Manoj Prabhakar Vs. Assistant Commissioner of Income

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jun-24-2004

Reported in : (2004)84TTJ(Delhi)625

Judge : P Parashar, T Chopra

Appellant : Manoj Prabhakar

Respondent : Assistant Commissioner of Income

Judgement :

1. This appeal has been filed by the assessee against the order of learned CIT(A) dt. 3rd Jan., 2003, for the block period 1st April, 1990 to 20th July, 1990.

2. Shri R.S. Singhvi, CA, appeared on behalf of the assessee whereas Shri B.N. Verma, senior Departmental Representative represented the Department.

3. Ground No. 1 taken in this appeal is general in nature and does not require any specific adjudication.

4. Ground Nos. 2, and 3 : These grounds challenge the sustenance of addition of Rs. 24,03,000 and the addition of Rs. 7,00,000 on account of purchase and sale of properties by the assessee. The relevant facts concerning the issues involved in these two grounds are as under: 4.1 The assessee was a prominent cricketer, On the basis of information that some cricket players and other individuals were involved in betting and fixing of matches, a search action was conducted under Section 132(1) of the IT Act at the residence of the assessee, i.e., at R-10, Nehru

Enclave, New Delhi, The first operation of search was conducted on 20th July, 2000, and, thereafter the last on 25th July, 2000, on which date locker of the assessee was also searched. During the course of search at the residence of the assessee certain documents were found and seized.

Page 25 of Annex. A3 was a document which contained a commission account. The figures mentioned on this document were as under : 4.2 In relation to this document, which was marked as Annex. A3, the statement of the assessee, namely, Shri Manoj Prabhakar, was recorded on 18th Sept., 2000. The relevant question and answer in this regard is as under: "Q. 22. Page No. 25 of Annex. A3 mentions commission account which mentions a commission of Rs. 1.72 lakhs for four properties. Please explain the paper? A. 22. This is an account given by Mr. Parvesh Kochhar of G-12, Bajaj House, 97, Nehru Place, New Delhi, which according to him was the commission due to him for the various properties sold and purchased by me through him. No such amount was due to him nor I have paid any such amount to him." 4.3 As a follow up enquiry after the statement of assessee, survey action under Section 133A was conducted by the DDIT (Investigation) Unit-I, New Delhi, on 21st Sept., 2000, at G-12, Bajaj House, 97, Nehru Place, New Delhi, which is the business premises of M/s Good Luck Estate. At this premises, Shri Parvesh Kochhar was available and his statement was recorded. The relevant portion of questions and answers pertaining to the transactions of commission account are as under : "Q. 7. Please state how much commission you are charging on property transactions? Q. 9. I am showing you a paper which is commission a/c seized at the time of search at the residence of Sh. Manoj Prabhakar. Sh. Manoj Prabhakar in his statement has stated that this paper is a commission a/c prepared by you regarding the various properties' transactions done by you on his behalf. Please state in whose handwriting this paper has been written and what do these figures indicate? A. 9. Yes, this paper is written by me. I have calculated the commission @ 2 per cent of the cost of property for each deal. I had helped Mr. Manoj Prabhakar to buy the flat in Sarvpriya Vihar for a consideration of Rs. 33,00,000 hence, my commission @ 2 per cent helped him to purchase the property at hotel Hill View Karan Block for Rs. 15,00,000 and hence my commission was Rs. 30,000. I had also helped him in the purchase of basement of R-65, GK-I for a consideration of Rs. 28,00,000 and hence, my commission worked out to Rs. 56,000. He had sold two plots through me situated in sector 15, Gurgaon, for Rs. 5,00,000 each and hence my commission is worked out at Rs. 20,000, however, I may clarify that I have not received any commission from him till date.

Q. 10. Please give details of the transaction of the Sarvpriya Vihar flat.

A. 10. The flat is situated at 7/18 or 7/17, Sarvpriya Vihar, three bedrooms flat on 1st floor. This flat has been sold by M/s Saluja Builders to Mr. Manoj Prabhakar and Mrs. Simmi Prabhakar. The total cost of this flat was Rs. 30,00,000 which has been paid by Sh. Manoj Prabhakar and Simmi Prabhakar.

Q. 11. Please give details of the transaction of the Oasis (Suraj Kund Road) property transaction.

A. 11. Sh. Manoj Prabhakar has purchased a suite in 'K' Block of Hotel Hill view. Though initially the agreement was for Rs. 7,50,000 but subsequently some other payments were made and hence the total consideration increased to Rs. 15,00,000 which has been paid by Sh.

Manoj Prabhakar.

A. 12. Sh. Manoj Prabhakar and Mrs. Simmi Prabhakar purchased the rear portion of basement of R-65, GK-I, N, Delhi, from Mr. Mishore Taklu of M/s Matang Builders for a total consideration of Rs. 28,00,000. This amount has been paid by Sh. Manoj Prabhakar.

A. 13. There were two plots of 200 sq. yards each in Sector 15, Gurgaon, owned by Mr. Manoj Prabhakar and Mrs. Simmi Prabhakar.

These were sold in 1993-94 to some buyers the names, I don't remember, for consideration of Rs. 5,00,000 each." 4.4 On the basis of the statement of Shri Parvesh Kochhar, the AO inferred that the sale consideration of properties purchased by the assessee was much more than shown in the sale-deeds. He, therefore, furnished a copy of the statement of Shri Kochhar to the assessee and sought his reply. The reply of the assessee dt. 12th July, 2002, as reproduced in the assessment order is as under : "1.6. Assessee's reply as per vide letter dt. 12th July, 2002, is summarised as under : (a) Assessee has denied that the property has been purchased over and above the consideration as per the sale deed/agreement to sell; it was submitted that sale deed/agreement to sell is a legal document and the purchase consideration has to be accepted as the one as per the agreement as has been held by superior Courts.

(b) It was submitted that Sh. Parvesh Kochhar was one of the witnesses of the abovesaid sale deed/agreement to sell and his statement, therefore, is in contradiction and cannot be relied upon.

(c) it was submitted that assessee has not paid any commission to Sh. Kochhar and therefore, Sh. Kochhar cannot substantiate his statement.

(d) It was submitted that it is very unlikely for a commission agent to keep dealing with a person even when no payment is forthcoming, therefore, the statement cannot be relied upon.

(e) It was submitted that no books of accounts of commission agent were produced or shown to the IT authorities where the receivable commission entry was recorded.

(f) IT authorities have not examined the vendors of the properties purchased by assessee to ascertain the sale consideration.

(g) Sh. Parvesh Kochhar has no locus standi to give the statement as he was neither the proprietor of M/s Good Luck Estate, nor the employee of M/s Good Luck Estate, agents who helped assessee with purchase/sale of above properties." 4.5 The assessee requested the AO for cross-examination of Shri Kochhar vide letter dt. 13th July, 2002. During the cross-examination Shri Kochhar stated that his father was the proprietor of M/s Good Luck Estate and he was rendering help to him in the business. He admitted that he arranged meetings of the assessee with the purchasers/sellers of the properties and also helped him in clinching the deal. Regarding the receipt of commission he said that he used to charge 2 per cent from the vendors and vendees both but in these transactions he did not receive the payment of commission as he was sure that Shri Prabhakar being a sports personality would definitely pay the commission to him. He also admitted that he received commission of Rs. 10,000 from the purchaser of two plots of Gurgaon, the purchase price of which was approximately Rs. 5,00,000 for each plot and out of the bill of Rs. 20,000 he received only Rs. 10,000, Regarding sale consideration of Sarvpriya flat, he disclosed that it was Rs. 33 lakhs and he billed the commission account accordingly. He also stated that he did not know the exact finally negotiated price. After his cross-examination the assessee submitted further additional submissions vide letter dt. 19h July, 2002, which are as under : "Proprietor of estate agency M/s Good Luck Estate was present when the IT authority conducted survey on the premises of M/s Good Luck Estate. Therefore, the rightful person to address the seized papers was the proprietor and not Sh. Kochhar who was helper of the estate agency.

As per the cross-examination Mr. Kochhar has no clue of the negotiated amount of the above properties. It was submitted that Sh.

Kochhar claims that assessee had paid Rs. 33 lakhs for purchase of property at Sarvpriya Vihar and during cross-examination he denies having knowledge about the quantum of physical payment to the deal of Sarvpriya Vihar and other properties.

It was submitted that in the original statement Sh. Kochhar has categorically mentioned that he charges 2 per cent commission for any property from vendor and vendee both. However, during his statement on cross-examination he says that he gets paid on different rates as per the discretion of the payer which at time is 2 per cent. 1 1/2 per cent. 1 per cent. etc., which is very vague." 4.6 After the cross-examination and additional written submissions, the AO re-examined Shri Parvesh Kochhar on 18th July, 2002, in order to verify certain facts. During re-examination Shri Kochhar admitted that the paper was in his own handwriting and was given by him to Shri Manoj Prabhakar because commission of Rs. 1,72,000 was due from him on account of sale/purchase of properties mentioned in the paper.

4.7 After taking into account the submissions of the assessee the AO made the following observations in relation to various arguments taken by the assessee: "(a) Assessee's contention that Sh. Parvesh Kochhar has no locus standi as he was neither proprietor nor employee of M/s Good Luck Estate does not carry any weight. It has been admitted by the assessee himself on oath on 18th Sept., 2000, that the seized page contains an account given by Sh. Parvesh Kochhar for various properties purchased and sold through him. It was not denied by assessee on 18th Sept., 2000, that properties have not been sold or purchased through Parvesh Kochhar. He only said that no such amount as mentioned in seized page was due to Kochhar. This again was obviously said with a view to avoid repercussions regarding actual sale and purchase prices of properties. The presence of commission a/c in Parvesh Kochhar's handwriting in assessee's possession proves beyond any doubt that Kochhar did play crucial role in the deals.

Assessee has preserved the paper only because this account was required to be settled with Kochhar. It has been explained by Parvesh Kochhar during the cross-examination by assessee that he was helping his father in his business, In India, it is common for a son to help his father in his business, even though the legal owner may be father. Undue weightage has been given by the assessee to Sh.

Parvesh Kochhar being not the proprietor. That Sh. Parvesh Kochhar was fully involved in the property deals of assessee is further proven by the fact that he has witnessed the agreements. Usually it is the property dealer concerned who signs as a witness in the sale-purchase agreements. Statement of Sh. Parvesh Kochhar only has been recorded as he was the person in whose handwriting the commission a/c is written. It is to be noted that his father, who is the proprietor of Good Luck Estate was present during the course of survey under Section 133A of IT Act and still statement of Sh.

Parvesh Kochhar was recorded, as he was the person who acted as property dealer in the sale-purchase transactions of assessee.

(b) Assessee has stressed upon the consideration recorded in the sale-purchase deed and has also requested to cross-verify its correctness from other party involved in the deal. Assessee's reliance on the sale deed, though beneficial from his own point of view is out of context. It is common knowledge that property deals are done actually at a higher value than the consideration recorded in sale deed to avoid stamp duty as well as income-tax. Obviously, the sale deed would show the value shown to the Department and not the amount exchanged underhand. Similarly, the other party will also confirm the sale deed consideration only as it has also evaded tax in its own case. When evidence has been found which proves that transaction has taken place at a higher value the sale deed is no longer reliable. Sarvpriya Vihar and Greater Kailash properties are in prime posh location and the consideration shown is quite low, proving further that there is understatement of consideration.

(c) Assessee has also contended on the basis of cross-examination that Shri Parvesh Kochhar does not have clue about negotiated value of the properties and has in fact denied knowledge about quantum of physical payment. This contention is nothing but hair splitting.

During the course of survey under Section 133A on 1st Sept., 2000, Parvesh Kochhar clearly said that he helped assessee to buy Sarvpriya Vihar flat for Rs. 33 lakhs; R-65, Greater Kailash-I, for Rs. 28 lakhs. Oasis property for Rs. 15 lakhs and to sell 2 Gurgaon plots for Rs. 5 lakhs each. He further stated that his commission was worked out @ 2 per cent of these sums. It is quite obvious that a property dealer would work out his commission only on the basis of the actual consideration in the deal. The fact that Shri Kochhar not only worked out the commission but also submitted the account of amount due to the client, i.e., assessee leaves no doubt that indeed the deals took place at prices quoted by him on survey date. There can be a dispute between assessee and Kochhar regarding percentage of commission to be charged, which perhaps is the reason for its non-payment, but there is no doubt about the actual consideration at which property deals took place through Kochhar. As far as the physical exchange of money not being witnessed by Kochhar is concerned, it is not a necessary condition to prove that undisclosed consideration has changed hands. After all Shri Kochhar made a statement during survey only on the basis of full knowledge about the deal and accordingly submitted his commission a/c. In fact, since he charged commission from both buyer and seller, he would definitely know the correct amount at which a deal was clinched.

(d) Assessee's submission that Sh. Kochhar was getting commission at different rates from different parties also does not help the cause of assessee as Sh. Kochhar clearly admits that the billing was done @ 2 per cent only. It is very much possible that the vendor and vendee do not pay the property dealer through books, the commission which is due to him as these transactions, most of the times, occur outside the books of accounts.

(e) The contention that no amount was paid by assessee as commission also doesn't help assessee as for this reason only commission a/c was prepared and given to Sh. Prabhakar by Sh. Kochhar mentioning that such and such amount was due from the assessee. The fact that Sh. Prabhakar preserved this paper proves that it contained as unsettled account of real transactions.

(f) Another point raised by assessee is as to how the commission agent was dealing with him when no payment was forthcoming. A commission agent may keep dealing with the agent getting commission from the vendor and the hope that vendee will pay the commission at a later date, etc. In fact, it has been categorically stated by Sh.

Kochhar in his cross-examination that he had received commission of Rs. 10,000 on account of sale of two Gurgaon plots from other party involved and as Sh. Prabhakar was a sports personality, therefore, Sh. Kochhar helped him as he was sure that Sh. Prabhakar will definitely pay commission to him.

(g) As to the submissions that the commission entry was not shown as a receivable, it is a common practice that commission on the actual consideration will not find mention in the books as part of the purchased consideration in itself is paid outside the books. It is quite likely that the commission was intended to be not disclosed for tax purposes by the property dealer also." 4.8 On the basis of the above, the AO worked out the difference between the sale consideration shown by the assessee and the actual sale consideration on account of purchase of three properties and made the following additions: 7,26,000 (total consideration for this property including front portion equals to Rs. 14 lakhs,, 6,75,000 of which is paid by Smt. Sandhya Prabhakar for the rear portion of the flat.

4.9 So far as the sale of properties by the assessee is concerned, the AO worked out the difference of Rs. 7 lakhs in the following manner: 5. The additions made by the AO were challenged before the learned CIT(A) who upheld the action of the AO and rejected the arguments made on behalf of the assessee.

6. Shri R.S. Singhvi, the learned Authorised Representative of the assessee, challenged the sustenance of addition by repeating the arguments advanced before the AO and the learned CIT(A). In addition and in particular, he made the following submissions; (i) The document, i.e., Annex. A3 did not pertain to the assessee.

It was not in the handwriting of the assessee nor the assessee made any payment on the basis of this document; (ii) Shri Parvesh Kochhar was not a property dealer. He was not even partner in the firm, namely, M/s Good Luck Estate. At the most his father Shri S. Kochhar could have been the commission agent as he was the proprietor of M/s Good Luck Estate.

(iii) Shri Parvesh Kochhar was neither employee of the firm nor executed any agreement of commission with the assessee. Shri Parvesh Kochhar did not receive any amount from the assessee on account of commission.

(iv) Shri Parvesh Kochhar was witness to the sale deeds which proved the sale consideration and any statement given by him contradictory to the version in the sale deed, which is a documentary evidence, has to be rejected. Otherwise also, Shri Parvesh Kochhar has stated that he did not know the finally settled or negotiated price. Thus, Shri Kochhar denied to have any knowledge of payment of Rs. 33 lakhs so far as Sarvpriya property is concerned, It is strange that an amount of Rs. 1,72,000 was left for recovery by Shri Kochhar. This also shows that the amount was not really demanded and at the most it was only a calculation or rough work.

(v) The persons from whom these properties were purchased were not examined.

(vi) The properties were not put for valuation by the Departmental valuer or any other valuer.

(vii) The document found and seized was not in the nature of bill and although Shri Kochhar was assessed to tax, but he was not required to produce the books of account to show that this amount was also entered in his books or in the books of M/s Good Luck Estate.

(viii) During his cross-examination Shri Kochhar had admitted that he was not party to the actual transaction. The document, i.e., Annex. A3 is totally irrelevant for making any addition because on the basis of this document, no commission was received from the assessee or from other parties who sold the property or who purchased the property from the assessee.

(ix) Before the CIT(A) various contentions were raised but he has not considered the same properly and has not rejected the same. He has only upheld the addition without assigning any reasons in relation to the arguments made before him.

6.1 The learned Authorised Representative in support of the above and other submissions which were made by him during the course of hearing before us, placed reliance on the ratio of following decisions: 7. The learned Departmental Representative, on the other hand, supported the order of the AO and that of the learned CIT(A). He also submitted that the figures written on the paper found during the course of search are directly co-related with the purchase and sale of properties done by the assessee and even a part of the commission on sale of Gurgaon plots, i.e., Rs. 10,000 was received.

8. In reply, the learned counsel for the assessee made reference to the Panchnama and to the sale deeds, copies of which have been filed in the paper book. He also made reference to the valuation report, photo copy of which is available on record. The learned counsel also made reference to the various other documents including the statement of Shri Manoj Prabhakar, the assessee, and the statement of Shri Parvesh Kochhar. He further made reference to various decisions including the following:R.K. Swamy v. Asstt. CIT (2004) 88 TTJ (Chennai) 940 : (2004) 88 ITD 185 (Chennai); (iii) Smt. Purnima Beri v. Dy. CIT

(2002) 76 TTJ (Asr)(TM) 467 : (2002) 82 ITD 137 (Asr)(TM);S.P. Goyal v. Dy. CIT (2002) 77 TTJ (Mumbai)(TM) 1 : (2002) 82 ITD 85 (Mumbai)(TM); (v) Prasanchand Surana v. Asstt. CIT (2001) 71 TTJ (Hyd) 456 : (2001) 76 ITD 423 (Hyd);P.K. Ganeshwar v. Dy. CIT 9. We have carefully considered the entire material on record and the rival submissions. The learned counsel for the assessee invited our attention to the valuation report which has been filed in the paper book. The assessee has obtained this report for showing the value of the properties purchased by the assessee. On the basis of the certificate given on the paper book it is found that the valuation report was not before the AO nor before the learned CIT(A). Hence, the evidence in the form of valuation report has been filed for the first time before the Tribunal. It is, therefore, obvious that the Department did not have any opportunity to controvert this evidence. In the interest of justice, such evidence cannot be considered unless the other side is provided an opportunity to rebut the same.

9.1 The AO has made the addition of Rs. 24,03,000 and Rs. 7,00,000 on the basis of the paper No. 25 of Annex. A3. On this document, only figures of the commission to be charged by the alleged broker, namely, Parvesh Kochhar has been mentioned. The actual amount of sale consideration has nowhere been mentioned on this document. The version of the assessee is that he did not pay any amount relating to this document on account of any commission to Shri Kochhar. Shri Parvesh Kochhar has also stated that he did not receive any amount as commission. Against this document, there is admittedly evidence in the shape of sale deeds which have also been filed on record. In these sale deeds the sale price/purchase price has been mentioned and according to the assessee this is the actual price paid by him for purchasing the property or the price received by him on sale of plots at Gurgaon. The AO has not examined the purchasers of properties from the assessee or the sellers from whom the assessee had purchased the properties, Regarding the "on" money or the money given beyond the consideration mentioned in the sale deeds, there is no evidence on record. Shri Parvesh Kochhar is a third party who is neither buyer nor seller of the properties. The Department has also not made any reference to the valuation cell and has not even tried to find out the sale value of any adjoining plot or building in the adjoining area sold or purchased during the relevant period. Some of the properties also relate to builders, but no enquiry has been made from such builders even.

9.2 In view of the above, the addition made only on the basis of the figures noted on the slip of paper found from the possession of the assessee and the statement of Shri Parvesh Kochhar cannot be sustained because no direct evidence is available on record to corroborate the fact regarding the passing of the consideration beyond and above the consideration mentioned in the sale deeds. Under these circumstances, we are of the considered opinion that the addition sustained by the learned CIT(A) on the basis of the above cannot be maintained. We are further of the view that the matter has not been properly investigated by the AO inasmuch as the buyers and sellers are not called for examination and for verification of the actual price paid to them or received by the assessee. Under these circumstances and in the interest of justice, we deem it fit and proper to set aside the matter to the file of AO for fresh adjudication. Accordingly, orders of authorities below on the issue in question are set aside and the matter is restored to the file AO to decide the issue afresh after making proper investigation and enquiry. While doing so, the AO shall also take into consideration the valuation report mentioned above and shall deal with the same accordingly and as per law. Accordingly, ground Nos. 2 and 3 stand allowed for statistical purposes.

10. Ground No. 4 : This ground has been taken to challenge the sustenance of addition of Rs. 9,65,000 on account of the payments received from bookies. The AO has worked out the addition on the basis of details given on pp. 15 and 16 of the assessment order which are as under: Introduction Dean Johns, Introduction Brian Lara, West Indies; Arjuna Ranatunga of Sri Lanka The payments mentioned in the above list at serial numbered 3, 4, 6, 8, 9 have been estimated on the basis of Mukesh Gupta's statement that Manoj Prabhakar promised him to introduce to other international players, against a payment of Rs. 50,000. Similarly, amount of Rs. 1,75,000 mentioned at Sl. No. 7 in the above list has been estimated @ Rs. 25,000 per player because the seven players involved were Ranji Trophy players and not international players. The entire amount is assessed in hands of assessee as he received it and most probably did not share it with others.

The above payments have not been reflected in the regular/block returns of the assessee and is, thus, undisclosed income of the assessee for the block period.

11. The learned CIT(A) has upheld this addition after making reference to the report of CBI and after drawing certain inferences.

12. The learned Authorised Representative of the assessee while challenging the addition, submitted that the addition is not based on any evidence or material found as a result of search and, therefore, the additions in the block assessment and particularly in view of provisions of Sections 158B(b) and 158BB(1) are not justified. He further pointed out that no question was put to the assessee relating to this issue at the time of search or thereafter. He also made reference to the CBI report dt. 31st Oct., 2000, and Madhvan Commission report dt. 24th Nov., 2000, He further pointed out that the assessments for asst, yrs. 1991-92 to 1997-98 in the case of the assessee were reopened and, therefore, on this basis also there is no justification to sustain these additions.

13. The learned Departmental Representative, on the other hand, supported the order of the learned CIT(A).

14. After going through the entire material, we find force in the submissions of the learned counsel for the assessee. In the block assessment undisclosed income can be worked out on the basis of the material found during the course of search. In the present case no incriminating document or other evidence was found during the course of search from the possession of the assessee to establish link between bookies and players. Further, the addition has been made on the basis of statement of Mr. Mukesh Gupta, but neither the copy of his statement was provided to the assessee nor he was confronted against the same and, therefore, the evidence against which the assessee was not confronted cannot be taken into consideration because such procedure is against the settled rules of natural justice. In our view, therefore, the addition made on the basis of statement of Mukesh Kumar Gupta or on estimate basis cannot be upheld. Accordingly, ground taken by the assessee is allowed and the addition of Rs. 9,65,000 sustained by the learned CIT(A) is deleted.

15. Ground Nos. 5, 6, 7 and 8 are general in nature and are taken only in support of ground Nos. 2, 3 and 4 which have been decided by us, hence, these grounds do not call for any specific adjudication.

16. In the result, assessee's appeal is partly allowed for statistical purposes.