

आयकर अपीलीय अधिकरण, C/'SMC' न्यायपीठ, चेन्नई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
C/"SMC" BENCH, CHENNAI

श्री. चंद्र पूजारी लेखा सदस्य, के समक्ष ।

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.Nos.2528 & 2529/Mds./2016

(निर्धारण वर्ष / Assessment Years :2008-09 & 2009-10)

Late Shri Narendra Kothari,
Rep by his son & L/R Mr.Nishant
Kothari,Old No.113, New No.250,
Kothari Towers, NSC Bose Road,
Chennai-79.

PAN AACPN 7254 R

Vs. The ITO,
Company Ward V(1)
Chennai-34.

(अपीलार्थी /Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by

: Mr.D.Anand,Advocate

प्रत्यर्थी की ओर से/Respondent by

: Mr.Shiv Srinivas,JCIT, D.R

सुनवाई की तारीख/ Date of hearing

: 29.11.2016

घोषणा की तारीख /Date of Pronouncement

: 09.01.2017

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER:

These two appeals are filed by the Assessee, aggrieved by the common order of the Learned Commissioner of Income Tax(A)-3,

Chennai dated 30.06.2016 pertaining to assessment years 2008-09 & 2009-10.

2. The first common ground in these appeals is that the learned Commissioner of Income Tax (Appeals) erred in directing the assessing officer to assess the entire 10 flats owned by the assessee at Thiruvanmiyur under the head income from house property. The learned Commissioner ought to have seen that out of the 10 flats owned by the assessee, only 8 flats have been let out and there is no income derived from 2 flats which have been kept vacant.

3. The facts of the issue are that the assessee is owning 17 flats at Thiruvanmiyur road, but the assessee offered rent from only 8 flats and stated that two flats are vacant due to leakage and water problems, another one flat was used by the assessee's staff, who were engaged to collect rent and other 6 flats were semi finished and used by M/s.Omkar Constructions P. Ltd. However, the AO not agreed with the assessee's contention considered the rent for 17 flats under the head "income from house property". Aggrieved with the order of Id. Assessing Officer, the assessee carried the appeals

before the Ld.CIT(A).On appeal, the Ld.CIT(A) directed the AO to consider the income from 10 flats only and agreed with the assessee that 7 flats are not let out and since the AO has not brought out any material contrary to the submissions of the assessee. Against this, the assessee is in appeals before us.

4. Before us, the main contention of the Id.A.R is that the assessee let out only 8 flats and two flats are not in living position, since there was a leakage and water problem.

5. On the other hand, Id.D.R relied on the orders of lower authorities.

6. We have heard both the parties and perused the material on record. The Id.A.R, though made an oral plea that the two flats are not in a position to let out due to leakage and sewage as they located in the last floor of the building, he has not brought any record to suggest that these two flats are not habitable condition, we remit the issue to the file of AO to verify whether these flats are really let out or not, by going through electricity, water usage from the respective department and also enquire with Revenue Authorities regarding

usage of Flats and if it is really in the habitable position and if the AO come to know that these flats are let out, then ALV to be brought to tax. With this observation, we remit this issue to the file of AO for fresh consideration after giving opportunity of hearing to the assessee.

7. The next common ground is that the learned Commissioner of Income Tax (Appeals) erred in directing the assessing officer to assess the 16 shops owned by the appellant at NSC Bose Road under the head income from house property. The learned Commissioner ought to have seen that out of the 16 shops owned by the appellant, only 10 shops have been let out and there is no income derived from 6 shops which is under self-occupation and used by the appellant for storage of its goods.

8. The facts of the issue are that the assessee is having 18 flats at NSC Bose Road and out of it, assessee offered rental income of 10 flats only. However, the AO considered the rental income of 16 flats. Aggrieved with the order of Id. Assessing Officer, the assessee carried the appeals before the Ld.CIT(A).On appeal, the Ld.CIT(A)

confirmed the order of Id. Assessing Officer. Against this, the assessee is in appeal before us.

9. Before us, it was submitted by the Id.A.R that six flats were used by storing the materials related to the projects executed by M/s.Omkar Constructions P. Ltd., wherein the assessee is a Director.

10. On the other hand, Id.D.R submitted that the Ld.CIT(A) observed that the Director is different from limited company and it amounts letting out the property to M/s.Omkar Constructions P. Ltd. Accordingly, Ld.CIT(A) confirmed the charging of rental income from these flats.

11. We have heard both the parties and perused the material on record. There is no dispute that these six flats situated at NSC Bose Road were used by other than assessee, namely M/s.Omkar Constructions P. Ltd. Being so, we are of the opinion that the assessee is let out the property to M/s.Omkar Constructions P. Ltd. and the ALV of those flats property to be taxed in the hands of assessee as income from house property. This ground of assessee raised in these two appeals stands dismissed.

12. The other ground raised by the assessee in the appeal in ITA No.2529/Mds./16 is with regard to confirming the addition of ₹10.35 lakhs made under the head undisclosed investment in land on the basis of a letter dated 26.03.2014 & 28.03.2014, alleged to have been obtained by the AO from M/s.Gurudev Foundation at the back of the assessee.

13. The facts of the issue are that the assessee purchased a property located at No.153 Perumbakkam village Tambaram Taluk, Kanchipuram district admeasuring 69 cents and 4700 sq. ft. from M/s.Gurudev Foundation vide two sale deeds dated 3.2.2010 and 5.4.2010 for a registered documentation value at ₹1,34,00,000/-. However, it was recorded in the books of accounts of assessee at ₹1,67,50,000/-. There was a survey u/s.133A of the Act at the business premises of M/s.Omkar Constructions P. Ltd., in which the assessee is a Director. Consequent to the survey, the assessee had admitted unexplained investment to the tune of ₹41.5 lakhs for assessment years 2010-11 & 2011-12. However, it was submitted by the assessee that total investment in the above said property was at ₹

209 lakhs and not ₹167.5 lakhs. Consequently, the assessee offered ₹ 41.5 lakhs as additional income towards unexplained investment in respect of the above property. However, the AO further enquired with the M/s.Gurudev Foundation on the basis of the letter dated 26.03.2014 & 28.03.2014. The AO came to know that there was further additional payment of ₹10.35 lakhs, in addition to the offer made by the assessee at ₹41.5 lakhs, the AO brought into tax another amount of ₹10.35 lakhs on the basis of letter from M/s.Gurudev Foundation. Against this, the assessee carried the appeal before the Ld.CIT(A).

14. On appeal, Ld.CIT(A) after getting the submissions of assessee, sent the same to the AO vide letter dated 29.02.2016. The AO in turn sent a Remand report on 31.03.2016, issued by Ld.CIT(A) on 01.04.2016. The AO in his remand report confirmed the additional payment of ₹10.35 lakhs to M/s.Gurudev Foundation by the assessee and he supported the assessment order in remand proceedings. On the basis of remand report, the Ld.CIT(A) confirmed the addition made on unexplained investment amounting to ₹10.35 lakhs. Against this, the assessee is in appeal before us.

15. The main contention of the Id.A.R is that other than the letter from M/s.Gurudev Foundation for the receipt of ₹10.35 lakhs payment from the assessee, there is no evidence in the hands of AO. According to Id.A.R, third party statement cannot be relied upon without providing cross examination, opportunity to the assessee. For this re relied on the judgement of Supreme Court in the case of CIT Vs. P. V. Kalyanasundaram in [2007] 294 ITR 49 (SC).

16. On the other hand, Id.D.R strongly supported the order of lower authorities and submitted that statement collected from M/s.Gurudev Foundation u/s.131 of the Act was confronted to the Authorised Representative of assessee, namely Shri Narendra Kothari and the assessee cannot claim that evidences collected by the Department at the back of the assessee and used against the assessee for framing the assessment order. He prayed that addition to be sustained.

17. We have heard both the parties and perused the material on record. In this case, the assessment was based on offer made by the assessee during the course of survey. Originally the assessee

executed sale deed for purchase of a property at Perumbakkam for ₹ 1.34 crores. However, it was recorded in books of accounts at ₹167.5 lakhs. During the course of survey, Sec.133A assessee admitted the sales consideration was 209 lakhs. Accordingly, the assessee offered additional income of ₹ 41.5 lakhs. The AO after accepting the offer of assessee during the course of survey, he enquired with the purchaser, namely M/s.Gurudev Foundation and on the basis of their letter, AO made further addition of ₹10.35 lakhs and there is no other positive material to suggest the payment of this, on money of ₹10.35 lakhs. The evidence with the AO only with the record of letters from M/s.Gurudev Foundation collected during the course of survey proceedings u/s.133A of the Act and even though the AO collected information from M/s.Gurudev Foundation, there was no opportunity of cross examination was given to the assessee and it was clearly stated by the AO that the fact was apprised to the assessee's counsel. In our opinion, apprising the facts to the assessee's counsel cannot be substitution for providing opportunity of cross examination to the assessee. In similar circumstances,

the Supreme Court in the case of CIT Vs. P. V. Kalyanasundaram

cited supra held as follows:-

“5. - - - Learned counsel representing the assessee-respondent has however pointed out that the Commissioner of Income-tax in particular, had after a very elaborate discussion of the matter, concluded on a finding of fact with regard to the nature of the transaction and this view had been accepted by the Tribunal as well. He has accordingly submitted that no substantial questions of law have been raised in this matter and the issues raised were purely questions of fact.

6. We have heard learned counsel for the parties and have gone through the record. It is true that the Division Bench of the High Court has borrowed extensively from the orders of the Tribunal and the Commissioner and passed them off as if they were themselves the author(s). We feel that quoting from an order of some authority particularly a specialized one cannot per se be faulted as this procedure can often help in making for brevity and precision, but we agree with Mr. Vahanvati to the extent that any " borrowed words" used in a judgment must be acknowledged as such in any appropriate manner as a courtesy to the true author(s). Be that as it may, we are of the opinion that the three questions reproduced above can, in no way, be called substantial questions of law. The fact as to the actual sale price of the property, the implication of the contradictory statements made by Rajarathinam or whether reliance could be placed on the loose sheets recovered in the course of the raid are all questions of fact. We therefore find no infirmity in the order of the High Court. Accordingly, we dismiss the appeal.”

In view of the above decision, we are of the opinion that lower authorities are not justified in making addition of ₹10.35 lakhs on the basis of letters furnished by M/s.Gurudev Foundation, who is the vendor as such, addition cannot be sustained. More so, when the

AO accepted the offer made by the assessee in his statement during the course of survey, once again he cannot step in or enquire the things with the vendor. He shall accept the offer made by the assessee in toto or reject in toto, he cannot do cherry picking so as to suit his needs. Accordingly, we are not in a position to appreciate the argument of the Id.D.R. Accordingly, we are deleting the addition made by the Id. Assessing Officer at ₹10.35 lakhs towards impugned land transaction. This ground raised by the assessee stands allowed.

18. In the result, both the appeals of assessee are partly allowed for statistical purposes.

Order pronounced in the open Court on 09th January, 2017 at Chennai.

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

Chennai,

Dated the 09th January, 2017.

K s sundaram.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |