

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

BEFORE : SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 4676/Del./2009
Asstt. Year : 2003-04

Ashok Kumar Gupta,
17/83, Anand Parbat,
Than Singh Nagar, New Delhi.
(PAN: AALPG 4014H)

vs.

A.C.I.T., Central Circle-16,
New Delhi.

ITA No. 4642/Del./2009
Asstt. Year : 2003-04

A.C.I.T., Central Circle-16,
New Delhi.
(Appellant)

vs.

Ashok Kumar Gupta,
17/83, Anand Parbat,
Than Singh Nagar, New Delhi.
(Respondent)

Assessee by : Sh. B.L. Gupta, ITP
Revenue by : Sh. S.K. Jain, D.R.

Date of hearing : 20.09.2016
Date of pronouncement : 16.11.2016

ORDER

Per L.P. Sahu, Accountant Member:

These are cross appeals filed by the assessee and the Revenue against the order of Id. CIT(A)-II, New Delhi dated 30.09.2009 for the assessment year 2003-04 on the following grounds :

Grounds raised in assessee's appeal :

- “1) On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in relying on the Inspector's report in respect of sale price of the property ignoring the actual consideration received.*
- 2) On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in confirming the addition of Rs. 1,37,21,900/- out of addition of Rs. 1,50,22,000/- incorrectly and unjustifiably made by the AO.*
- 3) On the facts and in the circumstances of the case and in law the authorities below erred in ignoring the provision of section 48 of the Income tax Act.*
- 4) On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in considering the sale price as business income even though the sale proceeds belong to others and even after considering the sale proceeds, they were still debtors of the assessee.*
- 5) On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in relying on the inspector's report in respect of sale price of property whereas he is not a technical person in the matter.*
- 6) On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in confirming the addition on the basis of inspector's report even though the same is based on market value and not on the basis of sale price and market value is no relevance so far as the sale consideration is concerned.*
- 7) On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in confirming the addition of Rs. 1,37,21,900/- on the basis of the inspector's report whereas the CIT (A) himself has not relied fully on the inspector's report and has made several adjustment in the report.*
- 8) On the facts and in the circumstances of the case and in law the Ld. CIT (A) erred in confirming the addition on the basis of the inspector's report ignoring several land mark judgment in the matter.”*

Grounds raised in Revenue's appeal :

"1. On the facts and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition amounting to Rs.21,36,500/- against Rs.15858400/- made by the AO on account of undisclosed income on sale of property.

2. On the facts and in the circumstances of the case the Ld. CIT(A) has erred in deleting the addition amounting to Rs.29,55,000/- made by the AO on account of undisclosed investment u/s. 69 of the I.T. Act.

3. On the facts and in the circumstances of the case the Ld. CIT(A) has no valid basis for differing with the estimate made by the AO."

2. The brief facts of the case are that Shri Ashok Kumar Gupta was a director in M/s. AKG Associates Pvt. Ltd. and he was drawing salary @ Rs.3750/- per month. A search was conducted on appellant on 07.05.2002. He was also engaged in financing activities against the security of properties and jewellery etc. All accounts of the assessee, bank and other transactions were being maintained/carried out in the name of assessee and his family members. The assessee filed his return of income declaring income of Rs.77,420/-. Later on, the return was revised and income was enhanced by Rs.4600/-. Statutory notices were issued and served upon the assessee. The assessee's case upto the date of search is pending before the Settlement Commission. The Id. Assessing Officer has decided the issue subject to the order of the Settlement Commission. In case of debtors being defaulter, the assessee sold the properties kept as security at the rate lower than the market

price and has not disclosed any profit arising from the sale of mortgaged properties in the return of income. The Assessing Officer asked the assessee for submission of valuation report for the properties sold/liquidated, but the assessee failed to submit the same before the AO. The AO deputed an Inspector for ascertaining the correct market price of the properties sold. On the basis of local enquiry, the Inspector submitted the report before the AO and the report of the Inspector was confronted to the assessee. The assessee submitted vide letter dated 29.02.2006 that the Inspector's report has no basis and is merely an estimate from the market enquiry. He further submitted that the market value of the estimated by Inspector is not correct. The AO did not accept this submission of the assessee and calculated the undisclosed income from the properties sold as per table No. 1 & 2 which are as under :

Table 1.

S. No.	Description of Property	Realization/sale consideration declared by the assessee	Amount advance keeping a margin of 30%	Difference i.e. income not disclosed
1.	A-8/1, Sector 15, Rohini (second floor)	6,16,000	4,31,200	1,84,800
2.	D-3/100, Sector-16, Rohini			
(a).	Ground Floor	40,000	28,000	12,000
(b).	First Floor	90,000	63,000	27,000
(c).	Second Floor	45,000	31,500	13,500
(d).	Third Floor	35,000	27,500	7,500
3.	F-2/68-69, Sector-11, Rohini			
(a).	F-2-68 Second Floor	25,000	17,500	7,500
(b).	F-2-69, Second Floor	25,000	17,500	7,500

(c)	F-2-68-69, Top Floor with roof rights	40,000	28,000	12,000
(d).	F-2-68-69, Ground floor	9,00,000	7,20,000	1,80,000
4.	G-1/45, Sector 15, Rohini	2,52,000	1,76,400	75,600
5.	B-5/42, Sector-15, Rohini	3,00,000 + 50,000	2,45,000	1,05,000
6.	KP-326, Pitam Pura (Ground Floor)	7,00,000	4,90,000	2,10,000
	Total undisclosed income			8,36,400

Table 2.

S. No.	Description of Property	Declared consideration by the assessee	Market Value as per Inspectors report as on date of realization/sale	Undisclosed income
1.	A-8/1, Sector 15, Rohini (second floor)	6,16,000	18,00,000	11,84,000
2.	D-3/100, Sector-16, Rohini			
(a).	Ground Floor	40,000	16,00,000	15,60,000
(b).	First Floor	90,000	14,00,000	13,10,000
(c).	Second Floor	45,000	14,00,000	13,55,000
(d).	Third Floor	35,000	16,00,000	15,65,000
3.	F-2/68-69, Sector-11, Rohini			
(a).	F-2-68 Second Floor	25,000	12,00,000	11,75,000
(b).	F-2-69, Second Floor	25,000	12,00,000	11,75,000
(c)	F-2-68-69, Top Floor with roof rights	40,000	18,00,000	17,60,000
(d).	F-2-68-69, Ground floor	9,00,000	17,00,000	8,00,000
4.	G-1/45, Sector 15, Rohini	2,52,000	17,00,000	14,48,000
5.	B-5/42, Sector-15, Rohini	3,00,000 + 50,000	15,00,000	11,50,000
6.	KP-326, Pitam Pura (Ground Floor)	7,00,000	30,00,000	23,00,000
	Total undisclosed income			1,50,22,000

Accordingly, the AO made addition of Rs.1,58,58,400/-.

3. The AO further noted that second floor of property K.P. 326 at Pitampura Delhi was purchased at Rs.45,000/-. This property has been sold at Rs.7,00,000/- whereas the market value determined by the Inspector of

ground floor was Rs.30,00,000/-. The property (second floor) purchased was only with roof rights. Therefore, the Id. Assessing Officer determined its market value at Rs.30 lacs. Therefore, the undisclosed investment was added u/s. 69 of the Act of Rs. 29,55,000/-. The Id. CIT(A) in appeal before him, after making certain adjustments, gave relief of Rs.13,00,100/- and Rs.8,36,400/- in undisclosed income from the properties sold. He also deleted the addition of Rs.29,55,000/-. Aggrieved by the order of the Id. CIT(A) both the parties are in cross appeals before the Tribunal.

4. The Id. AR of the assessee submitted that the Assessing Officer has made addition only on the basis of Inspector's report which cannot be relied because he is not the expert in the field. He just gathered information from the neighbourhood. How he has determined the market price is not clear from the report. The Assessing Officer has not recorded any statement of the purchasers. Neither the CIT(A) nor the AO nor Inspector has proved that the assessee has received money over and above the sale price determined between the seller and the purchasers of the properties sold. He submitted a written synopsis which reads as under :

“The assessee an individual was a director in M/s AKG Associates (P) Ltd. and drawing salary income. He was also financing against the security of properties and jewellery. Action u/s 132 was taken against him on 7/5/02 and during the course of search, a sum of Rs. 1,68,00,000/- was seized. Thereafter,

the assessee went before the Settlement Commission, where his application has been accepted but the matter is pending for final disposal. Before the Settlement Commission, he has offered undisclosed income of Rs. 2,70,00,000/- including the cash found at the time of the search. Therefore, the matter relating to the income of the assessee up to the date of search is under the consideration of the Settlement Commission and will be decided as and when the matter is finalized. Before Settlement Commission, the assessee has given the copy of the Balance Sheet, list of debtors and creditors etc. It has been stated that he has given loans against properties to one Shri M. C. Sharma. The total amount of loan advanced to M C Sharma as per the Balance sheet and as per the Settlement Commission's submission was Rs. 1,19,74,000/-. This loan was advanced to him against several properties which the assessee had got transferred in his name at the time of advancing loan as a security. The list of such properties has been detailed before the Settlement Commission and also given to the AO during assessment proceedings.

2. During the period relevant to the assessment year 2003 - 2004, the assessee sold some of these properties the details of which have been given in the assessment order on pages 3 & 4. These properties were sold at the price mentioned in each sale deed. The AO however, was not satisfied with the sale price on the ground that there was considerable rise in the real estate during the period in which the properties were sold. He therefore, deputed inspector to find out the market value of the property sold and the inspector submitted a report giving out the prevailing market rate in the year of report and also estimated market value in the year of sale. On confrontation, the assessee submitted that market value has no bearing so far as the sale consideration was concerned. The inspector never stated that the properties have been sold for more than the consideration shown in the various sale deeds. Moreover the inspector was also directed to find out prevailing market rate and not the actual sale price of the various properties. If permitted it could be said that the AO did not doubt the sale price but wanted to know the market value even though this was not a case of Wealth, tax. But AO did not agree and held that due to pressure of time he was forced to depute the inspector to find out the market prevailing price of the properties. Therefore, the AO adopted the price as given by the inspector in respect of properties sold and such adopted price has been given on page 3 of the assessment order. In all, six properties as given in table 2 of page 3 of the assessment order were sold. In table 2, the AO derives difference between the market value as per inspector's report and the consideration received at Rs. 1,50,22,000/- in respect of the properties sold and he treats the difference as income.

3. The AO was also of the opinion that in such like advances, the lender advances money by retaining 30% of the advance as margin money. Therefore, according

to the AO, the assessee must have advanced 30% less than the sale consideration. Such 30% has been calculated on page 3, table 1 of the assessment order and according to him, the difference of Rs. 8,36,400/- is the income on account of margin which he has also brought to tax in the assessment order. In this way, he has assessed the total amount of Rs. 1,58,58,400/- to tax (Rs. 1,50,22,000/- + Rs. 8,36,400/-).

4. The matter went before the CIT (A) where the CIT (A) is of the opinion that there was no justification for estimating the amount of rupees loan advanced. The amount of advance details has been given before the Settlement Commission where the final order was awaited. According to the CIT (A), it would not be proper to pass any comment about the correctness or otherwise of that amount of advance and therefore, he directed the deletion of Rs. 8,36,400/-. The department is not in appeal against this deletion.

5. Regarding the sale consideration, the CIT (A) did not fully agree with the AO and held that Income tax proceeding are civil proceedings and therefore, the conclusion with respect to the sale price has to be drawn based on preponderance of probability. But at the same time agreeing that the AO has not brought out any specific document in his possession that the actual sale consideration was higher than the amount given in the sale deeds. The CIT (A) also took into consideration the undisclosed income offered before the Settlement Commission and for this reason held that what was apparent was not real. He also held that there was increase in real estate price and therefore, according to him the presumption of the AO was correct. Even though, the CIT (A) agreed that the AO was correct in presuming the sale price but he made two modifications in the inspector's report and also what has been adopted by the AO. He held that the lower range of the market report as per the inspector's report should be adopted and secondly some concession should be allowed from the current market rate to arrive at the consideration received and in this connection, the relevant para is reproduced below:

"In my opinion, in all fairness, the AO should have adopted the lower limit of the range. Further, in my opinion, whereas inspector based on market enquiries can get the current rates correctly to a fair degree but for earlier period that too for period as old as almost three years, the rate as per market enquiries may not be so accurate. It is therefore, proper if tower limit of the range is adopted for the current year and margin for 10% appreciation every year is provided and accordingly, the prevailing market rate for the relevant year is estimated. If that is done then the estimated consideration will come to Rs. 1,68,36,900/- and in the opinion of the CIT (A), the sale consideration should be adopted at this figure against Rs. 31,18,000/- shown by the assessee and Rs. 1,99,00,000/- adopted by the AO." He held accordingly.

6. In the year under consideration, the assessee has purchased second floor of property No. KP-326 at Pritampura, Delhi. The AO states that the sale consideration in respect of ground floor of the same property was Rs. 7 lakhs. But as per the inspector's report, the value of ground floor was Rs. 30 lakhs. Therefore, the AO observes that since the assessee has purchased second floor with roof right, the consideration cannot be less than Rs. 30 lakhs. For this reason, he treated the amount of Rs. 29,55,000/- as undisclosed investment u/s 69 being the difference between Rs. 30 lakhs and Rs. 45,000/-.

7. It was submitted before the CIT (A) that the assessee has not purchased any second floor and what has been purchased is only the roof right of first floor which has been stated as second floor. Necessary evidence in respect of purchase consideration of Rs. 45,000/- in respect of roof right of KP-326 in the shape of sale deed was filed. Hence, the CIT (A) deleted the addition since the sale deed is not in doubt and also no second floor has been purchased. The seller has also not been examined. There is no evidence that I have paid any amount over and above the sale deed. Moreover, the addition is based on estimate without any evidence. The addition was deleted.

8. In this case, there is an appeal by the revenue by raising two grounds, namely, deletion in respect of KP-326 and also deletion of part addition in respect of sale consideration of the various properties.

9. The assessee has also filed appeal against the confirmation of addition of Rs. 1,37,21,900/-. Reliance has been placed on section 48. Any addition on the basis of inspector's report has also challenged. The CIT (A) himself has not relied on the report of the inspector. Addition has been sustained by the CIT (A) on the basis of presumption even admitting that there was no material brought by the AO on record to prove that the sale consideration was higher than declared.

10. Our submissions are the reliance on the land mark judgement in the case of K P Verghese. We are also relying on the provision of section 48. We are also submitting that there cannot be addition on the basis of the inspector's report. More significantly there cannot be addition on account of market rate, the inspector report or for that matter the AO has never stated that the assessee has received any amount over and above the declared consideration. Sale deeds have not been found to be incorrect or wrong. No evidence has been given by the authorities below that the assessee had received any amount over and above the price as per the sale deeds. The buyers have never stated that they have paid more than stated price. They were even never examined. The authorities below have only relied on the market value as it was a case of Wealth Tax. When the inspector was deputed to make enquiries he was never asked to find out the sale consideration but the current market price. No addition could be made on the basis of market price which is wholly irrelevant for the purpose of sale consideration. It is also very forcefully submitted that the CIT (A) himself has not

accepted the inspector's report. If the inspector's report is sacroscent then where is need for creating a big institution in the shape of valuation cell at all and also the provision in the I. Tax Act and therefore, everything should be done on the basis of inspector's report. Hence it is submitted that the addition sustained may be deleted.

11. The AO has otherwise it is submitted has accepted the sale consideration and having done so, inadvertently or it can be said on the basis of adopting a contrary approach estimated the sale price. These submissions of ours are based on the ground that the AO himself has accepted the sale consideration while calculating the 30% margin difference. Had the AO was of the opinion that the properties have been sold at a higher rate as mentioned by the him he should have calculated the 30% margin by adopting the sale consideration as taken by him. But he has not done so. He has accepted the sale consideration while calculating the margin but had not done so when considering the sale price.

12. There is another submission and i.e that properties are under mortgage and the sale consideration whatever would be the property of the person to whom the loan was advanced.

13. Besides the reliance on the case of K. P. Verghese, we are also submitting copies of the judgement in the case of Jupiter Builders, Pioneer Products, Kamal Kishore Chandak and Dinesh Jain. We are also relying on the Delhi Tribunal judgement in the case of Dharam Veer Yadav as per copy enclosed.

14. In the case of Jupiter Builders, the Hon'ble Delhi High Court has said that the AO being non-technical person cannot value the property. The present case is much weaker in as much as here the valuation has been done by the inspector and even that report has not been relied by the CIT (A).

It is therefore, submitted that the addition may kindly be deleted.”

5. On the other hand, the ld. DR relied on the order of the Assessing Officer.

6. After hearing both the parties and perusing the material on record and the orders of the authorities below, we find that the case is pending before the settlement commission upto the date of search, i.e. 07.05.2002. The Assessing

Officer has himself mentioned in his order that *“assessee’s case upto the date of search is pending before the Hon’ble Settlement Commission. Therefore, the issue regarding all the opening balances shall be considered by the Settlement Commission. It has been submitted by the assessee that the loan were given to various persons by him against security of properties, details of which appear in the balance sheet as on 07.05.2002 under the head “loans and advances against properties”. Same have been reflected in the petition before the Settlement Commission. Therefore, the matter of opening balance shall be considered if required after the decision of the Hon’ble Settlement Commission.”* Before us, none of the authorities have filed the final order of Settlement Commission. It is an admitted fact that similar issues for the part period are pending before the Settlement Commission and as per AO, the opening balances have to be decided by the Settlement Commission, as the matter is pending with it before the period of search. This shows that the decision of Settlement Commission, whatsoever, relating to the period prior to search, would certainly leave impact on the assessment of assessee for the period subsequent to search. We, therefore, deem it expedient in the interest of justice to remit the case back to the Assessing Officer with the direction to decide the matter de novo after considering the final order of Settlement Commission when passed. Needless to say, the assessee shall be given

reasonable opportunity of being heard. Accordingly, both the appeals are liable to be allowed for statistical purposes.

7. In the result, both the appeals of the assessee and Revenue are allowed for statistical purposes.

Order pronounced in the open court on 16.11.2016.

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Sd/-
(L.P. SAHU)
Accountant Member

Dated : 16.11.2016

*aks/-

Copy of order forwarded to:

(1) *The appellant*

(3) *Commissioner*

(5) *Departmental Representative*

(2) *The respondent*

(4) *CIT(A)*

(6) *Guard File*

By order

*Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi*