

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC-3", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

	I.T.A. No. 4009/DEL/2016	
	A.Y. : 2009-10	
INCOME TAX OFFICER, WARD 1(4)(1), RISHIKESH O/O CISF BUILDING IDPL, CAMPUS, VEERABHADRA, RISHIKESH, DISTT. DEHRADUN	VS.	M/S M.L. CREATIONS, PLOT NO. A-15, 17 & 18, MINI INDUSTRIAL ESTATE, RANIPOKHARI, THE. - RISHIKESH, DISTT. DEHRADUN (PAN: AAPFM5910L) AND C/O RAJ KUMAR & ASSOCIATES, CHARTERED ACCOUNTANT 4435/7, ANSARI ROAD, DARYAGANJ, NEW DELHI - 110 002
(APPELLANT)		(RESPONDENT)

Department by : Sh. F.R. MEENA, SR. DR
Assessee by : Sh. R.K. Gupta, CA & Sh. P.S.
Kashyap, CA

ORDER

This appeal by the Revenue is directed against the order of the Ld. Commissioner of Income Tax (Appeals)-VIII, Dehradun dated 4.4.2016 pertaining to assessment year 2009-10 on the following grounds:-

- 1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.34,10,713/- made on account of difference in the*

cost of construction in the valuation report and cost declared by the assessee without appreciating the facts that the assessee had never come forward to prove the cost of construction declared by him before the then A.O. during the course of assessment proceedings.

2. The Ld. CIT(A) has erred in law and on facts in ignoring the fact that the assessee was allowed ample opportunities by the AVO for furnishing the details of expenses to prove the cost of construction declared by the assessee.

3. The Ld. CIT(A) has erred in law and on facts in ignoring the fact that the assessee never been objected the valuation report made by the AVO during the course of assessment proceedings.

4. That the order of the Ld. CIT(A) be set-a-aside and the order of the A.O.

2. The brief facts of the case are the assessee firm filed its return of income electronically on 30.9.2009 declaring total income at NIL. The return was processed u/s. 143(1) of the I.T. Act, 1961. Later the case was selected for scrutiny through CASS. The assessee claimed its unit as a manufacturing of Gold ornaments. In this case assessment was completed u/s. 143(3) of the I.T. Act on 28.12.2011. During the year factory was constructed at Ranipokhri Dehradun

showing construction cost of Rs. 22,29,387/-. During the original assessment, a reference was made to AVO on 7.11.2011 for estimating cost of construction of factory. The AVOs' report dated 22.12.2-11 (before completion of assessment) was received by the AO on 5.1.2012. The AVO estimated the cost of construction at Rs. 56,40,100/-, thus difference of Rs. 34,10,713/-. The AO on the basis of AVO report, initiated re-assessment proceedings and made the addition of Rs. 34,10,713/- as unexplained investment u/s. 69A of the I.T. Act, 1961 vide his order dated 18.3.2013 passed u/s. 143(3)/148 of the I.T. Act, 1961.

3. Against the aforesaid assessment order, the assessee appealed before the Ld. CIT(A), who vide impugned order dated 4.4.2016 has deleted the addition and allowed the appeal of the assessee.

4. Aggrieved with the impugned order, the Revenue is in appeal before the Tribunal.

5. Ld. DR relied upon the order of the AO and reiterated the contentions raised in the grounds of appeal.

6. I have heard both the parties and perused the relevant records, especially the orders of the authorities below. I find that Ld. First Appellate Authority has elaborately discussed the issue in dispute by considering the

submissions of the Ld. Counsel of the assessee and adjudicated the issue in dispute as under vide para nos.12 to 21 of his impugned order.

12. The first ground of appeal raises three legal issues namely that without rejecting the books of accounts the reference to the AVO was illegal and unsustainable, without prior recording the reasons for satisfaction of making reference to AVO the reference was illegal and unjustified and the AVO's report could not be the basis for inferring the existence of escaped income so as to validly and legally empower the AO to initiate proceedings u/s 147/148. We may address these issues one by one. Firstly, the issue of reference to AVO without rejection of the books of accounts. The AO has relied upon the cases of CIT Vs. Bhawani Shankar Vyas (2009) . 311 ITR 8 (Uttarakhand) in support of the proposition that the reference could be made without rejecting the books of accounts. However, it is observed that the Hon'ble Supreme Court in the case of Sargam Cinema Ltd. Vs. CIT (2010) 328 ITR 513 (SC) considered the judgment of the Hon'ble Uttarakhand High Court in the case of Bhawani Shankar Vyas (supra). and held that the assessing authority cannot refer the matter to the departmental valuation officer without first rejecting the books of accounts. The Hon'ble

Allahabad High Court in the case of CIT Vs. Lucknow Public Educational Society (2011) 339 ITR 0588 (All) held that, "once that be the law as declared by the Supreme Court, it is not possible for us to consider the contention advanced on behalf of the revenue". In the present case it is quite clear that the assessee did maintain books of accounts for the construction and it did produce the ledger of construction account alongwith supporting vouchers for building material purchased and payments made to the labours for verification of the AO. However, the AO did not accept the same on account of the fact that the assessee did not produce a Map and a valuation report. He did not actually point out any defect in the accounts, being produced by the assessee, or if he did, he has not brought any such defect record in the assessment order from where it can be ascertained as to whether he noticed that these accounts were either incomplete or incorrect. Thus, the reference to the Departmental Valuation Officer without rejecting the audited construction account maintained by the assessee and produced before the AO alongwith supporting bills and vouchers and without recording any satisfaction of the need to make such reference, is not maintainable in law in view of the decision of the Hon'ble Supreme,

Court in the case of Sargam Cinema Ltd (Supra). Thus, no cognizance can be taken of the report of the Assistant Valuation Officer as the reference itself was bad in law

13. The next objection pertains to the fact that the AVO's report cannot be the basis for inferring the existence of escaped income so as to restore the AO the right to initiate proceedings u/s 148. In this context the assessee has cited several judgments which hold that the report of the Valuation officer is not per se an information for the purposes of reopening assessment u/s 147. On the other hand the AO has also cited two case laws which hold that reassessment notices were valid on account of substantial difference between the value estimated by Valuation Officer and value declared by the assessee. After considering the same, it is observed that in the case of Dr. Arjun D Barad Vs. ITO 83 ITO 774 (Nag) the Hon'ble ITAT has held that since the reference made by the AO to the DVO was without jurisdiction and therefore, invalid, assessments that were reopened solely on the basis of the AVO's report were not validly initiated. Considering the facts of the case, the ratio of this judgment has to apply to the present case. As the reference to the AVO has

been held to be bad in law, the reopening of the assessment on the basis of the report of the AVO cannot be upheld.

14. Furthermore, it is also observed that this is a case of construction expenses being recorded in the books of accounts and the report of the AVO was prepared without considering the books of accounts and bills and vouchers as the same were apparently not produced by the assessee before the AVO. In the circumstances, when the assessee has maintained books of accounts, the expenses for construction have been recorded in the books of accounts, the expenses are supported by documents in the form of bills and vouchers and the accounts have been audited and also examined by the AO who did not notice any discrepancy in the same, the estimation of investment on the basis of a formula based computation cannot give reason to believe that any income had escaped assessment. The Hon'ble Rajasthan High court in the case of CIT Vs. Pratap Singh, Amro Singh, Rajender Singh and Oepak Kumar 200 ITR 788 (Raj) has pointed out that where books of accounts are maintained than the assessment cannot be done on the basis of valuation report unless the books of accounts are first

shown to be incorrect. Hence, the AVO's report could not be the basis for a valid reopening of the assessee's case.

15. The next ground that has been agitated by the assessee is the fact that it had filed objections to the notice u/s 148 and the AO had proceeded to complete the assessment without disposing off the objections filed by the assessee, thus violating the principles laid down by the Hon'ble Supreme Court in the case of GKN Driveshafts India Ltd. 259 ITR 19 (SC). It has been argued that the Hon'ble Delhi High Court in its order dated 10.08.2015 in the case of Pro CIT VS. Tupperware India Pvt Ltd has held that where the AO did not make compliance to the said Supreme Court order by passing a speaking order, the CIT(A) had committed an error in not quashing the reopening order and the consequent assessment. However, the AO disposed the objections of the assessee in the assessment order itself. Before me, the assessee has taken the plea that this renders the assessment order as bad in law.

16. I have duly considered the facts and circumstances of the case objection. The question whether the failure of the AO to pass a speaking order disposing off the objections prior to the framing of the assessment order (in which the AO did address the objections)

would render the assessment order bad in law. The question has to be examined in the light of decisions of the various courts.

17. In a subsequent decision in the case of Garden Finance Ltd. V. CIT (Asst.) [2004] 268 ITR 48 (Guj), the effect of the Supreme Court decision in the case of GKN Driveshafts [2003] 259 ITR 19 came up for consideration and by a majority opinion it was laid down by the Hon'ble Court:

"What the Supreme Court has now done in the GKN Driveshafts (India) Ltd.'s case [2003] 259 ITR 19 is not to whittle down the principle laid down by the Constitution Bench of the Apex court in Calcutta Discount Co. Ltd. case [1961] 41 ITR 191 but to require the assessee first to lodge preliminary objection before the Assessing Officer who is bound to decide the preliminary objections to issuance of the reassessment notice by passing a speaking order and, therefore, if such order on the preliminary objections is still against the assessee, the assessee will get an opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the reassessment proceedings which would have entailed the liability to pay

tax and interest on reassessment and also to go through the gamut of appeal, the second appeal before Income-tax Appellate Tribunal and then reference/tax appeal to the High Court.

Viewed in this light, it appears to me that the rigor of availing of the alternative remedy before the Assessing Officer for objecting to the reassessment notice under section 148 has been considerably softened by the apex court in GKN Driveshafts (India) Ltd. 's case [2003] 259 ITR 19 in the year 2003. In my view, therefore, the GKN Driveshafts (India) Ltd.'s case [2003] 259 ITR 19 does not run counter to the Calcutta Discount Co. Ltd. case [1961]41 ITR 191 (SC) but it merely provides for challenge to the reassessment notice in two stages, that is,

(i) Raising preliminary objections before the Assessing Officer and in case of failure before the Assessing Officer;

(ii) Challenging the speaking order of the Assessing Officer under section 148 of the Act. II Honn'ble Gujrat High Court in the case of Arvind Mills Ltd. vs. ACW T [2004] 270 (Guj) while following the aforesaid decision concluded that once

the Supreme Court stated that the AO was bound to dispose of the objections by passing a speaking order, it was not open to the authorities to contend that in the absence of any provision in the Act, the authorities could not have passed a speaking order. Hon'ble Delhi High Court in the case of Delhi Tourism & Transport Development Corporation Ltd. vs. ACIT [2004] 141 Taxman 361 (Delhi), while relying upon the aforesaid decision of the Hon'ble Apex Court in GKN Drivesharfts (India) Ltd.(supra) directed to follow the procedure laid down by the Hon'ble Apex Court and pass a speaking order before passing the assessment order..

19. While adjudicating a similar issue, Hon'ble Gujrat High Court in the case of MGM Exports vs. DCIT [2010] 23 DTR 356 (Guj) observed as under:-

"Applying the aforesaid settled legal position to the facts of the case it is apparent that the action of the respondent authority in framing the reassessment order, without first disposing of the preliminary Objections raised by the petitioner, cannot be sustained. Accordingly, the reassessment order dated

December 16, 2008 is hereby quashed and set aside and the respondent authority shall dispose of the preliminary objections by passing a speaking order and only thereafter proceed with the reassessment proceedings in accordance with law."

20. In view of the aforesaid decisions of the Hon'ble Courts, and the self evident fact of the A.O. not passing any speaking order in disposing the assessee's objections, against the notice u/s 148 before proceeding with the assessment, it is held that the subsequent assessment order is bad in law and deserving of being quashed.

21. In view of the fact that the reopening of the case has been held to be invalid as the same was done on the basis of a valuation report from the Valuation Officer which was obtained by an invalid reference and also since the AO proceeded with the assessment without disposing off the objections raised by the assessee to the notice u/s. 148, it is held that both the reopening of the case and the consequent assessment order are bad in law. In the circumstances, the addition cannot be sustained. As the assessment

cannot be sustained on legal grounds, the addition of Rs. 34,10,713/- u/s. 69A as alleged undisclosed investment is deleted.

6.1 On going through the aforesaid finding of the Ld. CIT(A) on the legal issue. I find that Ld. CIT(A) by respectfully following the judgment of the Hon'ble Supreme Court i.e. in the case of GKN Driveshafts India Ltd. 259 ITR 19 (SC) and further following the decision of the Hon'ble Gujarat High Court in the case of Arvind Mills Ltd. vs. ACWT (2004) 270 ITR 469 (Guj.) and has rightly observed that AO has not passed the speaking order in disposing of the assessee's objections against the notice u/s. 148 of the I.T. Act, before proceeding with the assessment, hence, he held that the subsequent assessment order is bad in law and deserving of being quashed. I also find that Ld. CIT(A) also observed that reopening of the case has been held to be invalid as the same was done on the basis of the Valuation Report from the Valuation Officer which was obtained by an invalid reference and also since the AO proceeded with the assessment without disposing off the objections raised by the assessee to the notice u/s. 148 of the Act and accordingly he held that both the reopening of the case and the consequent assessment order are bad in law. In view of Ld. CIT(A) deleted the addition of Rs. 34,10,713/- u/s. 69A as alleged undisclosed investment is deleted. Therefore, I do not see any reason to interfere with the well reasoned finding of the Ld. CIT(A) on the issue in dispute, hence, I uphold the same.

7. In the result, the Appeal filed by the Revenue stands dismissed.

Order pronounced in the Open Court on 26/12/2016.

SD/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 26/12/2016

“SRBHATNAGAR”

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches

