THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.02. 2013

+ ITA 1089/2011
+ ITA 1090/2011

CIT ..... Appellant

versus

DISCOVERY ESTATES PVT. LTD. ..... Respondent

+ ITA 1097/2011

CIT ..... Appellant

versus

DISCOVERY HOLDINGS PVT. LTD. ..... Respondent

Advocates who appeared in this case:
For the Appellant : Mr N. P. Sahni, Sr. Standing Counsel with Mr Ruchesh Sinha, Jr. Standing Counsel.
For the Respondents : Mr G. C. Srivastava with Ms Preeti Bhardwaj, Advocates.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

R.V. EASWAR, J

These three appeals relating to two different assessees were heard together since common issues are involved and, therefore, a single order is passed for the sake of convenience.

2. The appeals are by the Revenue. ITA Nos.1089/2011 and 1090/2011 relate to the same assessee i.e. Discovery Estates Pvt. Ltd. and ITA No.1097/2011 relates to another company of the same group by name Discovery Holdings Pvt. Ltd. On 13.02.2012, the following substantial questions of law were framed by this Court in all the three appeals:

> "(i) Whether the Income Tax Appellate Tribunal was right in holding that the rental income should be assessed under the head "income from business" and not under the head "income from house property"?
> (ii) Whether the Income Tax Appellate Tribunal was right in holding that the sale consideration disclosed by the assessee on sale of shops should be accepted?
> (iii) Whether the findings recorded by the Income Tax Appellate Tribunal in respect of the question number (ii) are perverse?"

3. It is common ground that the first substantial question of law is to be answered in the negative, in favour of the Revenue and against the assessee in view of the judgment of this Court in ***CIT Vs. M/s Ansal Housing Finance and Leasing Co. Ltd. & Ors.*** decided on 31.10.2012 in ITA 18/1999.

4. So far as the other two substantial questions of law are concerned, they are connected with each other. The brief facts in this connection may be noticed. We are taking up first the facts in ITA No.1089/2011.

The assessee is engaged in the business of construction of commercial complexes. In the accounting year ended on 31.03.2006 relevant to the assessment year 2006-07, it had constructed 67081 sq. ft. area of a shopping mall called City Square Mall. The construction cost including the land cost amounted to ₹5,456/- per sq. ft. The shops in the complex were sold. In respect of 7 shops, the Assessing Officer noticed that the assessee had booked sales at ₹6,000/- per sq. ft. in the ground floor in the year 2003 whereas in the year 2005, shops in the same floor were booked at the rate of ₹3,390/- per sq. ft. One of the shops was even found to have been sold at the rate of ₹2,300/- per sq. ft. which was even less than the land cost of ₹2,332/- per sq. ft. The AO further noted that even in respect of the same floor, different rates were being charged from different customers. The following table sets out the relevant details:-

Date of agreement	**Floor**	**Name of Buyer**	**Area Sold**	**Rate Sq. ft.**
12.05.03	GF-16	Anju Arora	1394	6000
02.09.03	UG-16	Promila Arora	1882.17	4000
06.10.03	UG-17	Bimal Chawla	1133.49	4000
05.01.05	GF-ATM-5	Sanjay Kumar	252.17	4748
27.01.05	GF-ATM-2	Vandana Arora	295	3390

04.10.05	TF-05	Revie	2736.83	2300
07.12.05	GF-ATM-4	Laxmi opticals	275.8	5438.72

5. On the basis of the above findings, the Assessing Officer came to the conclusion that the assessee had suppressed the sale price and had booked losses which was not justified. According to him, no person would sell the property at prices even below the cost if he wishes to remain in business. He, therefore, disallowed the loss of ₹1,31,60,475/- shown by the assessee on sale of shops. This figure was arrived at by deducting the cost of ₹4,47,11,920/- from the sale price of ₹3,15,51,445/-.

6. On appeal, the assessee submitted as follows:-

(a) The rate at which space in a shopping mall is sold depends on various factors such as time, location, floor, size, approach, demand and supply etc. Therefore, there cannot be a uniform sale price. By way of example, it was pointed out that the shop sold to Anju Arora was in the ground floor and had the best approach and was ideally located as compared to the other shops. The buyer was also in great hurry as he realised the advantages. The assessee took

advantage of these factors and could strike a better bargain. Thereafter for four months, no shop could be sold and, therefore, prices had to be reduced.

(b) In the case of Promila Arora and Bimla Chawla, the prices were lower than in the case of Anju Arora because the shops were located in the upper floor. In the case of Sanjay Kumar, the price was higher because the shop was located in the ground floor, though it could not fetch the same price as in the case of sale to Anju Arora because of less advantageous location. The sale to Vandana Arora was at a price lower than the price paid by Sanjay Kumar as this space was not properly connected in the sense that there was only one entry from outside.

(c) The shop sold to Revie was in the third floor and was of a large area and, therefore, could fetch only ₹2,300/- per sq. ft.

(d) By December, 2005, the project was completed and the cost was known to the assessee and, therefore, a shop of a small size in the ground floor was able to fetch ₹5,438/- pr sq. ft. which is equal to the cost of land and construction.

(e) After December 2005 till March 2006, there was no sale of shops which shows that the demand for shopping space could widely fluctuate.

(f) There was no evidence brought on record to establish any understatement of sale consideration. No independent inquiries were made by the Assessing Officer to bring in comparable cases of sale at higher prices.

(g) The Assessing Officer, if he had suspected the declared sale prices, ought to have raised queries but he did not do so.

7. On consideration of the above submissions, the CIT (Appeals) held that there was no justification for disallowing the loss on the sale of shops. He accordingly directed the Assessing Officer to allow the loss.

8. The Revenue carried the matter in appeal before the Income Tax Appellate Tribunal in ITA No.3617/DEL/2009. The Tribunal took up the appeals of the Revenue in the case of the assessee for the assessment year 2007-08 (ITA No.3495/DEL/2010) as also in the case of M/s. Discovery Holdings Pvt. Ltd. for the assessment year 2007-08 (ITA No.3431/DEL/2010) and disposed of all the three appeals by a common order dated 25.02.2011. The issue relating to the disallowance of loss on

the sale of shops in the case of Discovery Estates Pvt. Ltd. for the assessment year 2006-07 and the deletion of the addition of ₹1,72,80,780/- made by the AO for the assessment year 2007-08 as well as the deletion of the addition of ₹31,32,992/- made by the Assessing Officer on similar grounds in the case of M/s. Discovery Holdings Pvt. Ltd. for the assessment year 2007-08 were considered together from paragraph 15 of the order. After considering in detail the facts and the rival submissions, the Tribunal recorded the following findings in Paragraph 19 of its common order:-

(a) The assessee is maintaining proper books of accounts and the Assessing Officer has not pointed out any specific defects therein.

(b) The view of the Assessing Officer that there can be no loss in real estate business and the assessee cannot sell the shops below cost price is not correct, having regard to the facts.

(c) The assessee has given reasons as to why it booked sales at the initial stage at a lower price. It was found that the assessee could not book a single shop for sale in the year 2004 and during the period from May 2003 to December

2004, it could book only five shops for sale. These factors suggest that in the beginning of the business, the assessee is forced to offer some concession in the price to draw custom.

(d) The Assessing Officer could have brought evidence on record to show that any purchaser had actually paid a price higher than the price shown in the books. No such evidence was forthcoming. There was not even material to doubt the sale transactions.

(e) It is not permissible for the Assessing Officer to rely on the perceived general market conditions; the price shown by an assessee cannot be doubted for the reason that in the opinion of the Assessing Officer, the real estate prices did not show any downward trend.

(f) The market prices can at best be a starting point for further inquiry but they cannot be substituted for the price shown by the assessee in the books of accounts.

On the basis of the aforesaid findings, the Tribunal upheld the order of the CIT (Appeals). It may be noted that since the CIT (Appeals) had deleted the additions in all the three cases, the Tribunal upheld the

decision of the CIT (Appeals) in all the three appeals filed by the Revenue for identical reasons.

9. For the sake of completeness, we may notice the facts relating to the assessment year 2007-08 in the case of M/s. Discovery Estates Pvt. Ltd. in ITA No.1090/2011 and in the case of M/s. Discovery Holdings Pvt. Ltd. in ITA No.1097/2011. In the case of Discovery Estates Pvt. Ltd., the Assessing Officer, on a scrutiny of the sale agreements filed before him and the copy of the accounts noted that though the total cost of construction, including the land cost, came to ₹5,456/- per sq. ft., the assessee had booked sales in the first floor at ₹5,000/- per sq. ft and sold the third floor shop to M/s. Vatika Hospitality Pvt. Ltd. at ₹5,412/- per sq. ft. From these figures, he drew the inference that the assessee had suppressed the sale price. According to him, it was not acceptable that the shops could be sold at the rates which are less than the total cost of construction. Moreover, some of the shops sold by the assessee were to a company by name M/s. Sewa Buildcon Pvt. Ltd., which is a sister concern of M/s. Sewa International Fashion Ltd., which was a partner of the joint venture under which the shopping mall namely, City Square Mall was constructed. There was no registered sale deed for the sale of

shops to Sewa Buildcon Pvt. Ltd; there was only a simple agreement. The Assessing Officer, in the absence of a registered sale document, took the view that the rent capitalization method will be appropriate to determine the fair market value of the properties. He calculated the fair market value of the property in accordance with the method prescribed by Rule 1 BB of the Wealth tax Rules, 1957 under the rent capitalization method and arrived at the fair market value of the rented property which was sold to Sewa Buildcon Pvt. Ltd. during the year at ₹3,84,86,160/-. The difference between the fair market value arrived at as above and sale price disclosed by the assessee came to ₹1,72,80,780/- which was added as sale consideration received outside the books of accounts. This addition as noted earlier was deleted by the CIT (Appeals) whose decision was confirmed by the Tribunal.

10. In the case of Discovery Holdings Pvt. Ltd., the assessee constructed a mall known as Mega City Mall. A total area of 201127 sq. ft. was completed in the relevant year, with 16744 sq. feet area under construction. The cost of the land and the construction cost was declared at ₹3,023/- per sq. ft. As in the other case, in this case also, the Assessing Officer noticed variation in the prices charged from different customers,

which are all noted in Paragraph 6 of the assessment order and came to the conclusion that these variations clearly showed that the assessee had suppressed the sale and booked a loss. For reasons that are similar to the reasons given in the case of M/s. Discovery Estates Pvt. Ltd. for the assessment year 2006-07 (ITA No.1089/2011), the Assessing Officer made an addition of ₹31,32,992/- to the book results. In doing so, he picked out only five properties for special treatment and made the addition in the following manner:-

Particular	Area (Sq.ft.)	Rate/sq. ft.	Value	Value @ 3750/- = per sq. ft.
SF-11	738.64	2750	20,31,260	27,69,900
SF-10	738.64	2750	20,31,260	27,69,900
SF-08	738.64	3001	22,17,000	27,69,900
SF-09	738.64	3001	22,17,000	27,69,900
SF-15	813.35	3074	25,00,000	30,49,612
			10996520	14129512

Difference ₹31,32,992/- =

It will be noticed from the above table that the Assessing Officer adopted the sale price of ₹3,750/- per sq. ft. as against the declared sale consideration and arrived at the addition. As noted earlier, the addition

was deleted by the CIT (Appeals), whose decision was confirmed by the Tribunal.

11. The main contention taken up on behalf of the Revenue was that the CIT (Appeals) as well as the Tribunal did not examine the assessment orders in the manner expected of them and both these authorities have deleted the additions made by the Assessing Officer without proper reasons. It was submitted that there was no satisfactory answer to the query raised by the Assessing Officer as to why and how the properties could be sold at a price which was lesser than the cost of construction (including land cost). It was further submitted that a part of the shops in the City Square Mall was sold by the assessee Discovery Estates Pvt. Ltd. to a sister concern at low prices and these sales were suspect. There were, it is contended, no registered sale deeds and the shops were being sold on the basis of unregistered agreements and thus there was no scrutiny of the sales by the registering authorities and this aspect was overlooked by the CIT (Appeals) as well as the Tribunal. It was thus contended that the findings recorded by the Tribunal were vulnerable to the criticism of being perverse.

12. On behalf of the assessee, it was submitted that the features noticed by the Assessing Officer in the course of the assessment proceedings such as absence of registered sale documents, sale of shops to a sister concern, difference in sale prices of the shops etc. have all been properly explained by the assessees and that at best, these features can only be a starting point for further inquiry and so long as there was no evidence brought on record to show suppression of the sale prices, no addition can be made. It was submitted that the assessing authority has no power to disturb the sale price shown except in three cases. The first is under Section 145 of the Act. Where the sale of properties is part of the business of the assessee, the Assessing Officer, if he is of the opinion that the accounts are not correct and complete, may proceed to reject the books of accounts and thereafter make a best judgment assessment of the income in the manner prescribed by Section 144. The second is the case where Section 50 C of the Act is invoked on the basis of the prices fixed by the Stamp Valuation Authorities of the State Government. That section, it is pointed out, however, applies only in the computation of capital gains and cannot BE availed by the Revenue where the profits of the business are to be computed.

13. The third is the case of section 92BA inserted by the Finance Act, 2012 w. e. f. 01.04.2013. This section gives power to the assessing officer to recalculate the profits shown by the assessee in cases of "specified domestic transactions", where the aggregate of such transactions entered into in the relevant accounting year exceeds a sum of ₹5 crores. According to the learned counsel for the assessee, except in these three situations, the Act does not permit the enhancement of the profits of the business shown by the assessee. It is further pointed out that in the present case, the assessing officer has not invoked section 145 (3). It is this sub-section that empowers him, where he is not satisfied about the correctness or completeness or the accounts of the assessee, to make an assessment to the best of his judgment in the manner provided in section 144. Therefore, there is no option to the assessing officer except to accept the book results. It is, however, conceded that if there is evidence to show suppression of the sale price, in that case the assessing officer can very well invoke the aforesaid provision of the Act, reject the books of the assessee as being incorrect and proceed to estimate the sale price. It is, however, pointed out that there is no such evidence in the

present case. It is further contended that this is the basis of the order of the Tribunal which can hardly be characterised as perverse.

14. On a careful consideration of the matter we are inclined to accept the submissions of the learned counsel for the assessee and agree with him that the findings recorded by the Tribunal are not perverse. It is not correct to say that the assessee did not satisfactorily answer the queries raised by the assessing officer on noticing the absence of registered sale documents, variations in sale prices of shops in the same floor, sale of shops to sister concerns, etc. They have all been answered by the assessees and we have adverted to the replies of the assessee while summarising its submissions made before the CIT (Appeals). Neither the CIT (Appeals) nor the Tribunal found anything amiss in those replies/ submissions. The power of the assessing officer to raise valid queries on the basis of the facts or unusual features noticed by him must be conceded. The features noticed by him in the assessees' business certainly constitute a starting point of inquiry. They are, however, not to be taken as evidence or material showing any suppression or understatement of the sale price. If on further probe, the assessing officer was able to unearth any evidence or material on the basis of which actual

suppression of the sale price could be found, then the additions made on that basis would be valid. Even if the evidence does not show the precise amount of suppressed sale price, but shows clearly and categorically that there was understatement of sale consideration, that would be sufficient to empower the assessing officer to reject the account books as being incorrect and incomplete. He may thereafter make an estimate of the profits of the business to the best of his judgment, on the basis of the evidence unearthed by him revealing suppression of sale price. But it is not open to him, merely on the basis of what he perceives to be the market conditions, to make additions to the sale price or the profits, without any evidence of understatement. These principles have been kept in mind by the Tribunal and, therefore, its order cannot be faulted or branded as perverse. Moreover, as rightly pointed out on behalf of the assessee, there is no other provision in the Act permitting the assessing officer to enhance the profits or the sale price except section 50C and section 92BA. Section 50C does not apply to the present case as it applies only to a case of capital gains. Section 92BA also does not apply as it came into force only from the assessment year 2012-13. Moreover,

it applies only to such domestic transactions as may be prescribed by the competent authority.

15. Several decades back the Madras High Court in the case of ***Shri Ramalinga Choodambikai Mills Ltd. v. CIT*: (1955) 28 ITR 952** held that in the absence of any evidence to show either that the sales were sham transactions or that the market prices were in fact paid by the purchasers, the mere fact that goods were sold at a concessional rate would not entitle the income tax department to assess the difference between the market price and the price paid by the purchaser as profit of the assessee. In ***CIT v. A. Raman & Co.*: (1968) 67 ITR 11** the Supreme Court held that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which actually accrues is taxable, but income which the assessee could have, but has not in fact earned, is not made taxable. These two judgments were approvingly noticed and applied by the Supreme Court in ***CIT v. Calcutta Discount Co. Ltd.*: (1973) 91 ITR 8**. These judgments apply to the present case in favour of the assessee.

16. A Division Bench of this Court was examining a converse case in ***CIT vs. Dinesh Jain HUF*: (2012) 211 Taxman 23**. There the question

arose under section 69B of the Act as to what was the correct investment made by the assessee in an immoveable property. The income tax authorities relied on the fair market value of the property calculated on the basis of rule 3 of Schedule III to the Wealth Tax Act which prescribed the rent capitalisation method for valuation of immoveable properties. The difference between the value of the property so calculated and the actual price paid by the assessee in that case was sought to be added as undisclosed investment. Disapproving the action, this Court held that the Wealth Tax Act was concerned with the fair market value of the asset and under Schedule III thereto, which came into force on 01.04.1989, it was not even an estimate of fair market value of the asset, but a prescribed computation of the value of the asset on the basis of the rent capitalisation method. The difference between the fair market value of the property and the investment made in the property for purposes of section 69B was pointed out and it was held that a mechanical addition of the difference between the value arrived at on the basis of the rent capitalisation method and the actual investment made by the assessee in the property has to be deprecated. We are referring to this aspect because in one of the cases before us, the assessing officer has sought to adopt rule 1BB of the

Wealth Tax Rules, which also prescribes the rent capitalisation method of valuation of immoveable properties, and to make an addition to the sale price on that basis. In our view such an approach cannot be countenanced.

17. It only remains for us to refer to the observations of the assessing officer to the effect that no one makes a loss in real estate business and that the market perceptions indicate that the prices of the immoveable properties are always on the upward trend. These observations have, *inter alia*, formed the basis of the additions made by the assessing officer. It was even suggested before us on behalf of the revenue that it is a "notorious practice" prevailing in real estate circles that in all property transactions there is non-disclosure of the full consideration. As pointed out earlier, this cannot *per se* constitute the basis of the addition, though we must hasten to add that it can very well be a starting point for further investigation. In ***Lalchand Bhagat Ambica Ram vs. CIT*****: (1959) 37 ITR 288**, the Supreme Court disapproved the practice of making additions in the assessment on mere suspicion and surmises or by taking note of the "notorious practice" prevailing in trade circles. It was observed as under:

> "Adverting to the various probabilities which weighed with the Income-tax Officer we may observe that the notoriety for

> smuggling food grains and other commodities to Bengal by country boats acquired by Sahibgunj and the notoriety achieved by Dhulian as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf."

18. The Tribunal cannot be said to have taken into account irrelevant material or ignored relevant material in arriving at its decision. It seems to have applied the right principles in support of its decision. Its order cannot therefore be termed as perverse.

19. For the aforesaid reasons we answer the second substantial question of law in the affirmative, in favour of the assessee and against the revenue. The third substantial question of law is answered in the negative, in favour of the assessee and against the revenue.

20. In the result the appeals filed by the revenue are partly allowed.

R.V.EASWAR, J

BADAR DURREZ AHMED, J

FEBRUARY 18, 2013
gm/hs