

D.S. Builders Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Mar-30-1988

Reported in : (1989)28ITD466(Delhi)

Judge : G Krishnamurthy, V Elhence

Appellant : D.S. Builders

Respondent : inspecting Assistant

Judgement :

1. This acquisition appeal has been filed by the transferee under Section 269C of the Income-tax Act, 1961. It arises out of the order dated 1-4-1987 of acquisition passed by the Competent Authority under Section 269F.2. The subject-matter of acquisition is free-hold plot No. S. 147, Greater Kailash-II, New Delhi measuring 298 sq. yards (249.16 sq.

metres). The transferor is Shri Kewal Krishan Sharma whereas the transferee is M/s. D.S. Builders, a firm at A-2/140, Safdarjung Enclave, New Delhi. The transfer took place on 3-2-1986 by means of a registered sale-deed. The apparent consideration was Rs. 9 lakhs. The transfer took place in pursuance of registered agreement to sell dated 13-11-1985. The Competent Authority initiated acquisition proceedings after recording reasons on 13-10-1986. The Competent Authority had made reference to the Departmental Valuation Officer, who vide his report dated 16-6-1986, determined the fair market value of this plot at Rs. 3.12 lakhs i.e. more than 36 per cent of the apparent consideration.

The acquisition proceedings were initiated after going through Form 37G- and this report of the Valuation Officer. The Competent Authority has mentioned in the impugned acquisition that he had reason to believe on the basis of presumptions available under Section 269C(2). He took the view that such presumptions were available to him even at the time of the initiation of the acquisition proceedings. For taking this view, reliance was placed by him on the following-decisions :-- (1) Mahavir Metal Works (P.) Ltd. v. Union of India [1974] 95 ITR 197 (Delhi) ; and (2) Sotlej Chit Fund & Financiers (P.) Ltd. v. CIT [1986] 161 ITR 174 (Punj. & Har.).

A number of objections were raised by the transferee appellant before the Competent Authority in its letters dated 12-3-1987 and 19-3-1987 which have been dealt with by the Competent Authority. He held that the plot in question was situated on 60 ft. wide main road and that in view of its ideal location its sale price was bound to be more as compared to sale prices of other plots of land in the same locality. He also observed that the plot in question is no doubt about 1 km. away from the market and is on one side of the locality but that these facts do not reduce its market value vis-a-vis plot No. S-228, Greater Kailash-II which is only 15 plots away from the plot in question. He also observed that if the Competent Authority had not passed acquisition orders in respect of properties mentioned at S1. Nos. 1 and 6 i.e. Section 374 and Section 462, it was not because the transfers were at fair market values but only because certain relevant uncolourable and untainted sale transactions escaped his notice and that if on suppression of real consideration some transferee had gone undetected or unpunished, it would be no ground for allowing another such instance to go unpunished. For taking this view reliance was placed by him on the decision of the Hon'ble Karnataka High Court in the case of IAC v. Laxmichand [1986] 159 ITR 730. He held that the Valuation Officer had rightly relied upon the instances which were comparable and representative of the fair market value. He also referred to the sale instances of plot No. S-18, Section 256, Section 332 and Section 199, Greater Kailash-II as indicative of the fair market value of the plot in question. He, therefore, took the view that the fair market value of the plot in question as on 13th November, 1985 was Rs. 12,32,000 by adopting a land rate of Rs. 4,945 per sq. mtr. He, therefore, held that the sale consideration had not been truly stated in the instrument of transfer. He further held that no evidence had been adduced either

on behalf of the transferor or on behalf of the transferee that the understatement of the consideration in the instrument of the transfer was not with the object of facilitating the concealment of the income by the transferor or concealment of the assets which have not been or which ought to be disclosed by the transferee for the purposes of the Income-tax Act, 1961. He also held that the consideration of the transfer as agreed to between the parties had not been truly stated in the instrument of the transfer with the object of:-- (i) facilitating the reduction or evasion of the liability of the transferor to pay tax under the Income-tax Act, 1961 in respect of the income arising out of the transfer.

(ii) facilitating the concealment of the income or assets which have not been as which sought to be disclosed by the transferee for the purposes of Income-tax Act, 1961 or the Wealth-tax Act, 1958.

After obtaining¹ the prior approval dated 31-3-1987 of the CIT(A), Delhi-II, New Delhi, the Competent Authority ordered the acquisition of the plot in question under Chapter XXA of the Income-tax Act, 1961.

3. That is how the transferee has come up in appeal before us. Firstly, Dr. S. Narayanan, the learned Counsel for the transferee appellant submitted that the burden of establishing the conditions of liability under Chapter XXA was on the revenue. For this proposition, reliance was placed by him particularly on the decision of the Supreme Court in the case of K.P. Varghese v. 1TO [1981] 131ITR

597. Secondly, he submitted that the power conferred on the Competent Authority under Section 269C is a penal power; and that the proceedings thereunder are quasi-criminal in nature. Thirdly he submitted that there had to be reason to believe and relevant material for the formation of belief. He explained that "reason to believe" was different from reason to suspect and that the reasons for the formation of the belief have to have a rational connection with or relevant bearing on the formation of the belief. He further explained that rational connection postulated that there must be a direct nexus or live link between the material and the formation of the belief. Fourthly he argued that the reliance placed on the two decisions referred to in the order of the Competent Authority for availing the presumptions under Section 269C(2) even at the time of the initiation of the

acquisition of the proceedings was misplaced and that these presumptions were available only at the stage after the initiation of the acquisition proceedings. In this connection, reliance was placed by him on the following decisions :--

(1) Smt. Bani Roy Chowdhury v. Competent Authority, IAC [1978] J12 ITR 111 (Cal.) ;

(2) Jai Kumar Kankaria v. Competent Authority [1981] 130 ITR 593 (Cal.) ;

(5) Sarabhai M. Chemicals (P.) Ltd. v. P.N. Mittal, Competent Authority [1980] 126 ITR 1 (Guj.) ;

(6) Unique Associates Co-operative Housing Society Ltd. v. Union of India [1985] 152 ITR 114 (Bom.) ;

(8) Himland Exports (P.) Ltd. v. ITAT [1987] 167 ITR 478 (Delhi) ; and

(9) Copy of the order of Delhi Bench 'E' in the case of Charanjit Singh and Smt. Tajinder Kaur. [IT Acq. Case Nos. 5 and 6 (Delhi) of 1983, dated 24-6-1985].

He submitted that although the Competent Authority had relied upon the sale instances in respect of Plot Nos. S-18, S-199, S-257 and S-332 but they were not put to the appellant at all. He pointed out that reliance had been placed on behalf of the appellant before the V.O./C.A. in respect of plot Nos. M-51, S-328, S-374 S-444, S-462 and W-106 of Greater Kailash-II in which acquisition proceedings had been dropped after being initiated and therefore, they were not touched by the ratio of the decision of the Karnataka High Court in the case of Laxmichand (supra). He also cited instances of Plot Nos. S-56, S-119, S-141, S-244, E-245 and Section 304 which were not relied upon before the V.O./C.A. but in which acquisition proceedings had been dropped by the Competent Authority after being initiated. He also referred to the instances of plot Nos. S-22, S-141, S-168, S-225, S-304, S-374, S-431 and S-531 in order to show that the instances relied upon by the Competent Authority were not at all comparable. In respect of the above submissions a detailed write-up was given by the appellant. Dr.

Narayanan also argued that the Valuation Officer had erred in overlooking the following disadvantages of plot No. S-147 in question :-- (i) It is situated on the outer most road at the rear side of the colony and is at a lower level (distance of 15 plots).

(v) It is close to the piece of land belonging to Delhi Municipal Corpn. wherein debris is being dumped and further beyond are DDA flats.

(vi) Its front is comparatively larger as compared to its rear side and thus the shape being "Shermukha" it is less acceptable according to popular belief.

(vii) Its service lane is at a higher level as compared to the front road side.

The appellant also raised in para 19 of the grounds of appeal the contention that the Competent Authority had erred in initiating the proceedings under Section 269D(1) beyond the prescribed period in that the Gazette of 15th November, 1986 was not available for the public by 30th November, 1986. However, at the time of the hearing of the appeal before us, this ground was not pressed. For all these reasons Dr.

Narayanan argued that the order of the Competent Authority being arbitrary, erroneous and illegal, deserved to be quashed. On the other hand, Shri A.P. Srivastava, the learned Departmental Representative strongly relied upon the order of the Competent Authority. He also relied upon the written submissions given by the Competent Authority in support of the acquisition order.

4. We have considered the rival submissions of both the sides. The first 3 contentions raised on behalf of the appellant in regard to the nature of the acquisition proceedings and the nature of the onus on the department and the meaning and scope of the expression "reason to believe" are undisputed and the material on the record has to be examined and weighed with reference thereto. The satisfaction of the Competent Authority under Section 269C(1) for the purposes of initiation of the acquisition proceedings has to be based on relevant material. No doubt the satisfaction of the Competent Authority is a subjective satisfaction of the objective facts referred to under Section 269C(1), but the

reasons for the formation of the belief have to have a rational and direct connection with the material coming to the notice of the Competent Authority, though the question of sufficiency or adequacy of the material is not open to judicial review.

In fact the question of satisfaction of the Competent Authority arises only if facts which confer jurisdiction on him to initiate proceedings can be shown to exist. The Competent Authority would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or there is no material relevant to the belief as required by Section 269(1). The Appellate Tribunal can always examine this aspect though the declaration of the sufficiency of the reasons for the belief cannot be investigated by it. There has to be a direct nexus or a live link between the material coming to the notice of the Competent Authority and the formation of his belief. It is not any and every material however vague and indefinite or distant or remote and farfetched that would warrant the formation of the belief.

The reason for the formation of the belief requires to be held in good faith and cannot be a mere pretence. In the present case even if for the purposes of initiation of the acquisition proceedings the Competent Authority could be said to have reason to believe that the fair market value of the plot in question exceeded the apparent consideration by more than 15 per cent of such apparent consideration, on a prima facie look at the report of the Valuation Officer, the matter does not end here. He had to further have reason to believe that the consideration for such transfer had not been truly stated in the instrument of transfer with the object of-- (a) facilitating the reduction or evasion of the liability of the transferor to pay tax under the Income-tax Act, 1961 in respect of any income arising from the transfer ; or (b) facilitating the concealment of any income or any moneys or other assets which have not been or which ought to be disclosed by the transferee for the purposes of the Income-tax Act or the Wealth-tax Act.

In our view the Competent Authority was not justified in taking the view that the presumptions mentioned in Section 269C(2) could be availed of by him for this purpose even at the stage of the initiation of the acquisition proceedings. In our

view the reliance placed by him on the two decisions referred to in the acquisition order was misplaced. In the case of Mahavir Metal Works (P.) Ltd. (supra), the question involved related to the validity of Chapter XXA viSection a-vis Articles 14, 19, 31 and 39 of the Constitution of India and it did not concern itself with the validity of the initiation of the acquisition proceedings. No doubt in the case of Sulej Chit Fund & Financiers (P.) Ltd. (supra) it was held by the Hon'ble Punjab & Haryana High Court that the presumptions contained in Section 269C(2) were available during the proceedings prior to the publication of the notice initiating the proceedings for acquisition. However, the view of the jurisdictional High Court of Delhi on this point has been quite contrary, as is clear from its decisions in the cases of Arun Mehra (supra) and Himland Exports (P.) Ltd. (supra). The view of the Hon'ble Delhi High Court is thus in line with the view expressed by the Hon'ble Calcutta High Court in the cases of Smt. Bani Roy Chowdhury (supra), Subhkaran Chowdhury (supra), Madho Properties Ltd. (supra), of the Bombay High Court in the case of Unique Associates Co-operative Housing Society Ltd. (supra) and of the Hon'ble Gujarat High Court in the case of Sarabhai M. Chemicals (P.) Ltd. (supra). There is no independent finding of the Competent Authority regarding understatement. Therefore, Dr. Narayanan is right in pointing out that the mere repetition verbatim of the objects specified in Section 269C(l)(a) and (b) could not take the place of a finding. There had to be a basis or a finding for the conclusion.

5. In view of our above finding, it would be no longer necessary to examine the merits. However, since arguments were raised on merits, we may as well examine the case on merits. On merits two factor particularly need notice. The first is that the Competent Authority has upheld the valuation made by the Valuation Officer and that valuation being more than 36 per cent of the apparent consideration, he has applied the presumptions under Section 269(2) read with Section 269F(6) and Section 269C(l)(a) and

(6) and taken the view that since there was no evidence on behalf of the transferee or the transferor in rebuttal of the presumptions, the presumptions operated conclusively" against the appellant. 3 types of cases have been cited before us namely,

(1) cases in which acquisition proceedings were not initiated at all;

(2) cases in which acquisition proceedings were initiated but later on dropped ;
and

(3) cases in which acquisition proceedings were upheld. So far as the first category is concerned, we would agree with the Competent Authority entirely that the fact that acquisition proceedings were not taken with regard to other properties in the case locality, is not a relevant fact. However, Section 269P(7) provides that if the Competent Authority is not satisfied as provided under Sub-section

(6) he shall, by order in writing, declare that the property will not be acquired under Chapter XXA. In other words if the acquisition proceedings have been initiated in respect of certain properties and thereafter those proceedings were dropped, it would lead to the conclusion that the Competent Authority was not satisfied ; that the consideration for such transfer as agreed to between the parties had not been truly stated in the instrument of transfer with such object as is referred in Clause (a) or Clause (b) of Sub-section

(1) of Section 269C. Such instances would therefore, be very relevant. So far as the 3rd class of cases are concerned, they would also be relevant. We need not consider the instances of those plots which were not cited on behalf of the appellant before the Valuation Officer or the Competent Authority. They would be of the same nature as the plots which were relied upon by the Competent Authority but not put to the appellant. We will now examine the instances which were cited on behalf of the appellant before the Valuation Officer/ Competent Authority. The first is plot No. E-101, Greater Kailash-I. It is not under dispute that Gr.

Kailash-I has a better location as compared to Greater Kailash-II (Gr.

Kailash-II is about 3 kms. from Gr. Kailash-I). This plot was of 352.5 sq. yards and the vacant plot was sold on 18-6-1984 for Rs. 6 lakhs i.e. @ Rs. 1,702 per sq. yard. On the same basis and allowing appreciation for time-gap, the fair market value of the plot in question would work out to Rs. 5,64,000 only. In regard to this

plot, acquisition proceedings were started only after the plot had been constructed upon. Therefore, the Valuation Officer could not have picked-up for comparison this plot not as a vacant plot but as a built-up property and that too in Greater Kailash-I. He obviously did so because the sale as a built-up property reflected the highest reported rate in Greater-Kailash-I. The second instance is of plot No.M-51, Greater Kailash-II. It is a plot of 262 sq. yards which was sold on 23-5-1985 for Rs. 7,50,000 i.e. @ Rs. 2,862 per sq. yard. If allowance was given for the time-gap and 5 per cent adjustment for being open on 3 sides, the fair market value of plot No. S-147 in question would come to Rs. 9,58,354 i.e., well within Rs. 10,35,000 (apparent consideration plus 15 per cent). The third instance is of plot No. S-328, Greater Kailash-II. It is of 300 sq. yards and was sold on 19-3-1984 for Rs. 7,50,000 i.e. @ Rs. 2,500 per sq. yard. Applying the same rate and after allowing for time-gap, the fair market value of plot No. S-147 in question, would work out to Rs. 8,44,200 only even though the location of plot No. S-328 is better than that of the plot in question. It is pertinent to note here that acquisition proceedings were dropped in this case. Then we come to plot No. S-374, Greater Kailash-II which has an area of 297.5 sq. yards. It was sold on 17-5-1985 for Rs. 8,40,000 i.e. at the rate of Rs. 2,823 per sq. yard.

At this rate the fair market value of the plot No. S-147 in question would come to Rs. 8,80,780 only in November, 1985. The location of plot No. S-374 is towards the centre of Section Block which is near to a big park and the market. It is also relevant to notice that the acquisition proceedings were dropped in this case also. Next, we come to plot No.S-444, Greater Kailash-II having an area of 550 sq. yards. It was sold on 22-8-1985 for Rs. 14 lakhs i.e. @ Rs. 2,545 per sq. yard. After allowing for time-gap, the fair market value of plot No. S-147 at this rate would work out to Rs. 9,47,300 even though plot No. S-444, has clear locational advantages as for example, it is south facing, close to the big park and situated on an 80 ft. wide road. In the case of this plot also acquisition proceedings were dropped. The next plot is W-106, Greater Kailash-II. Its area is 565 sq. yards. It was sold on 22-6-1984 for Rs. 14,00,000 i.e. @ Rs. 2,477 per sq. yard. On the same basis and after allowing appreciation for time-gap, the fair market value of plot No. S-147 in question comes to Rs. 8,21,586 only even though plot No. W-106 is a corner plot with 3 sides open and abuts on two roads, both of which are

80 ft. wide. The acquisition proceedings even in this case were dropped. The next instance is that of plot No.W-165, Greater Kailash-II, having an area of 400 sq. yards. It was sold in July, 1985 for Rs. 8,25,000 i.e. at the rate of Rs. 2,062 per sq.

yard. On the same basis the fair market value of plot No. S-147 in question would work out to Rs. 7,29,206 even though the location of plot No. W-165 is better than that of the plot in question when we look at the site plan. Plot No. S-199, Greater Kailash-II has an area of 300 sq. yards. It was sold on 6-7-1984 for Rs. 7,50,000 i.e. @ Rs. 2,500 per sq. yard. On this basis and after allowing for appreciation for time-gap, the fair market value of plot No. S-147 in question would work out to Rs. 8,24,268 only. Plot No. S-199 is farther away from the dumping ground. In the case of this plot, acquisition proceedings were dropped. Lastly we come to plot No. S-462, Greater Kailash-I having an area of 208 sq. yards. The first floor thereof was sold on 18-5-1985 for Rs. 4,50,000 i.e. @ Rs. 2,163 per sq. yard. It is also pertinent to notice that the Valuation Officer did not choose to examine the case of those plots whose location was most akin to that of the plot No. S-147 in question. The instances of such plots would be Section 139, Section 141, Section 143, Section 145, etc. Apparently therefore, relevant instances were not taken into consideration and only those instances which favoured the acquisition were taken as representative of the fair market value. This clearly shows that the report of the Valuation Officer was not fair. The plot in question is 28 feet 9 inches broad in its rear portion and 30 ft. 10.5 inches broad in its front portion.

That is how it has been claimed to be "Shermukha". Even if a view was to be taken that the shape was not much "Shermukha" and therefore, not much insuspicious or disadvantageous, there were other factors which would be relevant for considering its fair market value. It is located towards the fag-end of the colony. On its opposite side is a waste dumping ground and just beyond the dumping ground is a colony of DDA occupied by the middle income group. The appellant had also filed copies of certain photographs to emphasis the fact that right next to the plot in question there have been ' Jhuggies' all along. It is patent that these factors are depressants of market value and were not considered by the Valuation Officer. It is 1 km. away from the market and is not close to any park, Further, its service lane is at a higher level as compared to the front side. Looking to all these

facts therefore, we are of the view that the Valuation Officer's report on the basis of which the Competent Authority took the fair market value of the plot in question at Rs. 12,32,000 was not justified and the facts and instances referred to above clearly show that the apparent consideration of Rs. 9 lakhs represented the fair market value and that in any case the fair market value did not exceed 15 per cent of the apparent consideration. There is another relevant consideration. The assessee is engaged in the business of purchase of plots, construction of houses thereon and sales thereof. Thus it would not serve any useful purpose to it to understate the purchase consideration because in that case it would be paying more income-tax i.e. on an income which never accrued. In fact this factor cuts at the very finding of the Competent Authority regarding the motivation of tax evasion on the part of the appellant. A perusal of the impugned order of acquisition shows that the finding that the consideration agreed to between the parties had not been truly stated in the sale deed, had been reached on the basis of the presumptions available under Section 269C(2). Since we have already seen that OH facts the fair market value of the plot in question did not exceed 25 per cent of the apparent consideration, these presumptions would no longer be available. In fact, since the fair market value did not exceed 15 per cent of the apparent consideration, the acquisition order could not be made under Section 269F(6). In any case the said order does not contain any finding on the basis of any material other than the aforesaid presumptions, that the transferor had actually received anything more than what was declared in the instrument of transfer. In this connection, reference may be usefully made, among other cases, to the decision of the Supreme Court in the case of K.P. Varghese (supra) which was a case under Section 52(2). We do not accept the contention raised on behalf of the department in this regard that those principles could not be attracted.

Looking to the above material, we are, therefore, of the considered view that all the requirements of Section 269F(6) for a valid acquisition order not having been satisfied in the present case, the acquisition order cannot stand.

6. In the result, the appeal is allowed and the acquisition order dated 1-4-1987 made by the Competent Authority is hereby quashed.