

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA No.3776/Del/2009
Assessment Year: 2006-07

Dy. Commissioner of Income-tax, Circle-31(1), New Delhi	Vs.	Mr. Gun Nidhi Dalmia, 27, Akbar Road, New Delhi
		PAN :AACPD8352N
(Appellant)		(Respondent)

With

ITA No.4268/Del/2010
Assessment Year: 2006-07

ACIT, Circle-31(1), New Delhi	Vs.	Smt. Saraswati Dalmia, 27, Akbar Road, New Delhi
		PAN :AAHPD8884E
(Appellant)		(Respondent)

Assessee by	Sh. Tarandeep Singh, Advocate
Department by	Sh. J.S. Minhas, CIT(DR)

Date of hearing	02.05.2023
Date of pronouncement	31.07.2023

ORDER

Captioned are two appeals by Revenue in respect of two different assessees arising out of two separate orders of learned Commissioner of Income Tax (Appeals)-XXVI, New Delhi, pertaining to assessment year 2006-07. Since the issues involved in both the appeals are more or less common, they have been

clubbed together and disposed of by a common order, for the sake of convenience.

ITA No.3776/Del/2009

2. The grounds raised by the Revenue in this appeal are as under:

- (A). Ld. CIT(A) has erred in allowing relief of Rs.23,62,750/- out of expenses claimed u/s 48(1) without considering the fact that the same were excessive unreasonable and unjustified.
- (B) Ld. CIT(A) has erred in directing to include Rs.7.2 crore as part of sale consideration without considering the fact that the issue was dealt in detail in the assessment order where it was established by the AO that payment of Rs.7.2 crores made by DLF to Sh. Gun Nidhi Dalmia was not related to sale of equity shares of EKT, but for some other purposes.
- (C) Ld. CIT(A) has erred in directing the AO to treat FMV of shares of EKL at Rs.16,750/- instead of Rs.10/- as on 01.04.1981 without considering the fact that the issue was already examined in details in the assessment order where the facts and circumstances for adopting the FMV of shares of EKL as on 01.04.1981 at Rs.10/- are clearly enumerated.

3. Insofar as ground no. 'A' is concerned, briefly the facts are, the assessee is a resident individual. For the assessment year under dispute, the assessee filed its return of income on 27.07.2006, declaring income of Rs.9,21,24,691/-. In course of assessment proceedings, while perusing the return of income filed by the assessee, the Assessing Officer observed that while computing income from long term capital gain on sale of unquoted equity shares of M/s Edward Keventers (s) Pvt. Ltd. (in short 'EKPL') to M/s. DLF Ltd. (formerly known as 'M/s. DLF

Universal Ltd.), the assessee had deducted an amount of Rs.30 lakhs from the sale consideration towards expenses incurred in connection with transfer of shares. After calling for and examining the necessary details, the Assessing Officer noticed that the amount of Rs. 30 lakhs was paid to some professional entities/firms for rendering services in relation to transfer of shares. The Assessing Officer was of the view that the quantum of expenditure claimed by the assessee is unreasonable, hence, cannot be stated to be incurred wholly and exclusively in connection with transfer of shares, as provided under section 48(i) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'). Therefore, on estimate basis, he allowed expenditure of Rs.12,000/-. Whereas, he disallowed balance amount of Rs. 29,98,800/-. The assessee contested the aforesaid disallowance before learned first appellate authority. Being convinced with the submissions of the assessee, learned first appellate authority granted further relief by enhancing the quantum of allowable expenditure to Rs.23,62,750/-

4. We have considered rival submissions and perused the materials on record. Undisputedly, in connection with the transfer of unquoted equity shares of EKPL to DLF Ltd. the assessee had

taken assistance of reputed professional firm/entities, such as, M/s. Grant Thornton, M/s. Luthra & Luthra and various other entities. The breakup of Rs.30 lakhs claimed as expenditure is as under:

(i)	Grant Thornton (consultant for due diligence)	Rs.2,00,000/-
(ii)	Sanjeev Anand & Association, Lawyer	Rs.3,55,490/-
(iii)	S.K. Mittal and Co., Chartered Accountants	Rs.12,000/-
(iv)	Sethi and Mehra, Chartered Accountants	Rs.38,600/-
(v)	Luthra and Luthra, Lawyers	Rs.23,62,750/-
(vi)	S.C. Nanda, Lawyer	Rs.3,850/-
(vii)	Kajal Chandra, Lawyer	Rs.12,000/-
(viii)	D. Moitra, Lawyer	Rs.40,000/-

5. Undisputedly, in course of assessment proceeding, the assessee had furnished the details of expenditure incurred with supporting bills/vouchers. It is further observed, the Assessing Officer has neither doubted the fact that the assessee has incurred expenditure nor has found any deficiency or discrepancy in the supporting evidences. The Assessing Officer has merely observed that the expenditure incurred is unreasonable and cannot be considered to be wholly in relation to the transfer of shares. At the same time, the Assessing Officer has not disputed the fact that the assessee has incurred expenditure towards availing professional services in relation to transfer of shares, as,

he has himself allowed an amount of Rs.12,000/-, though, purely on estimate basis. Whereas, learned Commissioner (Appeals) has allowed expenditure of Rs.23,62,750/- towards payment made to solicitor firm M/s. Luthra & Luthra.

6. Facts on record reveal that the assessee, indeed, had availed professional services from M/s. Luthra & Luthra, a firm of lawyers, who have been engaged to facilitate the transfer of shares. It is observed, M/s. Luthra & Luthra has made legal research, arranged documentation, held discussion with the buyers on various issues, including due diligence and ultimate process of transfer of equity shares in terms with legal provisions and specific needs of the seller and the buyer. Thus, when the assessee has furnished supporting documentary evidences to establish on record that it had incurred expenditure in connection with transfer of shares, such claim of the assessee cannot be rejected/disallowed on conjectures and surmises. We further find, learned first appellate authority has examined the issue with proper application of mind and having found that a part of the expenditure was actually incurred by the assessee for facilitating the transfer of shares, has allowed the expenditure. No contrary evidence has been brought on record by the Revenue for enabling

us to disturb the factual finding of learned first appellate authority.

7. In view of the aforesaid, we decline to interfere with the decision of learned first appellate authority. The ground raised is dismissed.

8. In ground no. 'B', the Revenue has challenged deletion of addition of Rs.7.20 crores made by the Assessing Officer as income from other sources.

9. Briefly the facts qua this issue are, in course of assessment proceeding, while verifying the computation of long term capital gain, the Assessing Officer noticed that, though, as per the Escrow Agreement dated 7th May, 2005, at the time of sale of shares of EKPL to DLF Ltd., the value per share was shown at Rs.4472.18 resulting in total sale consideration of Rs. 296,65,66,936/-, however, in the computation of capital gain the assessee has shown total sale consideration of shares at Rs.303,85,66,936/-. When the Assessing Officer called upon the assessee to reconcile the difference, the assessee submitted that at the time of finalizing the negotiation of sale of shares of EKPL with DLF Ltd., it was mutually agreed that besides the consideration mentioned in the Escrow Agreement, the assessee

was paid extra consideration towards “control premium” in respect of his shareholding of 6,63,338 shares, being the controlling block of shares in EKPL. It was submitted, the understanding in respect of payment of this extra consideration towards the controlling block of shares was duly accepted both by the vendor and vendee. In support of such contention, the assessee furnished letter dated 29th March, 2006 from the assessee to DLF Ltd. and letter dated 25th May, 2006 from DLF Ltd. to the assessee. Thus, it was submitted by the assessee that the extra amount of Rs.7.20 crores, being payment made towards sale of shares, is taxable under the head ‘long term capital gain’. The Assessing Officer, however, did not accept assessee’s claim. He observed that in the Escrow Agreement, there is no mention about the extra payment of Rs.7.20 crores to the assessee towards his controlling interest in the shares. Further, he observed that an amount of Rs.7,07,92,500/- was paid to the assessee on 18.06.2005 as an advance for purchase of land. It is further evident from Board Resolution, dated 04.12.1987 of EKL, as per which, the assessee was entitled for special consideration of 7.5% on sale of land, though, the resolution was revoked on 30.05.2005 in another Board Meeting. Thus, finally the Assessing

Officer observed that assessee's claim that he has received the amount of Rs.7.20 crores towards sale of equity shares is a concocted story, hence, not believable. Thus, ultimately, he concluded that the amount of Rs.7.20 crores was received by the assessee not for sale of shares but for some other purpose. Accordingly, he treated the amount as income from other sources.

10. Being aggrieved with the aforesaid decision of the Assessing Officer, the assessee challenged the order before learned Commissioner (Appeals). While considering the issue in the context of facts and materials on record, learned Commissioner (Appeals), being convinced that the amount in dispute was received towards consideration of sale of shares, accepted assessee's claim and deleted the addition made towards income from other sources.

11. We have considered rival submissions and perused the materials on record. The short issue arising for consideration is whether the payment received by the assessee of Rs.7.20 crores from DLF Ltd. is to be assessed as long term capital gain or income from other sources? As discussed earlier, the assessee had claimed that since, he was the holder of 6,63,338 shares, being the controlling block of shares in EKPL, he entered into

negotiations for payment of controlling premium on transfer of shares, in addition to, the value of shares as per the Escrow Agreement. It is evident from the materials placed on record, which are also a part of the records before the Assessing Officer and learned first appellate authority, vide letter dated 29th March, 2006, the assessee intimated DLF Ltd. for payment of control premium of Rs. 108.54 per share on account of transfer of the controlling block of 6,66,638 shares of EKPL. Vide letter dated 25th May, 2006, DLF Ltd. agreed for payment of control premium at Rs.108.54 per share and accordingly issued a cheque dated 25th May, 2006 for an amount of Rs.7.20 crores drawn on HSBC Bank. The primary reason for which the Assessing Officer has not accepted assessee's claim that the amount of Rs.7.20 crores was received as part of sale consideration is, the said extra payment does not find place in the Escrow Agreement.

12. In our view, the basic reason for which the extra payment made to the assessee does not find place in the Escrow Agreement is due to the fact that in addition to the assessee, there are other share holders, who are party to the Escrow Agreement. Therefore, the excess payment made to the assessee could not have formed part of the Escrow Agreement. However, undeniably, the assessee

was holding the controlling block of shares of EKPL. Further, the allegation of the Assessing Officer that an amount of Rs. 7 crores was initially received towards advance for sale of land is totally unfounded as the Board Resolution referred to by him was never implemented since the land was never sold by EKPL. When documentary evidences indicate that both the vendor and the vendee, i.e., the assessee and DLF Ltd. have treated the payment of Rs.7.20 crores as control premium on sale of shares, there is no occasion for the Assessing Officer to rewrite the terms of agreement between the parties unilaterally. Moreover, the Assessing Officer has observed that the amount of Rs.7.20 crores was paid to the assessee for some other purpose. The aforesaid observation of the Assessing Officer clearly indicates that he himself was not sure for what purpose the payment was made. Thus, when the Assessing Officer had no other material in his possession to disprove the claim of the assessee that the amount was received towards sale consideration of shares, he could not have disallowed the claim on conjectures and surmises. Further, learned counsel has brought to our notice judicial precedents, wherein, it has been held that controlling interest is an incidence of share holding, hence, the consideration received is required to

be considered for the purpose of computing capital gain. In this context, we refer to the following decisions:

1. *Venkatesh Vs. CIT, reported in 243 ITR 367 (Mad.)*
2. *Smt. Maharani Ushadevi Vs. CIT, reported in 131 ITR 445 (MP)*

13. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals). Ground raised is dismissed.

14. In ground no. 'C', the Revenue has challenged the decision of learned Commissioner (Appeals) in accepting the Fair Market Value (FMV) of the shares of EKPL at Rs.1,675/- per share as declared by the assessee.

15. Briefly the facts are, in course of assessment proceedings, the Assessing Officer noticed that out of 6,63,338 equity shares of EKPL sold by the assessee to DLF Ltd., 45,317 shares were held/acquired by him prior to 01.04.1981 at the rate of Rs. 10/- per share. Whereas, the remaining 6,18,021 shares were acquired by him after 01.04.1981 at the same price of Rs.10/- per share. Whereas, in the computation of capital gain on sale of shares, the assessee had adopted the cost of acquisition of one equity share as on 01.04.1981 at Rs. 1675/- per share by invoking the provisions of section 55(2)(b) of the Act by treating the value as the FMV. In support of such valuation, the assessee furnished a

valuation report of a Chartered Accountant. On going through the valuation report, the Assessing Officer observed that while determining the FMV of the shares, the Valuer has taken the value of lease hold rights in land and building, admeasuring 22.95 acres (111000 sq. yards) at 48, Kaventer Lane, Sardar Patel Marg, Chanakyapuri, New Delhi, at Rs.26.89 crores as on 01.04.1981 based on the Valuation Report dated 18.10.2005 of Accurate Surveyors. On perusal of the balance sheet of EKPL as on 30.06.1981, the Assessing Officer observed that opening balance of the leasehold rights in the said property was shown at Rs.2,75,538/- and there was an addition of Rs.43,24,462/- on account of revaluation of the lease rights during the year ending 30th June, 1981 and the closing balance was shown at Rs.46 lakhs. Based on the aforesaid facts, the Assessing Officer called upon the assessee to justify the FMV of the share, valued at Rs. 1675/- per share. In response, the assessee furnished an exhaustive reply justifying the FMV of shares as on 01.04.1981. The Assessing Officer, however, was not convinced with the submissions of the assessee. He observed that the assessee has not given any basis for revaluation of lease hold rights in the land. He observed the valuation report of Accurate Surveyors, dated

18th October, 2005 compared the rates of residential land with the dairy farming land. He further observed that, by no stretch of imagination, the use of land could have been taken as residential instead of dairy farming as on 1st April, 1981.

16. Insofar as valuation of land by Accurate Surveyor, the Assessing Officer observed that Valuer has referred to a number of immovable property transactions claiming to be properties in the same locality. Whereas, none of the properties were as large as the property under consideration. He further observed, under the Income Tax Act, no specific formula is laid down to determine the FMV of the unquoted shares. Therefore, in absence of any specific procedure, other acts are to be examined, in which the procedure has been laid down. Having held so, he referred to Rule 1D of the Wealth Tax Rules and held that the valuation report of Accurate Surveyors obtained much after the date of relevant balance sheet is not relevant at all in determining the FMV of unquoted shares of EKPL under section 55(2)(b)(i) of the Act. He further observed that the assessee was allotted unquoted shares of EKPL from time to time during the period 1982-83 to 2000-01 and all throughout the rate of each equity share remained Rs.10 per share. Thus, he observed, when there was no increase in the

value of shares over a period of almost 20 years, the FMV of shares as on 01.04.1981 could not be Rs. 1675/- per share. On the aforesaid premises, he concluded that the FMV of each equity share as on 01.04.1981 is to be taken at Rs. 10 per share. Accordingly, he proceeded to compute the long term capital gain.

17. The assessee contested the aforesaid decision of the Assessing Officer before learned Commissioner (Appeals). Being convinced with the submissions of the assessee, learned Commissioner (Appeals) accepted the FMV of the shares as on 01.04.1981 as claimed by the assessee.

18. We have considered rival submissions and perused the materials on record. Undisputedly, the assessee has adopted the FMV of each equity share of EKPL as on 01.04.1981 at Rs.1675/- in terms of section 55(2)(b)(i) of the Act and based on the valuation report of a Chartered Accountant (CA). It is further observed, the CA has determined the FMV of the shares based on a valuation report of another Valuer, i.e, Accurate Surveyors, who has valued the lease hold rights in land and building held by EKPL, admeasuring 22.95 acres at a prime location in Delhi. The Accurate Surveyors have valued the property at Rs.26.89 croes as on 01.04.1981. Admittedly, while the assessee has furnished

valuation report of experts, determining the FMV of equity shares, the Assessing Officer has not made any reference to the Departmental Valuation Officer (DVO) for ascertaining the FMV of shares as on 01.04.1981. On the contrary, the Assessing Officer has referred to the balance sheet of EKPL as at 30.06.1981 and observed that that the value of land and building has been shown at Rs.46 lakhs.

19. As per section 55(2)(b) of the Act, the 'cost of acquisition' would mean that the cost of acquisition of the asset to the assessee or the FMV of the asset as on 01.04.1981, at the option of the assessee. The expression "fair market value" has been defined in section 2(22B) of the Act to mean the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date. Thus, going by the definition of FMV, it cannot be said that the value of asset shown at the balance sheet can be the FMV. Therefore, in our view, the Assessing Officer could not have referred to cost/value of land and building as shown in the balance sheet for determining the FMV of the equity shares. More so, when section 55(2)(b) of the Act provides an option to the assessee to adopt the cost of acquisition as per FMV. It is further noticed that the Assessing Officer has made a fundamental error

in determining the value of shares by referring to Rule 1D of the Wealth Tax Rules. It is observed, the said Rule stood omitted from the statute w.e.f. 01.04.1989. Therefore, the Assessing Officer has erred in law in determining the FMV by referring to Rule 1D of Wealth Tax Rules. He has committed further error by saying that there is no mode and mechanism for determining the FMV under the Income Tax Act. Whereas, section 55(2)(b) read with section 2(22B) of the Act provides mechanism for determining the cost of acquisition. In any case of the matter, to support the FMV of the shares as on 01.04.1981, the assessee has furnished valuation report of experts. Whereas, without taking assistance of DVO, the Assessing Officer has himself assumed role of an expert without having the requisite expertise or experience to determine the FMV of the equity shares as on 01.04.1981. It is well known that valuation is a highly technical subject, hence, has to be dealt by the experts. Therefore, when the Departmental Valuation Cell is available, the Assessing Officer, instead of referring the valuation process to the Valuation Cell, should not have taken the burden of valuation himself. In this regard, we are supported by the following decision:

1. *CIT Vs. Raghunath Singh Thakur, reported in 304 ITR 268 (HP).*

20. It is further relevant to observe, while deciding the issue, learned first appellate authority has himself made inquiry to ascertain the FMV of the land and building under the possession of EKPL and as per the records of L & DO for the particular area, the value of land as on 01.04.1981 was Rs.2,000/- per sq. metre, which works out to about 81 lakhs per acre, which is much higher than the value of Rs.46 lakhs as shown in the balance sheet. It is further evident, though, the Assessing Officer has observed that the nature and character of land is dairy farming land, however, the facts on record reveal that EKPL has applied for conversion of dairy farming use to residential use in the year 1970, which was eventually allowed in the year 1992. Therefore, the FMV of the lease hold rights has to be ascertained based on its character of residential use. It is further observed, though, the Assessing Officer has alleged that the Accurate Surveyors in their valuation report has not considered the value of land in same locality, however, the observation is factually incorrect. We may also observe, merely because the assessee purchased shares of EKPL over a period of 20 years at the same face value of Rs.10 per

share, it cannot be said that the FMV of the shares as on 1st April, 1981 would be Rs.10 per share. This is so because, the actual cost of acquisition cannot be the FMV as provided under section 55(2)(b) of the Act. In this regard, we refer to the following decisions:

1. *CIT Vs. Duncan Brothers reported in 209 ITR 44 (Cal.)*
2. *Sushiladevi R Somani reported in 197 ITD 316 (Mum)*

21. Thus, on overall consideration of facts and circumstances of the case in the light of ratio laid down in the judicial precedents cited before us, we are of the considered view that the decision of learned Commissioner (Appeals) on the issue is not justiciable. Accordingly, we uphold the same by dismissing the ground.

22. In the result, the appeal is dismissed.

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23. The solitary ground raised by the Revenue reads as under:

- (A) On the facts and in the circumstances of the case, the learned CIT(A) has erred in directing the A.O. to treat Fair Market Value of share of M/s. Edward Keventer(s) Pvt. Ltd. at Rs.1675/- instead of Rs.10 as on 01.04.1981 without giving any specific reason for the same.

24. As could be seen, this ground is identical to ground no. 'C' of ITA No. 3776/Del/2009 decided by us in the earlier part of the order, facts being identical, our decision therein will apply

mutatis mutandis. Accordingly, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised.

25. In the result, the appeal is dismissed.

26. To sum up, both the appeals of Revenue are dismissed.

Order pronounced in the open court on 31st July, 2023

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
VICE PRESIDENT

Dated: 31st July, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi