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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 1004/2015

PR. COMMISSIONER OF INCOME TAX
(CENTRAL-2)

..... Appellant

Through: Mr. Dileep Shivpuri, Senior Standing
Counsel with Mr. Sanjay Kumar, Advocate.

versus

VINITA CHAURASIA

..... Respondent

Through: Mr. Ajay Vohra, Senior Advocate with
Ms. Kavita Jha and Mr. Bhuwan Dhoopar,
Advocates.

AND

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ITA 1005/2015

PR. COMMISSIONER OF INCOME TAX
(CENTRAL-2)

..... Appellant

Through: Mr. Dileep Shivpuri, Senior Standing
Counsel with Mr. Sanjay Kumar, Advocate.

versus

VINITA CHAURASIA

Respondent

Through: Mr. Ajay Vohra, Senior Advocate with
Ms. Kavita Jha and Mr. Bhuwan Dhoopar,
Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE CHANDER SHEKHAR

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ORDER
18.05.2017

Dr. S. Muralidhar, J.:

1. These are two appeals under Section 260A of the Income Tax Act, 1961 ('Act') by the Revenue directed against a common order dated 29th May, 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 3551/Del/2013 and 3343/Del/2013 for the Assessment Year ('AY') 2010-11.
2. The question urged by the Revenue in these appeals is whether the ITAT erred in law in setting aside the initiation of proceedings against the Assessee under Section 153C of the Act. The further question urged is whether the ITAT erred in deleting the following additions made by the Assessing Officer ('AO'): Rs. 16,42,68,522 as cash payments from unaccounted sources; Rs. 39,65,106 on account of disallowance of payment of sinking funds; Rs. 29,73,830 on account of disallowance of maintenance security and Rs.65,70,747 on account of disallowance of commission.
3. The background facts are that the Assessee filed her return of income for the AY in question on 2nd August, 2010 declaring an income of Rs.2,20,19,780 under the heads income from house property, short terms capitals gains and income from other sources. The assessment for the AY in question was completed under Section 143(3) of the Act with the AO passing an assessment order dated 29th December, 2011 at a total income of Rs. 21,22,88,069 against the return income of Rs. 2,20,19,780.
4. On 19th June, 2009, a search and seizure operation was undertaken in

terms of Section 132 of the Act on the premises of Mr. Lalit Modi, a real estate broker. During the course of the search at his premises at L-48, Lajpat Nagar-II, New Delhi a document described as Annexure A-1 was found. The said document which is computer-generated, reads as under:

Big Bazar	In the name of	Brand (name)	Rent	18-05-2009
Vasant Sq Mall	Mrs. Vinita Chaurasia	R-sold%	Pantaloona	7250
S Area	39651.06	10.5		28,74,702 Monthly Rent
@	9285.71			
Total Cost	3285,37,354			
recd				
ch value	1642,68,832	164268832	0	
pdv value	1642,68,522	170225465	-59,56,943	
	3285,37,354	334494297	-59,56,943	- to Refund
Pending rent	From	To	No of Month	
	01-10-2006	30-04-2009	31	891,15,757 Rent Calculated
	Amount paid		400,00,000	Paid
	(18,27 29.8.08=2+1+1)		491,15,757	To Pay
Sinking Fund	3965106	ch in favr of VSM Sinking fund account-Suncity projects Pvt Ltd		
Maintenance Security	2973830	ch in favr of VSM MMS account-Suncity projects Pvt Ltd		
Free Hold charges	12490084	ch in favr of Suncity Projects Pvt Ltd		
Ch required	194,29,019	Commission on sale 2%	65,70,747	65,70,747 To Pay
				616,43,447 Total

5. The aforementioned document dated 18th May, 2009 contained the name of the Assessee showing the area in the Vasant Square Mall as 39561.06

sq.ft. with the 'ch value Rs. 16,42,68,832' which incidentally was the disclosed sale consideration for which the Assessee had purchased the aforementioned area in Vasant Square Mall i.e. 39,651.06 sq.ft. However, the document also reflected as 'Total Cost' a sum of Rs.32,85,37,354 and the additional sum as 'PDC Value' being Rs. 16,42,68,522.

6. A questionnaire was sent to the Assessee in response to which she gave a reply on 7th December, 2011. She enclosed a confirmation from Mr. Lalit Modi clarifying that Annexure A-1 page 5 did not pertain to any transaction in respect of purchase of any space in either Big Bazar, Vasant Square Mall and that it was just a draft proposal presumably by a broker. She also pointed out that the property which she had purchased had been for a consideration which was higher than the prevalent circle rate.

7. However, the AO was not satisfied with the said reply. The AO who incidentally was the common AO for both Mr. Lalit Modi and the Assessee recorded the following satisfaction note for issuance of a notice to the Assessee under Section 153C of the Act:

“30.6.2011 Satisfaction note for issue of notice u/S 153 C of the IT Act.

Name of the Assessee
PAN

Smt. Vinita Chaurasia
AAFPC4589D

Search and seizure action under Section 132 of the I.T. Act was carried out on 19th June 2009 at the residential as well as business premises of Shri Lalit Modi at () Lajpat Nagar-II, New Delhi. During the course of pendency of assessment proceedings in the case of Shri Lalit Modi for AY 2004-05 to 2010-11 (u/s 153A/143(3) the material seized from the

premises of the Assessee has been examined. After examining such seized material I am satisfied that the following seized documents belong to persons other than Shri Lalit Modi.

The detail of such paper is as under:

Annexure No.	Page No. of Annexure	Brief description of documents	Person to whom the document belongs
Ann A-1	5	These papers contain detail of transaction entered in by Smt. Vinita Chaurasia for acquisition of property at Vasant Square Mall.	Smt. Vinita Chaurasia

2. On the basis of document found and seized enquiries were conducted during the course of post search proceedings and it has come to notice that the property was acquired by the Assessee for a consideration of Rs. 32,85,37,3541 out of which only Rs. 16,42,68,832 has been paid by cheque and recorded in books of accounts by the buyer as well as seller. Apart from the above certain other payments representing Sinking Fund, Maintenance Security, Freehold charges and commission etc. have been paid by the Assessee. As such amount of Rs. 19,02,68,289 is required to be assessed in the hands of Assessee as undisclosed investment on the basis of entries mentioned on seized documents.

3. In view of the facts stated above, it is evident that documents belonging to the Assessee have been seized from a person covered under search u/S 132 of the I.T. Act, 1961. Hence, proceedings u/s 153C are being initiated for AY 2004-05 to 2009-10.

8. In the resultant assessment proceedings, the AO passed an order on 29th December, 2011 under Section 153C/143(3) of the Act making the following additions:

“4.5 In view of the above, I hold that not only the document being page no. 5 of A-1 seized from the premises of Shri Lalit Modi belong to her but its contents too pertain to her in entirety. Accordingly, I hold that payment over and above what is accounted in the books of 16.42 crores totalling to Rs.16,42,68,522/- is made otherwise than by way of cheque i.e. from her unaccounted sources and is accordingly brought to tax. As per the said document below mentioned payments were also required to be made:

- (i) Sinking fund Rs. 39,65,106/-
- (ii) Maintenance Security Rs. 29,73,830/-
- (iii) Freehold charges Rs. 1,24,90,084/-
- (iv) Commission Rs. 65,70,747/-

The assessee has not brought anything on record to explain the sources of the above payment also. In view of this, I hold that the assessee has made above payments also from her unaccounted sources. This would in turn mean total addition in the hands of the assessee of Rs. 19,02,68,289/-. Since, the assessee has not accounted for the above amounts being added, penalty proceedings u/s 271(1)(c) for concealment are also hereby initiated.

(Addition - Rs. 19,02,68,289/-)

With the above remarks, total income of the assessee is computed as under:-

Income as declared Rs. 2,20,19,780/-

Add: Addition as discussed above Rs. 19,02,68,289/- in the order at para 5.

Total taxable income rounded off Rs. 21,22,88,069”

9. The Assessee’s appeal was disposed of by the CIT (A) by an order dated

25th March, 2013. The appeal was allowed in part. The operative portion of the order of the CIT (A) read as under:

“15. Thus considering the receipt and the payment side of the unaccounted transactions on the seized paper, identified as page 5 of Annexure A-1 the total addition to be made in the case of the appellant are as follows:

In AY 10-11, addition of Rs 21,93,41,222 (Rs.22,59,11,969 - Rs 65,70,747). This comprises of Rs.16,42,68,522, which is the cash component of the total sale consideration of Rs 32,85,37,354; and Rs.59,56,943 appearing as 'to Refund' and Rs 4,91,15,757 appearing as 'To Pay', which had remained to be added by the AO and in respect of which the notice for enhancement was issued.”

10. The net result was that there was an enhancement of the assessable income by of the Assessee by Rs.5,50,72,700.

11. Both the Revenue and the Assessee filed appeals before the ITAT which came to be disposed of by the impugned order. Interestingly it may be also mentioned that Revenue's appeal in the case of Mr. Lalit Modi was also heard along with these two appeals. The Revenue's appeals were dismissed and the Assessee's appeal was allowed.

12. The ITAT held that the initiation of proceedings against the assessment under Section 153C was bad in law. It also proceeded to discuss the merits of the additions made by the AO and the CIT (A) and found them to be unsustainable in law.

13. It may be mentioned at the outset that as far as the dismissal of the Revenue's appeal by the ITAT in the case of Mr. Lalit Modi is concerned,

the Revenue filed ITA No. 992/2015 in this Court which was dismissed by an order dated 16th August, 2016. The very same document which has been relied upon by the Revenue in the case of the present Assessee was discussed by the Division Bench ('DB') in the aforementioned order. The order of the ITAT was upheld by this Court.

14. This Court has heard the submissions of Mr. Dileep Shivpuri, learned Senior Standing Counsel for the Department and Mr. Ajay Vohra, learned Senior counsel appearing for the Assessee.

15. It requires to be first noted that the document relied upon by the Revenue (Annexure A-1 page 5) to sustain the additions made to the assessable income of the Respondent has not been shown to 'belong' to the Assessee. In arriving at this conclusion, the ITAT followed the decision of this Court in ***Pepsico India Holding Ltd. v. ACIT (2015) 370 ITR 295 (Del)***. Mr. Shivpuri on the other hand submitted that there have been subsequent decisions of the DBs of this Court which have explained the aforementioned decision and in particular the phrase 'belongs to' occurring in Section 153C of the Act. He placed particular reliance on the decisions in ***Principal Commissioner of Income-tax-8 v. Super Malls (P.) Ltd. [2017] 291 CTR 142 (Del)***, ***Principal Commissioner of Income Tax, Circle-II v. Satkar Fincap*** (decision dated 16th November, 2016 in ITA No. 82 of 2016) and ***Principal Commissioner of Income Tax (Central)-2 v. Nau Nidh Overseas Pvt. Ltd.*** (decision dated 3rd February, 2017 in ITA No. 58/2017).

16. At the outset, it requires to be noticed that the search in the present case took place on 19th June 2009 i.e., prior to the amendment in Section 153 C

(1) of the Act with effect from 1st June 2015. Therefore, it is not open to the Revenue to seek to point out that the document in question, ‘pertains to’ or ‘relates to’ the Assessee. The example given by this Court in ***Pepsico India Holding Ltd.*** (*supra*) is that of a photocopy of a sale deed which contains the names of the vendor and the vendee being found with the broker. The mere fact that such photocopy of the sale deed was found with the broker would not lead to the conclusion that such a document 'belongs to' either the vendor or the vendee. While in the present case the AO in his satisfaction note does record that the document in question does not belong to Mr. Lalit Modi i.e. the searched person, he does not indicate on what basis he proceeds as if the document belonged to the Assessee.

17. In this context, it requires to be noticed that a very detailed interrogation of Mr. Lalit Modi in relation to this document took place, the relevant portions of which have been extracted by the ITAT in the impugned order. Question No. 25 posed to Mr Modi and his answer thereto reads as under:

“Q.25. I am showing you page no. 5 to 8 of Annexure A-1, please explain the contents.

Ans: Pages no. 5 to 8 are rough planning on page 5 proposal from Vasant Square Mall for sale was received and the deal did not materialise through me.”

18. The above statement was made in the course of the search. In the assessment proceedings in the case of Suncity Project Ltd. allegedly involving Mr. Lalit Modi, a specific question was put to him and his answer thereto was recorded on oath on 15th March, 2013 under Section 131 of the

Act reads as under:

“Q.3. During the course of search proceedings at your residence at L-48, Lajpat Nagar-II, New Delhi, loose papers were found and seized vide annexure A-1. I am showing you page No.5 of the said Annexure A-1. Kindly explain the transactions mentioned in it.

Ans. The Chaurasia family is known to me. At the time of execution of sale deed in favour of Mrs. Vinita Chaurasia by M/s Suncity Projects Ltd. in respect of commercial space purchased in Vasant Square Mall, I was present as a witness and signed on the documents Conveying titles as a witness before sub registrar. It happened somewhere in May 2009. Since I am in real estate business, incidentally after coming back from execution of the said sale deed, I was approached by a broker at my residence making enquiry about availability of commercial space in Vasant Square Mall at Vasant Kunj, New Delhi. Since I accompanied Mrs. Vinita Chaurasia who has purchased commercial space at Vasant Square Mall, I telephoned her and got the details of cost etc. of her commercial space in Vasant Square Mall and told these facts to the said brokers. After few days, the broker came to my residence and delivered a proposal, which is nothing but the same document shown to me as page No. 5 of Annexure A-1. The said proposal remained with me and before the same could be forwarded to Mrs. Vinita Chaurasia, a search and seizure operation by the Income Tax Department at my residence on 19.06.2009, during which the above mentioned paper containing the proposal was found and seized. Since it could not be delivered to Smt. Vinita Chaurasia, the proposal was not acted upon, hence, no transaction took place on the basis of the said page seized at page No. 5 of Annexure A-1. Had the said proposal materialized, I would have earned brokerage income. Since no such transaction took place, no commission was earned by me.”

19. What is evident from the above reply of Mr. Lalit Modi is that even according to him the document in question did not belong to the Assessee.

He appears to suggest that the document was a proposal delivered at his residence by some other broker and which proposal remained with him before it could be forwarded to the Assessee. In the meanwhile, the search and seizure operation took place.

20. There is no material whatsoever placed on record by the Revenue before the CIT (A) or the ITAT to justify the invocation of Section 153C of the Act against the Assessee on the basis that the above document belonged to her.

21. Turning to the decisions cited by Mr. Shivpuri it is seen that in ***Principal Commissioner of Income-tax-8 v. Super Malls (P.) Ltd.*** (*supra*), a pen drive was recovered from the residence of Mr. Ved Prakash Bharti who was a Director of the Assessee. The AO recorded “during the statement of Sh. Ved Prakash Bharti at the time of search, he has also stated that these documents (contained in the pen drive) pertain to him and Super Malls Pvt. Ltd., Karnal in which he is Director.” It is on the basis of the above facts that this Court rejected the Assessee's contention that the said documents could not be said to belong to the Assessee.

22. As regards the decision in ***Principal Commissioner of Income Tax (Central)-2 v. Nau Nidh Overseas Pvt. Ltd.*** (*supra*), the searched person Mr. Jatinder Pal Singh, was one of the Directors of the Assessee. As noted by the Court in the course of the search, he clearly stated that some cash seized in those transactions belonged to the Assessee.

23. In ***Principal Commissioner of Income Tax, Circle-II v. Satkar Fincap*** (*supra*), again, this Court noted in para 4 of its order that “during the course

of hearing it was suggested to the Respondent/Assessee through its counsel that having regard to the categorical statement in a note that “During the course of search & seizure documents/papers page 1 to 31 of Annexure A-28 seized by Party R-2, Annexures A-56, A-57 and A-58 seized by party 04 are found to belong to of M/s Satkar Fincap Ltd., (), Ramdutt Enclave, Uttam Nagar, New Delhi. I have examined the above mentioned documents/papers and provision of section 153 C is invocable in this case”, the ITAT's findings and conclusion cannot be sustained.”

24. In the present case, however, it is nobody's case other than the Revenue that the document found in the premises of Mr. Lalit Modi belongs to the Assessee. Mr. Shivpuri referred to Section 292 C of the Act for the purposes of drawing two presumptions (i) the one contained in Section 292 C (1) (i) to the effect that the document found in possession of a person should be presumed to belong to such person. As far as this is concerned, clearly, since the document was found in possession of Mr. Modi, the presumption, if at all, is attracted only qua Mr. Lalit Modi and not the Assessee herein.

25. There is, therefore, nothing to contradict the categorical finding of the ITAT that the document which formed the main basis for initiation of the proceedings under Section 153C of the Act does not belong to the Assessee. One of the principal conditions for attracting Section 153C of the Act is, therefore, not fulfilled in the present case.

26. Turning to the document itself, Mr. Shivpuri urged that the further presumption in Section 292C(1)(ii) would stand attracted viz., that the contents of the document should be presumed to be true. His submission was

that the said presumptions have not been rebutted by the Assessee and, therefore, whatever was said in the document should be taken to be sufficient proof of concealment of the income by the Assessee.

27. The Court is unable to accept the above submission of Mr. Shivpuri. The Court in this regard notices that the detailed interrogation of Mr. Modi revealed the source of the document and the fact that Mr. Modi was not the author of the document. Mr. Modi had suggested that it was some other broker who had given him the said document as a 'proposal'. There appears to have been no attempt made by the AO to enquire into the matter further to find out if at all there was any such other broker who had prepared the document. Further, there is no attempt also made to ascertain whether the prevalent market value of the space purchased by the Assessee could at all fetch the value indicated in the document which is Rs.32,85,37,354. This was too fundamental an issue to be left un-investigated. The AO appears to have proceeded purely on conjectures as regards what the document has stated without noticing the internal contradictions and inconsistencies. For instance, the document talks of rent payable for a period from 2006 onwards where in fact even according to the Revenue the Assessee purchased the property on 13th May, 2009. The shifting of the burden on the Assessee without making these basic enquiries to unearth the truth of the document could not have been accepted and was rightly commented upon by the ITAT. The entire basis for making the additions to the assessable income of the Assessee was a single document i.e., Annexure A-1. The attempt at making additions on the basis of Annexure A-1, without any further investigation on the above lines, is bound to be rendered unsustainable in

law.

28. Therefore, even as regards the merits of the additions made by the AO, the Court finds no error having been committed by the ITAT in deleting them.

29. No substantial question of law arises from the impugned order of the ITAT. The appeals are dismissed.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 18, 2017/dn

