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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 517/2024 & CM APPL. 60210-11/2024**

PR. COMMISSIONER OF INCOME TAX-1, DELHI

.....Appellant

Through: Mr. Sanjay Kumar, SSC.

versus

M/S ADVANTAGE FASHION PVT. LTD.

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

ORDER

14.10.2024

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1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*), impugning an order dated 30.11.2023 (hereafter *the impugned order*), passed by the learned Income Tax Appellate Tribunal (hereafter *the Tribunal*) in a batch of appeals and cross-appeals preferred by the Revenue and the assessee for the assessment years (hereafter *AY*) 2006-07, 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12.

2. The present appeal relates to the Revenue's appeal being ITA No. 798/Del/2017 for the AY 2010-11, which was dismissed by the Tribunal in terms of the common order impugned in the present appeal.

3. The Revenue has projected the following substantial questions of law for consideration of this Court:

“A. Whether the Ld. ITAT was correct in deleting the additions of Rs.6,97,45,648/- made on account



of interest income camouflaged as sale/purchase by the assessee ignoring the documents seized and nature of agreement?

B. Whether the Ld. ITAT was correct in deleting the additions of Rs.6,97,45,648/- made on account of interest income camouflaged as sale/purchase by the assessee ignoring the fact that no sale / purchase agreement of property contains clauses pertaining to corporate guarantee, personal guarantee, post-dated cheques etc?

C. Whether the Ld. ITAT was correct in deleting the additions of Rs.6,97,45,648/- made on account of interest income camouflaged as sale/purchase by the assessee ignoring the statement of Mr. Naveen Choudhary, CFO who admitted that the amount advanced to M/s Vatika Group is actually loan amount?”

4. The principal controversy in the present case relates to an addition of ₹6,97,45,648/- made by the learned Assessing Officer (hereafter *the AO*) in terms of the assessment order dated 27.03.2015. The AO had found a transaction, which was declared as giving rise to the capital gains was a subterfuge for a transaction of loan.

5. Accordingly, the AO held that the assessee had earned income by way of interest which was not disclosed in its books of accounts. The assessee had relied upon the statements made by the employees of other entities that had dealt with Vatika Landbase Private Limited (hereafter *Vatika*).

6. The AO had a similar view in respect of the transactions between other entities of Vatika. During the assessment proceedings, certain documents and information were received in respect of the said entities and



their employees / representatives were also examined. Based on the said material, the AO imputed that the assessee had entered into similar transactions with Vatika.

7. The search and seizure operations of Span India Group of cases was conducted on 16.01.2013 under Section 153A of the Act. Thereafter, notice was also issued to the assessee to furnish its returns of the income. The assessee thereafter had furnished the returns on 10.11.2014 for the relevant AY 2010-11.

8. The AO noted that the search and survey operations were also conducted by the Investigation Wing in the case of Shri K. S. Dhingra and Shri J. S. Dhingra (Dhingra Group) as well as the Shahi Group.

9. It is stated that during the search operation conducted on 16.01.2013, certain documents pertaining to Vatika group were also found. On the basis of such documents, the AO found that during the financial year 2005-06 four groups (the Shahi Exports group, the Span India group, the Dhingra group and the Harman Singh Dhingra group) had entered into similar transactions with Vatika whereby the said companies had agreed to purchase certain real estate in Jaipur. The details of the consideration paid by the said entities is set out below:-

"S.no	Name of the Company/Group	Amount
1.	U.K. Paints Pvt. Ltd. (Dhingra group)	13,00,00,000/-
2.	SEH Realtors Pvt. Ltd. (Shahi Exports group)	20,00,00,000/-
3.	Advantage Fashions Pvt. Ltd. (Span India group)	15,00,00,000/-
4.	Uttam Enterprises Pvt. Ltd. (Harman Singh Dhingra	2,00,00,000/-



	TOTAL	50,00,00,000”
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10. The said entities also paid further amount aggregating to ₹1,86,77,000/- to Vatika. The details of such payments are as under:-

“S.no	Name of the Company/Group	Date of Payment	Amount
1.	U.K. Paints Pvt. Ltd. (Dhingra group)	25.04.2006	58,86,100/-
2.	SEH Realtors Pvt. Ltd. (Shahi Exports group)	25.04.2006	85,82,900/-
3.	Advantage Fashions Pvt. Ltd. (Span India group)	25.04.2006	37,72,300/-
4.	Uttam Enterprises Pvt. Ltd. (Harman Singh Dhingra	25.04.2006	4,35,700/-
	TOTAL		1,86,77,000/-”

11. Thus, the assessee had paid an aggregate amount of ₹15,37,72,300/- to Vatika pursuant to its agreements to purchase immovable properties.

12. As stated hereinabove, the agreements also provided for buy-back of the said properties @ ₹5100/- per square yard within a period of two years from the date of the sale.

13. Thereafter, the assessee and similarly placed entities had entered into further agreements with Vatika for extending the period for buy back of the immovable properties which is subject to the said successive agreements by which the buy-back price was also increased.

14. However, Vatika did not buy back the rights of the assessee under the agreements. However, subsequently, the assessee refused to sell the immovable properties to the third party.



15. The assessee thereafter sold its rights under the agreements to M/s ESPO Developers Private Limited for a consideration of ₹22,50,12,000/- during the financial year 2010-11 in terms of the agreement dated 10.05.2010. The amount under said agreement was received by the assessee in the months of June, July and September, 2010.

16. The AO held that Vatika was the ultimate source of money paid to the assessee. The AO referred to the statements made by the authorised representative /employee of other entities as well as some documents to conclude that the transactions entered into by the aforesaid four groups were in the nature of loan bearing interest.

17. The AO also found that there was some information on the hard disc of the computers of Vatika which reflected the sale consideration was ₹52,39,60,975/-. On the basis of the above, the AO concluded that the assessee had received unaccounted interest income of ₹6,97,45,648/- during the relevant assessment year.

18. Accordingly, the AO had added the gains made by the assessee as the interest liable to tax as income from other sources and as unexplained income, and not as capital gains.

19. The transaction related to an agreement entered into by the assessee, with another real estate company Vatika (Vatika Landbase Private Limited) on 11.06.2005. In terms of the said agreement, the assessee had agreed to purchase certain immovable properties at the rate of ₹3,400/- per sq. yard, inclusive of the development charges and a license fee. The said agreement also included a buy-back clause whereby Vatika had agreed to re-purchase the said immovable property at the rate of ₹5,100/- per sq. yard at the end of the period of two years. The assessee was not compelled to sell the



immovable property to Vatika and had the right to retain the same. It was also agreed that in the event that the assessee chose a plot which was in a preferential location, it would necessarily have to pay an additional preferential location charges, subject to a maximum of 15% of the land area. The assessee was also entitled to sell the immovable property to any third party.

20. Aggrieved by the assessment order, the assessee had preferred an appeal before the learned Commissioner of Income Tax (Appeals) (hereafter CIT(A)), which was allowed by an order dated 25.11.2016. The learned CIT(A) had examined the commercial transaction between the parties and had found that the same could not be held to be a camouflage for a loan transaction as concluded by the AO.

21. The relevant extract of the order passed by the learned CIT(A) reads as under:-

“4.2.1.9 It can be seen from the very first agreement itself, that it is clearly an agreement to sell the plots to the appellant. There is not even a whisper of any loan or any whisper of any interest receivable on the sale consideration unless there is failure on part of the seller to hand over the plots to the buyer. There is a clause of a resale to Vatika, at a pre-determined rate. However, the appellant is not bound to sell to Vatika, and has the right to sell to any outside party. The completion of re-sale is at the option of the appellant solely, in case the actual market price of the land exceeds the agreed resale price. This clause indicates that the resale clause is to only secure an assured return on investment to the appellant, but the appellant is free to realize a higher return. The introduction of a guarantor and PDCs too is only an instrument to secure its minimum assured return from Vatika. In my opinion, a promise of assured return upon a re-sale to which only Vatika is bound, does not prove that the transaction is one of loan. In any case, the appellant was not bound to sell the property to Vatika, but had the unhindered right to sell to an outside



party. In fact, vide the amendatory agreement dated 05.06.2007, the appellant had the liberty to sell the plots to any outside party even before the due date of exercising the option to re-sell i.e. 10.06.2009. If it were a loan transaction simpliciter Vatika would not have agreed to such a condition.

4.2.1.10 It would also be seen that the agreement dated 11.06.2005 and subsequent agreements thereto have been entered into in the normal course of the appellant's activities. Seizure of these agreements does not automatically make them incriminating documents to be held against the appellant in assessment proceedings u/s 153A. What has to be seen is that whether the department has unearthed any evidence related to the transaction between appellant and Vatika group, which would prove or even indicate that the transaction was not really a purchase transaction but one of loan, on which interest has been received/receivable. The details of the assessment order have been discussed in the preceding paras of this order. To my mind, none of the other evidence referred to by the A.O., either individually or collectively, can be said to indicate that the specific transaction between the appellant and Vatika was actually a loan transaction. The evidence relied upon by the A.O. are individually discussed below.

4.2.1.11 The fact that UK Paints group, in an internal email communication (extracted from seized hard disk AS from the U.K. Paints group), has grouped an amount (Rs.43,00,00,000/-) given to Vatika as an "ICD", cannot be held against the appellant, especially when it does not detract from language of the agreement between the appellant and Vatika, nor does it mention any rate of interest on such an "ICD" or even interest received/receivable. On the other hand, the document extracted from the seized hard disk A-66 from Vatika premises, which is a detailed chart of agreements entered into by Vatika with the appellant, SHE Realtors P. Ltd, UK Paints India P Ltd and Uttam Enterprises P. Ltd., shows that the parties are Purchasers/Lenders., and depict the agreement thereon as a sale agreement. There is no indication of any interest @25% payable on the consideration, except "if refundable". Clearly, the transaction is a sale transaction, and would be subject to a penal interest @ 25% as the fall-back option, in case the primary transaction of sale does not go through. It is noteworthy that the re-sale price in the agreements is not @



25% p.a. of the consideration paid, thus indicating that 25% is only a penal rate of interest, and not the regular interest payable on the sum of Rs.15,00,00,000/-.

4.2.1.12 Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. In case of doubt, evidence of the acts done under it, is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument. {Abdulla Ahmed vs Animendra Kissen Mitter dt 14.03. 1950 (1950 AIR 15, 1950 SCR 30)). Thus, the conduct of the parties after signing of the agreements is not a conclusive tool of interpretation of a contract, and does not override the express terms of the contract. Nevertheless, it would be seen that even in the balance sheet of the appellant-company for the A.Y. 2006-07 to 2011-12, (i.e. period over which the agreement was extended repeatedly) the appellant has constantly in its audited balance sheet depicted this amount under the head "Property booking Vatika Landbase P. Ltd (Under Loans & advances)". It has not reflected any interest receivable in its books. This is quite indicative of the commercial understanding that the parties to the contract had. It is also seen that although Vatika had provided PDCs, no TDS was actually deposited in government accounts at any point of time over the entire period from A.Y. 2008-09 to 2011-12, neither has Vatika debited any interest on the sum of Rs.15 crores in its books during this period. This is also clear indicator of the commercial understanding between parties. Even in the extension agreement dated 05.06.2007 the actual plots for sale were identified, thus establishing conclusively the rights of the appellant as a purchaser of the plots; allotment of these plots would, as per the specific terms of the MOU dated 11.06.2005, related back to the date of the MOU dated 11.06.2005. Even the subsequent payment of extra consideration for preferential plots on 25.04.2006 in pursuance of and as part of the MoU dated 11.6.2005 is evidence of the true nature of the transaction. Therefore, it is clear that not treating the transaction as a loan transaction by the appellant in its accounts from the very beginning is not an afterthought.

4.2.1.13 Even the document (seized as Annexure A-12, page 79 from Vatika premises) being a note dated 28.10.2010 prepared by Sh. Manmohan Mehra of Vatika group for the perusal of Sh. Gautam Bhalla, Director named 'Jaipur Plots buy back Deal', shows that the note



relates to the buy-back deal between Vatika group and the lenders group; as per the note, ESPO Developers Pvt. Ltd. has been introduced into the transaction to perform the obligations of Vatika to buy back the plots. This too does not contradict the appellant's claim.

4.2.1.14 I have also gone through the statements of Sh. Navin Choudhary, CFO of Vatika group and Sh. Harish Ahuja, MD of the Shahi group relied upon by the A.O. (and reproduced in the assessment order). I am of the considered opinion that that none of these depositions too support the view that the transaction was actually an interest bearing loan transaction, and not a transaction of sale (with a provision for buy-back). There is neither any admission therein, nor even any indication that it is so, insofar as it relates to the transaction between Vatika and the appellant.

4.2.1.15 It would also be seen that the agreement dated 11.6.2005 and subsequent extension agreements have been entered into in the normal course of the appellant's activities and that the entries in the balance sheet reflect outcome of the agreement. A seizure of these agreements does not automatically make them incriminating documents to be used against the appellant nor do they, as discussed above, constitute incriminating material. What has to be seen is that whether the department has seized/unearthed any evidence related to the transaction between appellant and Vatika group. which would prove or even indicate that the transaction was not really a purchase transaction but one of loan, on which interest has been received/receivable. The details of the assessment order have been discussed in the preceding paras of this order. To my mind, none of the other evidence referred to by the A.O., either individually or collectively, can be said to indicate that the specific transaction between the appellant and Vatika was actually a loan transaction. Even the fact that in an internal email dated 08.10.2010 of the U.K. Paints group, sent by Sh. Vinod Kaushik to Sh. Naveen Choudhary, CFO of the U.K. Paints group, amount of Rs. 43 crores shown as due to U.K. Paints P. Ltd. for a similar transaction with Vatika Ltd. is classified as an 'ICD', cannot be held against the applicant.

4.2.1.16 Finally, it is necessary to examine the view of the A.O. that since the property was never registered in the name of the appellant, the appellant cannot be said to be the owner of the plots and consequently, the transfer of the land to ESPO cannot be said to be a sale which is exigible for capital gain. Section 45 defines profits and gains arising



from any 'Transfer' of a 'capital asset'. The term 'capital asset' is defined in section Sec 2(14) of the Income Tax Act as 'property of any kind', (subject to some exclusions, which are not relevant in the present case). This definition widens the scope of the term so as to include tangible and intangible assets and also any benefits, rights and actionable claims that a person may obtain in respect of such assets. Thus, the term 'property' is a word of widest import and it usually signifies every possible interest which a person can possibly hold and enjoy. 'Property' may be said to be a bundle of rights of all kinds to a person. In the case of CIT Vs Tata Services Ltd (122 ITR 594), the hon'ble Bombay High Court has held that the word 'property' used in Sec 2(14) is a word of the widest amplitude and any right which can be called property will be included in the definition of capital asset. It held that since a contract for sale of land is capable of specific performance and is also assignable, a right to obtain conveyance of immovable property is also clearly a capital asset contemplated u/s 2(14) of the Income Tax Act. The word 'transfer' in Sec 2(47) has also been defined to not only include a regular sale, but also any transaction that results in any extinguishment of any right in the property or any relinquishment of the same. Thus, the definition takes into its ambit not only cases where a person gives up his rights in the property voluntarily but also instances where he gives up his rights in favour of another person in consideration of the other person fulfilling his part of the obligations as per the contracted terms. In the present case, while the property in question has not been registered in the name of the appellant, it has entered into an agreement with the seller and as a consequence had absolute rights of disposal over them, and its rights were vested to the exclusion of all persons. Thus, it was the owner of the property for the purpose of Sec.45, and therefore at the point of transferring the plots to ESPO, capital gains accrued to the appellant.

4.2.1.17 The A.O. also mentions that there is no reason why the appellant should agree to take sale consideration which is less than the principal plus accrued interest amount. This is a valid suspicion, but I am afraid it is nothing more than that. This suspicion, if corroborated by any evidence, would lead to a suitable inference. But by itself, this suspicion does not make any case for the inference that the appellant has actually received an



undisclosed amount, over and above the sale consideration. No businessman can be compelled to maximize his profit. The A.O. cannot put himself in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own viewpoint but that of a prudent businessman CIT v. Dalmia Cement (B.) Ltd. [2002] 254 ITR 377(De1). Given the long-standing business relationship between the parties, there could be any commercial expediency (including an inability of the appellant to sell the plots to an outside party at the price of Rs.9,250/- p. sq.yd. at that point of time, or any other market condition) for the appellant agreeing to not insist on the higher rate agreed to with Vatika. In any case, in spite of search conducted on both the parties, there is no evidence to support a view that a higher consideration has indeed passed to the appellant. In fact UK Paints and been subjected twice to search action in 2011 and in 2013, without any evidence being unearthed that the transaction between Vatika and the appellant was actually had a loan transaction with an annual interest payable, and not a sale transaction.

4.2.1.18 The A.O. has also referred to the resale of property by the appellant to a buyer (ESPO) belonging to the Vatika group itself. It is also mentioned by the A.O. that the purchaser has been funded by Vatika itself, thus indicating its a sham transaction. Although this point appears attractive at the first blush, on a detailed examination, it does not bear support from a detailed reasoning. The property belongs to M/s Sanskar Buildtech P. Ltd and Nakshatra Buildcon Pvt. Ltd. Vatika Ltd. merely had exclusive rights to develop and sale the property and was never the owner; any sale-back , at the option of the appellant, was agreed to done to Vatika or its nominee. Ultimately, the property was sold to a Vatika nominee. Even otherwise, as per the terms of the agreement, the appellant was under no compulsion to sell the plots to either Vatika or any other party of the Vatika group, or even to a nominee of Vatika. The Vatika group was under a contractual obligation to purchase back the plots, but only at the option of the appellant, within a period of two years from the date of the agreement, at the prevailing market rates . The Vatika group did not have any vested rights to get the properties back from the appellant. On the other hand, the appellant was free to sell the lands in the open market, and the fact that the appellant sold the properties/its



rights thereon to a Vatika group company, is of no other consequence. If it were a loan transaction only, then Vatika would not have agreed to such a provision. In the agreement, allowing the appellant the rights to sell to any buyer of the appellant's choice.

4.2.1.19 I am therefore of the view, that the conclusion drawn by the A.O. in the appellant's case is erroneous. I hold that the appellant is liable for levy of Capital gains tax at the point of sale to ESPO (i.e., in A.Y.2011-12). The gain is long term, as the exclusive holding of the property in the hands of the appellant commenced from 11.06.2005 as per the terms of the MOU dated 11.06.2005. The interest income added by the A.O. for A.Y. 2006-07 to A.Y. 2011-12 is deleted.”

22. The Revenue preferred an appeal against the said decision of the learned CIT(A), which was dismissed by the Tribunal in terms of the impugned order. The Tribunal concurred with the decision of the learned CIT(A) that the transaction in question could not be termed as a transaction for loan on which the assessee was entitled to any interest.

23. The Revenue seeks to contend, what was apparent from the terms of the agreement between the assessee and Vatika, is not real. This contention has been examined and rejected by concurrent findings of two authorities.

24. The Supreme Court in the case of ***Sumati Dayal v. Commissioner of Income Tax: (1995) 214 ITR 801 (SC)*** had explained that to make any addition as unexplained income under Section 68 of the Act, the AO has to be satisfied that the apparent is not real, based on cogent evidence and the material on record.

25. In the present case, there is no cogent material to objectively conclude that the transaction in question was of a loan whereby the assessee had lent funds to Vatika and therefore the assessee's gains were in the nature of the interest on the said loan. As noted above, there was no compulsion for the



assessee to sell its rights to Vatika or its nominee. As noted above, this aspect was examined by the learned CIT(A) as well as the Tribunal and the said authorities had not agreed with the AO's assumption that a loan transaction was disguised as an investment.

26. The question clearly is one of the determination of facts and in view of the concurrent findings of the learned CIT(A) as well as of the Tribunal, no substantial question of law arises in the present appeal.

27. The present appeal is, accordingly, dismissed. Pending applications, also stands disposed of.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

OCTOBER 14, 2024

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Click here to check corrigendum, if any