

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on : 17.01.2013

+ **ITA 1263/2011**

CIT

..... Appellant

versus

MEERA GOYAL

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Karan Khanna, Sr. Standing Counsel with Ms
Asmita Kumar, Advocate.

For the Respondent : Mr Simran Mehta with Ms Inklee Roy and Ms
Yogita Sunaria, Advocates.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V. EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal by the revenue is directed against the order dated 05.04.2011 passed by the Income Tax Appellate Tribunal, New Delhi in ITA No.604/Del/2011 in respect of the assessment year 2007-08.

2. The respondent/ assessee has house property at 37, Friends Colony, New Delhi. On 28.01.2007 the respondent entered into an agreement to sell the said property to Shinestar Buildcon (P) Ltd. The sale consideration of the property was agreed upon at ₹150 crores. Earnest

money under the agreement was determined to be ₹36 crores. In respect of the said earnest money of ₹36 crores the respondent/ assessee received six cheques as under: -

Date	Cheque No.	Bank	Amount
28.01.2007	022114	UTI Bank Ltd.	9,00,00,000/-
28.01.2007	022115	-do-	9,00,00,000/-
28.01.2007	022119	-do-	5,00,00,000/-
28.01.2007	022120	-do-	5,00,00,000/-
28.01.2007	022121	-do-	5,00,00,000/-
28.01.2007	022122	-do-	3,00,00,000/-
			36,00,00,000/-

3. The balance amount was payable by 30.03.2007 and time was the essence of the contract. Clause 3 of the said agreement provided that if the purchaser failed to pay the balance consideration by that date, the seller (respondent/ assessee) had the right to forfeit the earnest money and the purchaser Shinvestar Buildcon (P) Ltd. would have no claim on the property whatsoever and the agreement to sell would stand terminated.

4. Shinvestar Buildcon (P) Ltd. failed to pay the balance consideration by 30.03.2007 and the respondent/ assessee sent a notice of forfeiture dated 31.03.2007 and forfeited ₹18 crores out of the earnest money of

₹36 crores. The first two cheques mentioned in the table above amounting to ₹18 crores were returned to Shinestar Buildcon (P) Ltd. as a part of the settlement arrived at between the assessee and the said Shinestar Buildcon (P) Ltd. However, the balance four cheques were encashed and the sum of ₹18 crores was forfeited.

5. The forfeited amount of ₹18 crores was shown as advance received from the property in the balance sheet of the respondent/ assessee and the said sum of ₹18 crores had not been offered for taxation in the relevant assessment year. The assessing officer did not accept this treatment of the said sum of ₹18 crores and held that the entire transaction was a sham transaction in which Shinestar Buildcon (P) Ltd. attempted to book bogus losses. As a result, the assessing officer made an addition of ₹18 crores.

6. Being aggrieved, the respondent/ assessee preferred an appeal before the Commissioner of Income Tax (Appeals) which was allowed. At this juncture it would be relevant to note that prior to the assessment being framed, directions under section 144A of the Income Tax Act, 1961 had been given by the Addl. Commissioner on a reference being made by the assessee under that provision in relation to the proceedings for the assessment year 2007-08. The directions given were, *inter alia*, as under:

“In the light of above observation, forfeited amount is not liable to be taxed as income or chargeable gain under the provisions of the act till there is sale of property. The legal position to this effect is supported from provisions of sec. 51 of the Income Tax Act, 1961 and various judgments referred to above.

However, the Assessing Officer is required to ensure that as and when the property is sold, the forfeited amount is adjusted towards the cost of the property for the purpose of computation of capital gain. Moreover, if the AO chooses to treat the forfeited amount otherwise she may do so after recording proper reasons in the body of the assessment order and after meeting out the legal position on the issue.”

7. The Commissioner of Income Tax (Appeals) held in favour of the respondent/ assessee in view of the fact that the assessing officer had not complied with the directions given by the Addl. Commissioner of Income Tax under section 144A of the said Act. He also held that the said directions were binding on the assessing officer and the assessing officer had no authority to disregard the said directions.

8. Being aggrieved by the order of the CIT (Appeals) the revenue preferred an appeal before the Income Tax Appellate Tribunal which has also been dismissed. The Tribunal held as under: -

“6. We have heard the rival contentions and perused the relevant records. We find that it is not disputed that there was an agreement to sell between the assessee and M/s Shinvestar Buildcon P Ltd. and in terms of the agreement the

assessee received ₹18 crores as earnest money. Subsequently, the said earnest money was forfeited by the assessee and the same was claimed as capital receipt. Assessing Officer was not satisfied, therefore, a reference was made to Addl. Commissioner of Income Tax, u/s 144 of the IT Act. The Ld. Commissioner of Income Tax (Appeals) has given a categorical finding that in respect of the issue of forfeiture of earnest money, the Addl. Commissioner of Income Tax, after taking into consideration the provisions of section 51 of the IT Act and decision of the Hon'ble Supreme Court in the case of Travancore Rubber and Tea Company Ltd., issued directions that forfeited earnest money is not liable to tax and the same is to be considered as charge against the property and value of the property is to be suitably adjusted for the purpose of computation of capital gain, as and when the property is sold.

6.1 We find ourselves in agreement with the Ld. Commissioner of Income Tax (Appeals) that the Assessing Officer had to abide by the directions of the Addl. Commissioner of Income Tax, which he has not done in this case. Further, Ld. Commissioner of Income Tax (Appeals) has given a finding that there was survey u/s 133A at the premises of the assessee and no incriminating material which has any adverse implication in relation to the genuineness of the transaction was found. Thus, it is clear that the addition was made on the basis of presumption. The earnest money was received through banking channels and genuineness of the receipt is not in dispute. We find ourselves in agreement with the Ld. Commissioner of Income Tax (Appeals) that no addition can be done on the basis of surmises and conjectures. Hence, we do not find any infirmity in the Ld. Commissioner of Income Tax (Appeals)'s direction that "as directed by the Addl. Commissioner of Income Tax, earned money so received and forfeited is to be adjusted against the cost of property and capital gain is to be worked out on the basis of the resultant cost as and when the property is sold. Accordingly, we uphold the order of the Ld. Commissioner

of Income Tax (Appeals) and decide the issue in favour of the assessee.”

9. Before us, the learned counsel for the appellant/ revenue sought to invoke the provisions of section 56(2)(vi) of the said Act. However, we find that this plea had not been raised before the Tribunal. Consequently, we are not inclined to entertain this plea of the learned counsel for the appellant. Even otherwise, before a plea based on section 56(2)(vi) of the said Act can be taken, a foundation has to be laid that the transaction was without any consideration. No such foundational plea had been taken before the Tribunal. Apart from this, we find that the Tribunal has rightly noted that the provisions of section 51 of the said Act would come into play as it specifically covers this type of a transaction. Once the transaction has been held to be genuine, there is no question of the transaction being without any consideration. Consequently, we find no merit in the revenue’s appeal, much less any substantial question of law for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

JANUARY 17, 2013/hs