

(2010) 09 DEL CK 0230

In the Delhi High Court

Case No : Income Tax A. No. 979 of 2010

Commissioner of Income Tax

APPELLANT

Vs

Moorti Devi

RESPONDENT

Date of Decision : 20-09-2010

Acts Referred:

Income Tax Act, 1961 — Section 132, 260A, 271(1)

Citation : (2010) 09 DEL CK 0230

Hon'ble Judges : Dipak Misra, C.J.; Manmohan, J

Bench : Division Bench

Advocate : Suruchi Aggarwal, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, C.J.—In this appeal preferred u/s 260A of the Income Tax Act, 1961 (for brevity "the Act") by the revenue against the order dated 19th November, 2009 by the Income Tax Appellate Tribunal (Delhi Bench "E" Delhi) (for short "the tribunal") in ITA No. 1012(Del)/2008 pertaining to the assessment year 1994-95, the following questions have been raised:

(i) Whether in view of seized material indicating payments over and above the disclosed value of the property preponderance of probability of entire value of the property as per the seized sale deed payment @ Rs. 79,00, 000/- should not be taken as real value?

(ii) Whether the burden of proof was not on the assessee and whether the assessee has not failed to satisfy the onus upon him?

(iii) Whether ITAT has not erred in holding that the assessee had not been confronted with the seized documents especially when the A.O. has clearly shown the documents bearing her signatures and the assessee in her reply, stated that the signatures and the assessee in her reply, stated that the signatures shown to her resembles to her signatures?

(iv) Whether the order of the learned ITAT is perverse as it has ignored the relevant facts on record?

2. To appreciate whether the aforesaid questions in actuality would give rise to any substantial question of law, it is apt to notice few necessary facts. The assessment for the year in question was completed on 21st March, 2001 at Rs. 71,33,092/- as against the declared income of Rs. 1,33,092/-. The foundation for the addition was that an information was received that certain documents relating to the assessee were seized during the course of search and seizure operation u/s 132 of the Act conducted on the business premises of M/s Shyam Garments. Against the original order of assessment, the assessee preferred an appeal before the CIT(A) who, by the order dated 16th December, 2004, in appeal No. 670/2001-02, confirmed the addition made by the assessing officer. The assessee carried the matter in the second appeal before the tribunal which, by the order dated 4th April, 2004, set aside the order with the directions to make the assessment de novo.

3. After the remand, the assessing officer asked the assessee to explain her position with regard to the documents bearing her signature. The same is reflect able from the order dated 11th December, 2006. The assessee, as is evident, stated that none of the documents was ever shown to her. Thereafter, on 18th December, 2006 and 20th December, 2006, the assessing officer directed to produce the assessee in person to the Inspector of the Ward or record her statement if she is not in a position to move. Eventually, her statement was recorded at her residence and during recording of statement, she was shown the document bearing her signature and to identify her signatures. She, in the reply, stated that the signatures shown to her resembles with her signatures. The assessing officer taking note of the fact that the assessee had denied the consideration involved in the documents thought it appropriate to make local enquiries to find out the probable consideration involved at that time in the transaction. It was gathered from the enquiries that the consideration as referred to in the documents, that is, Rs. 79 lakhs, looked to be genuine keeping in view the fact that the property is situated in a posh area and is admeasuring 400 sq. yards. Being of this view, the assessing officer treated the said investment as an unexplained investment and issued a demand on the computation of taxable income, imposed interest and initiated the penalty proceedings u/s 271(1)(c) of the Act.

4. On an appeal being preferred, the CIT(A) came to hold as follows:

12. As per the principles of natural justice, the appellant has been given ample opportunity firstly in the assessment proceedings, secondly in the appellate proceedings and in the proceedings before the ITAT and thereafter in reassessment proceedings and now in the appeal proceedings before me i.e. in five proceedings adjourned a few dozen times collectively but in none of these proceedings the appellant has brought out any cogent and reliable evidence in support of her stand. If the existence of the original documents or confrontation

thereof is not possible for one reason or the other, the judicial process cannot be presumed to be so weak as not be able to arrive at the truth of the matter on the basis of the materials available on record, the market conditions prevailing at the time of the transactions and normal conduct of the appellant expected from a prudent buyer for transaction of sale of property located in a well populated and prestigious locality developed by the DDA. The inability if any of the A.O. has, therefore, to be matched with and considered in the context of conscious, willful and deliberate devices adopted by the appellant for concealing vital facts of the matter and for withholding material facts which were within the knowledge of the appellant.

13. The appellant, therefore, cannot be permitted to succeed on the negative approach adopted by her which is contrary to the facts on record and her own submissions in the income tax returns as also in the course of the assessment proceedings. Therefore on the totality of facts of the matter and in view of the principles of natural justice as per the directions of the Hon"ble ITAT, I am of the considered view that the agreement to sell dt. 14.5.93 is the actual and material evidence in support of the sale transaction of the property in question, pursuant to which the vacant, physical possession of the property was handed over to the appellant alongwith all the rights pertaining thereto without any interruption, disturbances, claim or demand whatsoever. The fact of non-registration of the document did not create any hurdle for the appellant as the erstwhile owner does not appear to have challenged the occupation of the property by Smt. Moorti Devi for over 16 years or so and the law of adverse possession favours her. The A.O. was, therefore, fully justified in adopting the sale consideration in respect of the property at Rs. 79 lakhs thereby making an addition of Rs. 70 lakhs in respect of undisclosed investment in respect of purchase of the property No. B-1/43, Ashok Vihar, Phase-II owned by the appellant.

5. Being of this view, he affirmed the order passed by the assessing officer.

6. Being dissatisfied with the aforesaid order, the assessee carried an appeal before the tribunal. The tribunal took note of the fact that a search was conducted and two sets of documents were found and seized. Both the documents were in the name of the assessee and they pertained to the purchase of lease-hold plot No. B-1/43, Ashok Vihar, Phase-II, New Delhi. One was a sale deed dated 14th May, 1993 and the other was an agreement to sell dated 5th July, 1993. In the sale deed dated 14th May, 1993, the purchase consideration was shown as Rs. 79 lakhs and in the agreement to sell dated 5th July, 1997, the purchase consideration was shown as Rs. 9 lakhs. The tribunal referred to its earlier decision that how the matter was remanded and referred to the order passed by the CIT(A) dated 16th January, 2008 whereby the additions were confirmed. The tribunal, as is manifest from the order impugned, took note of the contentions especially that the letters were issued by the assessee on 10th October, 2006, 7th November, 2006, 17th November, 2006, 18th December, 2006, 20th December, 2006, 22nd December, 2006 and 14th June, 2007 to the

assessing officer asking to be confronted with the seized material and the fact that though the first appellate authority had accepted the position that it was not possible for the original documents to be confronted to the assessee, yet it proceeded to confirm the addition which was against the law. The tribunal also took note of the submission of the revenue that the seized document was a photocopy and it was duly shown to the assessee after the matter was remanded and, hence, the orders passed by the assessing officer and the CIT(A) cannot be flawed. The tribunal, after noting the material facts brought on record, came to hold that the assessee had consistently denied the very existence of the documents showing Rs. 79 lakhs as the purchase price of the property; that the original of the document was never confronted to the assessee by the assessing officer; that the assessing officer by order dated 29th December, 2006 had recorded that the assessee had clearly stated that none of the documents had her signatures and it was not possible to comment thereon; that she, in her examination, had only stated that the signature shown to her resembled her signature; and that she had categorically denied the consideration amount involved in the document. The tribunal further took note of its earlier order wherein various directions had been given which included that it was not clear from the material on record whether the seized documents were in the form of photocopies of the originals that have been found in the search. It also took note of the fact that the assessee had not been confronted with the original of the seized document. Thereafter, the tribunal came to hold as follows:

11. In our considered view, the approach adopted by the Id. CIT(A) is against the law. Merely on the basis of an alleged photo copy of a document, it cannot be assumed that the transaction was in fact entered into by the assessee. Definite positive evidence cannot be substituted by alleged photo copies, which have no evidentiary value in law. It cannot be gainsaid that by as many as seven letters (supra) beginning from 1.10.2006 to 14.7.2007, copies whereof have been found placed at pages 54 to 65 of the APB, the assessee repeatedly requested the AO even in the second round, pursuant to the aforesaid directions of the Tribunal to confront her with the seized document. This was not done. Now, the AO, in these circumstances, has obviously erred in making the addition, which was entirely uncalled for. The Id. CIT(A) has further erred in confirming the addition, even though the absence of original document have been admitted in the impugned order.

12. In *Moosa S. Madha And Azam S. Madha Vs. The Commissioner of Income Tax, West Bengal, Calcutta*, , it has been held that photo copies of a document have very little evidentiary value.

13. In "*Smt. J. Yashoda v. Smt. K. Shoba Rani*", 2007 TIOL 119 SC MISC (copy placed on record), it has been held that photo copies cannot be received as secondary evidence; that secondary evidence is admissible only in the absence of primary evidence; and that if the original itself is found to be inadmissible, the same party is not entitled to introduce secondary evidence of its contents. In the

present case, admittedly, the original alleged document is absent. That being so, secondary evidence thereof in the same of photo copy cannot form the basis of any addition.

7. On a perusal of the order passed by the authorities below, it is luminescent that the original documents were never confronted to the assessee. Nothing has been brought on record as to what happened to the original documents. There is no material even to indicate that the photocopies are the copies of the original documents.

8. In view of the aforesaid, we are of the considered view that the tribunal has correctly held that they do not have any evidentiary value. That apart, no steps were taken to establish the factum of the transaction but time and again reliance was placed on the photocopy of the instrument which pertained to the transaction.

9. In view of the aforesaid analysis, we do not perceive any merit in this appeal and, accordingly, the same stands dismissed without any order as to cost.