Shewalkar Developers (P) Ltd. Vs. Union of India (Uoi) and ors.

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SooperKanoon Citation : sooperkanoon.com/369228

Court : Mumbai

Decided On : Aug-07-2008

Reported in : [2010]321ITR318(Bom)

Judge : Anoop V. Mohta and ;C.L. Pangarkar, JJ.

Appellant : Shewalkar Developers (P) Ltd.

Respondent : Union of India (Uoi) and ors.

Disposition : Petition allowed in favour of the assessee

Judgement :

Anoop V. Mohta, J.

1. The petitioner has challenged an order dated 23-2-1993 passed under Section 269UD(1) of the Income Tax Act, 1961 (For short 'Act') and an order under Section 269UE(2) of the Act, dated 4-3-1993, thereby holding that the apparent consideration shown by transferor/transferee in Form No. 37-1 of the IT Act has been grossly understated and therefore, subjected the said property for pre-emptive protection at the consideration of Rs. 20,67,500 (-) Rs. 1,07,043 = 19,60,456 and, therefore, directed the transferee to handover the possession. The petitioner (transferee) entered into an agreement of development and sell with one Shri Vikramsinha Bisen and five others (transferors) to transfer the land admeasuring 16,540 sq. ft in Khasra No. 55, Mouja Ajni PSK 9, Wardha Road,

Nagpur, for consideration of Rs. 20,67,500 i.e. @ Rs. 125 per sq. ft. The property mentioned in the agreement was sold @ Rs. 150 per sq. ft., however, the consideration was agreed to be paid @ Rs. 119 per sq. ft. i.e. at 26 per cent less than the market rate as observed in the order dated 23-12-1993.

2. As the said property was purchased by the Appropriate Authority by order dated 29-12-1989 under Section 269UD(1) of the Act, the petitioner had filed writ petition which was allowed by remanding the matter back for fresh hearing. The matter was heard accordingly. As per the contentions based upon the material on record, the estimated cost of compound wall, development charges, are to be borne by the transferee moreover out of the total area of land an area of 1250 sq. ft. is to be retained for approach road for common use of both the parties. Considering transferors right for the use to the extent of 50 per cent, the burden on this account on the transferee works out to Rs. 78,125. The total expenditure mentioned above, works out at Rs. 4,56,109 and same is to be added back to the apparent consideration as per the provision of Section 269UA(1)(i) of the Act. The property was agreed to be sold @ Rs. 125per sq. ft. which is the prevailing market rate of the property. The transferee relied upon one sale instance, (sale instance mentioned hereinabove). The said property was sold @ Rs. 150 per sq. ft. It is stated that this property has better location due to fact that it is adjoining to Shri Sai Baba Mandir and has great religious sanctity whereas property under consideration is situated next to big nullah. Hence, these two properties cannot be compared.

3. As noted, there was nothing mentioned in the show-cause notice dated 30-12-1992 issued by respondent authority with regard to the sale transactions or the reason for taking decision to show-cause as to why the property should not be purchased except calling the petitioner for hearing. Therefore, there was no material before the Authority except the sale instances relied upon by the petitioner, which was agreed to be sold at Rs. 150 per sq. ft. on 5-4-1989 whereas the property under consideration was agreed to be sold on 2-10-1989 (c) Rs. 125 sq. ft. The sale instance so relied upon by the Department was, in fact, the instance relied upon by the petitioner. The terms and conditions of both these agreements apart from location of the property, as the property of sale instance

has better location as it was adjoining to Shri Saibaba temple and has a great religious sanctity. The property involved in the present case, however, is situated next to a big nullah. Apart from this, as noted above, the total expenditure as mentioned above works out near about to Rs. 4,50,000. The same needs to be added back to the apparent consideration. In this background, the agreed rate of Rs. 125 per sq. ft., which is prevailing market rate of the property, cannot be termed as undervalued or understated. Respondent Nos. 1 and 2 in its return dated 3-8-1993 contended that there is undervaluation of the property by 16.66 per cent more and not at 26 per cent less than the market rate as recorded in the order dated 23-2-1993.

4. The Division Bench of this Court in Writ Petn. No. 715 of 1993, Dr. Balwantrao Rangrao Akre and Ors. v. Appropriate Authority, dated 17-11-1994 held that the difference in the fair market value of the property should be 15 per cent or more. In the present case and considering the terms and conditions of the agreement, with regard to the estimated cost of the compound walls, development charges are to be borne out by the transferee; area of 1,250 sq. ft. is to be retained for approach road for common use of both the parties; burden on this count as noted work out to be Rs. 78,175 and the total expenses in this background work out to Rs. 4,50,000 approx. just cannot be overlooked while considering Section 269UA(1) of the Act. It is difficult to dissect and read separately this part of agreement, which is definitely interlinked and connected to decide the term 'apparent consideration' of the specified agreement. Thus, the additional cost to be borne by the purchaser works out to Rs. 28 per sq. ft. and, therefore, total consideration payable per square feet works out to Rs. 147 i.e. Rs. 119 + Rs. 28. This amount is, therefore, quite reasonable in comparison with the rate of Rs. 150 per sq. ft. as considered to be fair market value by the Appropriate Authority. It is also to be noted that the details about co-ownership was also mentioned and reflected in the agreement for development and sale with purchaser including the consideration to be received by each one of that and accordingly mentioned in the Form No. 37-I submitted to the Appropriate Authority. In the show-cause notice, as already noted, there was no detail or reason given with regard to the undervaluation of the property. In the present case, therefore, without any material with the Department, based upon the sale instance given by the petitioner, they proceeded and passed the order as

noted above. In the present case, the valuation difference is about 16.66 per cent though, above 15 per cent but considering the valuation of Rs. 4,50,000 as recorded above, we are of the view that it could not be termed as understated or undervalued for the purpose of relevant provisions of this chapter under the Act. C.B. Gautam v. Union of India and Ors. : [1993]199ITR530(SC) .

The Division Bench of this Court in Dr. Balwantrao Akre (supra) has allowed the petition also on the ground that there was no material/reason mentioned with regard to the undervaluation in the show-cause notice by rejecting the case of the Department to remand the matter for fresh enquiry.

5. It is always necessary to consider the terms and conditions of such an agreement also while forming any opinion based upon the return/agreement for sale as filed in Form No. 37-I of the Act. All the terms and conditions specified in the agreement need to be taken into account in totality while deciding 'apparent consideration'. CIT v. Smt Vimlaben Bhagwandas Patel : [1979]118ITR134(Guj) and . v. CIT : [1986]162ITR693(Bom) .

6. In this background, we are of the view that the impugned orders passed by the Appropriate Authority are illegal and invalid as were passed on the basis of a rate determined wrongly. The comparative transaction was not considered by the Appropriate Authority properly. There is no material and/or decision and/or instances placed on record and/or brought on record to determine a 'fair market value' and to arrive at such a conclusion. The comparison of incomparable properties is impermissible Mehta Mody & Co. v. Appropriate Authority and Ors. : 2009(1)BomCR350 .

7. The Appropriate Authority failed to determine the fair market value with reasons. The Department has failed to specify and to discharge its onus of establishing that the undervaluation is with a view to evade taxes. Mrs. Amarjit Thapar and Ors. v. S.K. Laul, Chief Engineer and Ors. : [2008]298ITR336(Bom) and Kishor Tulsidas Choksi and Ors. v. Appropriate Authority and Anr. : [2008]298ITR228(Bom) .

8. In the result, the writ petition is allowed. The impugned orders of the Appropriate Authority are quashed and set aside. Rule is made absolute accordingly. No order

as to costs.