

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI O.P. KANT, ACCOUNTANT MEMBER

I.T.A. No. 5911/DEL/2014		
A.Y. : 2010-11		
ITO, WARD 33(4), ROOM NO. 1603, DR. SP MUKHERJEE CIVIC CENTRE, JL NEHRU MARG, NEW DELHI - 2	VS.	SH. ANIL KUMAR GUPTA G-1 & 2, SWASTIK BHAWAN, RANJEET NAGAR COMMERCIAL COMPLEX, NEW DELHI - 5 (PAN: AFNPG3508H)
(ASSESSEE)		(RESPONDENT)

Revenue by : Mr. Ashok Khandelwal, CA & Sh.
Akash Khandelwal, CA
Assessee by : Sh. C.P. Singh, Sr. DR.

ORDER

PER H.S. SIDHU : JM

The Revenue has filed this Appeal against the impugned Order dated 27.8.2014 of the Ld. CIT(A)-XXVI, New Delhi relevant to assessment year 2010-11.

2. The grounds raised in the appeal read as under:-

1. The CIT(A) has erred in deleting the addition of Rs. 1,90,59,000/- without appreciating that the AO had

rightly enhanced the value of the property keeping in view the value taken by the Registrar of Stamps on the basis of prevailing circle rates.

2. The CIT(A) has not correctly appreciated the facts of the case which establish that the assessee is not a builder / developer but only using a device by showing properties as stock-in-trade so as to pay less tax by selling them much below the circle rate.

3. The CIT(A) has erred in deleting the addition of Rs. 8,88,089/- without appreciating the fact that in the absence of any documentary evidences w.r.t. properties being vacant for particular period or being used by the assessee for his business. Assessee cannot be allowed any benefit and AO has rightly made addition on the basis of notional ALV.

4. The appellant craves leave to add, alter or amend any / all of the grounds of appeal before or during the course of hearing of the appeal.

3. The brief facts of the case are that the assessee is a promoter and builder and doing business through his proprietary concern under the name and style of M/s Anil Kumar Gupta & Co. The

assessee, during the relevant assessment year, sold two commercial properties; one at Agra and another at Indore. The assessee filed his return of income showing income of Rs. 3,96,112/-. The case of the assessee was picked up for scrutiny. Consequentially the assessment was completed on income of Rs. 2,03,43,201/- by making two additions (i) business income of Rs. 1,90,59,900/- and (ii) notional rental income u/s. 22 of the Act. Aggrieved by the assessment order, the assessee appealed before the Ld. CIT(A), who vide his impugned order dated 27.8.2014 has partly allowed the appeal of the assessee. Against the order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal.

4. Ld. DR relied upon the Order of the AO and reiterated the contentions raised in the grounds of appeal. In support of AO's order, he relied upon the decision of the Hon'ble Delhi High Court in the case of CIT vs. Ansal Housing & Construction (2016) 72 taxmann.com 254 (Delhi).

5. Ld. counsel for the assessee relied upon the order of the Ld. CIT(A) and relied upon the case laws on which Ld. CIT(A) has relied in his order i.e. (2012) 139 ITD 504 (Delhi) ACIT vs. Dr. Prabha Sanghi; (2012) 31 CCH 032 Bang. Trib., Shankuntala Devi vs. DDIT and (2007) 110 TTJ (Mumbai) 89 Premsudha Exports (P) Ltd. vs. ACIT and also relied upon the decision of the ITAT, Mumbai in the case of Sh. Sachin R. Tendulkar

vs. DCIT decided in ITA no. 3755/Mum/2016 dated 10.8.2018 wherein it was held that in case property has remained vacant for whole year the income assessable would be NIL u/s. 23(1)(c) of the Act.

6. We have heard both the parties and perused the records especially the impugned order as well as case laws cited by both the parties. We find that Ld. CIT(A) has elaborately discussed the issues in dispute vide para no. 6 to 6.5 and para no. 7.2 to 7.4 of the impugned order. The relevant finding of the Ld. CIT(A) are reproduced as under:-

"6. I have carefully considered the submission of the appellant and perused material on the record. I have gone through the above cited judgments, which hold that in case there is a document evidencing the sale and there is nothing on record to prove that the assessee has paid anything more than the sum stated in the deed evidencing the sale, the sale consideration should be the value stated in the document of sale and not any other value, has to be taken for computing the income of the seller. It is trite law that a person who alleges a particular fact has to prove the same by cogent positive evidence. Once the evidence is led and the individual against whom it is alleged is confronted with that evidence, the law presumes that the individual alleging a fact has discharged the onus and thereafter, it is for

the other individual against whom the evidence is produced to rebut the same and demonstrate that the evidence so led is not a good and sufficient evidence. Here, the understatement of the sale consideration by the appellant has been inferred by the AO on the basis of difference between the Value of the property for stamp purposes (Circle rate) and the sale consideration shown in the sale deed. In the course of the appellate proceedings, the appellant filled a copy of a sale deed of the property situated in the same Mall by the Builder of the Mall to demonstrate that the appellant's sale price in the Vinayak Mall, Agra is in the same range.

6.1 In a judgment, the Apex Court in the case of K.P. Varghese Vs. ITO [1981] 131 ITR 597 (SC) has held that to throw the burden of showing that there is no understatement of the consideration paid, on the assessee would be to cast an almost impossible burden upon him to establish a negative; namely, that he did not pay any consideration more than what has been declared by him. Therefore, if the Revenue seeks to hold that the assessee has paid more than what has been declared by him in respect of the assessment in question, the onus would lie on the Revenue to prove

this fact by bringing some material on record. The ratio laid down in this case is held applicable here also.

6.2 Keeping in view the above facts and legal pronouncements cited above, I am inclined to agree with the view of the Ld. AR. The provisions of section 50C are held not applicable here being the case of a builder & developer where the properties are held as stock-in-trade and not as assets. Accordingly, the case laws relating to section 50C are also not applicable to the facts of this case. Undisputedly, the property at Vinayak Mall, Agra was purchased at a lesser price than that of the circle rate by Rs. 1,67,02,827/-. It indicates that the sale price of the property at the time when the appellant bought the property was at lesser rate than that of the circle rate. Since the property was bought at lesser rate therefore, the presumption is that its sale consideration thereafter has to be commensurate with the purchase price in the same ratio in absence of any extraordinary factor giving rise to its value. The appellant demonstrated that the builder of the Mall had sold a similar property (parameters of both properties differs a little bit; size, floor, location, etc.) in the mall at around the same rate in September 2009, which has not been controverted by the AO. No adverse material

was brought on the record by the AO to substantiate his finding even after conducting various enquires as stated in the appellant's submission. Even if market value of property appears to be higher than consideration declared by assessee in sale document, this cannot by itself be sole ground for treating difference between declared consideration and market value as income of the appellant without establishing that higher consideration has been paid over and above consideration indicated in sale document. Since there is no evidence on the record to show that the parties had arranged to put a fictitious price in the agreement, the commercial expediency of the contract was to be adjudged by the contracting parties as to its terms.

6.3 It is neither a case where the provisions relating to Capital Gains will apply nor will the case laws relating to Capital Gains apply. However, I am of the considered view that the ratios laid down in the case laws relating to Capital Gains have bearing on this case also. Various Hon'ble High Courts have held that full value of consideration u/s 48 cannot be construed fair market value as per Section 55A of the Income Tax Act. The Hon'ble Delhi High Court has held the similar view in case of Smt. Nilofer I. Singh; 309 ITR 233 and Dev

Kumar Jain; 309 ITR 240 after considering the Hon'ble Supreme Court decision in case of CIT v. George Hinderson & Co. Ltd. [1967] 66 ITR 622. The full value consideration means the full value of consideration received by the transferee in exchange of the capital assets transferred by him. The Hon'ble Supreme Court also observed that in the case of full value consideration is the full sale price is actually paid/received. It was further of the view that the expression "full value means the whole price without any deduction, whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor did it have any necessary reference to the market value of the capital assets which is the subject matter of the transfer". The Hon'ble Mumbai High Court, in case of in case of CIT v. Texspin Engg. & Mfg. Works [2003] 263 ITR 345/129 Taxman 1 (Bom.) has held at page number 354 & 355 as under:

"Now, in the present case, it is argued on behalf of the Department before the Tribunal, for the first time, that in this case, on the vesting of the properties of the erstwhile firm in the limited company, there was a transfer of capital assets and, therefore, it was chargeable to income-tax

under the head "Capital gains" as, on such vesting, there was extinguishment of all right, title and interest in the capital assets qua the firm. We do not find any merit in this argument. In the present case, we are concerned with a partnership firm being treated as a company under the statutory provisions of Part IX of the Companies Act. In such cases, the company succeeds the firm. Generally, in the case of a transfer of a capital asset, two important ingredients are : existence of a party and a counter-party and, secondly, incoming consideration qua the transferor. In our view, when a firm is treated as a company, the said two conditions are not attracted. There is no conveyance of the property executable in favour of the limited company. It is no doubt true that all properties of the firm vest in the limited company on the firm being treated as a company under Part IX of the Companies Act, but that vesting is not consequent or incidental to a transfer. It is a statutory vesting of properties in the

company as the firm is treated as a limited company. On the vesting of all the properties statutorily in the company, the cloak given to the firm is replaced by a different cloak and the same firm is now treated as a company, after a given date. In the circumstances, in our view, there is no transfer of a capital asset as contemplated by section 45(1) of the Act. Even assuming for the sake of argument that there is a transfer of a capital asset under section 45(1) because of the definition of the word "transfer" in section 2(47)(iii), even then we are of the view that the liability to pay capital gains tax would not arise because section 45(1) is required to be read with section 48, which provides for mode of computation. These two sections are required to be read together as the charging section and the computation section constitute one package. Now, under section 48 it is laid down, inter alia, that the income chargeable under the head "Capital gains" shall be computed by deducting from the full

value of the consideration received or accrued as a result of the transfer, the cost of acquisition of the asset, and the expenditure incurred in connection with the transfer. Section 45(4) is mutually exclusive to section 45(1). Section 45(4) categorically states that where there is a transfer by way of distribution of capital assets and where such transfer is due to dissolution or otherwise of the firm, the Assessing Officer was entitled to treat the market value of the asset on the date of the transfer as full value of the consideration received. This latter part of section 45(4) is not there in section 45(1). Therefore, one has to read the expression "full value of the consideration received/accruing" under section 48 de hors section 45(4) and if one reads section 48 with section 45(1) de hors section 45(4) then the expression "full value of consideration" in section 48 cannot be the market value of the capital asset on the date of transfer. In such a case, we have to read the said expression in the light of the

two judgments of the Supreme Court in the case of CIT v. George Henderson and Co. Ltd [1967] 66 ITR 622 and in the case of CTT v. Gillanders Arbuthnot and Co. [1973] 87 ITR 407 in which it has been held that the expression "full value of the consideration" does not mean the market value of the asset transferred, but it shall mean the price bargained for by the parties to the transaction. It has been further held that the consideration for the transfer of a capital asset is what the transferor receives in lieu of the assets he parts with, viz., money or money's worth, and, therefore, the very asset transferred or parted with cannot be the consideration for the transfer and, therefore, the expression "full value of the consideration" cannot be construed as having a reference to the market value of the asset transferred and that the said expression only means the full value of the things received by the transferor in exchange for the capital asset transferred by him. In the circumstances, even if we

were to proceed on the basis that vesting in the company under Part IX constituted transfer under section 45(1), still the assessee ought to succeed because the firm can be assessed only if the full value of the consideration is received by the firm or if it accrues to the firm. In the present case, the company had allotted shares to the partners of the erstwhile firm, but that was in proportion to the capital of the partners in the erstwhile firm. That allotment of shares had no correlation with the vesting of the properties in the limited company under Part IX of the Act. Lastly, section 45(1) and section 45(4) are mutually exclusive. Under section 45(4) in cases of transfer by way of distribution and where such transfer is as a result of dissolution, the Department is certainly entitled to take the full market value of the asset as full value of consideration provided there is transfer by distribution of assets. In this case, we have held that there is no such transfer by way of distribution and, therefore, section 45(4) is

not applicable. This deeming provision, regarding full value of consideration, is not there in section 45(1) read with section 48. If one reads section 45(1) with section 48, it is clear that the former is a charging section and if that section is applicable, the computation has to be done under section 48, which only refers to deductions from the full value of consideration received or accruing. Section 48 does not empower the Assessing Officer to take the market value as the full value of consideration as in the case of section 45(4). In the circumstances, even if we were to hold that vesting amounts to transfer, the computation is not possible because it has been laid down in the above judgment of the Supreme Court that full consideration cannot be construed to mean the market value of the asset transferred. The Legislature, in its wisdom, has amended only section 45(4) by which the market value of the asset on the date of the transfer is deemed to be the full value of

consideration. However, such amendment is not there in section 45(1)."

6.4 The AO has not brought any material on record to show that actual consideration received by the appellant is more than the consideration shown by the appellant. Section 45 talks about substitution of FMV with the full value of consideration only in certain special circumstances, such as, determination of value of damage as a result of flood, riot, accident, fire, etc (Sec. 45(1A). Section 45(4) also prescribes that the fair market value be deemed to the full value of the consideration in respect of distribution of capital asset on the dissolution of a firm. Similar provisions are in section 50C. Only under these specific instances prescribed under the Income Tax Act; the FMV can be substituted with the amount of full value of consideration. Broadly, all such situations, where FMV can be substituted for full value of consideration have now been covered by section 50D from 01.04.2013. But as per above discussion, there is no such clause of substitution while computing the capital gain u/s. 48 or business income u/s 28 and the gain/profit has to be computed on the basis of the "full value of the consideration". Except for the situations mentioned in

Section- 45(4), 45(1A) and 50C (as of now 50D though not relevant here), I am of the view that there is no provision in the Income Tax Act, which allows adoption of FMV of a property as full value of consideration received for the purpose of computing business income. However, the new section 43CA introduced by Finance Act 2013 w.e.f. 1st April 2014 for computation of business income will apply to sale of the immovable property held as stock-in-trade after 01.04.2013 as the amendment is prospective and cannot be applied to sales of properties held as stock in trade in the relevant AY.

6.5 From the above facts mentioned in preceding pages, it is amply clear that the judicial view is totally in favour of the appellant in holding that in case there is a document evidencing the sale and there is nothing on record to prove that the assessee has received anything more than stated in the said document evidencing the sale, then the sale consideration shall be the full value of consideration stated in the document of sale and not any other value. Thus, in view of above discussion and legal pronouncements. I am of the view that the AO has erred in adopting the sale price @ circle rate for the

purpose of computing the appellant's income. Accordingly, the addition of Rs.1.90.59.000/- is hereby deleted. The AO shall allow the consequential relief.".....

... "7.2 I have carefully considered the facts of the case and perused the material on the record. It is evident from the record that the house at Ranjeet Nagar is occupied by the appellant for his business purposes. The property at Ranjeet Nagar is shown as the office of the appellant not only in the Income Tax records but the appellant's audit report, etc. etc. Therefore, I do not see any justification on the part of the AO in assessing any deemed income from this property. Accordingly, the addition of rental income of Rs.1,20,000/- on this score is hereby deleted.

7.3 To work out income from the house property, the annual value of house property as per section 23(l)(a) has to be determined first. Annual Value is the amount for which the property might be let out on a yearly basis. In another words, it is the estimated rent that the landlord could get if the property was rented out. The Annual Value of Let-Out House Property, according to me, has to be worked out as under:

Gross Annual Value - Municipal Taxes paid

Where Gross Annual Value = Higher of Actual Rent Received or Expected Rent

Expected Rent = Higher of Municipal Value or Fair Rental Value but restricted to the Standard Rent

7.4 The ratio laid down in the case of Dr. Prabha Sanghi, 139 ITD 504, is held applicable here. In the case of Dr. Prabha Sanghi, the Hon'ble ITAT, New Delhi has specifically held that two houses which were earlier let out in preceding years remained vacant wholly during the relevant year. Therefore, the Annual Value (AV) of these two properties which first determined u/s 23(1)(a) becomes NIL after allowing the effect of section 23(1)(c), [in another words vacancy allowance] as there is no dispute on vacancy of these properties for entire year. Thus, the AV determined u/s 23(1)(a) will become NIL in accordance with the provisions of section 23(1)(c) if the property is lying vacant for the entire year. Here in the appellant's case; the commercial properties let out to one of the sister concerns were vacated on 30.04.2009 as evident from the above submission. Then I do not see any logic in not claiming rent if paid by the sister concern because it goes against the tax avoidance/planning of the group as a whole.

When the AO has accepted the fact that 'that sister concern' had vacated the property at other places; Agra and Indore, then I am unable to understand the finding of the AO in respect of other properties that it had not vacated those when the facts are same. Similarly, the property situated at Saharnpur was also claimed vacant for entire year. Further, the AO has not brought any material on the record to establish that these commercial properties were let after 30.04.2009 to any one and the property situated at Saharnpur was not lying vacant. Thus, the provisions of section 23(l)(c) will get attracted here in respect of these properties. Accordingly, the Rental Value of these house properties while lying vacant can be taken at NIL [after determining the Annual Value u/s 23(l)(a) and thereafter allowing benefit u/s 23(l)(c)]. Accordingly, the Annual value from the commercial properties at Panipat, Faridabad and the property at Saharanpur are directed to be determined after allowing the benefit of vacancy u/s 23(l)(c). The AO's action in assessing the notional rental income from these house properties is held not-justified. Thus, the addition made under the head house property in the impugned order in respect of the properties at Panipat, Faridabad and Saharanpur

*is deleted. Accordingly, grounds No. 5 to 8 are allowed.
Consequential relief shall be given by the AO..."*

6.1 After perusing the findings of the Ld. CIT(A), as aforesaid and after going through the case laws cited by both the parties, we are of the view that the case law cited by the Ld. DR is distinguished on the facts of the case. However, the case laws cited by the Ld. CIT(A) in his impugned order are directly applicable on the facts of the case and the decision of the ITAT, Mumbai in the case of Sh. Sachin R. Tendulkar vs. DCIT decided in ITA no. 3755/Mum/2016 dated 10.8.2018 is also applicable in the present case, wherein it was held that in case property has remained vacant for whole year the income assessable would be NIL u/s. 23(1)(c) of the Act. Therefore, respectfully the precedents relied upon by the Ld. CIT(A) in his order, Ld. CIT(A) has rightly held that there is a document evidencing the sale and there is nothing on record to prove that the assessee has received anything more than stated in the said document evidencing the sale, then the sale consideration shall be full value of consideration stated in the document sale and not any other value. Ld. CIT(A) further rightly held that the AO has erred in adopting the sale price @ circle rate for the purpose of computing the assessee's income. Accordingly, the additions was deleted by the Ld. CIT(A) and AO was directed to allow the consequential relief. In view of above, there is no infirmity in the order of the Ld. CIT(A) on the issues in dispute, which does not need any interference on our

part, therefore, we uphold the action of the Ld. CIT(A) on the issues in dispute and reject the grounds raised by the Revenue.

7. In the result, the Revenue's Appeal stands dismissed

Order pronounced on 13/03/2019.

Sd/-

[O.P. KANT]
ACCOUNTANT MEMBER

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 13/03/2019

SRBHATNAGAR

Copy forwarded to: -

1. Assessee -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar, ITAT, Delhi Benches