(2007) 07 GUJ CK 0064

In the Gujarat High Court

Case No : Tax Appeal No''s. 1938-40 of 2006

Commissioner of Income Tax APPELLANT

Vs

Maulikkumar K. Shah RESPONDENT

Date of Decision : 20-07-2007

Acts Referred:
Income Tax Act, 1961 — Section 132(2), 132(4)

Citation : (2008) 307 ITR 137

Hon'ble Judges : Y.R. Meena, C.J;Akil Kureshi, J

Bench : Division Bench

Advocate : Manish R. Bhatt, for the Appellant; None appeared, for the Respondent

Final Decision : Dismissed

Judgement

1. The following question has been proposed for admission of this appeal:

Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the Commissioner of Income Tax (Appeals) deleting the addition made on account of ''on-money'' receipt ?

2. The short controversy raised in this question is whether there should be addition on the basis of an amount mentioned on loose papers along with rates per sq.ft. of different floors. The Tribunal has considered this aspect as under:

6. We have heard the rival contentions of both the parties. Looking to the facts and circumstances of the case, we find that it is the facts on record that in the seized diary the assessee has estimated and mentioned the figures for 66 shops at Rs. 2,38,77,000. Statement of Kiritbhai K. Shah was recorded u/s 132(4) and the assessee has replied to various questions, as under:

Question 21. What is the position of booking/sale in your building projects of Bardolpura and Madhupura which are in progress ?

Answer 21. Booking of about 35 offices has been made in Bardolpura. This booking is provisions. Its rates are Rs. 200 per sq.ft. Rs. 250 per sq.ft. and Rs. 300 sq.ft for 3rd, 2nd and 1st floors.

Question 22. Whether you have taken ''on-money'' in the booking, i.e., the amount which is not shown in the account books ?

Answer 22. No, I have not taken ''on-money''.

Question 23. Are you sure and remember that you have not taken on-money ?

Answer 23. I properly remember that I have not taken ''on-money''.

Question 24 As to what extent the booking in your scheme at Madhupura has been made ?

Answer 24. Booking of 2 offices therein has been made rate of which is Rs. 1,000 per sq.ft.

Question 25. Whether you have taken any ''on-money'' in this scheme ?

Answer 25. No I have not taken any ''on-money''.

Question 49. We are showing you annexure A-9. After seeing page No. 2, state what it is ?

Answer 49. In next years, perhaps there may be development of Bardolpura area. Such rough estimates after discussion might have been stated therein.

Question 50. On this page, in heading, you have stated Bardolpura Madhukant Complex. You are stated that in figure, there may be perhaps development of Bardolpura. What is the meaning thereof ?

Answer 50. Because there has been sale of very less per cent, out of total project cost. Most of the goods is to be sold. It might be figures for getting estimates thereof.

Question 51. Bardolpura Madhukant Complex has been made by you. As per page No. 2 thereof, 66 shops have been constructed, it is as per that ?

Answer 51. I have not made Madhukant Complex but has developed it. Whatever I am stating is being stated in the capacity of developer and about 66 shops and offices have been constructed.

3. The shops were constructed by Madhukant Construction Consultancy. The notings on page 2 in annexure A-9, a diary, was found and seized by the Department. On page 2 of the said diary a shop-wise and floor-wise area and rates of Madhukant Complex, Bardolpura has been given with the complete break up. In the books of account for the assessment year 1995-96, the assessee has credited the rates of those shops at Rs. 425 per sq.ft. for first floor, Rs. 375 per sq.ft. for second floor, Rs. 325 per sq.ft. for third floor and Rs. 800 per sq.ft. for ground floor. As against this the notings on page 2 of annexure A-9 show the rates at Rs. 500 per sq.ft. for first floor, Rs. 600 per sq.ft for second floor, Rs.

700 per sq.ft. for third floor, Rs. 3,000 per sq.ft. for ground floor, Rs. 3,500 for ground floor-B and Rs. 2,700 per sq.ft for the cellar. Because of the difference in rates as mentioned in the seized paper and the books of account, the Assessing Officer has calculated the "on-money". The assessee has booked 35 shops as on the date of search, on which the Department has charged "on-money" in, the assessment year 1995-96.

4. In his statement recorded u/s 132(4), Shri Kiritbhai K. Shah, denied to have charged any "on-money". We find that the notings on the seized diary found from the premises of Kiritbhai K. Shah is the only material on the basis of which the Assessing Officer has made the impugned additions. The Assessing Officer has not brought any corroborative material on record to prove that such sales were made and "on-money" was received by the assessee outside the books of account. The Assessing Officer has not examined any purchaser to whom the sales of shops were effected. Onus heavily lay on the Revenue to prove with corroborative evidence that the entries in the seized diary actually represent the sales made by the assessee. Such onus has not been discharged by the Revenue. We are of the considered view that mere entries in the seized material are not sufficient to prove that the assessee has indulged in such a transaction. It is well-settled that if certain documents were found from the possession of the assessee during the course of search operation, burden lies on the assessee to explain the nature of transactions recorded in the said seized material. The assessee is duty bound to explain discrepancy, if found, on the basis of seized materials vis-a-vis books of account. But when the assessee furnishes explanation which sought to be supported by evidence, the burden is shifted to the Revenue to establish that the explanation of the assessee is false.

5. In the case of Shri S.K. Gupta v. Deputy CIT [1999] 63 TTJ 532 , the Income Tax Appellate Tribunal, Delhi "C" Bench has deleted similar addition made on the basis of some seized paper by accepting the contention of the assessee that the seized papers contain estimates. The Income Tax Appellate Tribunal has observed: "The notings on the piece of paper do not indicate the actual transaction. The paper in question does not indicate that any transaction had ever taken place because it does not contain any information as to what was the nature of transactions. If at all, any such transaction took place for the parties to the transactions, what was the date of transaction, what did the figure noted on the piece of paper represent, and whether in any manner the paper in question has any relevancy to the determination of the income in the hands of the assessee. No evidence has been brought on record to corroborate the allegation that the assessee had entered into any transaction or had earned any income." In the case at hand, right from the beginning the assessee is stating that the notings appearing in the diary on page No. 2 are rough estimates and estimation was made for submission to the bank for obtaining the loan from bank. The inference of the Assessing Officer that the assessee has received "on-money", i.e., the differential amount as shown in the seized diary and books of account, is merely based on suspicion and surmises and there is no material whatsoever to

support the conclusion of the Assessing Officer that the assessee has in fact received any "on-money". The Assessing Officer has no evidence with him to support his conclusion. He also take juridical note of the fact that the assessee has worked out floor-wise rate of the shop on the seized paper but it is not possible that every shop can be sold at that price and while selling the shops many purchasers may pay advance money. Therefore, rates of all the shops at the time of actual sales cannot be the same as estimated in the seized paper. We find that in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, the hon''ble Supreme Court has held (page 618):

... it was not the contention of the Revenue that the property was sold by the assessee to his daughter-in-law and five of his children for a consideration which was more than the sum of Rs. 16,500 shown to be the consideration for the property in the instrument of transfer and there was an understatement or concealment of the consideration in respect of the transfer. It was common ground between the parties and that was a finding of fact reached by the Income Tax authorities that the transfer of the property by the assessee was a perfectly honest and bona fide transaction where the full value of the consideration received by the assessee was correctly disclosed at the figure of Rs. 16,500. Therefore, on the construction placed by us, Sub-section (2) had no application to the present case.

6. We also found that in the case of Commissioner of Income Tax, West Bengal II Vs. Durga Prasad More, , the hon''ble Supreme Court has observed (page 545) : "It is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of the recitals, otherwise it will be very easy to make self-serving statement in document either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recital made in document either executed by him or executed in his favour then the door will be left wide open the evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents.

7. Considering the facts and circumstances of the case in its entirety, we are of the considered view that the addition as made by the Assessing Officer being based on mere presumptions and assumptions and without any corroborative evidence, cannot be sustained and the said additions have rightly been deleted by the Commissioner of Income Tax (Appeals) in all the years under consideration. The Revenue''s appeals, therefore, fail.

8. The amount mentioned along with rates per sq.ft. of different floors on the loose papers is in respect of an estimate asking for the loan from the bank. No other evidence has been shown to justify that these amounts were received from

purchasers. The Commissioner of Income Tax (Appeals) and the Tribunal both found that on the basis of these loose papers, no addition is justified. No interference is, therefore, called for in the order of the Tribunal.

9. The appeals stand dismissed at the admission stage.