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A.M. J.M.

**IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH: AGRA
BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER, AND
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER**

ITA No. 230/Agra/2016
(ASSESSMENT YEAR: 2011-12)

Shri Sanjeev Parashar A-6, Mahavir Park, Extension, Aligarh. PANNo.AJOPP3902F (Assessee)	Vs.	ITO, Ward -1, Aligarh. (Revenue)
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Assessee by	Shri Pankaj Gargh, AR.
Revenue by	Shri Waseem Arshad, Sr. DR.

Date of Hearing	26.09.2017
Date of Pronouncement	07.12.2017

ORDER

PER, A. D. JAIN, JUDICIAL MEMBER:

This is assessee's appeal for A. Y. 2011-12. The following grounds have been raised:

- “1. Because the ld. CIT (Appeals) was not justified in confirming the order of A.O.
2. Because the ld. CIT (Appeals) has failed to appreciate that the valuation of the property disclosed by the appellant was supported by the valuation report of the

Registered Valuer and the A.O. has not rejected the valuation report before referred the matter for DVO.

3. *Because the Id. A.O. was not justified in not accepting the valuation report of Registered Valuer, which was based on item wise method.*
4. *Because the Id. CIT (A) has failed to appreciate that this issue has already been decided in favour of the appellant by the hon'ble jurisdictional ITAT, Agra in the case Shri Amol Chand Varshney Sewa Sansthan vs. Additional Commissioner of Income-Tax, Aligarh in ITA No. 198 & 199/Agra 2012 vide dated 22-03-2013.*
5. *Because the Id. CIT (Appeals) has failed to appreciate that the appellant has provided approved drawing, actual plan and structural drawings to the DVO as required and hence valuation of property by plinth area method is wrong and contrary to the facts.*
6. *Because the Id. CIT (Appeals) was not justified in confirming the addition of Rs.78,56,381/- in valuation of property on estimated basis.*
7. *Because the Id. CIT (A) has failed to appreciate that the appellant had started construction of building w.e.f. 6-01-2009 to 31-10-2010 and hence cost of construction should be bifurcated in respective assessment years.”*

2. The following additional grounds have also been taken:

(i) *Because the reference made by the Assessing Officer u/s 142A of the I. T. Act to the Valuation Officer without rejecting the books of accounts maintained is wrong, arbitrary and bad in law.*

(ii) *Because the reference made to the Valuation Officer is wholly arbitrary and bad in law as there was no material with the Assessing Officer to record any satisfaction that the assessee had made investment which are not recorded in books of accounts.*

3. These additional grounds are admitted, being legal in nature, not requiring any fresh material to be brought on record.

4. Apropos the merits of the additional grounds, section 142A of the IT Act, as applicable, reads as follows:

“142A (1) The Assessing Officer may, for the purposes of assessment or reassessment, make a reference to a Valuation Officer to estimate the value, including fair market value, of

any asset, property or investment and submit a copy of report to him.

(2) The Assessing Officer may make a reference to the Valuation Officer under sub-section (1) whether or not he is satisfied about the correctness or completeness of the accounts of the assessee.”

5. The Id. Counsel for the assessee has contended that the AO has, without having any material and without recording any satisfaction that the assessee had made investment in construction of flat which is not recorded in his books of account, and without rejecting the assessee's books of account, referred the matter to the Valuation Cell u/s 142A of the Act, only to examine the claim of investment. As per the Id. Counsel, this is not in accordance with law.

6. The Id. DR, on the hand, states that section 142A stands amended retrospectively by the Finance (No. 2) Act 2014. This section, as per the Id. DR, being a procedural section, is to be taken as applicable retrospectively.

7. The AO, in the assessment order, has observed (assessment order page2, para 2, second sub-para), has observed as follows:

“The assessee shown total investment of Rs.248.61/- Lakhs in the construction of the building of flats but the estimated value of the building was more higher side

than shown by the assessee. Thus, to examine the veracity of the claim of investment of Rs.248.61/- Lakhs in construction, Valuation Cell of the Department was requested under the provisions of section 142A (1) of the IT Act to value the property so as to arrive at the actual cost of construction.”

8. Sections 142A(1) and (2), as amended by Finance (No.-2) Act 2014, read as follows:

“142A. Estimate by Valuation Officer in certain cases.—(1) For the purposes of making an assessment or re-assessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.

(2) The Valuation Officer to whom a reference is made under sub-section (1) shall, for the purposes of dealing with such reference, have all the powers that he has under section 38A of the Wealth-tax Act, 1957 (27 of 1957).”

9. The extant section 142A was substituted for the erstwhile section, w.e.f. 1.10.2014. It nowhere states that it will be active respectively.

10. Moreover, this very provision, i.e., the un-amended / un-substituted section 142A has been considered in ‘Goodluck Automobile (P) Ltd. vs. ACIT’, 359 ITR 306 (Guj). It has been held therein as under:

“From the language employed in the heading of the section as well as the opening part of the said section, it can be seen that the expression used by the Legislature is "estimate". Thus, resort can be made to the said provision by the Assessing Officer for the purpose of estimating the value of any investment, bullion, jewellery or any valuable article in the circumstances referred to therein. It is common knowledge that the question of estimate arises only when the books of account of the assessee are not reliable. In other words, if the Assessing Officer is of the view that the computation of taxable income cannot be based on the books of account of the assessee, he can reject the books of account and proceed to estimate the taxable income of the assessee. The question of making an estimate of the value of any investment referred to in section 69 of the Act would arise only when the Assessing Officer finds that the assessee has made investments which are not recorded in the books of account, if any, maintained by him. On a conjoint reading of the provisions of section 69 and section 142A of the Act, it appears that for the purpose of resorting to the provisions of section 142A of the Act, the Assessing Officer would first be required to record a satisfaction that the assessee

has made investments which are not recorded in the books of account. As a necessary corollary, he would then reject the books of account as not reflecting the correct position and then proceed to make the assessment on the basis of estimation, for which purpose he can resort to the provisions of section 142A of the Act and make a reference to the Valuation Officer for estimating the value of such investment. Thus, on a plain reading of section 142A of the Act, it is apparent that the question of estimating the value of any investment would arise only when the books of account are not reliable. Accordingly, the Assessing Officer would first be required to reject the books of account before making a reference to the Valuation Officer. The rejection of books of account should precede the reference to the Valuation Officer. As rightly contended by the learned counsel for the assessee, the report of the Valuation Officer cannot form the foundation for rejection of the books of account.

10. *In the context of the controversy in issue it may also be germane to notice the provisions of section 145(2) of the Act, as it stood at the relevant time, which provided that where the Assessing Officer is not satisfied with the correctness or completeness of the accounts of the assessee, or where no method of accounting has been regularly employed by the assessee, the Assessing Officer may make an assessment in the manner provided under section 144 of the Act. Therefore, when*

the Assessing Officer records that he is not satisfied about the correctness or completeness of the accounts of the assessee, etc., the Assessing Officer can make a best judgment assessment. In other words, before proceeding to estimate the value of any investment the Assessing Officer has to record that he is not satisfied about the correctness or completeness of the accounts of the assessee.

11. *At this juncture, reference may be made to the decision of the Uttara-khand High Court in CTT v. Bhawani Shankar Vyas [2009] 311 ITR 8 (Uttarakhand), wherein the court was dealing with the question as to whether the Income-tax Appellate Tribunal was justified in holding that without rejecting the books of account, the Assessing Officer was not justified in making reference to the Departmental Valuation Officer, ignoring the retrospective effect of the provisions of section 142A of the Income-tax Act ? The court held that where the Income-tax Officer while making his assessment had doubts on the correctness of the accounts submitted by the assessee, the Income-tax Officer was perfectly justified in making a reference to a departmental valuer without formally or categorically rejecting the books of account submitted by the assessee. According to the High Court, this view was further strengthened by section 142A of the Act. The court accordingly held that the Income-tax Appellate Tribunal was not justified in holding that without rejecting the books of account, the*

Assessing Officer was not justified in making reference to the Departmental Valuation Officer. The said decision came to be carried before the Supreme Court in the case of Sargam Cinema v. CIT (supra) wherein the court found that the Tribunal had decided the matter rightly in favour of the assessee inasmuch as the Tribunal came to the conclusion that the assessing authority could not have referred the matter to the Departmental Valuation Officer (DVO) without the books of account being rejected. It was observed that the Tribunal had recorded a categorical finding that the books were never rejected, which aspect had not been considered by the High Court. The court, accordingly, set aside the order of the High Court and restored the order of the Tribunal.

12. *The facts of the present case may be examined in the light of the statutory scheme discussed hereinabove as well as the decision of the Supreme Court in Sargam Cinema (supra). In this regard, a perusal of the assessment order reveals that the Assessing Officer has categorically recorded a finding to the effect that the accounts are duly audited and complete details are available. From the tenor of the order of the Assessing Officer, it is apparent that he has made the reference to the Valuation Officer merely to seek expert advice regarding the cost of construction. There is nothing in the assessment order to suggest that the Assessing Officer had any doubt regarding the cost of construction or that he was not justified regarding the*

correctness or completeness of the books of account. Before making the reference to the Valuation Officer for ascertaining the fair price of construction, the Assessing Officer does not appear to have ascertained the correctness or otherwise of the cost of construction shown the assessee in its books of account. Thus, prior to making the reference the Valuation Officer, the Assessing Officer has not ascertained as to what was the defect in the cost of construction disclosed by the assessee in returns of income. Moreover, it is apparent that the only reason for making the addition under section 69 of the Act is that there is a difference the cost of construction as determined by the Valuation Officer and as shown by the assessee. At no stage of the assessment proceedings does the Assessing Officer appear to have mentioned that the books of account are defective or that the cost of construction as shown in the books of account is not the true cost of construction. Thus, while making the reference to the Valuation Officer, the Assessing Officer has not recorded any defect in the books of account nor has he rejected the same. Except for the difference in the estimated cost determined by the Valuation Officer and the actual cost as shown by the assessee, the Assessing Officer has not brought any material on record to establish that the assessee had made any unaccounted investment in the construction of the building in question and that the books of account do not reflect the correct cost of construction. Under the circumstances, there

was no occasion for the Assessing Officer to make a reference to the Valuation Officer. As held by the Supreme Court in the case of Sargam Cinema (supra), unless the books of account are rejected, the Assessing Officer cannot make a reference to the Valuation Officer. The reference made to the Valuation Officer, not being in consonance with the provisions of law, was, therefore, invalid. Accordingly, the report made by the Valuation Officer pursuant to such an invalid reference could not have been made the basis for addition under section 69 of the Act.

13. In view of the above discussion, the Tribunal was not justified in holding that the reference made by the Assessing Officer to the Valuation Officer for estimating the cost of construction was not invalid. The Tribunal was also not justified in holding that the addition made by the Assessing Officer under section 69 of the Act was correct. Both the questions, accordingly, stand answered in favour of the assessee and against the Revenue. The appeal, therefore, succeeds and is, accordingly, allowed. The impugned order passed by the Tribunal is hereby quashed and set aside. No order as to costs.”

11. No decision contrary to ‘Goodluck Automobile’ (supra), has been cited.

12. In the present case, as observed at pages 1 and 2 of the assessment order itself, the assessee produced his books of account before the AO. Balance sheet and profit and loss account of the relevant previous year and those of the preceding two years were also filed before the AO. It was from these documents that the AO took the year-wise investment made by the assessee in construction. Details thereof have been given at page 2 of the assessment order.

13. The AO did not reject the assessee's books of account before referring the matter to the Valuation Cell of the Department, as noted in the assessment order itself and the reference was made solely to examine the veracity of the assessee's claim of investment in construction. That being so, the matter stands squarely covered in favour of the assessee by 'Goodluck Automobile' (supra), wherein 'Sargam Cinema vs. CIT', 328 ITR 513 (SC) has been followed.

14. Therefore, it is held that the reference made by the AO u/s 142A of the Act without rejection of the assessee's books of account is invalid. The Additional Grounds are are, accordingly, accepted. This issue was raised by the assessee before the Id. CIT(A) by way of written submissions, as reproduced in the impugned order. However, the Id. CIT(A) has not decided this issue.

15. There is no merit in the Department's contention that the extant section 142A is applicable retrospectively. The section has specifically been made applicable, by the legislature itself, w.e.f. 1.10.2014 and so, it cannot be said to operate retrospectively.

16. Nothing further survives for adjudication.

17. Accordingly, the impugned order is reversed.

18. In the result, the appeal is allowed.

Order pronounced in the open court on 07/12/2017.

Sd/-
(DR. MITHA LAL MEENA)
ACCOUNTANT MEMBER

Sd/-
(A.D. JAIN)
JUDICIAL MEMBER

Dated: 07/12/2017

AKV

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT AGRA