IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : F : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA Nos.2370 & 3211/Del/2008
Assessment Year : 2004-05

DCIT, Najibabad, Distt. Bijnor (UP).	Vs.	M/s Parmarth Iron Pvt. Ltd., Nai Basti, Bijnor. PAN: AADCP1049C

ITA No.1992/Del/2008
Assessment Year : 2004-05

M/s Parmarth Iron Pvt. Ltd., C/o M/s Corporate Professional, D-28, South Extension, Part I, New Delhi – 110 049. PAN: AADCP1049C	Vs.	DCIT, Najibabad, Distt. Bijnor (UP).

(Appellant) (Respondent)

Assessee by : Dr. Rakesh Gupta, &
Shri Somil Aggarwal, Advocates

Revenue by : Shri Surender Pal, Sr. DR

Date of Hearing : 13.02.2019
Date of Pronouncement: 21.02.2019

ORDER

PER R.K. PANDA, AM:

ITA Nos.1992/Del/2008 and 2370/Del/2008 are cross appeals. The first one is filed by the assessee and the second one is filed by the Revenue and are directed against the order dated 24th March, 2008 of the CIT(A) Bareilly for assessment year 2004-05.

2. ITA No.3211/Del/2008 filed by the Revenue is directed against the order dated 16th July, 2008 passed u/s 154/250 of the CIT(A), Bareilly for assessment year 2004-05. For the sake of convenience, all these appeals were heard together and are being disposed of by this common order.

3. Facts of the case, in brief, are that the assessee is a private limited company engaged in the business of manufacturing and selling of MS bar, commission and plying of truck. It filed its return of income on 01.11.2004 declaring a loss of Rs.57,73,025/-. During the course of assessment proceedings, the Assessing Officer asked various details as per page 2 and 3 of the assessment order. The assessee filed the written reply on 13th February, 2006. The assessee also produced the books of account which were examined by the Assessing Officer. During the course of assessment proceedings, the Assessing Officer observed that it has started production w.e.f. 4th February, 2004 only. Further, the assessee company has disclosed total investment in factory building during the year at Rs.1,81,08,728/- and, in support of the same, no valuation report or detailed building account was filed. Therefore, the Assessing Officer deemed it proper to make a reference u/s 142A of the IT Act, 1961 to the Valuation Officer of the Department to work out cost of construction of the factory building. The DVO determined cost of the factory building at Rs.5,64,07,000/- as against the cost of construction of Rs.1,81,08,729/-. He further noted that the value declared by the assessee as cost of construction includes development expenses of Rs.18,81,388/- which is not construction cost. Therefore,

the cost of construction declared by the assessee amounts to Rs.1,62,27,341/-. The Assessing Officer, therefore, asked the assessee to explain the difference in the cost of construction at Rs.4,01,79,659/- (i.e., Rs.5,64,07,000/- (-) Rs.1,62,27,341/-). The assessee filed detailed reply and objected to the valuation made by the DVO. However, the Assessing Officer rejected the objections raised by the assessee and added the amount of Rs.4,01,79,659/- to the total income of the assessee as unexplained investment.

4. The Assessing Officer further noticed that the assessee received share application money of Rs.20 lakhs from three persons, namely, Nepostel (India) (P) Ltd.- Rs.10 lakhs, Ria Marketing Services (P) Ltd. – Rs.5 lakhs, and Invish Finvest (P) Ltd. – Rs.5 lakhs. On being asked by the Assessing Officer to produce the above parties for his examination, it was replied by the assessee that these persons being of means are busy in their social and official engagements cannot be produced today i.e., the date given by the Assessing Officer. However, it was requested that the genuineness may be verified from his end by issuing notices to them or by obtaining confirmations from them. The Assessing Officer, therefore, issued summons u/s 131 of the Act to the above three persons on 16.11.2006. The letter addressed to Ria Marketing Services Pvt. Ltd. was returned back by the Postal Authorities with the remarks "BANDH PADA HAI." The other two persons neither attended in person nor sent any reply and the envelops were not received back. Therefore, the Assessing Officer assumed that these have been delivered to the persons addressed to In absence

of any compliance from the above parties and observing that the assessee could not discharge the onus cast on him by proving the identity and creditworthiness of the share applicants and genuineness of the transactions, the Assessing Officer, invoking the provisions of section 68, made addition of Rs.20 lakhs to the total income of the assessee.

5. In appeal, the ld.CIT(A) gave part relief to the assessee. So far as the addition on account of unexplained investment in the factory building is concerned he sustained only an amount of Rs.1,18,54,248/- and deleted the balance amount. So far as the addition u/s 68 is concerned, the ld.CIT(A) confirmed the addition made by the Assessing Officer.

6. Aggrieved with such part relief given by the CIT(A), the assessee as well as the Revenue are in appeal before the Tribunal by raising the following grounds:-

ITA No.2370/Del/2008

"1. That the ld.CIT(A) has erred in law and facts of the case in deleting the addition of Rs.2,83,25,411/- on the ground that valuation officer inspected the building on 21.08.2006 and report was given as on 03.03.04 while some construction was also made between 01.04.2004 to 21.08.2006. The Assessing Officer has made addition of Rs.4,01,79,6591/- after considering the report of the valuation officer. Hence order of Assessing Officer may be restored.

2. the Assessing Officer has made addition to the tune of Rs.20,00,000/- as share application money in the three share holders after giving proper opportunity to the assessee co. as unexplained share application money. The ld.CIT(A) has deleted the addition in view of fact that the identity, genuineness and credit worthiness of the parties have been established. Hence the ld.CIT(A) has erred in law and facts of the case in deleting the addition."

ITA No.1992/Del/2008

1. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not deleting in full the addition made by Ld. AO of Rs.4,01,79,659/- on account of alleged unexplained investment in the factory building that too without any basis, material or evidences and has further erred in sustaining the addition of Rs.1,18,54,248/- on this account.

2. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not deleting in full the addition made by Ld. AO of Rs.4,01,79,659/- on the ground that Ld. AO has erred in law and on facts in making a reference to Ld. DVO u/s 142A that too without pointing out any defects in the books of account and without rejecting the books of account and has further erred in relying upon the report furnished by the ld. DVO and in any case valuation report supplied by the valuation officer being bad in law and against the facts and circumstances of the case.

3. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not reversing the action of Ld. AO in rejecting the books of accounts u/s 145(3) that too without any basis, material or evidences.

4. That in any case and in any view of the matter action of Ld. CIT(A) in not quashing the assessment order framed by Ld. AO u/s 144 that too without any basis, material or evidences.

5. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in recording a contradictory finding that the books of accounts could not be produced completely as per the requirements of Ld. AO and some books of accounts were produced but they were not complete in all respect and that too without pointing out in what manner books were not complete in all respect and what were those records which could not be produced whereas Ld. CIT(A) has himself recorded in the other part of the order that books of accounts were produced and examined by Ld. AO on 13-02-2006.

5A That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in granting the rebate of self supervision @ 7.5% instead of 10% as claimed by the assessee company and has further erred in not granting the appropriate relief as sought by the assessee in this regard.

5B. That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in making arithmetical error in totaling at page 48 of the appeal order by making addition of Rs.4,60,856/- being the estimated cost of construction of RCC roof of the oil tank instead of deducting the same,

thus leading to double addition o1 Rs.9,21,712/- and has further erred in not granting the appropriate relief as sought by the assessee in this regard.

5C That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not giving relief on account of over estimation of cost of construction of Compound Wall (Boundry Wall) and has further erred in not granting the appropriate relief as sought by the assessee in this regard.

5D That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not accepting the rates of construction of under ground water tank at Rs.0.75 PL as shown by the registered valuer of the assessee company and has further erred in accepting the rates given by Ld. DVO at Rs.3.25 PL that too without and basis, material or evidences and has further erred in not granting the appropriate relief as sought by the assessee in this regard.

5E That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not accepting the quantity of oil tank structure at 136 KL as shown by the registered valuer of the assessee company in its report on the basis of sanction obtained of the competent authority and has further erred in accepting the same at 1410 KL as shown by Ld. DVO in its report that too without any basis, material or evidences and has further erred in not granting the appropriate relief as sought by the assessee in this regard.

5F That having regard to the facts and circumstances of the case, Ld. CIT (A) has erred in law and on facts in not accepting the rates of construction of oil tank structure @ 2.10 PL as shown by the registered valuer in its report and has further erred in accepting the same @ 3.25 PL as shown by Ld. DVO in its report that too without any basis, material or evidences and has further erred in not granting the appropriate relief as sought by the assessee in this regard.

6. That the appellant craves the leave to add, modify, amend or delete any of the grounds *of* appeal at the time of hearing and all the above grounds are without prejudice to each other."

6.1 The Revenue has also filed the following grounds in ITA No.3211/Del/2008 wherein the CIT(A) has given further relief to the assessee in the 154 proceedings:-

1. Under the circumstances of the case whether Commissioner of Income Tax (Appeal), Bareilly was justified in invoking the provisions of section 154 of the I.T Act-1961 in respect of the following issues which were duly decided after applying full mind in his order dated.24/3/2008 :

(i) Rebate on self-supervision.

(ii) Cost of construction of under ground water tank.

2. Under the circumstances of the case whether Commissioner of Income Tax (Appeal), Bareilly was justified in invoking the provisions of section 154 of the I.T. Act-1961 to consider following issues again and providing relief to the assessee on account of:

(i) Cost of construction of water tank;and.
(ii) Cost of construction of oil tank.

3. Under the circumstances of the case whether passing of order u/s 154 in respect of above mentioned issues would not amount to re-consideration of the issues already adjudicated upon originally?

4. Under the facts and circumstances of the case, the CIT(A) Bareilly has erred in law and facts in applying enhanced deduction for self supervision at the rate of 10% on the basis of some CPWD circular in suppression of his earlier findings of taking 7.5% deduction as reasonable after considering all facts and circumstances in his order dated 24/3/2008.

5. Under the circumstances of the case the Commissioner of Income Tax (Appeal), Bareilly has erred in law in allowing relief to the assessee on account of over valuation of Compound wall by wrongly considering this issue again u/s 154 and allowing relief of Rs. 6,03,022/- to the assessee in wrong manner.

6. Under the circumstances of the case the Commissioner of Income Tax (Appeal), Bareilly has erred in law and on the facts in accepting the assessee's statement regarding rate of construction of water tank by wrongly considering this issue again u/s 154 and directing the Assessing Office in wrongful manner to adopt the rate of underground water tank at 0.75 PL(adopted by registered valuer of assessee) as against the rate of 3.25PL (adopted by DVO in his report)

7. Under the circumstances of the case the Commissioner of Income Tax (Appeal Bareilly has erred in law and on the facts in accepting the rate of construction and capacity in respect of oil tank by wrongly considering this issue again u/s 154 and directing the Assessing Office in wrongful manner to adopt the measurement of 136KL taken by the registered valuer instead of 1410KL taken by the DVO and again directing the AO in wrongful manner to adopt the rates of oil tank structure at the rate of Rs. 2.10 PL(adopted by registered valuer of assessee) as against the rate of 3.25PL (adopted by DVO in his report).

8. Order of the Commissioner of Income Tax (Appeal), Bareilly dated: - 16-09-08 may be set-a-side and that order of the Assessing Officer dated 26/12/2006 may be restored.

9. Any other grounds which may be taken during the course of appellate proceedings."

7. The ld. counsel for the assessee, at the outset, argued the first issue i.e., the addition made by the Assessing Officer on account of unexplained investment in the factory building totaling to Rs.4,01,79,659/-.

8. The ld. counsel for the assessee, referring to page 4 of the assessment order, submitted that the Assessing Officer has referred the matter to the DVO u/s 142A of the Act vide letter dated 5th April, 2006. He submitted that before referring the matter to the DVO, the Assessing Officer had not rejected the books of account and only after receiving the valuation report from the DVO, he rejected the books of account. Referring to page 57 of the paper book, he submitted that the assessee, during the course of assessment proceedings had produced all the books of account such as cash book, ledger, journal, stock register, purchase and sales bills and vouchers etc., which are maintained in regular course of business. Referring to page 38 of the paper book, he drew the attention of the Bench to the reply given before the Assessing Officer wherein it was stated that the building has been valued by Registered Valuer and the report has already been submitted. Referring to page 110 to 113 of the paper book, he submitted that the DVO, vide his report dated 20th January, 2006 has valued the cost of construction of the complex at Rs.1,76,00,000/-. Referring to the following decisions including the decision of the Hon'ble Allahabad High Court, which is the jurisdictional High Court, he submitted that the assessing authority cannot refer the matter to the DVO u/s 142A(1) of the IT Act without first rejecting the books of account:-

(i) CIT vs. Lucknow Public Educational Society (2011) 339 ITR 588 (All);

(ii) CIT vs. Subhash Chandra Gupta (2014) 105 DTR 295 (All);

(iii) CIT & Ors. Vs. Asha Chaurasia & Ors. (2017) 98 CCH 85 (All);

(iv) Nirpal Singh vs. CIT (2013) 359 ITR 398 (P&H);

(v) Pr. CIT vs. Sanjay Hiralal Thakkar (2016) 97 CCH 168 (Guj); and

(vi) CIT vs. Vijaykumar D. Gupta (2014) 365 ITR 470 (Guj).

9. He accordingly submitted that since the Assessing Officer in the instant case has not rejected the books of account before referring the matter to the DVO, therefore, the same is not in accordance with the law. Referring to the order of the CIT(A), the ld. counsel for the assessee drew the attention of the Bench to the findings given by the CIT(A) wherein he has categorically held that he finds merit in the arguments of the ld. counsel for the assessee that the action of the Assessing Officer in making reference to the DVO is not in accordance with the law. However, at the same time, the ld.CIT(A) deviated from his finding and upheld the action of the Assessing Officer on the ground that the assessee has not produced complete books of account for which the Assessing Officer could not examine and determine the detailed and correct cost of construction of the factory building. Referring to the various replies given by the assessee, he submitted that the assessee has produced all the relevant books of account including cash book, ledger, bills and vouchers, etc. and, therefore, the finding of the ld.CIT(A) is not correct.

10. So far as the merit of the case is concerned, the ld. counsel for the assessee submitted that the amount sustained by the ld.CIT(A) is not just and proper since he has not considered the arguments advanced by the assessee and has not granted self supervision charges at 10%. Further, there are certain arithmetical errors in the totaling and application of abnormal rate of construction of underground water tank and various other items. He has not considered the report of the registered valuer in the right perspective. He accordingly submitted that both legally and factually, the order of the CIT(A) is not sustainable and, therefore, the additions made by the Assessing Officer and sustained by the CIT(A) should be deleted. So far as the relief granted by the CIT(A) is concerned, he strongly supported the order of the CIT(A) to this extent.

11. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that there is no bar in referring the matter to the DVO when the Assessing Officer is not satisfied with the books of account maintained. There is no illegality in referring the matter to the DVO before rejecting the books of account. He accordingly supported the order of the Assessing Officer and the order of the CIT(A) to the extent he has sustained the addition. So far as the relief granted by the CIT(A) is concerned, the ld. DR strongly objected to the same and submitted that the ld.CIT(A) without appreciating properly the report given by the DVO, has granted substantial relief which is not just and proper in the facts and circumstances of the case. He accordingly

submitted that the grounds raised by the Revenue should be allowed and the grounds raised by the assessee be dismissed.

12. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We have also considered the various decisions relied on by both the sides. We find the Assessing Officer, in the instant case, has made addition of Rs.4,01,79,659/- u/s 69 of the IT Act being unexplained investment in the factory building. We find the ld.CIT(A) sustained an amount of Rs.1,18,54,248/- in the first order and deleted the balance amount. Subsequently, in the order passed u/s 154, the ld.CIT(A) gave some further relief. It is the submission of the ld. counsel for the assessee that the Assessing Officer, without rejecting the books of account first could not have referred the matter to the DVO u/s 142A of the IT Act. We find the ld.CIT(A) while deliberating on this issue at page 41 to 45 of his order has observed as under:-

> " I have carefully considered the written submissions made by AR, perused the assessment order and other material on records. It is observed that the main objection of the AR is that the action of AO to make a reference to the D.V.O is not in accordance with law and the facts of the case. According to him, even after the insertion of section 142A, it is a condition precedent for A.O. to give a finding that the books of account of the appellate are defective and the cost of construction can not be ascertained from such defective books of account. Such finding has to be based on material and proper reasoning. On the basis of these finding A.O. is required to first reject the books of account and only thereafter he gets the authority as per law to make any reference to the D.V.O for the ascertainment of correct amount of cost incurred by the appellant company. A.R. has argued repeatedly that this is a condition precedent to enable A.O. to assume jurisdiction to make reference to the D.V.O. He has relied upon plethora of decisions of various High Courts and the Income Tax Appellate Tribunal including the decisions from Hon'ble Allahabad High Court.
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> I have considered the argument of A.R. and I have also gone through case laws relied upon by him. I find force in the arguments of A.R. It is clear

from the assessment order that the Books of Accounts were produced and examined by A.O on 13-02-2006. During this period, the A.O. made the detailed examination of records of appellant Co. and no defect was pointed out by him and there was no such finding recorded in the assessment order that it was not possible for him to ascertain cost of construction from these books of account. The appellant is a company whose accounts have been audited and the auditors have not pointed out any defect. The A.O. made reference to DVO on 05-04-2006 and before doing that A.O did not reach on the conclusion nor he recorded a finding that as per facts of the case it was not possible for him to ascertain the cost of construction on the basis of books of accounts other records maintained by the appellant Co.. The D.V.O's report was received by the A.O. dated 14-09-2006 in which the difference in cost of construction was point out by D.V.O. It was subsequently on the basis of D.V.O's report only A.O. drew this inference that the books of accounts of the appellant Co. are not correct and complete. Even at this stage A.O. has not recorded any independent finding observing that the books of accounts and other records of the appellant Co. are defective in such a manner that the cost of construction could not be ascertained from these books and other records. He has merely stated that he was not satisfied about the correctness or completeness of the account of the appellant Co.. He has not given any reasons or the basis for showing his dissatisfaction about the correctness and completeness of accounts of the appellant Co. except that there was difference in cost of construction as shown by the appellant Co. and as estimated by the D.V.O through his report. Thus the action of A.O. in making reference to D.V.O is not in accordance with law for following two reasons namely:-

1. He did not record a finding before making reference to D.V.O that books of account and other records of the appellant Co. produced before him were defective and it was not possible to ascertain the cost of construction from these books of accounts and other records, which was a condition precedent.

2. Even when subsequently A.O. has rejected the books of accounts he has not recorded his findings that as per facts of the case how the books were defective in such a manner that it was not possible to ascertain the cost of construction from the books of account and other records.

I have gone through various judgments also referred to by the AR. In many decisions such as

1. CIT vs. Meerut Cement Company (P) Ltd., supra, 150 Taxman 7 (Allahabad). Delivered on 19-04-05.

2. CIT Vs Hotel Joshi 242 ITR 478 (Raj)

it has been held that if the assessee maintained books of account in regular course of business and necessary entries related to the expenses incurred towards cost of construction are properly made in the books of accounts, they are produced for verification and their correctance is not doubted then these should be accepted and AO has no cause for making reference to DVO. Moreover the rejection of books of account is a condition precedent to reference to the DVO.

I intend to agree to the AR that after the insertion of section 142A of the I. T. Act by Finance Act 2004, the AO is bound to follow the law as per bounded by jurisdiction of High Court. Besides, if the value of an asset is determined and claimed by an assessee on the basis of regular books of accounts maintained for that purpose and not on the basis of registered valuers valuation report, the reference to the DVO by the AO is not proper. Section 55A of I.T. Act requires specially vide sub clause (ii) of clause (b) that the AO as to record the basis or reasons for making a reference to DVO for ascertaining the fair market value of asset having regard to the nature of the asset and other relevant circumstances. In the light of decision of CIT Vs Hotel Joshi as mentioned (Supra) it is also not necessary to accept the report of the DVO based on CPWD rates nor it is necessary to accept the report of the registered valuer based on PWD rates because the cost of construction varies from place to place depending upon local conditions. CPWD rates are based on Instruction No 1671 which says that data collected by Valuation Cell is in the nature of broad guidelines and in its application to individual case may vary on the facts on the particular case. The section 142A has been brought in statute with a view to put the controversy on rest as to whether the AO has at all power to make reference to the Valuation Officer or not u/s 55A of the I. T. Act. Now it is undoubtedly clear after the insertion of section 142A that the AO has the power as per law to make reference to the valuation after fulfilling the condition precedent. In my considered view though the assessee has maintained regular books of account but it is fact that the same could not be produced completely as per requirement of the AO. From the submissions made and the documents produced by the AR, it appears that some books of accounts were produced but they were not complete in all respects which did not help the A.O. in examining and determining the total and correct cost of construction of the factory building year wise. This prompted the AO to make a reference to the DVO to give his expert opinion. In my view there is no infirmity in making the reference by the AO to the Valuation Officer and no grievance arose to the appellant by merely making a reference to a Governmental authority, an expert on the subject. This ground of appeal fails."

13. From the various replies given by the assessee during the course of assessment proceedings vis-à-vis a perusal of the findings given by the CIT(A) shows that the

Assessing Officer in the instant case has not rejected the books of account before making a reference to the DVO on 5th April, 2006. We find the Hon'ble Allahabad High Court in the case of *Lucknow Public Educational Society (supra)* has held that u/s 142A(1) the assessing authority cannot refer the matter to the DVO without first rejecting the books of account. Relevant observation of the Hon'ble High Court at para 18 to 20 of the order read as under:-

> "18. The issue for consideration is, whether the Assessing Officer, under Section 142A (1), can refer a matter to the Valuation Officer, for the purpose of making an estimate of such value. Under sub-section (3) of Section 142A, it is provided that on receipt of the report of the Valuation Officer, the Assessing Officer may, after giving the assessee an opportunity of being heard, take into account such report in making such assessment or reassessment. Would the language of Section 142A mean that before proceeding to call for a report of the Valuation Officer, the books of accounts must be rejected.
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> 19. The judgment in Bhawani Shankar Vyas (supra) also came up for consideration before the Supreme Court in the case of Sargam Cinema Vs. Commissioner of Income -Tax, [2010] 328 ITR 513 (SC)], wherein the Supreme Court has held that the Assessing Authority cannot refer the matter to the Departmental Valuation Officer without first rejecting the books of account. 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.
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> 20. For the aforesaid reasons, the questions of law as framed would not arise and, consequently, all the appeals are dismissed."

14. We find the Hon'ble Allahabad High Court in the case of *CIT vs Subhash Chandra Gupta (supra)* has held that the Assessing Officer cannot refer the matter to the DVO without first rejecting the books of account. Similar view has been taken by the Hon'ble Allahabad High Court in the case of *Asha Chaurasia & Ors. (supra).* In that case, the substantial question of law formulated was as under:-

"Whether the Hon'ble ITAT has erred in law as well as in the facts and circumstances of the case in holding that the books of account has to be rejected before referring to the D.V.O. u/s 142A and ignoring the decision in case of Bharathi Cement Corporation Ltd. Vs. CIT - 253 CTR 98 (AP) and the decision rendered by the division bench of Uttrakhand High Court in Case of CIT Vs. Bhavani Shankar Vyas - 311 ITR 8 (Uttrakhand)."

14.1 The Hon'ble High Court decided the issue in favour of the assessee and against the Revenue by observing as under:-

"4. Learned counsel for the parties, at the outset, stated that question raised in these appeals is squarely covered by judgment dated 25.01.2017 passed by this Court in Commissioner of Income Tax, (Central) Lucknow Vs. Shri Udai Chand Chaurasia Shri Ram Road Lucknow (Income Tax Appeal No. 25 of 2015), alongwith other connected matters, which reads as under:

"1. Heard Mr. Sidharth Dhaon, learned counsel for Revenue and Sri Abhinav Mehrotra, learned counsel appearing for Assessees in all these appeals and perused the record.

2. All these appeals have arisen from judgment and order dated 21.10.2014 passed by Income Tax Appellate Tribunal, Lucknow Bench "B', Lucknow (hereinafter referred to as the "Tribunal") in Income Tax Appeals No. 437/LKW/2013, 439/LKW/2013, 440/LKW/2013 and 761/LKW/2013 and relates to Assessment Years 2005-06, 2007-08, 2008-09 and 2004-05, respectively.

3. Substantial question of law formulated in these appeals reads as under:-

"Whether the Hon'ble ITAT has erred in law as well as in the facts and circumstances of the case in holding that the books of account has to be rejected before referring to the D.V.O. u/s 142A and ignoring the decision in case of Bharathi Cement Corporation Ltd. Vs. CIT - 253 CTR 98 (AP) and the decision rendered by the division bench of Uttrakhand High Court in case of CIT Vs. Bhavani Shankar Vyas - 311 ITR 8 (Uttrakhand)."

4. It is submitted that a similar question has already been decided by this Court against Revenue in Income Tax Appeal No. 205 of 2015 (Commissioner of Income Tax-I, Kanpur Vs. M/s Sahyog Jan Kalyan Samiti, Kanpur) decided on 06.09.2016 following Supreme Court judgment in Sargam Cinema Vs. Commissioner of Income Tax, 2009 (2010)328 ITR 513 (SC).

> 5. Sri Sidharth Dhaon, learned counsel for Revenue, however, submitted that there is another judgment of Andhra Pradesh High Court in Bharathi Cement Corporation Pvt. Ltd. Vs. Commissioner of Income Tax and others, (2013) 356 ITR 74, which is a decision dismissing appeal of Assessee at the stage of admission. It is submitted that therein a divergent view has been taken.
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> 6. We find that in the judgment of Andhra Pradesh High Court, judgment in Sargam Cinema Vs. Commissioner of Income Tax (supra) has been noticed in para 16 and it has been held that since it is a short judgment and facts are not very clear, therefore, same will not help the Assessee.
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> 7. It appears that relevant facts were not brought to the notice of the Bench which caused decision in Sargam Cinema Vs. Commissioner of Income Tax (supra) but so far as this Court's judgment in Commissioner of Income Tax-I, Kanpur Vs. M/s Sahyog Jan Kalyan Samiti, Kanpur (supra) is concerned, we find that in the appeal preferred by Revenue, it was admitted by it that law laid down in Sargam Cinema Vs. Commissioner of Income Tax (supra) on the similar question is clearly applicable and has been answered against Revenue. In that view of the matter, following the decision in Commissioner of Income Tax-I, Kanpur Vs. M/s Sahyog Jan Kalyan Samiti, Kanpur (supra), we answer the above question against Revenue.
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> 8. All these appeals are, accordingly, dismissed."

15. The various other decisions relied on by the ld. counsel for the assessee in the case law compilation also support its case that unless and until the books of account are first rejected by the Assessing Officer, the Assessing Officer is not justified in making reference to the DVO u/s 142A and if reference is held to be had in law, the DVO's report is to be ignored and cannot be the basis to make the addition. In view of the above discussion and in view of the binding decisions of the jurisdictional High Court cited (supra), we hold that the Assessing Officer is not justified in referring the matter to the DVO u/s 142A(1) without first rejecting the books of account. Therefore,

such reference to the DVO being not in accordance with the law, the report of such DVO has to be rejected and no addition can be made on the basis of such report of the DVO.

16. So far as the observation of the ld.CIT(A) that the assessee has not produced the books of account completely as per requirement of the Assessing Officer is concerned, the same is contrary to the facts. The finding of the CIT(A) shows that the assessee has maintained regular books of account. The reply of the assessee before the Assessing Officer as well as the observation given by the Assessing Officer in the body of the assessment shows that the assessee has produced the books of account. We find the Assessing Officer, at page 3 of the order has mentioned as under:-

> "On 13.02.2006 assessee filed a written reply. Books of Accounts produced and examined with."

16.1 Similarly, the Assessing Officer at page 5 of the order has observed as under:-

> "Assessee has filed written replies to the queries raised in various dates. In view of written replies filed and details produced, the manufacturing and trading results disclosed are not disturbed."

17. Therefore, under the facts and circumstances of the case, the observation of the CIT(A) that the assessee has not produced the complete books of account for the perusal of the Assessing Officer is incorrect.

18. In view of the above discussion, we hold that no addition can be made on the basis of the report of the DVO since the Assessing Officer has made the reference to the DVO without first rejecting the books of account. The grounds raised by the

assessee are accordingly allowed on this issue and the grounds raised by the Revenue are dismissed.

19. Now, coming to the second issue i.e., the addition u/s 68 is concerned, we find the Assessing Officer, in the instant case, made addition of Rs.20 lakhs being share application money received by the assessee from the three persons named earlier on the ground that the assessee failed to produce the above parties for his examination and the letters issued to the above three parties were not complied with since one letter was returned unserved and the other two parties did not respond. It is the submission of the ld. counsel for the assessee that proper opportunity was not granted to the assessee and, therefore, he has no objection if the matter is restored to the file of the Assessing Officer with a direction to give one final opportunity to the assessee to substantiate with evidence to his satisfaction regarding the identity and credit worthiness of the share applicants and the genuineness of the transaction.

20. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to give one final opportunity to the assessee to substantiate with evidence to his satisfaction regarding the identity and credit worthiness of the share applicants and the genuineness of the transaction. The Assessing Officer shall decide the issue as per fact and law. We hold and direct accordingly. The second issue raised by the assessee in the grounds of appeal are accordingly allowed for statistical purposes.

21. In the result, the appeal filed by the assessee is allowed for statistical purposes as indicated above and both the appeals filed by the Revenue are dismissed.

The decision was pronounced in the open court on 21.02.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMFBER

Dated: 21st February, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi