

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH : D : NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA Nos.1087 & 5309/Del/2013  
Assessment Years: 2008-09 & 2009-10

Vishnu Apartments Pvt. Ltd.,  
4/17B, MGF House,  
Asaf Ali Road,  
New Delhi.  
PAN: AAACV6397E

Vs ACIT,  
Central Circle-7,  
New Delhi.

ITA No.1903/Del/2013)  
Assessment Year: 2008-09

DCIT,  
Central Circle-7,  
New Delhi.

Vs Vishnu Apartments Pvt. Ltd.,  
4/17B, MGF House,  
Asaf Ali Road,  
New Delhi.  
PAN: AAACV6397E

(Appellants)

(Respondents)

Assessee by	:	Shri I.P. Bansal & Shri Vivek Bansal, Advocates & Ms Suman Sapra, CA
Revenue by	:	Shri J.K. Mishra, CIT, DR
Date of Hearing	:	12.09.2019
Date of Pronouncement	:	10.10.2019

ORDER

PER R.K. PANDA, AM:

ITA Nos.1087/Del/2013 and 1903/Del/2013 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 16<sup>th</sup> January, 2013 of the CIT(A)-1, New Delhi, relating to assessment year 2008-09.

2. ITA No.5309/Del/2013 filed by the assessee is directed against the order dated 11<sup>th</sup> September, 2013 of the CIT(A)-1, New Delhi for assessment year 2009-10. Since common issues are involved in all the three appeals, therefore, these were heard together and are being disposed of by this consolidated order for the sake of convenience.

ITA Nos.1087/Del/2013 (by the assessee) & ITA No.1903/Del/2013 (by the Revenue).

3. Facts of the case, in brief, are that the assessee is a company. A search and seizure operation u/s 132 of the IT Act, 1961 was carried out in the case of the assessee on 12<sup>th</sup> September, 2007. During the course of assessment proceedings, the Assessing Officer noted that the assessee has completed part of the project in Jaipur pertaining to the mall and apportioned the cost of the mall and hotel the details of which are given at para 4 of the assessment order. While going through the apportionment of expenses between the mall and the hotel project, the Assessing Officer noted the following anomalies:-

“(i) The cost of land at village Tigra-Maidawas and Shikhopur amounting to Rs.477.84 lac and Rs.28.85 lac respectively has not been reduced from the cost of the project.

(ii) In terms of built up area the ratio of Mall and Hotel is approximately 65.35 whereas 83% of construction cost has been allocated to the Mall only. In case of indirect cost 90% of the entire cost has been allocated to the Mall.

Such allocation has no basis except one certificate dated 16.11.2008 issued by one M L Mutneja & Co., which is a chartered accountant firm (the same is enclosed with the order as Annexure B). How can a chartered accountant allocate cost in a project, is best known to the assessee. Moreover, no working/document was furnished evidencing the basis on which the allocation was made.

(iii) As a result of the above allocation what has happened is that cost per square feet of built up area of Mall works out to be Rs.2316 whereas for Hotel same works out at Rs.1013 per sq. ft. of built up area. In other words, the cost of per sq. ft of built up area of Mall is 2.3 times that of the Hotel for which there is absolutely no basis.”

4. He, therefore, allocated the cost of the mall and the hotel by making his own calculation which is as under:-

Opening stock as on 01.04.2007		4165.43 lacs
Add: Construction expenses	1440.95 lacs	
Indirect expenses	245.00 lacs	1685.95 lacs
		5851.38 lacs
Less: Land at Shikhopur	26.85 lacs	
Land at village Tigra and Maidawas (Note 1)	477.84 lacs	504.69 lacs
		5346.69 lacs

Hence, the total cost attributable to the Metropolitan Project, Jaipur which includes both the Mall and the Hotel is 5346.69 lacs. The proportionate allocation of cost on the basis of the built up area is as under:-

Cost allocated to Mall  $5346 \text{ lacs} \times 203945/315279 = 3458.62 \text{ lacs}$

Cost allocated to Hotel  $5346.69 \text{ lacs} \times 111334/315279 = 18888.08 \text{ lacs}$

Total saleable area of Mall – 136778 sq. ft.

Cost per sq. feet  $3458.62 \text{ lacs}/136773 = 2528$

Say 2530/- per sq. ft.

Sold area  $2430 \times 114504 = 28,96,95,120/-$

5. He reduced the cost of these lands from the cost of construction. Since the cost charged to the P&L Account as per the assessee's computation was Rs.39,45,73,993/-, whereas the cost of sales computed by the Assessing Officer was Rs.28,96,95,120/-, the Assessing Officer made addition of Rs.10,57,78,873/- being the difference on account of excess cost charged for the project.

6. In appeal, the Id.CIT(A), on the basis of the report of the DVO which was not obtained at the time of making the assessment, but, was obtained during the course of appeal proceedings, sustained an addition of Rs.90,50,894/- and deleted the addition of Rs.9,67,27,979/-. Aggrieved with such part relief granted by the CIT(A), the assessee as well as the Revenue are in appeal before the Tribunal by raising the following grounds of appeal:-

Assessee's appeal (ITA No.1087/Del/2013)

“Ground No. 1:

The Ld. Commissioner of Income Tax (Appeals) - 1, New Delhi (hereinafter referred to as 'CIT(A)') has erred in law and in the fact & circumstances of the case by passing the order dated 16.01.2013 under section 250 of the Income Tax Act, 1961 (hereinafter referred to as 'The Act'). The order passed by the CIT(A) is illegal being against the principles of natural justice and against the provisions of the Act.

Ground No. 2:

- a) The CIT(A) has erred on facts and circumstances of the case in confirming the addition amounting to Rs. 90,50,894 on the basis of the valuation report of the District Valuation Officer, Jaipur ("DVO").
- b) The CIT(A) has erred on facts and circumstances of the case in relying on the valuation report of DVO.

- c) The CIT(A) has erred on facts and circumstances in not appreciating the fact that DVO has determined the cost of Mall and Hotel on the basis of Plinth Area Rates and Cost Index Method for the basic structural work of the building and accounts method for finishing items in the building, however the determination of cost by the appellant is based on actual cost which has actually been incurred and claimed by the appellant in its audited financial statements.
- d) The CIT(A) has erred on facts and circumstances in not appreciating the fact that the difference between the cost of construction as per the books of accounts and the estimated cost of construction (according to the DVO's report) is only a marginal, and an acceptable one, therefore, the cost determined by the appellant should be considered in view of the decision of Hon'ble Delhi High Court i.e., Commissioner of Income-tax vs. Ambience Developers and Infrastructure (P.) Ltd. (IT Appeal Nos. 195 to 199 & 203 of 2012) July 27, 2012.

Hence, the appellant prays that the total addition confirmed at Rs. 90,50,894 is only on surmises conjectures and should be deleted.

Ground No.3:

The appellant prays that he may be allowed to add, amend, alter or forego any of the above grounds of appeal as the circumstances may warrant.

Ground No.4:

The above grounds are without prejudice to each other.”

Revenue's appeal (ITA No.1903/Del/2013)

- “1. The order of Ld. CIT(A) is not correct in law and facts.
2. On the facts and circumstances of the case, the Id. CIT(A) has erred in deleting the addition of Rs.9,67,27,979/- made by the A.O. on account of excess cost charged for the project.
3. The appellant craves leave to add, amend any/all the ground of appeal before or during the course of hearing of the appeal.”

7. The ld. counsel for the assessee, at the outset, referred to the copy of the assessment order for assessment year 2010-11 and drew the attention of the Bench to para 6.12 of the order which reads as under:-

“6.12 In this, the Department has referred case to the District Valuation Officer to ascertain the cost of construction incurred by the assessee on the construction of integrated Project at Jaipur comprising of shopping mall & hotel. The DVO vide its report dated 02.11.2012, valued the cost of construction of the total project at Rs. 82,67,93,120/-, as against the total cost declared by the assessee at Rs.85,22,37,406/-. Thus, the assessee have overstated that cost to the extent of Rs.2,54,44,286/-, which has been claimed in the income Tax Return as cost/expenditure but not supported with the tangible accretion in the assets. Therefore, this excess cost of Rs.2,54,44,286/- claimed by the assessee are to be disallowed. The part of this amount has already been taxed In the F.Y. 2007-08, relevant to A.Y. 2008-09 and the balance amount of Rs. 1,63,93,392/- is pertain to total project which has culminated/completed during the current financial year and liable to be taxed during the year, excess claim of cost and to be disallowed. Therefore, the amount of Rs.1,63,93,392/- is added to the income of the assessee on account of “Excess claim of Cost of Integrated Project.”

8. He submitted that the report of the DVO was not available at the time of assessment although the Assessing Officer had referred the matter to the DVO. The report of the DVO was obtained before the appeal was heard by the CIT(A) and the copy of the same was forwarded to the Assessing Officer for his comments. After considering the report of the DVO, the ld.CIT(A) gave relief to the assessee to the extent of Rs.9,67,27,979/-, but, sustained the addition of Rs.90,50,894/-. He submitted that since the Assessing Officer in the order for assessment year 2010-11 has already accepted the DVO's report, therefore, when the CIT(A) had granted relief on the basis of the DVO, the Revenue should not have any grievance.

9. So far as the addition sustained by the CIT(A) is concerned, he submitted that the same is not justified under the facts and circumstances of the case since the books of account of the assessee are not rejected and the addition has been sustained by the CIT(A) on the basis of the report of the DVO which is on estimate basis. Referring to the decision of the Hon'ble Supreme Court in the case of *Sargam Cinema vs. CIT*, 328 ITR 513, he submitted that the Hon'ble Supreme Court in the said decision has held that an assessing authority cannot refer any matter to the DVO without rejecting the books of account. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. Ambience Developers and Infrastructure (P) Ltd.*, 210 taxman 187, he submitted that the Hon'ble High Court in the said decision has held that for insignificant difference between cost of construction as per books of account and that estimated by the DVO, addition on the basis of DVO's report is not justified. He submitted that in the instant case, the cost of construction of the total project was shown by the assessee at Rs.85,22,37,406/- whereas the DVO had determined the cost of construction of the total project at Rs.82,67,93,120/-. Thus, the difference in over statement of cost to the extent of Rs.2,54,44,286/- is only 2.99% of the total cost of construction declared by the assessee which is very insignificant. He accordingly submitted that the addition sustained by the CIT(A) under the facts and circumstances of the case is not justified.

10. The ld. DR, on the other hand, strongly supported the order of the Assessing Officer and submitted that the ld.CIT(A) was not justified in deleting the addition of Rs.9,67,27,979/- made by the Assessing Officer on account of excess cost charged for the project by simply relying on the report of the DVO.

11. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer, in the instant case, made addition of Rs.10,57,78,873/- to the total income on the ground that the assessee has over stated the cost of construction. We find the ld.CIT(A), after considering the report of the DVO and the remand report of the Assessing Officer to such DVO's report sustained the addition of Rs.90,50,894/- and deleted an addition of Rs.9,67,27,979/-. The reasons for such part relief granted by the CIT(A) have already been reproduced in the preceding paragraphs. It is the submission of the ld. counsel that when the books of account of the assessee are not rejected and the difference between the value determined by the DVO and the value declared by the assessee is insignificant, no addition on account of such difference in cost of construction can be made.

12. We find some force in the above argument of the ld. counsel. As mentioned in the earlier paragraph, the Assessing Officer while passing the order for assessment year 2010-11 has himself accepted the value determined by the DVO

and has made proportionate addition for assessment year 2010-11. Therefore, when the Ld.CIT(A), following the report of the DVO has reduced the disallowance, the Revenue should not have any grievance. Accordingly, the grounds raised by the Revenue are dismissed.

12.1 Now, coming to the grievance of the assessee, it is an admitted fact that the books of account of the assessee have not been rejected before referring the matter to the DVO for determination of the cost of construction. The Hon'ble Supreme Court in the case of *Sargam Cinema (supra)*, has held that an assessing authority cannot refer any matter to the DVO without rejecting the books of account. The relevant observation of the Hon'ble Supreme Court at para 4 and 5 of the order reads as under:-

"4. In the present case, we find that the Tribunal 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. 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.

5. For the above reasons, the impugned judgment of the High Court is set aside and the order passed by the Tribunal stands restored to the file. Accordingly, the assessee succeeds."

13. Since, in the instant case, it is an admitted fact that the books of account of the assessee are not rejected and the assessee has maintained all bills and vouchers which are not found to be false or untrue, therefore, without rejecting the books of account of the assessee, the Assessing Officer could not have referred the matter to

the DVO for determination of the cost of construction and thereby making addition on the basis of such difference.

14. Even otherwise also, it is an admitted fact that the difference between the cost of construction declared by the assessee at Rs.85.22 crores as against the value determined by the DVO of Rs.82.68 crores is only 2.54 crores which is less than 3% of the total cost of construction declared by the assessee. Thus, the difference being less than 3% is very insignificant. We find the Hon'ble Delhi High Court in the case of *CIT vs. Ambience Developers and Infrastructure (P) Ltd.*, (*supra*) has held that for insignificant difference between cost of construction as per books of account and that estimated by the DVO, addition on the basis of DVO's report is not justified. The relevant observation of the Hon'ble High Court reads as under:-

“16. In view of the above, it is evident that the valuation in this case was uncritically accepted by the AO. As can be seen from a comparison of the valuation by the assessee, with that of the DVO, the variation is 3.86 %. This is a very minor variation, having regard to the large amounts involved. Besides, the fact that the AO did not examine the variations, with specific reference to any items of expenditure that were unreasonable, or showed wide variation, these differences can also be put down to differing perceptions, and the practice adopted by the concerned business activity.

17. In view of the above discussion, and having regard to the fact that the variation in valuation, in this case between what was disclosed by the assessee and what was indicated by the DVO is not significant, this court is of opinion that there is no infirmity in the findings contained in the impugned order of the Tribunal. No substantial question of law arises for consideration. The appeals are, therefore, dismissed.”

15. Since, in the instant case, the assessee has maintained the books of account supported by bills and vouchers for the construction of the mall and hotel, which was not rejected by the Assessing Officer before sending the matter to the DVO for

determination of the cost of construction and since the difference in the value declared by the assessee and the value determined by the DVO is also very insignificant being less than 3% of the total cost of construction declared by the assessee, therefore, in view of our discussion in the preceding paragraphs, we are of the considered opinion that the CIT(A) was not justified in sustaining the addition of Rs.90,50,894/-. Accordingly, the order of the CIT(A) is set aside and the grounds raised by the assessee are allowed.

16. In the result, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is allowed.

ITA No.5309/Del/2013 ( A.Y. 2009-10)

17. The grounds raised by the assessee are as under:-

“Ground No. 1:

The Ld. Commissioner of Income Tax (Appeals) - 1, New Delhi (hereinafter referred to as 'CIT(A)') has erred in law and in the fact & circumstances of the case by passing the order dated 11.09.2013 under section 250 of the Income Tax Act, 1961 (hereinafter referred to as 'The Act'). The order passed by the CIT(A) is illegal being against the principles of natural justice and against the provisions of the Act.

Ground No. 2:

- e) The CIT(A) has erred on facts and circumstances of the case in confirming the addition amounting to Rs. 2,68,177/- on the basis of the valuation report of the District Valuation Officer, Jaipur ("DVO").
- f) The CIT(A) has erred on facts and circumstances of the case in relying on the valuation report of DVO.
- g) The CIT(A) has erred on facts and circumstances in not appreciating the fact that DVO has determined the cost of Mall and Hotel on the basis of Plinth Area Rates and Cost Index Method for the basic structural work of the building and accounts method for finishing items in the building, however the determination of cost by the

appellant is based on actual cost which has actually been incurred and claimed by the appellant in its audited financial statements.

- h) The CIT(A) has erred on facts and circumstances in not appreciating the fact that the difference between the cost of construction as per the books of accounts and the estimated cost of construction (according to the DVO's report) is only a marginal, and an acceptable one, therefore, the cost determined by the appellant should be considered in view of the decision of Hon'ble Delhi High Court i.e., Commissioner of Income-tax vs. Ambience Developers and Infrastructure (P.) Ltd. (IT Appeal Nos. 195 to 199 & 203 of 2012) July 27, 2012.

Hence, the appellant prays that the total addition confirmed at Rs. 90,50,894 is only on surmises conjectures and should be deleted.

Ground No.3:

The appellant prays that he may be allowed to add, amend, alter or forego any of the above grounds of appeal as the circumstances may warrant.

Ground No.4:

The above grounds are without prejudice to each other.”

18. After hearing both the sides, we find the grounds raised by the assessee are identical to the grounds raised in ITA No.1087/Del/2013 for assessment year 2008-09. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the grounds raised by the assessee are allowed.

19. In the result, both the appeals filed by the assessee are allowed and the appeal filed by the Revenue is dismissed.

The decision was pronounced in the open court on 10.10.2019.

Sd/-

(KULDIP SINGH)  
JUDICIAL MEMBER

Dated: 10<sup>th</sup> October, 2019

Sd/-

(R.K. PANDA)  
ACCOUNTANT MEMBER

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi