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

Reserved on: 30.08.2018
Pronounced on : 18.09.2018

\+ **ITA 599/2004**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Sh. Rahul Chaudhary, Sr. Standing Counsel with Ms. Vibhooti, Advocate.

versus

M/S. ANSAL PROPERTIES AND INDUSTRIES ..... Respondent
Through: Sh. M.S. Syali, Sr. Advocate with Sh. Satyen Sethi, Sh. Arta Trana Panda, Ms. Gargi Sethee and Sh. Vikrant, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. Following questions of law arise for consideration in this appeal under Section 260A of the Income Tax Act, 1961 by the Revenue:

1) Whether the Tribunal was correct in law in holding that the amount of Rs.42 crore was taken by the assessee as security and the same cannot be termed as undisclosed income and as such outside the purview of block assessment under Chapter XIV-B of Income Tax Act, 1961?

2) Whether the Tribunal was correct in law in confirming the order of CIT(A) and thereby deleting the addition of Rs.30 crore made by the. Assessing Officer on account of unexplained cash payment made by the assessee to Sh. S.K. Jatia to acquire land in village Tigra?

3) Whether the Tribunal was correct in law in confirming the order of CIT(A) in reducing the addition of Rs.45,08,971/-

to Rs.6,35,525/, made by the Assessing Officer, on account of unaccounted cash recorded in seized cash slips ignoring the statement recorded during the proceedings which revealed that this cash was over and above the amount recorded in the books of accounts?

4) Whether the Tribunal was correct in law in confirming the order of. CIT(A) deleting the addition of Rs.92 lacs made by the Assessing Officer on account of commission paid to M/s Televista Electronics Limited on sale of plot in Sushant Lok to M/s Vatika Green Field Limited ignoring the relevant provisions of section158B(b) of the Income Tax Act, 1961?

5) Whether order passed by Income Tax Appellate Tribunal is perverse in law as well as on facts in respect of the items referred to in the questions hereinabove?"

Re: Question No.1

2. The facts in brief in respect of this question are as narrated below; the Assessing Officer (AO) brought to tax an amount of ₹42 crores for the alleged suppressed sale proceeds of property at 27, Kasturba Gandhi Marg, New Delhi (the "property" or "the premises"). The assessee [hereafter "APIL"] had entered into an agreement with the owner of (the property) Late Dr. Raghunath for development of the property on 18.03.1971. A further agreement was entered into between the legal heirs of Late Dr. Raghunath, tenants/other parties and the assessee under which property was assigned for consideration to the assessee for construction of a commercial complex. The assessee, in 1980 filed a suit for specific performance before this court. During the pendency of the suit, the owners of the property sold the property to M/s. Mahajan Industries (P) Ltd. (as presently known- called hereafter as "Mahajan"). The suit for specific performance of agreement dated 06.07.1977 was decreed in favour of the assessee on 17.09.1991 against

which Mahajan preferred an appeal. An out of court settlement was arrived between the assessee and Mahajan, the terms of which were set out in MOU dated 27.08.1994; under that the asseessee's share in multistoreyed complex to be built (with its funds) was to be 40%. On 01.04.1995, the assessee entered into an agreement with M/s Verka Investments Pvt. Ltd. ["VIPL" hereafter] whereby the latter acquired (from the assessee) the right of 40% in built up area along-with the obligation to develop and constitute multistoreyed complex for a total consideration of ₹ 42 Crores. Thereafter, a confirmatory agreement was entered into amongst the assessee, VIPL and Mahajan, whereby the latter (Mahajan) accepted that the assessee's obligation to construct and complete the commercial complex shall be carried out by M/s VIPL and that after deposit of ₹ 40 Crores with the assessee under the agreement dated 01.04.1995, M/s VIPL shall be entitled to book and sell 40% of total built up area in its own name.

3. On 10.02.2000, a search was carried out on Ansal Group of companies and its Directors (including APIL and its directors). During the course of search, a 'Note" (Annexure A -3) was found and seized from the residence of Shri Deepak Ansal, Managing Director, Ansal Housing and Construction Ltd. The 'Note' related to tax provision in respect of the property at 27, Kasturba Gandhi Marg. The AO reproduced the said confidential 'Note' in the assessment order. It is reproduced as under:

> *"NOTE ON TAX PROVISION - PROPERTY NO. 27, K.G. MARG, NEW DELHI.*
>
> *APIL was holding development rights for erecting a multi-storeyed commercial building on captioned plot under the*

Agreement dated 6th July, 1977 with Shri Anand Nath and others (Principal owners).

2. As per the terms of the said agreement, APIL was entitled to 65% and principal owners to 35% of the total built up/saleable area, which was to be constructed on the stated plot.

3. The principal owners in violation of the agreement dated 6.7.1977 and during the pendency of a specific performance suit filed by APIL against them in the year 1980, transferred the said property with structure thereon to Mahajan Industries Ltd.

4. The stated suit for specific performance filed by APIL was decreed by the Hon'ble High Court of Delhi in favour of APIL in September, 1991 against which an appeal was filed by Mahajans before the higher bench of the Hon'ble High Court.

5. In order to avoid likely prolonged litigation and uncertainties of result, APIL, principal owners and Mahajans arrived at an out of court settlement whereby APIL was entitled to 40% and Mahajans to 60% of construction and development rights on the said property.

6. APIL agreed to transfer its rights under a settlement to M/s Verka Investments Pvt. Ltd., New Delhi at a total consideration of Rs.52 crores.

7. During the relevant period the company was in dire need of funds for liquidation of borrowings as well as an important and crucial payment to HUDCO towards Ansal Plaza project. Therefore, the proposed arrangement was planned from tax point of view in order to defer the tax liability and as a part of tax planning exercise, the total consideration was broken into two parts and received under different agreements as mentioned hereunder:-

(a) Rs.42 Crores as consideration to transfer, assign and sell all the rights of APIL to the buyers under agreement dated 1.4.1995.

(b) Rs.10 Crores were received under three separate agreements as booking amounts to purchase residential flats in APIL's residential project "Celebrity Homes".

I. AGREEMENT FOR RS.42 CRORES

a) Out of total consideration of Rs.42 Crores, APIL had already received an amount of Rs.40 Crores in the year 1995-96. The remaining amount of Rs.2 Crores was also received in ABL as interest free inter corporate deposit to be recovered and paid to APIL at a later date.

b) The said amount of Rs.40 Crores as per the terms of the agreement was received as security deposit for due and timely performance of the obligations of buyer, which amounts to 95.23% of the total consideration.

c) The development and construction works on the said property is to be completed within a period of 7 years, failing which APIL is entitled to forfeit the entire amount of security deposit as also to recover the remaining Rs.2 Crores which, in fact, has already been received in ABL.

d) The mere reading of the terms of this agreement clearly indicates and establishes that the whole purpose for going in for this is to defer the income tax liability. After having received 95.23% of the total consideration, which is non-refundable whether or not the building is completed, the total amount is taxable in the year in which it was received.

e) Under these agreements, there is no clause by virtue of which M/s Verka Investments (P) Ltd., can make claim of refund of any part of consideration paid under the agreements. Liability of development and construction of project is of M/s Verka Investments Pvt. Ltd. and the company has no liability whatsoever in this regard.

f) In the income tax assessments the entire amount of Rs.40 Crores is being carried over year after year as non-refundable security deposit under this agreement. The assessing officers have not gone into the details of the transaction as also the

agreement in detail otherwise the total amount can be liable for income tax even in the assessment year 1995-96 and if it so happens, the income tax liability including penalty and interest on this amount would be much more than Rs.42 Crores i.e. the total consideration under this agreement.

II. AGREEMENT FOR RS.10 CRORES

a) An advance aggregating to Rs.I0 Crores was received under three agreements (Rs.4 Crores, Rs.3 Crores and Rs.3 Crores) as booking amounts against the sale in total of 108 residential apartments in the proposed Celebrity Homes project of APIL. The total consideration was fixed at Rs.39 Crores to be received in phased manner over a period of 24 months from the date of signing of agreement. The first instalment of 20% was due within two months from the date of agreement.

b) As per the terms of agreement if the buyer fails to make payments as per agreed schedule, the agreement is to be cancelled and determined and the entire booking amounts is to be forfeited. Accordingly, as no payment was received subsequently to the date of booking, the entire amount was forfeited in June, 1995 as conveyed to the buyers vide our three separate letters.

c) The buyer had also confirmed and agreed for forfeiture of booking amounts by APIL as conveyed to us vide its three separate letters of 9th Sept., 1995.

d) Therefore the entire amount of Rs.10 Crores was the income of APIL for the year 1995-96, which could not be accounted for in the books and has actually been accounted for in the year 1998-99.

e) If this amount is treated as taxable income of 1995-96 i.e., the year in which it was forfeited, the likely incidence of income tax on this amount would be at least Rs.15 Cr. including the interest and penalties which are payable as per the provisions of Income Tax Act.

8. In light of above submissions, the overall income tax liability could be more than Rs.52 Cr. i.e., the total consideration for sale and transfer of APIL's rights if the assessing officers go into the colourable tax planning device by lifting corporate veil to find out the exact and true of transaction. However, if the income is managed to get assessed in the year in which the same is accounted for, which is quite unlikely, specially in the case of the amount of Rs.10 Cr. received under the second agreement, the tax liability may even be lower.

Keeping in view the fairness and reasonableness, our tax department has assessed the minimum tax liability at Rs.25 Cr. which is 50% of the total consideration.

CONCLUSION

While working out the networth of APIL, full amount of Rs.52 Cr. Has been taken as profit in the books and no tax has been paid against it. Some tax provision on this huge income has to be provided. This is an income which has already accrued and is different from those incomes which are projected and yet to accrue. Therefore, the provision of tax be made. The question is what amount?

The company's tax department has therefore provided Rs.25 Cr. as fair and reasonable tax liability while working out the networth of APIL. This is being disputed. It is being suggested that to defer the provision of this liability and whatever amount becomes payable ultimately should be shared equally by all the three. This uncertainty of future and the possibility of recovering the amounts in future from AHCL and ABL is too much of a risk for APIL. APIL does not want to leave anything for the future but want to decide everything now and close the chapter forever. The provisions of Rs.25 Cr. towards tax liability is absolute minimum."

4. The Revenue's position in the ensuing block assessment proceedings was that the 'Note' stated that the proposed arrangement was planned for tax

point of view only to defer the tax liability. Out of total consideration of ₹ 42 Crores, the assessee had already received an amount of ₹ 40 Crores in the year 1995-96 and the remaining amount of ₹ 2 Crores was also received in M/s Ansal Buildwell Ltd. as interest free inter corporate deposit to be paid to the assessee at a later date. Under this agreement, there was no clause by virtue of which M/s VIPL could claim refund of any part of the consideration paid under the agreements. The liability of development and construction of the project was entirely of M/s VIPL and the assessee had no liability whatsoever in this regard.

5. The AO after carrying out necessary investigation and on consideration of the interpretation of 'Note' recovered during the course of search also recorded statement of Sh. Yatinder Singh, Director of M/s VIPL, Sh. Rakesh Mahajan of M/s Mahajan Industries Pvt Ltd., statement of Sh. Suresh Ansal, statement of Sh. Gopal Ansal and after consideration of all the above facts and the interpretation of the 'Note' issued questionnaire dated 11.10.2001 alongwith the notice under section 142(1) to the assessee. Sh. Rajeev Wadhwa, Sh. Rakesh Mahajan and Sh. Yatindra Singh were also subjected to cross examination by the assessee. The assessee filed detailed replies dated 05.11.2001, 16.01.2002 and 19.02.2002 before the AO explaining the matter in detail. The AO, however, did not agree with the submission of the assessee and made the addition of ₹ 42 Crores in the hands of the assessee in the block assessment.

6. The CIT(A), upon the grievance by the assessee considered the submissions as well as the documentary materials on record which included the agreement between the assessee and the VIPL on the one hand and the

note discovered during the search proceedings. The appellate Commissioner set aside the amount of ₹ 42 crores brought to tax, holding firstly that since VIPL's letter dated 25.09.1995 clearly stated that the cheque for ₹ 2 crores was in mutually agreed terms, and that the said amount was received as earnest money against the present and future projects, (which conformed to the note discovered during the search proceeding and given that on the same date, the last cheque was also issued to the appellant,) the intention of the parties was to show the amount of ₹2 crores as part of sale consideration. It was held that the said ₹ 42 crores then passed to the assessee, which could not be claim it to be a security deposit. It was secondly held that the right to refund relied upon by the assessee is an aspect the tax effect of which is to be considered only when the contingency, i.e. the refund arises; thirdly that the VIPL treated the amount of ₹42 crores as a consideration for acquisition of development rights and as stock in trade in its books and not as an advance. These clearly revealed the intention of the parties which was to treat the amounts as sale consideration. The statement of VIPL's director too was taken into account in this regard. It was further held that the liability of obtaining necessary sanctions(for development and construction) was that of VIPL as was the case with discharge certificate – which was the liability of Mahajan, towards VIPL. Therefore, as far as the assessee was concerned, that sale transaction was complete and it was not entitled to postpone showing accrual of income on account of sale of development rights in its books of accounts. It was held that the assessee's argument that it had no right to forfeit the amount was immaterial since the consideration had passed into its hands and the receipt was not in the nature of advance. The assessee was successful in persuading the ITAT to accept its contentions. The ITAT's

reasoning in its impugned judgment discloses that its decision was weighed considerably by the phraseology of Section 158B(b) which defined what was "undisclosed income". It held that since the assessee had disclosed in the first instance in the original returns all the details to the department, the discovery of note *per se* did not make any difference and that the addition could not be made on the ground that it was seized in the search proceedings. The ITAT further held that the appellate Commissioner's reliance on ₹ 2 crores paid to M/s. Ansal Buildwell Ltd. overlooked that the assessee did not receive the amount. The ITAT noticed that contrary to the facts found, the AO had held that ₹ 2 crores was paid on 25.09.1995 by VIPL to M/s. Ansal Buildwell Ltd. and therefore, the appellate Commissioner's findings were based on inaccurate facts. It further held that the Revenue cannot interpret a written agreement between the third parties in its own manner. The Tribunal placed strong reliance on the fact that the assessee had shown security deposit for regular assessment in 1996-97 and that during the relevant time the AO failed to discharge the burden that was upon the Revenue. The reasoning of CIT(A) that VIPL had shown that the amount, i.e. security deposit was stock in trade was also faulted. The ITAT questioned the reasoning saying that even that amount became subject matter of arbitration proceedings and that the liability was not an ascertained one. Furthermore, it was held that VIPL's books were not under the control of the assessee and that it was only the assessee's books of account that were relevant. It was also held that the culmination of arbitration proceedings was the point of time when the assessee became entitled to appropriate the amounts it had kept with it as security deposit.

7. Upon appeal, the ITAT upset the findings of the AO and the CIT (A), holding that fresh material justifying addition in a block assessment was not seized. The ITAT relied on some of its previous orders. It also held that the note could not be relied on having regard to the fact that the agreement, as well as the sum of ₹ 42 was disclosed during the course of regular assessment proceedings and the assessee was entitled to treat the amount as a deposit, in accordance with the express terms of the agreement.

8. The Revenue contends that a plain look at the agreement between the parties dated 01.04.1995 clearly showed that the assessee had sold all rights over the property and received ₹ 42 crores. The division of the said amount – a small part (₹ 2 crores which was payable to M/s. Ansal Buildwell Ltd.) was a matter of detail and at the convenience of the assessee. The terms of the agreement clearly showed that the intention of the parties was to convey the property and all manner of rights and interests that the assessee possessed, to VIPL. The consideration agreed and the method of payment, i.e. ₹ 40 crores on specified dates or at specified intervals was also known. Furthermore, though styled as security deposit and ostensibly placing the burden on VIPL to carry on building activity and obtain for that purpose all necessary sanctions and clearances, the assessee did not and could not exercise any control over the manner of execution of the obligation, if any. It was emphasized that the time given or agreed to by the parties for the utilization of development rights and construction was 7 years. Further the assessee had no control over the manner of discharge of information in relation to such activities. It could not impose in any manner whatsoever its views or decision nor could it deduct any penalty or monetary damages for

the performance of such so-called obligations. Plainly, the so-called security deposit was nothing more than sale consideration but treated for the sake of assessee's convenience as a deposit.

9. It was submitted that in the course of the search and seizure proceedings, the note shed a different light upon the nature of the transaction which necessitated further enquiry. The notice and inferences that the AO drew were based upon other corroborative matters such as the statement made on behalf of the VIPL and furthermore on an examination of its books of accounts which clearly showed that the amount was treated as part of the stock in trade which meant that nearly or atleast all meaningful rights and interests had passed to it. In these circumstances, the Revenue was entitled to treat the inference that the note showed new light which entitled it to bring to tax the amount of ₹42 crores.

10. Mr. M.S. Syali, learned senior counsel for the assessee urged that this Court should not interfere with the final findings of fact rendered by the ITAT which is the last forum or tribunal of fact. It is argued that the terms of the agreement between the parties were interpreted by the Revenue consistently in all the years, especially in the year the receipt had to be returned. Urging that ₹2 crores was paid to another entity and not to the appellant and that it was linked to handing over of possession, learned senior counsel emphasized that consistent with the terms of the agreement, the entire possession had not been handed over. The parties to the agreement envisioned performance of certain obligations by the VIPL. It was to control and check the performance of these obligations which led them to agree to treat the amount as a security deposit and not as a consideration. Learned

counsel stressed upon the fact that the event of sale would be the point of time when the assessee, on a future date, upon satisfaction, state that the contract had been performed; at that point of time, the amount should be justifiably appropriated and then treated as consideration received. Till then, its treatment in the books of accounts and even in the balance-sheet is only a deposit, was justified.

11. It was highlighted that the impugned order cannot be termed as erroneous because the ITAT preferred to interpret the document (i.e. the agreement) differently and say that the real nature of the amount received was consideration, ignoring the plain terms of the document, which revealed the intention of the parties unambiguously, to treat the amount as a security deposit, to be appropriated on a future date. It was also emphasized that as a matter of fact, the said appropriation itself became contentious and was subject matter of a reference to arbitration.

12. The material terms of the agreement which are part of the record were in fact reproduced by the AO, which read as follows:

> *This agreement is made at New Delhi on this 1st day of April, 1995 between:*
>
> *M/s. Ansal Properties &Industries Ltd,* 115 *Ansal Bhawan,* 16 *KG Marg, New Delhi-110001, through Shri* G *R Gogia who has been authorised by the Board of Directors vide resolution passed in its meeting held on 21st May,* 1993 *hereinafter referred to as the first party (which expression shall be deemed to mean and include its successor-in-title/office, nominees and assigns) of the First Part:*
>
> *AND*

M/s. Verka Investment Pvt. Ltd; A-1/71A, Panchsheel Enclave, New Delhi through Shri Yatinder Singh, Director, who has been authorised by the Board of Director vide resolution passed in its meeting held on 31st March 1995 *hereinafter referred to as the Second Party (which expression shall be deemed to mean and include its successor-in-title/office, nominees and assigns) of the Second Part:*

WHEREAS the First Party is holding development rights for erecting a *multi-storeyed commercial building as permissible on the plot of land known as and bearing NO.*27 *K* G *Marg, New Delhi (hereinafter referred to as the said plot) under agreement dated 6th July* 1977 *(hereinafter referred to as the said agreement) with Shri Anand Nath and Others (hereinafter referred to as the Principal Owners);*

AND WHEREAS under the terms of the said agreement the First Party is entitled to sixty five percent (65%) *and the Principal Owners* or *their nominees/successors are entitled to thirty five percent* (35%) *of the total builtup/saleable and other areas including basements and parking spaces;*

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AND WHEREAS the Said Suit of specific performance was decreed by the Delhi High Court in favour of the First Party on 17.09.1991 vide order dated 17th September, 1991 *against which an appeal was filed by the Present Owner which has been pending since October,* 1991 *before the Hon'ble Delhi High Court;*

AND WHEREAS on account of prolonged litigation and uncertainties of result, the First Party and the Present Owner have arrived at an out of Court settlement (hereinafter referred to as *the Settlement) which is yet to be made* a *rule of the Court of competent jurisdiction with each other by virtue of which the First Party shall carry out construction and development on the Said Plot and shall be entitled to forty percent (40%) of areas in place of sixty five percent (65%), and the Present Owner*

shall be entitled to sixty percent (60%) in place of thirty five percent (35%) *of areas subject to other terms of the Settlement relating to sharing of various costs and other obligation of the parties thereto;*

xxxxxxxxxxx *xxxxxxxxxxxx* *xxxxxxxxx*

NOW THIS AGREEMENT WITNESSETH* AS *UNDER

I. That the Second Party agrees to carry out development and construction etc. upon the Said Plot bearing No. 27 *Kasturba Gandhi Marg, New Delhi measuring approximately* 1.185 *acres of* a *multi storeyed commercial building as permissible at the expenses, risks and liabilities proportionate to its share and the share of the Present Owner and in terms of the Settlement.*

2. That the First Party also agrees to transfer, assign and sell to the Second Party its entire forty percent (40%) share of the total builtup/ saleable areas including basements and parking spaces in the building to be erected upon the Said Plot. Currently, FAR permissible on the Said Plot is One hundred and fifty (150).

3. That the Second Party and the Present Owner shall be responsible for obtaining necessary sanctions including the passing of the building plans, obtaining of terms of conversion from the L&DO and exemptions under the ULCR Act etc. and all costs or outgoings for obtaining any sanction shall be met by the Second Party and the Present Owner in proportion to their respective share in the proposed building on the Said Plot.

4. That the first party is in possession of one room and a *verandah in the existing building on the said plot and these shall be handed over to the second party on receipt of payment under Clause* 9 *(iv). The possession of the balance of the Said Plot and the structures thereon shall be obtained by the Second*

' party from the Present Owner under the terms of the Settlement.

5. That the development and construction work on the Said Plot shall be completed by the Second Party within a *maximum period of seven years of the grant of necessary sanctions from the competent authorities and obtaining the possession of the remaining portion of the said plot from the present owner, whichever takes place later.*

6. That the Second Party, at the proportionate cost to be borne between it and the Present Owner, shall be liable and responsible for timely completion and development of the project.

7. That the consideration amount payable by the Second Party to the First Party for permitting development and construction on the Said Plot as *stipulated in Clause* 1 *above and for transfer* as *per Clause 2 above of the First Party's forty percent (40%) share of areas including basements, parking spaces* as *may be sanctioned is fixed at rupees four hundred twenty million onl (Rs.420,000,000,00) which shall become due and payable* as *per clauses* 10 *infra. It is again clarified that the Second Party shall be liable and responsible for construction and completion of the project at the cost and expenses, including any out-going, levies, charges of whatever name known as may be claimed by the L&DO, the Authority under the ULCR Act or any other Authorities or agencies in connection with the grant of sanctions or otherwise to be shared between the Second Party and the Present Owner in proportion· to their respective share in the proposed building and other open/covered spaces, basements, etc.*

9. That the Second Party by way of security for due, proper and timely performance of *the obligations under this agreement undertakes to make* a *deposit of rupees four hundred million (Rs. 400,000,000.00) as follows:*

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10. That the consideration as mentioned in clause 7 *above shall become due and payable from the Second Party to the First Party only on construction and completion* of *the project as per covenants hereto and on their obtaining from the Present Owner* & *Certificate for satisfactory discharge of all the liabilities and obligations undertaken by the First Party to Present Owner under the Settlement Agreement and after the areas falling to the share of the Present Owner are handed over to them. Security deposit as indicated in clause NO.-9 above at the discretion of the Second Party shall them be appropriated by the First Party towards sale consideration of rupees four hundred twenty million (Rs.420,000,000) due under this agreement and the balance sale consideration shall be paid by the Second Party to the First Party within* a *period of thirty* (3) *business days thereof.*

11. That in the event of breach of the Second Party under this Agreement the Party of the First Part shall have only the right to recover its consideration specified under Clause 7 *mentioned hereof.*

12. That the Second Party shall be responsible to hand over to the Present Owner sixty percent (60%) of the total built-up saleable areas including basement and parking spaces allocated to the share of the Present Owner under the terms of the Settlement.

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14. Timely payment of the sale consideration and the security deposit as per clause 9 *and 10 above forms the essence of the terms of the contract."*

13. The search and seizure proceedings took place on 10.02.2000; the block assessments notice under Section 158BC was issued on 22.01.2001 and the return was filed on 13.03.2001 whereby the assessee stated that its undisclosed income was NIL. The search proceedings had unearthed a

note,[termed confidential], it importantly stated that the terms of the agreement indicated that the purpose for drawing it up was to defer income tax liability and that after receiving 95.23% of the total consideration, it was not refundable irrespective of completion of building, the amount was to be taxable in the year it was received - *"the total amount is taxable in the year in which it was received"*. The note also stated that there was no condition enabling VIPL to claim refund of any part of consideration and that it was fully responsible for development and construction of the project. The note, however, observed that the assessee had no liability whatsoever of carrying out construction. It further stated that the AO had not gone into the details of transaction as also the agreement and *"otherwise the total amount can be liable for income tax even in the assessment year 1995-96 and if it so happens, the income tax liability including penalty and interest on this amount would be much more than ₹ 42 crores, i.e. the total consideration under this agreement"*. After noting these, it was further stated that the tax department had provisioned, i.e. *"provided ₹ 25 Cr. as fair and reasonable tax liability while working out the net worth of APIL. This is being disputed. It is being suggested that to defer the provision of this this liability and whatever amount become payable ultimately should be shared equally by all the three".* This *uncertainty of future from AHCL and ABL is too much of a risk for APIL……The provisons of ₹ 25 Cr. towards tax liability is absolute minimum.*"

14. Post search investigation and during the course of proceedings, the statements of directors of VIPL was recorded – in the course of survey proceedings under Section 133A. In the course of statement, it was

categorically admitted that sale consideration paid to the assessee was ₹ 42 crores. It was further stated that the assessee had no stake in the property as all its rights were acquired, in the sale transaction by the VIPL through the agreement of 01.04.1995. VIPL asserted that it became the owner of the property and therefore, entitled to book and sell 40% of total built-up/saleable area. That was conveyed.

15. This Court notices that the AO found that the assessee was in dire need of funds to liquidate its borrowing as well as make important payments towards the ongoing projects. The proposed arrangement was, therefore, planned from tax point of view to defer tax liability that was otherwise to accrue. It was noticed that the assessee had received ₹ 40 crores in 1995-96 and the balance was received by M/s. Ansal Buildwell Ltd. as interest free inter corporate deposit to be paid to APIL at a later date. This Court notices that the development and construction work in terms of the agreement was to be completed in a 7 year period failing which the assessee was at liberty to forfeit the amount. There was no term in the agreement which entitled the assessee to exercise any manner of control over the performance of this obligation – spelt out in clause 7. Therefore, the inference drawn by the AO and confirmed by the CIT(A) that the terms of the deposit as one for security was merely a camouflage or devise to postpone tax liability that was plainly staring in the assessee's face. This was also demonstrated by the fact that VIPL was under no circumstances entitled to claim refund of any part of the agreement which *inter alia* aimed over all development rights and the consequential rights to construct, let and collect consideration for the built-up space. The assessee could not claim any share in that nor control method

or manner of execution. The device was created, i.e. of security deposit, to enable the assessee to successfully convey and postpone its tax liability which otherwise accrued in the order of execution in successive assessment years but for the seizure of notes which let the cat out of the bag, as it were. The Revenue would have continued to remain in the dark and eventually the assessee would not have paid any tax towards the amount which were plainly received as consideration. The note, in fact, admitted the correct position that the tax liability had to be postponed for business reasons.

16. This court also notices that the AO found that M/s. Ansal Buildwell Ltd. in its reply during the assessment proceeding stated that ₹2 crores was received as earnest money against the present and future projects. The assessee's contention was that this was received by it as interest free inter corporate deposit to be refunded and paid to APIL at later date. Given these contradictory statements, the AO proceeded to lift the veil and discern the true nature of the transaction and hold that even the ₹2 crores was nothing but part of the overall consideration agreed upon by the parties. This Court is of the opinion that this finding is in conformity with law. This was also supported by the fact that VIPL showed the entire sum of ₹ 42 crores as stock in trade thereby confirming the interpretation that the real intention was that the entire sum was towards the consideration and not to be treated as part security deposit and the other as something else. In fact the said amount of ₹ 2 cores was specifically mentioned even in clause 10 of the agreement.

17. The objective of empowering the Revenue to bring the tax amounts as undisclosed income under Section 158 BA is based on the sole consideration

that if in the course of search under Section132, the material throwing new light on otherwise concluded assessments are disclosed and seized, the concluded assessment of the previous years can legitimately be reopened and that inferences can be justly drawn on the basis of such materials or otherwise of undisclosed income and the position of quantum of such income would be the subject matter of block assessment. The courts have consistently ruled that to enable the Revenue to make block assessments, the search must be based on authentic materials and must be by a designated officer having sufficient responsibility since a search and seizure implicates adversely the privacy of the individual or a concern. Once concluded the search proceedings have to culminate in a block assessment within a defined period of time.

18. One of the most fundamental bases amongst the other important considerations is that if new materials or documents come to light, the assessee's income can be revisited and additional amounts brought to tax. Having regard to these objectives, and the mandate of Section 158B(b), the sum of ₹42 lakhs brought to tax by the AO in the entire circumstances of the case was reasonable given the materials seized, the survey conducted and the statements recorded during the course of assessment proceedings. All these clearly reveal that the security deposit was a mere camouflage or a devise to postpone tax liability towards an uncertain date, at the convenience of the assessee. Clearly, the amount received pursuant to the agreement and the conveyances executed thereafter, showed that the intent of the parties was to treat it as a final consideration payable and paid *in presenti*. For these

reasons, the first question is to be answered in favor of the Revenue and against the assessee.

Re: Question No.2

19. The facts here were that during the course of search in the assessee's premises, a brown diary – Annexure A-23 was seized from the office premises of M/s. Ansal Buildwell Ltd. The assessment was that of one Vinod Tiku, AVP (Technical) of M/s. Ansal Buildwell Ltd. It contained the following note: *"Jatia (Anil Bhalla – 100 crores divided into – 70-30- for 167, 112 acres)"*.

20. The AO deduced the figure 167.112 as 167.112 acres of land in Village Tigra owned by M/s. Aadharshila Towers Pvt. Ltd (ATPL). This company was managed and controlled by Sh. S.K. Jatia. The share capital of the company was owned by the corporate entitles which held shares worth ₹6,60,000/-. The assessee entered into an agreement on 31.01.1996 for purchase of entire shareholdings of Aadharshila Towers Ltd. The total consideration was ₹ 70.2 crores. The AO was of the opinion that ₹ 70 crores for 167.112 acres mentioned in the seized diary referred to this payment. According to the statement of Sh. Tiku recorded on 16.082.000 in which he disclosed ₹ 100 crores represented the cost which included the cost of land – ₹70 crores and ₹ 30 crores was the appropriate cost of development. The cost of development was towards external and internal development charges for the entire 167.112 acres. The AO referred to enquiries made on sample basis stating that besides cheque payments, part of the consideration was in cash. The statement of M/s. Margdarshak Properties Ltd. that the total consideration was ₹6.5 lakhs per acre whereas ₹ 1.5 lakhs per acre was

received as "on money". The AO, therefore, inferred that approximately 87% was paid in cash. Consequently, he brought to tax an amount of ₹ 30 crores holding it to be cash paid.

21. In the appeal, the assessee urged that the addition was made on presumptive basis that the figure of cash "30" represented cash consideration paid outside the books. It emphasized that Section 132AA used the expression *"may be presumed."*This implied that the question of presumption would depend on circumstances of each case. The assessee complained that the expression *"divided into"* were read into the notings of Vinod Tiku. As to the truth, the veracity of these statements could not be verified. The AO's approach was contrary to the mandate of 132(4A)(2A) of the Act. It is urged that even if the statements were accepted *arguendo* that part of the consideration was paid in cash that itself did not warrant that the conclusion that beside ₹70.2 crores an amount of ₹ 30 crores was paid. The other contentions too were urged.

22. The CIT(A) noticed that the statement of Vinod Tiku was that ₹ 30 crores was an approximate figure of development split into two - external development charges for the entire area at ₹ 60 crores and the external development charges – ₹ 14 crores. It was further observed that Vinod Tiku corroborated this position in the subsequent questioning and also in an affidavit. The CIT(A) particularly relied upon the answers to question nos. 16 and 17 and held that the totality of statements showed that the license in favor of the assessee was issued in 1996 after it furnished the bank guarantee and that this explanation of Vinod Tiku on 31.07.1998 could not be appreciated as it is an afterthought. The CIT allowed the assessee's appeal

noting, therefore, that the AO alleged since that the figure *"30 represented cash payment"*– the onus of proving was upon him. Reliance on the statement *per se,* therefore, could not overcome explanation of Vinod Tiku with respect to the payment of Rs.. 30 cores towards overall development charges.

23. The ITAT which rejected the Revenue's appeal on this point held as follows:

> *"Since the diary in question was not recovered from the premises of the assessee, which is independent public limited co., therefore, no presumption under section 132(4A) could be drawn against the assessee. In the block assessment, the burden is upon the AO to prove that the particular item is undisclosed income. Admittedly, no other evidence is recovered during the course of search to prove that in fact any payment of Rs.30 crores outside the books of accounts has been made by the assessee to Sri S.K. Jatia. The AO has made addition in the case of the assessee in respect of payment of Rs.30 crores made to Sri S.K. Jatia. Even in the seized diary the narration is "Adharshila Jatia [Anil Bhalla]". Neither Sri S.K. Jatia nor Anil Bhalla were examined by the AO during the course of assessment proceedings. Therefore, we fail to understand as to how the addition could be sustained in the hands of the assessee. It appears from the above circumstances that the department has made subsequent enquiries against the assessee in order to connect the assessee with the diary in question but such things are not permitted as is held by Bombay Bench of I.T.A.T. in the case of Sundar Agencies (supra). No addition could be made in the block assessment on the basis of assumption and presumptions. Merely some material is recovered during the search, no addition could be made in the hands of the assessee on the basis of some subsequent enquiries and that too purely on assumption and presumptions. The AO observed in the assessment order while making the addition that he made enquiries from the villagers. This was the main*

reason to make up the theory of the payment made outside the books of accounts on the basis of inference drawn on estimate basis. It is an admitted case that the villagers had a dealing with M/s Aadharshila Towers Private Ltd. for selling of their land. These transactions were not at all connected with the assessee. The villagers have not made any incriminating statement against the assessee.

The inference drawn by the AO that initially M/s A TPL was owned by Sri S.K. Jatia and then subsequently was taken by the assessee by itself is no ground to draw the presumption against the assessee that since some dealing outside the books of accounts had happened between the villagers and M/s ATPL, there is no presumption that such transaction would have also happened in between ATPL and the assessee."

24. The Revenue contests the findings of the ITAT and submits that the presumption drawn in the circumstances of the case was upon analysis of materials and that AO's view was justified. It was pointed out that independent corroboration in regard to the seized diary was by way of consideration paid for acquisition of shares in Aadharshila Towers for ₹ 70 crores. The diary clearly stated that the total cost was ₹ 100 crores. The farmers who received the consideration were paid partly in cash. These corroborative materials were insufficient in income tax proceedings, on an application of principles of evidence to hold that ₹30 crores was the undisclosed cash component of the consideration.

25. This Court is of the opinion both the CIT and ITAT have rendered findings that were sound and reasonable on the question of whether the seized diary per se could in the overall circumstances of the case result in the addition of ₹ 30 crores. The assessee's explanation consistently was that ₹30 crores was towards internal and external development charges. This was an

aspect which could be easily decided by securing relevant information from the statutory authority, i.e. HUDCO who received the payments. Independent corroboration of these too could have been sought otherwise the relevant books of account could have been checked. Furthermore, the statute does not compel the Revenue to raise a presumption; even when a tax authority does so, the sole basis of an addition entirely hinging upon the interpretation of certain figures in a diary would be flawed. For these reasons, this Court is of the opinion that since the inference drawn with respect to findings are based on essentially factual materials which were analyzed by the CIT and the ITAT, there is no reason to interfere with those findings. This question is accordingly answered against the Revenue and in favor of the assessee.

Re: Question No.3

26. The addition made on this aspect was to the tune of ₹ 45,08,971 and a further addition of ₹6,35,525/- on denoting unaccounted cash reflected in the seized cash slips. The facts are that 7 slips reflecting amounts of ₹ 45.08 lakhs were seized from the wallet of Mr. Sushil Ansal. He explains that the slips pertained to APIL's cash. The statement of three employees of the company were recorded by the AO; the assessee furnished detailed explanation regarding the nature of transactions that were the subject matter of the slips; the AO disbelieved the explanation holding that there was nothing to establish a link between he assessee's cash reflected in its books with the cash slips. Therefore, he concluded that the amounts were received by Sh. Sushil Ansal outside the books of accounts. He added back these amounts. CIT(A) noted and analyzed the manual cash book which showed

on 25.01.2000 and 27.01.2000, cash balance amounts of ₹21,21,464 and ₹24,71,462/- and on 27.01.2000, ₹24,53,525/- as cash in hand. This was verified to be correct. The assessee tried to deposit ₹20 lakhs in the company's account with Laxmi Vilas Bank Limited but could not since the bank had limited/smaller chest which could not accommodate that quantity of cash. Consequently, the amount was kept in the small locker and on 29.01.2000 taken and deposited with Canara Bank, Janpath. The amount was subsequently transferred of Laxmi Vilas Bank Ltd. on 30.01.2000. This, the CIT(A) noticed was reflected in the bank statements relating to the two accounts. The CIT(A) on appeal, therefore, held that the materials on record and the explanation given by the assessee with respect to the difference in cash balances in respect of seized cash books and the computer statement on the other hand were not in any way disturbed by the statements of the employees recorded. It was, therefore, held that the assessee's explanation that there were sufficient balances in the accounts of several imprest holders and that such amounts which were reflected in the slips should be treated as explained was, therefore, accepted. However, upon the tally of the total amount, the sum of ₹ 45,08,971/- was reduced to ₹6,32,525/-.

27. The ITAT held that the assessee had explained the substantial sum of ₹19,63,375/- and ₹20 lakhs which were reflected as cash in hand in terms of company's cash book which was seized on 28.01.2000; the findings of the AO, inasmuch as they proceeded to hold that there was no evidence to link assessee with cash receipts, were set aside. The ITAT was of the opinion that apart from the bare view that the AO took, that there was no other material to substantiate the assumption that slips denoted amounts outside the cash book

in the documents which were the subject matter of assessment, it also found that the CIT(A) had reconciled all figures in the matter and deleted the part addition. The Revenue's appeal was, therefore, dismissed. The ITAT directed the AO to verify the correct figures and add the concerned amounts, even while upholding the CIT(A)'s decision.

28. This Court is of the opinion that this question pertains to pure finding of fact which concerns inferences to be drawn on the basis of material found. The CIT(A) and the ITAT felt that the amounts reflected in the seized slips were fully explained in the relevant cash balances found in the books of accounts and the bank statements of the assessee. Furthermore, the ITAT has remitted the issue with respect to verification of the extent of addition after having upheld the CIT(A)'s order. Thus, the question only is whether the sum to be added back is ₹ 6,35,525/- or something more. Given the intensely factual nature of analysis, the Court is of the opinion that there is no substantial error calling for interference. This question of law is, therefore, answered in favor of the assessee and against the Revenue.

Re: Question No.4

29. During the course of search, the documents reflected in Annexure A-2 were seized from the residence of Sh. Gopal Ansal, i.e. 2 bills for ₹ 60 lakhs and ₹32 lakhs raised by M/s. Televista Electronics Limited, Noida ("Televista" hereafter). The bills were for commission payable to facilitate sale of building measuring 2.12 acres in Sushant Lok, Gurgaon. Televista billed the assessee. The plot had been sold to M/s. Vatika Green Field Limited [hereafter "Vatika"] on 19.12.1997. The assessee claimed that it paid commission of ₹92 lakhs to Televista. The statement of Sh. Vipin

Luthra was recorded. The statement of Vatika's employee – Anil Bhalla was also recorded. Sh. Bhalla denied involvement of Televista in the deal. Sh. Luthra further mentioned that he was involved in arranging the sale of the plot. The AO took into consideration the fact that Sh. Vipin Luthra was the son-in-law of Sh. Sushil Ansal, the Chairman and Managing Director of the assessee and that the expenditure could not have been allowed under Section 40A(2). The CIT(A) however disagreed and set aside the AO's findings noting that the consideration paid for sale of the plot was ₹ 23 crores and that ₹ 92 lakhs was the commission commensurate with the fair market value service rendered by Televista. The CIT noted an affidavit of Sh. Bhalla dated 15.02.2002 where he mentioned about the role of Vipin Luthra and Televista and also had added that he assumed that no commission was payable by the assessee. After consideration of all these circumstances, in the Revenue's appeal, the ITAT further held that the amount could not be brought to tax as it was claimed as commission payable in the original returns and it was so claimed consistently by the assessee even in the block assessment.

30. This Court is of the opinion that the facts clearly indicate that ₹ 92 lakhs was claimed as commission payable to Televista and reflected duly in the documents and books filed along with the returns. These was subjected to normal assessment at the time when they were reported. The block assessment did not bring out any fresh material except the invoices for the AO to deduce any further undisclosed income. In these circumstances, the addition made by the AO was, in the opinion of this Court, correctly set aside by the lower appellate authorities. This question of law too is answered against the Revenue and in favor of the assessee.

Re: Question No.5

31. This question of law, i.e. with respect unreasonableness and perversity as a general one and pertains to the evidence of ITAT as a whole. The court notices that barring the first question, on which the findings on the impugned judgment are plainly erroneous, in law, there is sufficient factual basis for the findings rendered in the other questions that were specifically framed as questions of law. This question, therefore, is answered party in Revenue's favor as far as Question no.1 is concerned.

32. As regards of the impugned order, the court is of the opinion that there is no perversity or unreasonableness in the other findings. In view of the foregoing discussion and since the Revenue has succeeded as regards Question of law No.1 and also having regard to the fact that Question no. 3 was partly remitted by the ITAT, this court holds that additions have to be made in terms of the answers to Question No.1 and the remand, directed by the ITAT (limited to Question No.3), is to be worked out. The appeal filed by the Revenue is accordingly partly allowed. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

SEPTEMBER 18, 2018