

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: "A", NEW DELHI**

**BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.6304/Del/2015
Assessment Year: 2012-13

DCIT, Central Circle-18, New Delhi	Vs.	M/s. Gawri Builders Pvt. Ltd., B-8, Basement Floor, Ansal Tower, 38, Nehru Place, New Delhi.
PAN :AAACG0107H		
(Appellant)		(Respondent)

And

ITA No.6305/Del/2015
Assessment Year: 2012-13

DCIT, Central Circle-18, New Delhi	Vs.	M/s. Jab Construction Pvt. Ltd., B-8, Basement Floor, Ansal Tower, 38, Nehru Place, New Delhi.
PAN :AAACJ0097M		
(Appellant)		(Respondent)

Department by	Shri C.P. Singh, Sr.DR
Assessee by	Shri Rajeshwar Prasad Painuly, CA

Date of hearing	27.02.2019
Date of pronouncement	07.03.2019

ORDER**PER O.P. KANT, A.M.:**

These two appeals by the Revenue, are directed against two separate orders dated 29/09/2015 passed by the Ld. Commissioner of Income-Tax (Appeals)-27, New Delhi [in short "the Ld. CIT(A)"] for assessment year 2012-13. In both appeals identical issue in dispute is involved, and hence both were heard together and disposed of by way off this consolidated order for convenience.

2. The grounds of appeal raised in ITA No. 6304/Del/2015 are reproduced as under:

1. *That the Commissioner of Income Tax (Appeals) has erred in law and on facts of the case in deleting Rs.1,79,51,125/- which was added to the income of the assessee on account of unexplained investment based on the report of the valuation officer.*
2. *That the Commissioner of Income Tax (Appeals) has erred in arriving at a decision on the submissions of the assessee which were not produced during the assessment proceedings and in not asking a remand report from the Assessing Officer on the new facts.*
3. (a) *The order of the CIT(Appeals) is erroneous and not tenable in law and on facts.*
(b) *The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.*

3. Identical grounds have been raised in ITA No. 6305/12/2015.

4. Briefly stated facts of the cases are that a search and seizure action under section 132 of the Income-tax Act, 1961 (in short 'the Act') was carried out at the premises of the Aerens/AEZ Group, which was engaged in real estate development. A joint land admeasuring 1505 yd.² was owned by M/s Jab Construction Private Limited and M/s Gawri builders Private Limited, i.e., the assesseees in present appeals before us. On this land 8 flats were constructed jointly by these two companies. In the course of search at the residence of Sh. Sanjeev J Aeren, promoter of AEZ Group, certain documents were seized, according to which on sale of two flats out of the eight flats constructed, on money of Rs. 1.25 crores in cash was received by the seller companies during the financial year corresponding to the assessment year under consideration, i.e., 2011-12.

4.1 The assesseees M/s. Gawri Builders Private Limited filed its return of income on 28/02/2013, declaring total income of Rs.29,80,000/-. The assessee M/s. Jab Construction Private Limited filed return of income on 28/02/2013, declaring total income of Rs.61,04,520/-. Both the cases were selected for scrutiny and notice under section 143(2) of the Act was issued and complied in both cases. During assessment proceeding, it was submitted on behalf of the assessee that in respect of booking of flats, M/s Jab Construction Private Limited and M/s Gawri Builders Private Limited had received cash amounting to Rs.1 crore from Mr. Surinder Singh and Rs.25 lakhs from M/s Ring India Infotech Private Limited and said amount had been entered by the assessee in the books of accounts, i.e., subsequent to search. In view of the above fact of money received on sale of

flats, Ld. Assessing Officer made a reference to the District Valuation Officer (DVO) to ascertain the cost of construction of the property under reference. The DVO valued the cost of construction of the property at Rs.7,11,02,250/-. The Assessing Officer, after subtracting the total cost of construction of Rs.3,52,00,000/- declared by these companies, he held the balance amount to Rs.3,59,02,250/- as unexplained investment in construction, which was divided equally between these two companies, i.e., amounting to Rs.1,79,51,125/-and added in the hands of both the companies.

4.2 On further appeals, the Ld. CIT(A), deleted the addition holding that without rejecting books of accounts or having pointed out defects or discrepancy in the cost of construction declared in the books of accounts, the Assessing Officer was not empowered to make reference to the Ld. DVO for estimating the cost of construction of the property.

4.3 Aggrieved with the above finding of the Ld. CIT(A), the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

5. In the grounds raised the addition of Rs.1,79,51,125/-, deleted by the Ld. CIT(A), has been challenged. In one of the grounds, it has been raised that no remand report has been called for on the new facts submitted before the Ld. CIT(A) and the Ld. CIT(A) adjudicated the matter relying on those new facts.

6. The Ld. DR supporting the grounds submitted that the Assessing Officer is justified in making the addition. In view of the valuation report, the investment in construction has been found in excess of the investment in construction recorded in books of

accounts. He also submitted that the Ld. CIT(A) also taken into consideration the new fact of utilization of the old consumable material in construction of the property, without providing opportunity to the Assessing Officer of rebutting the same.

7. On the other hand, the learned counsel of the assessee supported the finding of the Ld. CIT(A) on the issue on dispute and submitted that the Ld. CIT(A) adjudicated the issue mainly on the ground that no discrepancy has been found in the cost of construction declared by the assessee in the books of accounts and thus, reference to the Ld. DVO was not valid.

8. We have heard the rival submissions and perused the relevant material on record. In the facts and circumstances of the case, mentioned in earlier paragraphs, the main issue in dispute is whether the Assessing Officer was correct in making reference to the Ld. DVO for estimation of the cost of construction in the property without either rejecting books of accounts or pointing out any discrepancy in the cost of construction debited in the books of accounts of the assessee. Before the Ld. CIT(A), the assessee relied on the decision of the Hon'ble Supreme Court in the case of *Sargam Cinema Vs Commissioner of income tax* (2011) 241 CTR 179 (SC) wherein it is held that the Assessing Officer cannot invoke the power under section 142A for making reference to the Ld. DVO view in relation to estimation of cost of construction, without rejecting the books of accounts . The Ld. CIT(A) adjudicated the issue in favour of the assessee observing as under:

"6. After considering the appellant's contention, carefully gone through the order of the ACIT, Central Circle-18, and deliberated on

the case laws referred by the AR of the appellant during the course of hearing. From the record it was found that the said case the appellant was jointly engaged in construction of a project namely B-8, Jangpura project with another company and the same they have sold as an inventory. In the said case assessing officer has made addition mainly on the basis of the valuation report of D.V.O.. On the basis of the same, fact held as under:-

6.1.1 The said case after considering the prima facie fact it has been observed that in this case books of account of the assessee which also contained the cost of construction/investment hadn't been rejected by assessing officer for the relevant period and that there was no adverse material available with the Assessing officer in respect of undisclosed investment in the aforesaid project except for the valuation report of the D.V.O. According to same it is clear that the addition made by Assessing officer on the basis of valuation report without finding any discrepancy in the books of account was presumptive and contrary to the law.

6.1.2 The said case assessee had also utilized consumable materials of old building for construction of B-8, Jangpura projects. Whereas, this fact hasn't been considered by assessing officer. Further, it has found that the Assessing officer has also not pointed out a single instance to show that the assessee has actually incurred expenditure more than that recorded in the books of account.

6.1.3 In the said case, valued property was mainly stock in trade belonging to assessee and another company and the same has been also sold on stamp duty value or higher the stamp duty value. Hence, there is no loss of revenue.

6.1.4 In the result the ground of the appeal is allowed.”

9. We find that section 142A provides for reference to the Ld. Valuation Officer for the purpose of enabling the Assessing Officer to estimate the value of any investment, bullion, jewellery etc. in the course of assessment proceedings, in relation to sections particularly section 69, 69A and 69B. However, in our opinion, this power of making reference cannot be used arbitrarily. Sections 69, 69A and 69B of the Act are attracted mainly, when the assessee fails to explain the nature and source of the

investment from the books of accounts or their investment is either not recorded in the books of accounts or not fully disclosed in the books of accounts. If the Assessing Officer find himself satisfied with the correctness of the books of accounts, he may not required to invoke these provisions and the Assessing Officer may choose making reference under section 142A , when he is satisfied about the incorrectness of the books of accounts. According the Hon'ble Supreme Court in the case of Sargam Cinema (supra), the rejection of books of accounts is a prerequisite for the Assessing Officer for assuming the powers conferred under section 142A of the Act. The relevant finding of the Hon'ble Supreme Court is reproduced as under:

“4. In the present case, we find that the Tribunal decided the matter rightly in favour of the assessee in as much as the Tribunal came to the conclusion that the assessing authority could not have referred the matter to the DVO without the books of account being rejected. In the present case, a categorical finding is recorded by the Tribunal that the books were never rejected. This aspect has not been considered by the High Court. In the circumstances, reliance placed on the report of the DVO was misconceived.”

10. We also note that Hon'ble Gujarat High Court in the case of Goodluck Automobiles Private Limited Vs ACIT in Tax Appeal No.148 of 2000, in judgement dated 07/08/2012 following various decisions of the Hon'ble Supreme Court concluded that reference made by the Assessing Officer to the Valuation Officer for estimating the cost of construction, without rejection of books of accounts was not valid.

11. On perusal of facts of instant case, we find that the Assessing Officer has nowhere pointed out any mistake or error in the cost of construction debited in profit & loss account. The AO has nowhere mentioned that how declaring excess cash of Rs.1.25 received by the assessee would impact cost of construction debited by the Assessee. Thus, in view of facts of instance case, respectfully following the above decisions, we are of the opinion that there is no infirmity in the order of the Ld. CIT(A) on the issue in dispute.

12. Further, we note that the amendment made to section 142A removing the requirement of satisfaction about correctness or completeness of the accounts, for making reference to the Valuation Officer has been introduced in the Act by way of Finance (No.2) Act, 2014, w.e.f., 01/10/2014. As the assessment year involved in the present appeal is 2012-13, said amendment is not effective over the instant appeals.

13. Further as regard to the contention of the Revenue that no remand report has been called for on the new facts of utilisation of consumable material of old building for construction of the property is concerned, we are of the opinion issue in dispute has been decided by the Ld. CIT(A), in view of the decision of the Hon'ble Supreme Court and the so-called new facts have no bearing or impact on the decision arrived by the Ld. CIT(A) and thus, not relevant for sustaining the finding of the Ld. CIT(A). We have held reference to the Ld. DVO as invalid at threshold and thus, facts related to quantum of addition are not relevant.

14. In view of the aforesaid discussion, we uphold the finding of the Ld. CIT(A) in both the above appeals and dismiss the ground raised by the Revenue in both appeals.

15. In the result, both the appeals are dismissed.

Order pronounced in the open court on 7th March, 2019.

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Sd/-
[O.P. KANT]
ACCOUNTANT MEMBER

Dated: 7th March, 2019.

RK/-[d.t.d.s]

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi