissioner of Income Tax (Appeals) as also the Tribunal have founded their conclusion essentially on the premise that the respondent-assessee had requested for an opportunity of cross-examining Jamil A. Khan and that such an opportunity had not been provided by the assessing officer. However, from the record we do not find that there was any such request made by the respondent-assessee for cross-examining Jamil A. Khan. In fact, we find it rather intriguing as to why would the respondent-assessee request for cross-examining Jamil A. Khan when the respondent-assessee himself had furnished affidavits to Jamil A. Khan in support of his case. The observations of the Commissioner of Income Tax (Appeals) as also of the Tribunal that despite the request of the respondent-assessee, the assessing officer had not provided opportunity of cross-examining Jamil A. Khan, are contrary to the record. We are therefore, of the opinion that the answer to the question framed has to be in

favour of the revenue and against the respondent-assessee. It must also be mentioned that in the conclusions arrived at by the Tribunal, there is reference to the return filed by Jamil A. Khan. But, that reference is to the original return filed by Jamil A. Khan and not to the revised return filed by Jamil A. Khan. The Tribunal had completely overlooked the fact that Jamil A. Khan had filed a revised return after he had made a surrender of Rs. 10 crore during the survey operation. In that return an amount of Rs. 6.29 crores has been shown as the cash component of the purchase of shares of R.S. Builtwell Pvt. Ltd. from the assessee and his relatives. That aspect of the matter has been ignored by the Tribunal. Consequently, having answered the question in favour of the revenue, we set aside the impugned order and remit the matter to the Tribunal for considering the same afresh on all grounds.

The appeal is allowed as above. There shall be no order as to costs.

