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

\+ ITA 736/2010

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Suruchii Aggarwal, Advocate

versus

NAVEEN GERA ..... Respondent
Through: Mr. Piyush Kaushik, Advocate

% Date of Decision: 17th August, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

MANMOHAN, J:

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act, 1961") challenging the order dated 11th September, 2009 passed by the Income Tax Appellate Tribunal (in short "Tribunal") in ITA. No. 66/Del/2001, for the block period 1st April, 1988 to 20th August, 1998.

2. Briefly stated the relevant facts of the case are that the respondent-assessee had made investment in two plots of agricultural land in December, 1996. The investment in the farm houses were

made by the assessee in the name of his father, namely, Mr. L.D. Gera for a total consideration of ₹ 41,35,700/-. The abovesaid properties were brought from Sam Aviation(P) Ltd. of which the assessee was one of the Directors. It is an admitted fact that the sources and the investment made thereof in these two plots had been declared by the respondent-assessee under Voluntary Disclosure of Income Scheme, 1997 (for short "VDIS"). On 20th August, 1998, a search and seizure under Section 132 of Act, 1961 was carried out at both the respondent-assessee's residential and business premises. The sale deeds of the abovesaid properties were found during the search.

3. The Assessee Officer (in short "AO") referred the properties for valuation to the District Valuation Officer (in short "DVO") alleging that respondent-assessee had invested huge amount in the purchase of the farm house over and above the investment disclosed in VDIS. On the basis of the DVO's report, the AO made an addition of ₹ 2,24,08,820/-.

4. On an appeal being filed by the respondent-assessee, the learned Commissioner of Income Tax (Appeals) [for short CIT(A)] allowed the same and deleted the addition made by the AO. The revenue challenged the CIT(A)'s order, which was dismissed by the Tribunal by observing as under :-

> *"63…….Being aggrieved, the assessee carried the matter in the appeal before Ld. CIT(A) who has deleted this addition on the basis that the assessee in fact has purchased the property from M/s. Sam*

Aviation (P) Ltd. where the assessee was also a director. It is also noted by him that the purchase was made by M/s. Sam Aviation (P) Ltd. and in the case of company, there is no action taken for extra payment. It is also noted by him that there is no evidence that action has been taken in the hands of the seller for extra receipts. It is also submitted that there was no material found during the search that any extra payment was made by the assessee to the seller company or by the seller company to the original seller. On this basis, this addition and now, the revenue is in further appeal before us.

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65. We have heard the rival submissions and have gone through the material available on record and the Tribunal decision cited by Ld. AR of the assessee. We find that this is undisputed factual position that no evidence whatsoever was found in the course of the search indicating any undisclosed investment in agricultural land. The factum of purchase of land was disclosed by the assessee before the Department in VDIS, 1997 and in the absence of any adverse material found in the course of search, the addition made by the Assessing Officer in the present case, on the basis of valuation report of DVO cannot be sustained in the absence of any adverse material found in the course of search. We, therefore, decline to interfere in the order of the Ld. CIT(A) on this issue."

(emphasis supplied)

5. Ms. Suruchii Aggarwal, learned counsel for the revenue submitted that both CIT(A) and Tribunal have erred in law in deleting the addition of ₹ 2,24,08,820/- made by the AO on the ground that addition based on DVO's report could not be sustained as no adverse material had been found during the search. She also relied upon the Supreme Court's decision in ***Commissioner of Income-Tax Vs. Mukundray K. Shah, (2007) 290 ITR 433*** to contend that the block assessment of undisclosed income can be based on the evidence found in the search and/or material or information gathered in post search

inquiries made on the basis of evidence found in the search.

6. Mr. Piyush Kaushik, learned counsel for the respondent-assessee contended that no addition could be made by AO in the absence of any incriminating evidence found during the search. He submitted that no adverse material was found during the search which could show that respondent-assessee had made more investment in the property than what had been declared in the sale deed and consequently, no reference could be made to the DVO.

7. Mr. Kaushik further submitted that the reference to the valuation officer and consequent addition made on the basis of said valuation officer's report is itself bad in law as the Proviso to Section 142A of Act, 1961 itself stipulates that the said Section does not apply in respect of assessments made on or before 30th September, 2004. To fortify the said submission, learned counsel relied upon this Court's decision in ***Commissioner of Income Tax Vs. M/s. Jupiter Builders Pvt. Ltd., (2006) 287 ITR 287 (Del.)***.

8. We have heard the learned counsel for the parties and also perused the record.

9. We do not find merit in the submission made by Ms. Suruchii Aggarwal that the concealed income was detected during the course of

search or any evidence was found which would indicate such concealment. The seized material containing the sale deeds of the properties, which have been relied upon to make reference to DVO, had already been declared to the revenue by the respondent-assessee under VDIS. We are also in agreement with the submission made by Mr. Piyush Kaushik that it is settled law that in the absence of any incriminating evidence that anything has been paid over and above than the stated amount, the primary burden of proof is on the Revenue to show that there has been an under-statement or concealment of income. It is only when such burden has been discharged, would it be permissible to rely upon the valuation given by the DVO. Further, the opinion of DVO, *per se*, is not an information and cannot be relied upon in the absence of other corroborative evidence (See ***K.P. Varghese Vs. ITO, (1981) 131 ITR 597 (SC), Civil Appeal No. 9468/2003*** (***Assistant Commissioner of Income Tax, Gujarat Vs. M/s. Dhariya Construction Company***) decided by the Apex Court on 16th February, 2010, ***CIT Vs. Shakuntala Devi, (2009) 316 ITR 46, CIT Vs. Ashok Khetrapal, (2007) 294 ITR 143 (Del.)*** and ***Commissioner of Income Tax Vs. Manoj Jain, (2006) 287 ITR 285 (Del.)***).

10. Further, the reliance of learned counsel for the revenue on the Supreme Court's decision in ***Mukundray K. Shah*** (supra) is misplaced. In the said case, the entire picture regarding the working of circular trading became apparent only after seeing the cash flow statement

which emerged in the inquiry conducted by the Department on the basis of evidence found during the search. In the present case, since the details of the properties had already been disclosed under VDIS, it cannot be said that the Department came in possession of any information which it did not possess earlier.

11. We are further in agreement with the submission made by Mr. Kaushik the Proviso to Section 142A of the Act, 1961, has no retrospective effect. The relevant extract of Section 142A of the Act, 1961 reads as under :-

> *"**142A. Estimate by Valuation Officer in certain cases.***
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> *(1) For the purposes of making an assessment or re-assessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or [2][section 69B or fair market value of any property referred to in sub-section (2) of section 56 is required to be made], the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.*
>
> *(2) ……*
>
> *(3) ……*
>
> *Provided that nothing contained in this section shall apply in respect of an assessment made on or before the 30th day of September, 2004, and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A."*
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> (emphasis supplied)

12. It is pertinent to mention here that the assessment was made by the AO on 30th August, 2000 and the CIT(A) decided the appeal on 30th January, 2001, which is clearly prior to the cutoff date of 30th September, 2004. Consequently, it was not open to the AO to order valuation of the property by DVO.

13. Accordingly, the present appeal, being bereft of merit, is dismissed *in limine*.

MANMOHAN, J

CHIEF JUSTICE

AUGUST 17, 2010
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