IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.101 of 2017 (O&M)
Date of decision: March 28, 2019

The Principal Commissioner of Income Tax (Central), Ludhiana

……Appellant

Vs.

Shri Kulwinder Singh, 425-Mota Singh Nagar, Jalandhar

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Mr. Rajesh Katoch, Sr. Standing Counsel for the appellant-revenue.

Ms.Radhika Suri, Sr. Advocate with Mr. Manpreet Singh Kanda, Advocate for the respondent(s).

Mr. J.S.Bhasin, Advocate for the respondent in ITA No.97 of 2018.

<u>Ajay Kumar Mittal</u>,J.

1. This order shall dispose of bunch of six appeals bearing ITA Nos.101, 124, 125 of 2017, 92, 97 and 107 of 2018, as learned counsel for the parties are agreed that the issues involved in all these appeals are similar. However, the facts are being extracted from ITA No.101 of 2017.

2. ITA No.101 of 2017 has been preferred by the appellant-revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 1.8.2016, Annexure A.III, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (in short, "the Tribunal") in ITA No.659(Asr)/2014 for the assessment year 2009-10, claiming following substantial questions of law:-

"i) Whether the Hon'ble ITAT has erred both in law and on facts in upholding the decision of CIT(A) where the learned CIT(A) has deleted the addition of ₹ 2,27,00,000/- made on account of unaccounted and undisclosed investment under Section 69B of the Act, ignoring the fact that as per seized documents (copy of agreement) seized from the residence of Shri Vinay Kumar, Accountant of M/s PISCO, the company from which the assessee has also purchased the land in the same area and in the same period reveals that the rate of sale price was actually ₹ 11.05 crores based on an agreement dated 10.5.2007 entered into between Shri Ravneet Takhar son of Shri Ravinder Singh, MD of M/s PISCO as a first party and Shri Mohinder Singh son of Sri Gopal Singh and Shri Joginder Singh son of Shri Labh Singh as second party?

ii) Whether the Hon'ble ITAT has erred both in law and on facts in upholding the order of learned CIT(A) where the learned CIT(A) has restricted the addition of ₹ 14,00,000/- made on account of disallowance of interest under section 36(1)(iii) of the Act to ₹ 10,95,795/- without appreciating the fact that the assessee has not maintained any separate account for interest bearing/interest free funds?

In ITA Nos. 92, 97 and 107 of 2018, in addition to the above two questions, the following additional question was also claimed:-

> "Whether the impugned order dated 26.9.2017 passed by the ITAT is sustainable in the eyes of law or maintainable in the facts and circumstances of the case?"

3. A few facts relevant for the decision of the controversy involved as available on the record of ITA No.101 of 2017 may be noticed. The respondent assessee is engaged in the business of sale/purchase of property. During the course of assessment proceedings under Section 153A read with Section 143(3) of the Act, it was noticed by the Assessing Officer that the respondent-assessee during the financial year 2008-09 relevant to the assessment year 2009-10 had purchased land measuring 2 kanals 10 marlas

from Punjab Iron and Steel Co. Limited (PISCO), GT Road, Jalandhar and the same was shown to have been purchased for ₹ 1 crore as per the registered conveyance deed. During the course of search at the residential premises of Shri Vinay Kumar, Accountant of M/s PISCO, a photo copy of duly stamped, witnessed and fully honoured agreement dated 10.5.2007 was found and seized. The said agreement was between Ravneet Takhar son of Ravinder Singh, MD of M/s PISCO and Mohinder Singh Bajwa and Joginder Singh for sale of land measuring 24 kanals 1 marla situated at Village Birring, Jalandhar at the rate of ₹ 11,05,00,000/- per acre. Since the land purchased by the assessee was a part of the same land situated in Village Birring, the Assessing Officer after allowing opportunity of hearing to the assessee and considering his submissions, arrived at a conclusion that the assessee had understated the investment in the purchase of the land and by adopting the same rate as shown in the above mentioned agreement dated 10.5.2007, an addition of ₹ 2,27,00,000/- was made under section 69B of the Act on account of undisclosed investment in the purchase of the land vide assessment order dated 24.3.2014, Annexure A.1. An addition of ₹ 14 lacs was made by the Assessing Officer on account of disallowance of interest expenditure under Section 36(1)(iii) of the Act as the assessee had made interest free advances to his relatives. Aggrieved by the order, the assessee filed appeal before the Commissioner of Income tax (Appeals) [CIT(A)]. Vide order dated 14.8.2014, Annexure A.II, the CIT(A) restricted the addition of ₹ 14 lacs relating to the interest disallowance to ₹ 10,95,795/-. The addition of ₹ 2,27,00,000/- made by the Assessing Officer under section 69B of the Act on account of undisclosed investment in the purchase of the land was deleted by the CIT(A) on the ground that action on the basis of such an agreement even though being a photo copy, could be made in the hands of the parties to the agreement, as the evidence in the case of the income tax proceedings did not have to be in the nature of evidence under Section 65 of the Evidence Act, 1872. Aggrieved thereby, the revenue filed appeal before the Tribunal. Vide order dated 1.8.2016, Annexure A.III, the Tribunal upheld the order passed by the CIT(A) and dismissed the appeal. Hence the instant appeals by the appellant-revenue.

4. We have heard learned counsel for the parties.

5. We proceed to examine question No.(i) claimed in these appeals. Before adjudicating the controversy involved in these appeals on this issue, it would be apposite to reproduce the relevant statutory provision i.e. Sections 69B of the Act which reads thus:-

> **"Amount of investments, etc., not fully disclosed in books of account.**
> **69B.** Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be the income of the assessee for such financial year."

6. A plain reading of Section 69B of the Act shows that if in any financial year, the Assessing Officer finds that the amount invested by the assessee exceeds the amount recorded in his books of account and no satisfactory explanation is given, then the excess amount may be deemed to be the income of the assessee for such financial year. In other words, Section

69B of the Act requires that the Assessing Officer has to first find that the assessee has expended an amount which he has not fully recorded in his books of account. It is only then that the burden shifts to the assessee to furnish a satisfactory explanation. If the explanation is not found to be satisfactory, the excess amount may be added to the income of the assessee.

7. Admittedly, in the present case, the assessee filed its return of income for the assessment year in question on 28.2.2013 declaring income of ₹ 10,04,250/-.The assessee filed reply to the questionnaire alongwith the required detail and documents. Assessment under Section 153A read with Section 143(3) of the Act was framed on 24.3.2014 at ₹ 2,51,52,675/- as against the returned income of ₹ 10,04,250/-. Thus, the Assessing Officer made addition of ₹ 2,41,48,425/- on different counts. During the assessment proceedings, it was noticed by the Assessing officer that the assessee had purchased certain land from M/s PISCO which was shown to have been purchased for ₹ 1 crore as per the registered conveyance deed. During the search at the residential premises of the Accountant of M/s PISCO, some documents and agreement were found showing the rate of the land at ₹ 11,05,00,000/- per acre. Since the land purchased by the assessee was part of the same land, the Assessing officer concluded that the assessee had understated the investment in the purchase of the land. Addition of ₹ 2,27,00,000/- was made under Section 69B of the Act on account of undisclosed investment in the purchase of the land. Further, addition of ₹ 14 lacs was made by the Assessing Officer on account of disallowance of interest expenditure under Section 36(1)(iii) of the Act as the assessee had made interest free advances to his relatives. On appeal by the assessee, the CIT(A) restricted the addition of ₹ 14 lacs to ₹ 10,95,795/-. The addition of ₹ 2,27,00,000/- under Section 69B of the Act was deleted by the CIT(A). It has

been categorically recorded by the CIT(A) that the issue of alleged understatement of sale consideration in the registration deed has to be proved by the revenue and the same can be done by leading positive evidence either in the form of some documents found during the course of search or otherwise which could prove that consideration over and above the registration deed had passed on from buyer to the seller. The evidence relied upon by the Assessing Officer represented a photo copy of an agreement to sell with regard to a deed between two other persons in respect of different piece of land and on a different date. Thus, the Assessing Officer could definitely make a presumption on sale price being higher than what was stated in the registration deed by the assessee. The said presumption had to be supported by some evidence of transfer of such consideration from the buyer to the seller. The registration between the assessee and the seller had been at a price which was at least as per circle rate approved by the revenue authorities and hence could not be said to be below fair market price. After examining the entire case law on the point, it was recorded that as per Section 69B of the Act, it is the burden of the Assessing Officer to first prove that there was understatement of the consideration(investment) in the books of account. Since the present case was proceeded on the assumption that there was understatement of the investment without a finding that the assessee invested more than what was recorded in the books of account, the decision of the Assessing Officer could not be approved. Section 69B of the Act was thus wrongly invoked. The relevant findings recorded by CIT(A) read thus:-

> "14. The issue of alleged understatement of sale consideration in the registration deed has to be roved by the revenue and the same can be done by leading positive evidence either in the form of some documents found during the course of search or otherwise which could prove that consideration over and above the

registration deed had been passed on from buyer to seller. The evidence relied upon by the Assessing Officer in the instant case represents a photo copy of an agreement to sell with regard to a deed between two other persons in respect of different piece of land and on a different date. The Assessing Officer on the basis of the said seized documents, which has been denied by all the constituents mentioned therein could definitely make a presumption on sale price being higher than what was stated in the registration deed by the appellant. However, the said presumption has to be backed up by some evidence of transfer of such consideration from the buyer to seller. The appellant alongwith seller had been subjected to search operation within the meaning of section 132 of the IT Act 1961 but no such evidence could be found to be existing. This means that the presumption of the Assessing Officer eventually remains a presumption and therefore cannot be substituted in place of evidence i.e. essential requirement to unsettle the sale consideration as recorded in the registered documents. It is also important to appreciate that the said registration between the appellant and seller has been at a price which is at least as per circle rate approved by the revenue authorities and hence cannot be said to be below fair market price. The Hon'ble Apex Court in the case of ***KP Varghese vs. ITO*** 131 ITR 597 (SC) had given judgment in the context of applicability of section 52(2) of Income Tax Act, 1961 which dealt with the possible under statement of sale consideration. The said section has been omitted by Finance Act 1987 w.e.f 1.4.1988 and the only presumption as of now is in terms of applicability of section 50C in the case of computation of capital gain in the case of the seller. The understatement that could be presumed in such eventuality in the hands of the buyer cannot lead to an addition under section 69 which clearly shows that it is the evidence of passing on of unaccounted sale consideration that has to be brought on record.

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8. On appeal by the revenue, it was categorically recorded by the Tribunal that the agreement seized was only a photo copy of the original which was not seized from the assessee. The seller, buyer and the witnesses refused to identify the same. The assessee was neither a party nor witness to the agreement. The assessee was not related to either party. The assessee purchased the land directly from PISCO at the prevalent circle rate. In the purchase deed of the assessee, the rate was ₹ 4 crore per acre = ₹ 2.50 lacs per marla as against that of ₹ 11.05 crore per acre as mentioned in the agreement seized. The land purchased by the assessee was different from that mentioned in the agreement seized. The burden was on the department to prove understatement of sale consideration which was not discharged. Thus, the presumption of the Assessing Officer could not lead to a conclusion of under investment by the assessee, liable for addition. The relevant findings recorded by the Tribunal read thus:-

> "8. From the rival contentions and the material on record, the following facts emerge:-
>
> i) The agreement seized was only a photocopy of the original.
> ii) It was seized not from the assessee but from the third party.
> iii) The seller refused to identify the agreement.
> iv) The buyer refused to identify the agreement.
> v) The witnesses to the agreement refused to identify it.
> vi) The AO did not make total addition on account of total value of the transactions in the cases of the other buyers or sellers, as mentioned in the agreement.
> vii) The assessee was not a party to the agreement.
> viii) The assessee was not witness to the agreement.
> ix) The assessee was not related to either any party or any witness to the agreement.

x) The assessee purchased his land directly from PISCO.

xi) The assessee purchased the land at the prevalent circular rate.

xii) The assessee paid due stamp duty on the transaction.

xiii) The purchase deed of the assessee was registered with the Registrar at Jalandhar.

xiv) In the assessee's purchase deed, the rate mentioned was of ₹ 4 crore per acre = ₹ 2.50 lakhs per marla, as against that of ₹ 11.05 crore per acre, as mentioned in the agreement seized.

xv) Action on the basis of the agreement seized was warranted in the cases of the parties thereto, due to the presumption under section 132(4A) of the Act, which presumption noticeably is rebuttable.

xvi) No such action can be taken in the case of a party whose transaction was with regard to land contiguous or similarly situated to the land mentioned in the agreement seized.

xvii) No action is called for in a case of transaction consequential to the transaction mentioned in the agreement seized.

xviii) There is no evidence of unaccounted investment by the assessee.

xix) The Assessing Officer himself clarified to the assessee that the sale consideration in the agreement seized was taken for the purpose of comparative rate only.

xx) The land purchased by the assessee was different from that mentioned in the agreement seized.

xxi) It is the burden of the department to prove understatement of sale consideration.

xxii) This burden has not been discharged.

xxiii) There is no positive evidence against the assessee.

xxiv) Thus, the AO's presumption did not materialize into conclusive evidence against the assessee.

xxv) Such a presumption cannot be accorded the status of fool proof evidence against the assessee.

xxvi) Such a presumption cannot lead to a conclusion of underinvestment by the assessee, liable for addition.

9) The learned CIT(A) has duly considered all the above said facts as well as the relevant case laws. There has been no effective rebuttal to the well reasoned elaborate findings recorded by the learned CIT(A).

10) In view of the above discussion, we are of the considered view that the learned CIT(A) has passed a detailed, well reasoned and well versed order which does not require any interference and accordingly, the same is upheld. Ground No.1 is thus, rejected."

9. Learned counsel for the respondent assessee relied upon certain judgments in support of her claim. In ***Commissioner of Income Tax vs. Smt.Suraj Devi,*** (2010) 328 ITR 604 (Delhi), it was held by the Delhi High Court that the primary burden of proof to prove understatement or concealment of income is on the revenue and it is only when such burden is discharged that it would be permissible to rely upon the valuation given by the Valuation Officer. The relevant observations read thus:-

"4. It is settled law that the primary burden of proof to prove under-statement or concealment of income is on the Revenue and it is only when such burden is discharged that it would be permissible to rely upon the valuation given by the DVO. ***(See K.P. Varghese Vs. ITO, 131 ITR 597, CIT Vs. Shakuntala Devi, (2009) 316 ITR 46 and ITA No. 482/2010 decided by this Court on 5th May, 2010)***.

5. In any event, the opinion of the DVO, per se, is not an information and cannot be relied upon without the books of account being rejected--which has not been done in the present case. The Supreme Court in its order dated 19th October, 2009 in Civil Appeal No. 6973/2009 has held as under:-

> "Delay condoned.
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> Leave granted.
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> In the present case, we find that the Tribunal decided the matter rightly in favour of the assessee inasmuch as the Tribunal came to the conclusion that the Assessing Authority (AO) could not have referred the matter to the Departmental Valuation Officer (DVO) without books of accounts being rejected. In the present case, a categorical finding is recorded by the Tribunal that the books were never rejected. This aspect has not been considered by the High Court. In the circumstances, reliance placed on the report of the DVO was misconceived.
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> For the above reasons, the impugned judgment of the High Court is set aside and the order passed by the Tribunal stands restored to the file. Accordingly, assesee succeeds.
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> Civil Appeal is allowed. No order as to costs."

6. Further the Supreme Court in its order dated 16th February, 2010 in Civil Appeal No. 9468/2003 has held as under:-

> "Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the District Valuation Officer (DVO). Opinion of the DVO per se is not an information for the purposes of reopening assessment under Section 147 of the Income Tax Act, 1961. The AO has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no

> merit in the Civil Appeal. The Department was not entitled to reopen the assessment.
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> Civil appeal is, accordingly, dismissed. No order as to costs."

Similar was the position in ***K.P.Varghese vs. Income Tax Officer, Ernakulam and another,*** (1981) 131 ITR 597.

10. In view of the above facts proved on record, the Tribunal rightly upheld the findings recorded by the CIT(A) on question No.(i). Learned counsel for the appellant-revenue has not been able to point out any error or illegality therein.

11. Adverting to question (ii), it would be apposite to reproduce Section 36(1)(iii) of the Act, which reads thus:-

> "**36.**(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—
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> xxxxxxxx
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> (*iii*) the amount of the interest paid in respect of capital borrowed for the purposes of the business or profession:
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> **Provided** that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset (whether capitalised in the books of account or not); for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.
>
> *Explanation:* Recurring subscriptions paid periodically by shareholders, or subscribers in Mutual Benefit Societies which fulfil such conditions as may be prescribed, shall be deemed to be capital borrowed within the meaning of this clause;"

12. A perusal of the above provision shows that the deductions in respect of the amount of interest paid qua capital borrowed for the purposes of business or profession shall be allowed in computing the income referred to in Section 28 of the Act. A proviso has also been added to the effect that any amount of interest paid in respect of capital borrowed for acquisition of an asset for any period from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.

13. With regard to the second question qua deletion of addition of ₹ 14,00,000/- on account of disallowance of interest under Section 36(1)(iii) of the Act, the Assessing Officer noticed that the assessee had made interest free advances and loans to his family members/sister concerns and at the same time, debited bank interest to the tune of ₹ 22.19 lacs. The assessee was asked to explain as to how the interest bearing funds could be said to be used for the purpose of business especially in the face of interest free loans to friends/sister concerns. No explanation was given by the assessee. The Assessing Officer thus proceeded to disallow 12% on the entire amount of advances leading to disallowance of ₹ 14 lacs. The CIT(A) recorded that the entire set of circumstances showed that the assessee had avoided to give data from the books of account to show the business use of interest bearing funds. Thus, the view of the Assessing Officer that the interest bearing funds had been diverted to advance interest free loans, could not be said to be arbitrary. Consequently, the CIT(A) restricted the disallowance to ₹ 10,95,795/-. The Tribunal rightly upheld the findings recorded by the CIT(A) on this point. The relevant findings recorded by the Tribunal in this regard read thus:-

"11. As regards Ground No.2, the Department has contended that the learned CIT(A) has erred in deleting the addition of ₹ 14,00,000/- on account of disallowance of interest under section 36(1)(iii) of the IT Act.

12. The learned DR relied on the order of the Assessing Officer.

13. The learned counsel for the assessee, on the other hand, strongly relied on the order of the learned CIT(A) and reiterated the submission made before him.

14. We have heard the rival contentions and have carefully gone through the material available on record, including the order of the learned CIT(A). The relevant findings given by the learned CIT(A) qua this issue in his order in paras 25 to 29 of the order are as follows:-

> "25. The ground of appeal at Sr.No.3 pertains to the claim of the appellant that the Assessing Officer has wrongly made disallowance of ₹ 14,00,000/- under section 36(1)(iii). The Assessing Officer has brought on record that the assessee has made interest free advances and loans to his family members/sister concerns in the following manner:-
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> xxxxxxxxxxx
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> At the same time had debited bank interest to the tune of Rs.22.19 lacs. The Assessing Officer required the assessee to explain as to how the interest bearing funds could be said to be used for the purpose of business especially in face of interest free loans to friends/sister concerns highlighted above. No explanation on the said issue before the Assessing Officer as recorded in the assessment year at para 5.2. The Assessing Officer therefore proceeded to disallow 12% on the entire amount of advances leading to disallowance of Rs.14 lacs.

26. During the course of appellate proceedings the AR of the appellant submitted his arguments on the issue as under:-

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29. I have considered the facts of the case, the basis of addition made by the Assessing Officer and the arguments of the AR on the issue. It is seen that the entire set of circumstances show that the appellant has avoided to give data from the books of account to show the business use of interest bearing funds. In the circumstances the view of the Assessing Officer that the interest bearing funds have been diverted to advance interest free loans cannot be said to be arbitrary. In the circumstances the disallowance is restricted to ₹ 10,95,795/-, in view of the comments of the undersigned in para 21 of this appellate order."

15. It is seen that the learned CIT(A) has duly taken into consideration and given credit to the assessee of interest payable at the rate of 12% on credit balances of Himsons Exports ₹ 36000/-, Jalandhar Construction Co. Limited ₹ 60,000/-, Jaswant Singh & Sons ₹ 60,000/-, Rajindra Deposits & Advances Limited ₹ 66,960/- and Harpreet Singh ₹ 1,62,000/-. The learned CIT(A) has also taken cognizance of the interest chargeable @ 12% on the debit balances of advance for Satpal Cold ₹ 12000/-, Dalbir Singh ₹ 12000/-, Gurbachan Singh ₹ 50,400/-, Harman Builders Pvt. Limited, ₹ 8,96,835/-, Inderpal Singh ₹ 24000/-, Jagjit Singh ₹ 36000/-, Narotam Singh ₹ 6000/-, Raminder Kaur ₹ 3,11,520/-, Ravinder Singh ₹ 12000/-, Satish Kumar ₹ 96000/- and Venus Builders Pvt. Limited ₹ 24000/-. It is in this manner that the disallowance has been restricted to ₹ 10,95,795/- taking out the sum of interest payable amounting to ₹ 24,97,899/- representing the capital brought in by Sh.Kulwinder Singh.

16. The learned CIT(A) has observed that as available from the calculation chart given by the assessee, even the amount of capital of Shri Kulwinder Singh brought into the business was taken to be a part of the calculation, treating this amount to be funds available free of interest and that the capital is meant to earn profits and separate interest thereon to decide the issue of disallowance could not have been done. It was on this basis that the learned CIT(A) held that no interest was payable to the assessee on this amount of ₹ 24,97,899/-.

17. We do not find any error in the order of the learned CITA). The assessee has not challenged the same. Finding no error therewith, the same is hereby upheld. Accordingly ground No.2 is upheld."

The findings recorded by the Tribunal on this issue have not been shown to be illegal or erroneous by the learned counsel for the appellant-revenue.

14. The additional question claimed in ITA Nos.92, 97 and 107 of 2018 qua maintainability of the impugned order passed by the Tribunal, is general in nature and in view of our findings on questions Nos. (i) and (ii), this question is also rejected.

15. As a result, no substantial question of law arises. All the six appeals are hereby dismissed.

(Ajay Kumar Mittal)
Judge

March 28, 2019 **(Manjari Nehru Kaul)**
'gs' **Judge**

Whether speaking/reasoned **Yes**
Whether reportable **Yes**