THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.07.2014

\+ **ITA 1095/2011**

CIT **.....** Appellant

versus

NARINDER KR. BUDHIRAJA ..... Respondent

AND

\+ **ITA 444/2012**

COMMISSIONER OF INCOME TAX-IV ..... Appellant

versus

NARINDER KR. BUDHIRAJA ..... Respondent

Advocates who appeared in this case:
For the Appellant : Mr Roy Chaudhuri.
For the Respondent: Dr Rakesh Gupta, Mr Rishabh Kapoor, Mr Sohil Agarwal and Mr Khushbu Upadhayay.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J (ORAL)

1. The present appeals have been filed on behalf of the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). In ITA 1095/2011, the Revenue has impugned a common order dated 11.03.2011 passed by the ITAT (hereinafter referred to as the "Tribunal") in ITA No. 1409/Del/2009 and ITA No. 2112/Del/2009. By

way of ITA No. 444/2012, the Revenue has assailed the decision of the Tribunal dated 23.03.2012 whereby its appeal against an order dated 08.06.2011 passed by CIT (Appeals) setting aside a penalty of ₹18,52,435/- imposed by the Assessing Officer under Section 271(1)(c) of the Act, had been rejected. Both the appeals relate to the Assessment Year 2005-06 and the same have been taken up for hearing together.

2. The controversy in the present appeals relate to an addition of deemed income of ₹55,00,000/- under Section 69B of the Act as unexplained investment and levy of penalty as a consequence thereof.

3. Briefly stated, the relevant facts of the case are as under:-

3.1. The assessee purchased a built-up property admeasuring 250 sq. meters bearing the address FD-22, Pitampura, Delhi. The conveyance deed of the property was registered and disclosed a consideration of ₹20 lacs for the transaction. The said amount of ₹20 lacs was paid by the assessee to the vendor-Ms Poonam Chaudhary by a cheque. The Income Tax Return for the Assessment Year 2005-06 was filed by the assessee on 31.07.2005 and was processed under Section 143(1) of the Act, on 23.02.2006. In the meantime, the Investigation Wing of the Income Tax Department suspected that the transaction for sale and purchase of the property in question had not been correctly reflected and, accordingly, issued summons to the assessee under Section 131 of the Act. The assessee appeared before Income Tax Authorities on 18.11.2005 and recorded his statement. Questions no. 11 and 12 posed and the answers recorded by the assessee are relevant and are quoted below:-

"Q.11 Which property did you sell or purchase this year i.e. in the year 2005-06 or got sold or purchased for any other one for commission, please give details.

Ans. This year, in March 2005, a property No. FD – 22, Pitampura New Delhi, which is a Kothi measuring about 250 meters, is purchased from Smt. Poonam Chaudhary wife of Shri Raju Chaudhary but its Sale Deed has been got made of Rs. 20,00,000/- but its actual purchase value is Rs. 75,00,000/- (Rupees seventy five lakhs). Difference Rs. 55,00,000/- has been given in cash. I will produce the Sale Deed of this property to you within the period of two days.

Q.12 Please tell me the source of Rs. 55,00,000/-, which you gave cash to Smt. Poonam Chaudhary.

Ans. Above-mentioned amount of Rs. 55,00,000/- (Rupees fifty lakhs only) has been given by me from my Undisclosed income, which I have not shown in my Income tax Return."

3.2. Subsequently, the assessee wrote a letter dated 24.11.2005 seeking to resile from the statement made before the Income Tax Authorities on 18.11.2005. The assessee stated that: *"I was goaded to state in response to Question of the statement that I had purchased a property bearing no. FD-22, Pitampura for Rs.75 lacs whereas the registered value was Rs.20 lacs"*. The reason provided by the assessee for signing the statement was that he was suffering from high grade fever at the material time and "*might have signed the paper without properly applying my mind or appreciating the contents on the issue. The drugs being administered at that point of time may have led to mental confusion*."

3.3. The Assessing Officer received information regarding the statement

made by the assessee, from the Income Tax Authorities and the return filed by the assessee was taken up for scrutiny. Apparently, the Assessing Officer was not satisfied that the purchase consideration for the property in question was ₹20 lacs and that the said amount reflected the real value of investment of the assessee in the said property. He, accordingly, referred the matter to the Valuation Officer (DVO) under Section 142A(1) of the Act to make an estimate of the value of the said property. The DVO valued the property in question at ₹98,75,400/-. The Assessing Officer accepted the value as reported by the DVO and passed an assessment order dated 27.12.2007 assessing a sum of ₹78,75,400/- as deemed income under Section 69B of the Act. The Assessing Officer concluded that the assessee's statement before the Income Tax Authorities was without any pressure. He also observed that the statement given by the assessee before the Income Tax Authorities did not mention that the assessee was not well at the material time. He, therefore, concluded that the grounds for retraction were an afterthought. The Assessing Officer also recorded his satisfaction that the assessee had concealed his income and accordingly directed initiation of penalty proceedings under Section 271(1)(c) of the Act.

3.4. The assessee appealed against the assessment order to the CIT (Appeals). The CIT (Appeals), by an order dated 02.01.2009 also affirmed the finding of the Assessing Officer that the statement made by the assessee before the Income Tax Authorities was without any undue influence and its retraction was an afterthought. He further held that the valuation reported by the DVO also corroborated the fact that the assessee had paid a sum much larger than the registered value of ₹20 lacs. The CIT (Appeals) held

that the valuation made by the DVO pointed towards the truthfulness of the statement made by the appellant before the Income Tax Authorities. Accordingly, he restricted the addition of income under Section 69B of the Act to ₹55 lacs – the amount admitted to have been paid by the assessee outside his books of accounts.

3.5. The assessee preferred an appeal against the order dated 02.01.2009 passed by CIT (Appeals) in as much as an addition in income, under Section 69B of the Act, has been sustained. The revenue also preferred an appeal to the extent that the quantum of addition of income had been reduced from ₹78,75,400/- to ₹55,00,000/-. The appeal preferred by the assessee was allowed and that preferred by the Revenue was dismissed by the Tribunal. By its common order dated 11.03.2011, the Tribunal held that an admission being a voluntary declaration contrary to the interest of the assessee was good evidence but was not conclusive as in certain circumstances it was open for the declarant to withdraw the same. The Tribunal held that as a general rule of practice it would be unsafe to rely upon a retracted confession without any corroborative evidence. The Tribunal also noted the assessee's contention that he was not keeping good health and was under influence of sedative drugs. The Tribunal also reasoned that *"the ADI is a senior IRS Officer. His intellectual compatibility is on high pedestal than the assessee and the assessee not being professionally qualified could come under the influence of the authority"*, and concluded that an addition of income could not be made solely on the basis of the statement made by the assessee. The valuation report provided by the DVO was also rejected by the Tribunal principally

on the ground that it had based the valuation taking into consideration a solitary instance of sale of a plot of land situated at Prashant Vihar (an adjoining locality), which was auctioned by DDA on 16.01.2004 - much prior to the acquisition of the property in question, by the assessee. The Tribunal also held that the DVO should have collected instances of sales from the neighbourhood and also considered those that were provided by the assessee. Having failed to do so, the Tribunal held that the valuation report could not be given any credence.

3.6. The present appeal (ITA No. 1095/2011) was preferred by the Revenue challenging the Tribunal's order of 11.03.2011. The said appeal was admitted on 22.03.2012 and the following question was framed:-

> *"Whether the Income Tax Appellate Tribunal was right in deleting the addition of Rs.55 lacs sustained by the Commissioner of Income Tax (Appeals) for the reasons and grounds stated in the order dated 11th March, 2011?"*

3.7. The Assessing Officer also passed an order dated 30.03.2010 imposing a penalty of ₹18,52,435/- being 100% of the tax on ₹55 lacs which was upheld as undisclosed income by the CIT (Appeals). The assessee preferred an appeal against the said order which was allowed by the CIT (Appeals) on 08.06.2011, in view of the decision of the Tribunal whereby the addition of income on account of unexplained investment had been set aside.

3.8. The order of the CIT (Appeals) dated 08.06.2011 was carried in appeal and was affirmed by the Tribunal in its order dated 23.03.2012. The appeal (ITA No. 444/2012) has been preferred by the Revenue against the Tribunal's decision of 23.03.2012. This appeal was admitted on 03.08.2012

and the following question of law was framed by this Court:

> *"Whether did the ITAT fall into error in setting aside the penalty imposed upon the assessee under Section 27(1)(c) of the Income Tax Act."*

4. We have heard the learned counsel for the respondent.

5. The learned counsel for the respondent supported the decision of the Tribunal and contended that an addition under Section 69B of the Act could not be made only on the basis of a statement made by the assessee. He relied upon the decision of a division bench of the Madras High Court in the case of ***CIT v. Kalyansundaram*: 282 ITR 259** in support of his contention that an addition of deemed income on account of unexplained investment could not be made solely on the basis of a statement recorded by the Income Tax Authorities without any independent corroborative evidence. The assessee also referred to the judgement of the Supreme Court in the case of ***CIT v Kalyansundaram*: 294 ITR 49** whereby the aforementioned judgement of the Madras High court was affirmed. It was further contended on behalf of the assessee that the sale and purchase of the property in question was evidenced by a duly registered written deed and the same could not be disbelieved on the basis of any oral statement made by the assessee or any other person. He referred to Sections 91 & 92 of the Indian Evidence Act, 1872, to support his contention that the Assessing Officer could not accept an oral evidence which was contrary to a written document. He also cited a decision of a Division Bench of the Punjab & Haryana High Court in the case of ***Paramjit Singh v Income Tax Officer*: 323 ITR 588** in support of this contention.

6. In our view, the CIT (Appeals) had correctly appreciated the facts

and the applicable law. The statement made by the assessee on 18.11.2005 in pursuance of the summons under Section 131 of the Act was apparently voluntary and there was no allegation that any undue influence or coercion had been used by the Income Tax Authorities. Even in the letter dated 24.11.2005 whereby the assessee sought to resile from his statement, the only reason given by the assessee was that he was suffering from high fever and had signed the papers without properly applying his mind or appreciating the contents or issue. The said letter was disbelieved by the Assessing Officer as well as by the CIT (Appeals) and in our view, rightly so. The Assessing Officer and CIT (Appeals) held that the retraction was merely an afterthought as during the recording of the statement, the assessee had not made any statement that he was unwell or was under any medication. It is relevant to note that the statement made by the assessee was not during any raid or search and seizure operations or even during a survey conducted by the Income Tax Authorities but was in response to summons that had been issued by the Income Tax Authorities. It was also open for the assessee to seek an adjournment of the proceedings before the Income Tax Authorities in the event, he was unwell to attend the same.

7. The Assessing Officer was also of the view that the consideration reflected by the assessee was understated and that the real value of the investment made by the assessee in purchasing the property in question was more than as disclosed by him. He accordingly, referred the property to be valued by a DVO. The DVO valued the property at ₹98,75,400/-. Although the said report was assailed by the assessee on the ground that the report was based on an auction of a property at the adjacent colony and not in the

colony in which the property in question was situated, it cannot be disputed that the instance of sale referred to by the DVO relates to a locality in the immediate vicinity of the property in question. The assessee also placed instances of other transactions of sale/purchase of property in the vicinity of the property purchased by the assessee. The CIT (Appeals) considered them and concluded that the value assessed by the DVO pointed out towards the truthfulness of the disclosure made by the appellant. In our view, there was no infirmity in the approach of the CIT (Appeals). It is also relevant to note that as per the report, the value of land alone was estimated as ₹60,96,804/- and the estimated value of construction itself exceeded the total consideration reflected by the assessee. The value of land estimated by the DVO is based on the price as discovered in an open auction. The price discovered in an open auction is undoubtedly one of the most reliable indicators of the market value of an asset and the same could not be ignored. The difference in the disclosed consideration and the value as estimated by the DVO is so large that even if the valuation was not considered accurate, it nonetheless indicated that the recorded consideration was understated and the DVO's report could be relied upon to corroborate the statement of the assessee, that he had paid an additional sum of ₹55 lacs in cash.

8. In the case of ***P.V. Kalyanasundaram*** *(supra)* a Division Bench of Madras High Court had upheld the decision of the Tribunal dismissing the appeal preferred by the Revenue against an order of CIT (Appeals) holding that an addition of income based only on a statement made by a seller could not be made by the Assessing Officer. In that case, a search was conducted

in the premises of the assessee on 08.12.1998 and the Assessing Officer had made an assessment under Section 158BC of the Act for a block period from 01.04.1988 to 08.12.1998. The assessee therein had purchased certain lands at Salem on 26.10.1998 which was registered for ₹4.10 lacs. The vendor of the said land recorded his statement on the date of search i.e. on 08.12.1998 and admitted that he had received ₹4.10 lacs as sale consideration. However, in response to a subsequent question, he admitted that he had received a sum of ₹34.35 lacs. The statement of vendor was again recorded three days later on 11.12.1998 and on this date he stated that he had received a consideration of ₹34.85 lacs. The vendor thereafter on 08.01.1999 filed an affidavit mentioning that he had only received a sum of ₹4.10 lacs and that the earlier statements given before the Income Tax Authorities were not true. This affidavit was subsequently withdrawn. Thereafter, the vendor recorded a statement on 20.11.2000 again reiterating that the purchase consideration received by him was ₹34.85 lacs as against ₹4.10 lacs as recorded in the registered sale deed. Noting the conflicting nature of statements given by the seller, the CIT (Appeals) held that his statements could not be relied upon and accordingly, deleted the addition made by the Assessing Officer on the basis of those statements. The appeal filed by the Revenue was dismissed by the Tribunal. The Division Bench of the Madras High Court also upheld the order of the CIT (Appeals) and the Tribunal and concluded that since the Assessing Officer had not conducted any independent inquiry relating to the value of the property purchase and had merely relied on the statement given by the seller, the assessment could not be sustained. The Court also observed that if an independent inquiry had been made by referring the matter to the Valuation Officer, the

controversy could be avoided. The relevant extract of the decision of the Madras High Court is quoted below:-

> *"We also found that the Assessing Officer did not conduct any independent enquiry relating to the value of the property purchased. He merely relied on the statement given by the seller. If he would have taken independent enquiry by referring the matter with the Valuation Officer, the controversy could have been avoided. Failing to refer the matter was a fatal one.*
>
> *In view of the foregoing conclusions, we find no error in the order of the Income-tax Appellate Tribunal and requires no interference. Hence no substantial questions of law arises for consideration of this Court. Accordingly, the above tax case is dismissed. No costs."*

9. The decision of the Madras High Court was upheld by the Supreme Court. In our view, the decision in the case of ***P.V. Kalyanasundaram*** *(supra)*, thus, does not support the assessee in the present matter. First of all, in the present case, the Assessing Officer has referred the matter to a Valuation Officer since there was material before him to indicate that the value at which the transaction for purchase and sale of property was recorded was understated. In this case, unlike in the case of ***P.V. Kalyanasundaram*** *(supra)*, the Assessing Officer had obtained a valuation report which would, at the minimum, corroborate that the values of property in the vicinity were more than the consideration at which the sale-purchase transaction had been recorded by the assessee. Secondly, it is relevant to note that in the present case the statement had been made by the assessee and not by any third party. And thirdly, the statement made by the assessee had been held to be voluntary and without any undue influence, both by the Assessing Officer and the CIT (Appeals). It is also not the case

of the assessee that the Income Tax Authorities had unduly influenced or coerced the assessee to make the statement in question.

10. The contention that an assessment can never be made on the basis of an oral statement which is opposed to a written document is also devoid of any merit. It is well settled that Indian Evidence Act, 1872, does not apply to assessment proceedings. A Constitution bench of the Supreme Court in the case of ***Dhakeshwari Cotton Mills Ltd. v. Commissioner of Income Tax*****: [1954] 26 ITR 775(SC)** held as under:

> *"we are in entire agreement with the learned Solicitor-General when he says that the Income-tax Officer is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law"*

11. In a case where the allegation is that the transaction has been undervalued, the Assessing Officer can always rely on other material which establishes that the values recorded in the document are not correct.

12. In the case of ***Paramjeet Singh*** *(supra)* an addition had been made on the basis of a registered sale deed executed by the assessee. The vendors had recorded a statement that they had received no consideration. In the given facts, the Court held that the decision of the Tribunal in rejecting the statements and accepting the consideration as reflected in the registered sale deed did not suffer from any legal infirmity. The said decision is not an authority for the proposition that a Assessing Officer is bound to accept the consideration as recorded in the registered sale deed and has to reject any other contrary evidence.

13. In our view, in the given facts of this case, the Tribunal erred in

holding that the DVO's report did not corroborate the statement made by the assessee before the Income Tax Authorities.

14. For the above reasons, this Court is of the opinion that the appeal ITA 1095/2011 has to succeed. The question of law is answered in favour of the revenue/appellant. The appeal is accordingly allowed.

15. However, in ITA No.444/2012, the matter has to be remitted to the CIT (Appeals) to consider the assessee's submissions with respect to the penalty since the impugned order dated 23.03.2012 in this case had affirmed CIT (Appeals)'s order of 08.06.2011. That order of the CIT (Appeals) made in penalty proceedings had given effect to the Tribunal's order in the substantive proceedings. The rights and contentions of the parties in respect of the penalty shall be gone into independently in accordance with law by the CIT (Appeals).

16. The ITA No.1095/2011 is accordingly allowed. ITA No.444/2012 is disposed of in the above terms.

VIBHU BAKHRU, J

S. RAVINDRA BHAT, J

JULY 01, 2014
RK/MK