(2014) 01 GUJ CK 0086

In the Gujarat High Court

Case No : Tax Appeals Nos. 27, 28 and 29 of 2014

Commissioner of Income Tax — APPELLANT

Vs

Jayendra N. Shah — RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:
Income Tax Act, 1961 — Section 132(4), 142A

Citation : (2014) 367 ITR 686

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : K.M. Parikh, Advocate for the Appellant

Judgement

Akil Abdul Hamid Kureshi, J.—These appeal involve the same assessee and the questions raised by the Revenue also overlap. These appeals are, therefore, heard together and are being disposed of by this common order. The Revenue has challenged the common judgment of the Income-tax Appellate Tribunal, Ahmedabad ("the Tribunal" for short) dated June 21, 2013, for three separate assessment years, i.e., 2008-09; 2009-10 and 2010-11. The assessee was subjected to search proceedings during which, he disclosed that in the cost of construction of a house, an undisclosed income to the extent of Rs. 1.50 crores had gone into. However, this statement was later on retracted. In addition to the value of the house; including the land shown at Rs. 1.34 crores (rounded off), the assessee filed the return of income declaring further investment of Rs. 38.30 lakhs (rounded off) in such house from the undisclosed sources. The issue in these appeals center around the additions made by the Assessing Officer--deleted by the Commissioner of Income-tax (Appeals) and the Tribunal towards undisclosed investment of the assessee for the purchase of land and construction of the house. Since the construction spells over the three assessment years, the cost thereof has been broken down by the Assessing Officer by giving effect in each year separately.

2. During the assessment proceedings, the assessee disputed an additional

investment in purchase of land in excess of Rs. 42 lakhs shown in the books. With respect to the cost of construction, the assessee stuck to its return in which the additional cost of Rs. 38.30 lakhs from undisclosed sources was declared. To substantiate this claim, the assessee produced a report from a valuer who estimated the cost of construction; including furniture and fixtures at Rs. 1.36 crores. The Assessing Officer referred the matter for valuation of land and building to the Departmental Valuation Officer ("DVO" for short). As per the DVO''s report, the cost of land would be Rs. 65.38 lakhs (rounded off) and the cost of construction excluding furniture and fixture would be Rs. 1,24,22,000. To such cost of construction estimated by the DVO, the Assessing Officer added a sum of Rs. 13.5 lakhs towards furniture and fixtures and came to a figure of Rs. 1,37,22,000. Thus, there was a minor difference of Rs. 1,22,000 in the cost of construction estimated by the DVO as compared to the report of the assessee''s valuer. Despite such minor difference, strangely the Assessing Officer in the assessment order added a sum of Rs. 1.71 lakhs (rounded off) towards the cost of construction in the assessment year 2008-09; Rs. 11.06 lakhs (rounded off) for the assessment year 2009-10 and Rs. 14.90 (rounded off) for the assessment year 2010-11. Thus, the total addition of Rs. 27.69 lakhs (rounded off) came to be made by the Assessing Officer for the three assessment years towards the cost of construction.

3. The Assessing Officer also added a sum of Rs. 23.38 lakhs (rounded off) towards investment in purchase of land, accepting the DVO''s report.

4. These additions were challenged by the assessee before the Commissioner (Appeals). The Commissioner of Income-tax (Appeals) deleted both the additions. With respect to the cost of construction, the Commissioner of Income-tax (Appeals) observed as under:

"19. I have carefully considered the submissions made by the appellant and have gone through the assessment orders passed by the Assessing Officer. I have also gone through the various judicial decisions relied upon by the appellant and the related provisions of the Act.

19.1 It is an undisputed fact that the appellant during the course of search proceedings repeatedly made the admission under section 132(4) if the Income-tax Act confirming the fact that he has incurred the expenditure of Rs. 1,50,00,000 out of his undisclosed income in the construction of bungalow No. 4 Janod, Amarkunj Society and, accordingly, he has disclosed unexplained investment of Rs. 1,50,00,000 in the construction of bungalow as his unaccounted income. The relevant statement has already been reproduced by the appellant in his submissions and, therefore, the same is not repeated for the sake of brevity.

19.2 Subsequently, the appellant has got the construction of bungalow duly estimated by the private registered valuer. The report of the registered valuer is on record. As per the registered valuer''s report, the total estimated cost of construction of the bungalow is Rs. 1,36,00,000. The cost of construction of this bungalow has been shown as per the books of account of the appellant and his wife at Rs. 96,47,566. Thereafter, the appellant has disclosed Rs. 38,30,000 in the return of income for the assessment year 2010-11 on account of undisclosed investment in the construction of bungalow. Thus, as against the disclosure of undisclosed investment of Rs. 1,50,00,000 made during the course of search proceedings as per the statement recorded under section 132(4) of the Act, only Rs. 38,30,000 has been disclosed by the appellant in the return of income.

19.3 For estimating the fair cost of construction, the Assessing Officer has also referred the matter to the DVO under section 142A of the Act. The DVO has estimated the fair cost of construction of the bungalow at Rs. 1,24,22,644. Therefore, the cost of construction as per the DVO as well as private registered valuer is almost the same. The Assessing Officer has relied on the DVO''s report and made addition amounting to Rs. 1,71,344, Rs. 11,06,928 and Rs. 14,90,927 in the assessment years 2008-09; 2009-10 and 2010-11, respectively. The total addition made by the Assessing Officer on account of undisclosed investment in construction of the bungalow for all the assessment years is Rs. 27,69,199....

19.8 So far as the addition on account of unexplained investment made in the construction of house on the basis of the valuation report is concerned, in the case of (2008) 113 ITD 255, it has been held that for making addition, the Department cannot make sole reliance on the DVO''s report and made addition of the entire difference. It is to sacrosanct but an estimate by a technical person and it taken in advisory capacity. On a perusal of the valuation report of the DVO as well as private registered valuer, it is noted that there is hardly any substantial difference between these two reports. The cost of construction estimated by the private registered valuer is at Rs. 1,36,00,000 whereas in the case of the DVO the estimated cost of construction is Rs. 1,24,22,644. On comparison of the report, it is noted that the private registered valuer''s report of the estimated cost of construction also includes the cost of air-conditioners, electrical fixtures, movable furniture, etc., amounting Rs. 8,50,000 as well as bathroom fittings, amounting to Rs. 5,00,000. The report of the DVO clearly specifies that the estimated cost of construction does not include the cost of AC movable items, i.e., electrical, kitchen and gym equipment. Considering the above, there is hardly any difference in the two estimated values of construction of the bungalow....

19.12 In view of the above, I assessment of the considered opinion that no addition is called for on account of the sole reliance on the DVO''s report as has been made by the Assessing Officer since the value of the cost of construction as determined by the DVO is almost the same as has been shown by the appellant including the disclosed amount of Rs. 38,30,000. In view of the above, I do not find any reason for addition to be made on account of the DVO''s report when there is hardly any difference in the cost of construction as shown by the appellant and the DVO''s report. Accordingly, the addition made by the Assessing

Officer of Rs. 1,71,344; Rs. 11,06,928 and Rs. 14,90,927 for the assessment years 2008-09; 2009-10 and 2010-11, respectively, is deleted since there is no justification in making any such addition. This ground of appeal is accordingly allowed for the above years."

5. In so far as addition for purchase of land is concerned, the Commissioner of Income-tax (Appeals) held and observed as under:

"21. So far as the addition made for the assessment year 2008-09 on account of undisclosed investment in the purchase of land for construction of bungalow amounting to Rs. 23,38,200 is concerned, it is noted that the Assessing Officer has made the addition on the basis of the DVO''s report. The DVO has estimated the cost of land at Rs. 65,38,200 as against the recorded value of Rs. 42,00,000 in the books of the appellant.

21.1 It is an admitted fact that there was no admission in respect of the undisclosed investment in purchase of land. The disclosure was made by the appellant only in respect of construction of the bungalow. No adverse material/ document has been found during the course of search proceedings indicating that the investment in land is more than what has been recorded in the books of account. The only defect with respect to the purchase of land as has been pointed out by the Assessing Officer is in respect of expenditure incurred on account of stamp duty, additional stamp duty, registration fees, etc., amounting to Rs. 1,25,050. The same has not been accounted for by the appellant for which separate addition has already been made. There is no other evidence pointing out the fact that the land has been purchased at higher price than the documented amount.

21.2 There is no dispute to the well-settled legal proposition that no addition can be made merely on the basis of the valuation report, which is just an estimate prepared by a technical person. Whenever the Assessing Officer wants to adopt the valuation made by the DVO, he is first of all required to point out the defects in the accounts maintained by the assessee or to indicate that the cost shown in the books of account is not correct.

21.3 In the present case, the Assessing Officer has not pointed out any defect in the books of account based on which reference under section 142A can be justified so far as the cost of land is concerned. There is nothing on record to suggest that there is any defect in the books of account maintained by the appellant-firm so as to conclude that books of account maintained by the appellant-firm cannot be relied upon so far as the purchase price of land is concerned.

21.4 In the present case, the Assessing Officer has made the addition mainly on the basis of the valuation report made by the DVO. There is not a single stance to show that the appellant had actually incurred the expenditure that was more than that recorded in the books of account. There is no reference to any such evidence found even during the course of search proceedings.

21.5 Considering the entire facts and circumstances of the case, I assessment of the considered opinion that so far as the addition on account of unexplained investment made in the purchase of land on the basis of the valuation report is concerned, no sole reliance on the DVO''s report can be made for the purpose of making addition of the entire difference. In view of the above, the addition made by the Assessing Officer as undisclosed investment of Rs. 23,38,200 in purchase of land on the basis of the DVO''s report is deleted. This ground of appeal is accordingly allowed."

6. The Revenue challenged the said order of the Commissioner of Income-tax (Appeals) before the Tribunal. The Tribunal confirmed the view of Commissioner of Income-tax (Appeals) giving further separate reasons. The Revenue has thereupon filed these appeals.

7. We have no reason to interfere with the concurrent reasonings of the two authorities below. Firstly, taking the issue of cost of construction, it clearly emerges from the record that between the DVO''s estimation of cost of construction without furniture and fixture and that of the assessee''s valuer, there is a minor difference of Rs. 1.22 lakhs. When we are considering the total figure in the vicinity of Rs. 1.36 crores, this difference is insignificant. Even if, therefore, the Assessing Officer had accepted the DVO''s report in its entirety, the total addition under the head could not have exceeded Rs. 1.22 lakhs. He instead made an addition of Rs. 27.69 lakhs, for which we see no basis whatsoever. Learned counsel, Shri K.M. Parikh, strenuously urged that the construction was carried out in three separate previous years relevant to different assessment years. The Assessing Officer had, therefore, divided the undisclosed investment in the cost of construction in these three years. Even if this be so, we fail to see how the total of these three years of expenditure could exceed Rs. 1.22 lakhs which was the difference between the DVO''s valuation and that of the valuation of the assessee''s valuer, on the basis of which he filed the return.

8. Coming to the question of addition towards purchase of land, the Commissioner of Income-tax (Appeals) as well as the Tribunal both have examined the issue on the basis of the material available on record. It is noted that the assessee had made no disclosure towards the purchase of land in his statement during the search proceedings. The addition was made merely on the basis of the DVO''s report without there being any other material. Moreover, the DVO had also substantially relied on jantri rates and had made other references for arriving at the valuation. Both the issues are based primarily on factual aspects. No question of law, therefore, arises. All these appeals are dismissed.