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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 778/2017

PRINCIPAL COMMISSIONER OF INCOME TAX-4 Appellant
Through: Sanjay Kumar, Advocate for Mr Rahul
Chaudhary, Senior Standing Counsel

versus

HI-ENERGY REALTORS PVT. LTD. Respondent
Through: Mr S. Krishnan and Mr Gaurav Goel,
Advocates

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

ORDER
09.10.2017

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1. The Revenue is in appeal against the order dated 28th February 2017 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3789/Del/2009 for the Assessment Year ('AY') 2006-07.

2. The questions sought to be urged by the Revenue are as under:

"A. Whether on facts and in the circumstances of the case ITAT was correct in law in deleting the addition of Rs. 15,77,59,691/- made by the AO u/s 69B of the Act?

B. Whether on facts and in the circumstances of the case ITAT was correct in law in not appreciating the benefit in question in any case covered under the head "Profits and gains of business or profession" in view of Section 28 (iv) of the Act?"

3. The assessment of the Assessee for AY 2006-07 was completed under Section 143(3) of the Income Tax Act, 1961 ('the Act') on 26th December 2008 on total income of Rs. 15,87,03,349/- against return income of Rs. 6,55,453/-.

4. The reasons for the above addition was that the Assessee had shown purchase of land of Rs. 40,36,91,100/-. The documents filed by the Assessee show that the Assessee had acquired 17.81 acres of land at Ullawas and Behrampur villages in exchange for 16.16 acres of land at Badshahpur village.

5. According to the Assessing Officer ('AO'), the Assessee thus acquired 1.65 acre of land in excess for which no value was shown in the books of account. The AO sought explanation from the Assessee and in its reply dated 26th November 2008, the Assessee stated that it had not made any sale/purchase of the land but had merely exchanged the land as a result of which no profit or gain had arisen.

6. In the assessment order dated 26th December 2008, the AO referred to the details of purchases of land made by a group company of the Assessee, viz. Golden View Builders Pvt. Ltd., wherein the average rate per acre was higher in Ullawas village (Rs. 2,44,68,000/- per acre) as compared to Behrampur village (Rs. 1,68,78,000/- per acre). The differential amount, according to the AO, had been withheld by the Assessee and accordingly the aforementioned addition was made by invoking Section 69B of the Act.

7. The Assessee then went in appeal before the Commissioner Income Tax (Appeals) ['CIT (A)'] who by the order dated 26th June 2009 held as under:

“(h) Except relying on stated comparable transactions in a group company's case (which has been refuted by the appellant by citing comparable independent transaction showing a much lesser value), the AO does not bring in evidences to support his case under statement within the meaning of section 69B of the Act. The appellant relies on ***K P Varghese Vs IT0 13 1 ITR 397 (SC)***. There it has been held that burden lies on the Revenue to show that there is under statement of consideration. It has been further held that to throw the burden of showing that there is no understatement of the consideration on the appellant would be to case an impossible burden on him to establish a negative, namely, that he did not receive any consideration beyond that declared by him. A similar view has been taken in ***CIT Vs Sivhakant Co. Pvt. Ltd. 159 ITR 71***. The sum and substance of the citations is that the consideration declared by be appellant has to be accepted by the Revenue as true unless it is proved to be wrongly declared, and the burden of proof is upon the Revenue to establish that the appellant has understand such sale consideration. In ***CIT Vs Harpal Sing 169 Taxman 90 (P & H)***, it was held that since there was no material or evidence before the AO to conclude that the assessee has paid a consideration over and above the documented price as per sale deed, the addition u/s 69B is without any basis. In ***CIT Vs Naresh Khdtar (HUF) 130 Tax Man 15 (Del)***, it was held that material not being present to counter the figure of actual investment as per books, no addition under Section 69B could have been made. In ***CIT Vs Lalit Bhasin 147 Taxman 619 (Del)***, when the purchase was not verified from the stock exchange or from the seller, it was held that addition without evidence in support of that, would be an addition on the basis of conjecture and nothing else. In ***Shankarlal Nebhulal (HUF) Vs DCIT (2004) 2 SOT 671 (Ahd)***, it was held that there could be no addition u/s 69B, if there is no evidence of payment of on-money for purchase of immovable property. In the case under appeal, no evidence being on record or substantiate a view that the appellant has paid more than what was recorded in the books, the AO could not have invoked the

provisions of section 69B.”

8. An alternative submission was made before the CIT (A) by the Revenue that even if Section 69B could not have been invoked, the differential amount could be brought to tax under Section 28(iv) of the Act. Repelling this contention, the CIT (A) held as under:

“(h) The crux of the issue is whether the appellant receive more in exchange, which could have been taxable u/s 28(iv) and whether the excess was funded from outside the books. Facts show that 16.16 acres of land at Badsahpur was exchanged for 17.8 1 acres of land Behrampur/Ullawas. It means receipt of 1.1 acres for every one acre exchanged. As to why 0.1 acres in excess for every one acre of exchange was agreed upon to be delivered to the appellant is that the appellant's landholding was contiguous, has locational advantage, where as the counter parties was dispersed and suffered on the aspect of locational advantage. These factors are vital for determining the terms of exchange. Secondly, the stamp valuation authorities do not value the land at Behrampur at any sale different from that of Badshahpur. Since the stamp valuation authorities would not have determined the value of any land without factoring in demand and supply, locational advantage, proximity to public facilities, infrastructure, the determination of fair value by the appellant of land at Behrampur and Ullawas at the same rate 9after adjustment for locational advantage and dispersed nature of holding) could not have been faulted. Parity in the market rates and the rate determined by the stamp valuation authorities at the two locations is given more so when evidences are not on record to indicate that the appellant paid more as against the documented price as part of the exchange.

Per reasoning above, I hold that, there being no surplus in value of land transferred to the appellant, and there being no basis or evidences to invoke the provisions of section 69B, the impugned addition is without merits. The grounds answered on merits, the appellants arguments that the

additions have been made without affording opportunity to rebut and that the additions have been made without a show cause either for invoking the provisions of section 69B or for relying on comparable transactions, become redundant and hence not adjudicated.”

9. In view of the above factual finding, the CIT (A) did not consider it necessary to examine the contention of the Assessee that the aforementioned additions had been made without giving the Assessee sufficient opportunity of hearing on the factual aspects.

10. The Revenue then went in appeal before the ITAT which by the impugned order dismissed the appeal of the Revenue. The ITAT concurred with the finding findings of the CIT (A) and held as under:

“22. In the present case, shares were not exchange and there was exchanges of Land in the same locality and the duration of purchase of land and its exchange i.e. four-five months was very short. Furthermore, land rates are never uniform as in the share market and the A0 has not brought on record . - any allegation, material, evidence or document on record supported by proof of any rate variation resulting in a profit and addition has been made purely on the estimate basis and the stand of the A0 taken in the case of Golden View Builders Pvt. Ltd. (supra), which has dismissed by the tribunal order (Supra). In absence of any material or evidence or documents to establish that the assessee has made investment and amount expended on making such investments or acquiring land exceeds the amount recorded in this behalf in the books of accounts, which has been properly audited and accepted by the department.”

11. Having heard learned counsel for the parties, the Court is of the view that no substantial question of law arises inasmuch as the revenue has been unable to persuade the Court that the aforementioned factual finding of the

CIT (A), concurred with by the ITAT, suffers from perversity.

12. The appeal is accordingly dismissed but, in the circumstances, with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

OCTOBER 09, 2017

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