

आयकर अपीलिय अधिकरण, सुरत न्यायपीठ, सुरत
**IN THE INCOME TAX APPELLATE TRIBUNAL-SURAT-BENCH-SURAT
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUTANT MEMBER**

आ.अ.सं./I.T.A No.1337/AHD/2016

निर्धारण वर्ष/Assessment Year: 1999-2000

M/s. Ashadeep Developers, Shyam Nagar-4, Near Seventh Day High School, Vijalpore, Navsari 396450 PAN: AAAAA 9272 F		Income Tax Officer, Ward-1, Navsari
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Hiren R. Vepari, CA
राजस्व की ओर से /Revenue by	Mrs. Anupama Singla, Sr.D.R.

सुनवाई की तारीख/ Date of hearing:	04.02.2020
उद्घोषणा की तारीख/Pronouncement on	04.02.2020

आदेश /O R D E R

PER O. P. MEENA, AM:

1. This appeal by the Assessee is directed against the order of learned Commissioner of Income tax (Appeals)-Valsad (in short “the CIT (A)”) dated 30.03.2016 pertaining to Assessment Year 1999-2000, which in turn has arisen from the assessment order passed under section 143 (3) r.w.s. 147 dated 25.03.2014 of Income Tax Act, 1961 (in short ‘the Act’) by the Income Tax Officer, Ward- 1, Navsari (in short “the AO”).

2. Additional ground- during the currency of appeal, the assessee has raised an additional ground as under:

“The learned CIT (A) erred in dismissing the ground on reopening particularly when the re-opening was done based on the report of the Valuation Officer and when the matter was referred to him, no proceeding under the Act were pending.”

3. The learned counsel for the assessee submitted that essentially this ground is legal ground. It was submitted that by way of written submissions that the assessee undertook construction of an Apartment with 21 flats in a project called Deeplaxmi Apartment during the period from F.Y. 1996-97 to 1999-2000. No proceedings were pending. However, based on the request letter of DCIT Circle - 1, Navsari dated 06.08.1999 under section 131 (1)(d) , the DVO undertook the valuation of the property and submitted report dated 29.11.2000 (PB-1 to 6)at Rs.71,71,225. Based on which, the Department has initiated proceeding under section 148 of the Act on 16.01.2006. (PB-23). Therefore, the learned counsel for the assessee contended that reference to DVO could be made when assessment proceedings are pending. In the case of there was no proceedings were pending hence, reference to DVO was not valid. Further, the reopening of assessment has been done based on DVO report which is not valid in the light of following judgements; Me & Mummy Hospital

v. ACIT [2014] 107 DTR (Gujarat) 209 (PB-104) CIT v. Baldev Plaza [2013] 94 DTR (All) 313, (PB-113), ITO v. Nisarg Co-op Housing Society Ltd. [2011] 48 SOT 136 (Ahmedabad-Trib) PB-122) , CIT v. Umiya Co-op Housing Society Ltd. [2009] 314 ITR 272 (Gujarat) (PB-124), Manjusha Estate Pvt. Ltd. v. ITO [2009] 314 ITR 263 (Gujarat) and ITO v. Agencies Rajasthan (P) Ltd. [2008] 117 (JP) 542(PB-136) contended that the AO did not have authority to refer the matter to DVO under section 131 (1)(d) of the Act on 06.08.1999 when no proceedings were pending on the date neither any return was filed nor any notice under section 148 of the Act was issued by the AO to the assessee by that date , re-opening as well as additions were not sustainable. However, the ld. CIT (A) while dealing the issue held that that issuing summons to the assessee tantamount to proceeding. However, considering the ratio of above judgements of various High Court and tribunal, it was urged that re-opening of assessment is not valid.

4. *Per contra*, the ld. Sr. D.R. submitted that the ITO Ward -1 Navsari, during the course of assessment proceedings in the case of M/s. Deep Laxmi Apart noticed the assessee society constructed the project during F.Y. 1996-97 to 1999-2000. Therefore, the case of M/s. Deep Laxmi Society was referred to DVO Ahmedabad for valuation of

said property vide letter dated 06.08.1999 which was received on transfer by the DVO Baroda for determination fair market value of the property. The DVO has assessed the value of property at Rs.71,71,225 as against the cost of property supplied by the AO at Rs. 36,00,000. Therefore, difference of Rs. 39, 48,225/- between DVO report and cost reported by the assessee during assessment proceedings at Rs. 36, 00,000, was added based on project completion method in the case of M/s. Deep Laxmi Apartment. The assessment of M/s. Deep Laxmi Apartment was completed on 29.03.2005 under section 144 r.w.s. 147 of the Act. (Copy of assessment order placed at Paper Book Page No. 83-86]. Therefore, the ld. Sr. D.R. submitted that valuation report from DVO was obtained during the course of assessment proceedings in the case of M/s. Deep Laxmi Apartment during assessment proceedings being undertaken in that case. Thus, summons under section 131 (1)(d) dated 06.08. 1999 for referring to DVO was issued in the case of Deep Laxmi Apartment during the pendency of proceedings in that case. Therefore, assessment in the case of the assessee was reopened on the basis of DVO report obtained by the AO of M/s. Deep Laxmi Apartment during assessment proceedings in that case. In said case, the M/s. Deep Laxmi Apartment has furnished cost of project at Rs.

36 lakhs. Therefore, the contention of the learned counsel for the assessee that reference was made when no proceedings were pending before the AO hence, re-opening based on DVO report is not valid is without any basis and far from facts. Therefore, the AO has rightly assumed jurisdiction u/s.147 of the Act in the case of the assessee when it was revealed in the assessment proceeding in the case of M/s. Deep Laxmi Apartment that the assessee has not filed any return of income for the investment made in construction of M/s. Deeplxmi Project, which was constructed by the assessee i.e. M/s. Ashadeep Developers.

5. We have heard the rival submissions and perused the relevant material on record. We find that the learned counsel for the assessee has not made any submission as to why this additional ground was not raised while filing of appeal before tribunal except saying that it is legal ground. Nor any affidavit is filed before for spelling reasons and justification of admission of additional ground and why not raised at first instance at the time of filing of appeal. Therefore, in such circumstances, the additional ground raised now by the assessee is not admissible, as the learned counsel for the assessee has not made out a case as to why this should be admitted. Even on merits, we further find that while finalizing assessment in the case of M/s. Deep

Laxmi Apartment, it was submitted before him that cost of construction of said project was at Rs. 36 Lakh. Therefore, to elucidate the fair market value of the said project a reference was made by the AO of M/s. Deep Laxmi Apartment vide letter dated 06.08.1999 to DVO Ahmedabad to ascertain cost of construction of the said project of society. The DVO Baroda has reported the cost of construction at Rs. 71.71 Lakh vide valuation report dated 29.11.2000 as against the declared cost of construction before the AO at Rs. 36 Lakh hence, the difference of Rs. 39.48 Lakh was made in the case of M/s. Deep Laxmi Apartment by finalizing the assessment under section 144 r.w.s. 147 on 29.03.2005. Thus, it is discernible that the case of M/s. Deep Laxmi Society was referred to DVO Ahmedabad for valuation of said property vide letter dated 06.08.1999 which was received on transfer by the DVO Baroda for determination fair market value of the property. The DVO has assessed the value of property at Rs.71,71,225 as against the cost of property supplied by the AO at Rs. 36,00,000. Therefore, difference of Rs.39,48,225/- between DVO report and cost reported by the assessee society during assessment proceedings at Rs.36,00,000, was added based on project completion method in the case of M/s. Deep Laxmi Apartment. The assessment of M/s. Deep Laxmi Apartment was completed on 29.03.2005 under

section 144 r.w.s. 147 of the Act. (Copy of assessment order placed at Paper Book Page No. 83-86]. Therefore, the Id. Sr. D.R. submitted that valuation report from DVO was obtained during the course of assessment proceedings in the case of M/s. Deep Laxmi Apartment during assessment proceedings being undertaken in that case. Thus, summons under section 131 (1) (d) dated 06.08.1999 for referring to DVO was issued in the case of Deep Laxmi Apartment during the pendency of proceedings in that case. Therefore, assessment in the case of the assessee was reopened on the basis of DVO report obtained by the AO of M/s. Deep Laxmi Apartment during assessment proceedings in that case. In said case, the M/s. Deep Laxmi Apartment has furnished cost of project at Rs. 36 lakhs. Therefore, the contention of the learned counsel for the assessee that reference was made when no proceedings were pending before the AO hence, re-opening based on DVO report is not valid is without any basis and devoid any merit. These facts clearly showed that no reference was made in the name of M/s. Ashadeep Developers (the assessee). Therefore, contention of the Learned Counsel that reference to DVO made when no proceeding pending and therefore, re-opening made is devoid of any merit and based on wrong and misleading facts and contrary to record. In view of this matter, the additional ground is

neither maintainable as no argument and justification is given and how it has come to be raised in second round of assessment proceedings which was carried out at the behest of Tribunal for supplying reasons for reopening of assessment only, Nor this grounds of appeal was taken before the AO, hence, it is not maintainable in law and also liable to be dismissed on merits due to facts as discussed above. The reliance by the Learned Counsel on various case laws cited above are not applicable as the facts of the present case entirely different as laid down in those case laws, and hence, we are not discussing each case laws as each case has its different facts. Therefore, additional ground of appeal is accordingly, dismissed.

6. Regular grounds of appeal:(I)

Ground No. (1) relates to confirming addition of Rs. 39,48,225 being difference between the value determined by the DVO at Rs. 71,71,225 and Rs. 36,00,64,541.

Ground No. (2) Without prejudice to above that when construction was spread over four years i.e. 1996-97 to 1999-2000, there was no justification for making addition in one year.

Ground No. (3) is without prejudice the Id. CIT (A) ought to have learned DVO has not given show-cause notice to the assessee.

Ground No. (4) Relates to that DVO adopted CPWD rates then valuation to be ignored.

7. Since above ground are interconnected to main issue of addition of Rs. 39,48,225, hence, being consider together.

8. Brief facts are that this is second round of appeal. The Tribunal vide order dated 31.01.2012 [I.T.A.No. 2520/Ahd/2007] has set-aside the assessment order to the file of the AO with a direction to provide reason for reopening of assessment to the assessee and make denovo assessment and pass speaking assessment order. In compliance, thereto the AO supplied the reasons and pass assessment order by making same addition as made in original assessment. During the course of original assessment proceedings, the Power of Attorney holder Shri Atulbhai C Desai, attended on 16.01.2006 and 30.01.2006 stated that books of accounts are prepared but return of income could not be prepared. It was also stated by him that total contract receipts is worked out at Rs. 66,77,000 and Rs. 65,90,000 expenses incurred for the project. However, no supporting evidences were filed. The assessee had filed Xerox copies of balance sheet trading account and capital account for F.Y. 1995-96,96-97,98-99 on 13.02.2006, hence, he was asked to file working of total income for A.Y. 98-99,99-2000,2000-01 but same were not filed. In set-aside assessment proceedings, notice under section 142(1) was issued on 19.03.2004 to the assessee but nobody attended on stipulated time. Therefore, the AO took cost of construction at Rs. 71,71,225 as per valuation report dated 29.11.2000 and after

allowing deduction of cost of land at Rs. 3,75,000 from Rs. 36,00,000 worked out actual cost of project at Rs. 32,25,000 and made addition of difference of Rs. 39,48,225 on the basis of project completion method. This method was adopted, as the assessee has not filed any return of income for A.Y.1998-99, 1999-00, 2000-01.

9. Being, aggrieved, the assessee filed an appeal before the Ld. CIT (A). Before whom it was submitted that the appellant is engaged in construction of project in the name of Deep Laxmi Apartment consisting of 21 flats. The construction started for A.Y. 1996-97 and completed in A.Y. 1999-2000. As per the details filed before ITAT following expenses were incurred:

Assessment year	Land	Construction
1996-97	4,40,000	33,05,489
1997-98		23,41,632
1998-98		1,06,508
1999-2000		4,10,912
Total	4,40,000	61,64,541

10. Total area constructed was 16,980 sq.; cost of per Sq. Ft. comes about Rs. 350 sq. ft., which is reasonable at the time. It was mentioned that DVO determined total cost at Rs. 71,71,225 whereas

the assessee shown at Rs. 61,64,541 hence, difference is of Rs. 19,96,678 which is less than 15% be ignored. It further submitted that how the figures of Rs. 36,00,000 for cost of construction is not clear. It was further claimed that no addition based on valuation report could be made. However, CIT (A) observed figure of cost of construction at Rs. 63,64,541 on the basis of books of accounts cannot be relied upon as same are not supported by the books of accounts. The appellant himself given cost of construction at Rs. 36,00,000 during the course of assessment proceedings in the case of M/s. Deep Laxmi Apartment . Hence, the CIT (A) held the cost of construction at Rs. 36 Lakh and confirmed the findings of the AO. The claim that DVO report is not correct , the CIT (A) observed that the DVO has given number of opportunities to the assessee to furnish detail but no details or any objection were filed before him. With regard to assessing income in one year, the CIT (A) observed that the AO in para No. 5 of assessment order had given clear finding that during the course of assessment proceedings of Asha Deep Developers, the appellant has stated that it has completed the project in A.Y. 1999-2000, and there was no work in progress shown in A.Y. earlier years, hence, the contention of the appellant was not found acceptable. With regard that report of DVO be ignored as no show-cause notice

was given, the CIT (A) observed that DVO has issued number of notices and even made telephonic talk to the appellant and despite all this the appellant didn't cooperate and not even single detail called for was filed. With regard CPWD rate and PWD rates, the CIT (A) viewed that the assessee has not raised any objection before DVO. With regard to difference being less than 15%, the CIT (A) observed that difference is at Rs. 39, 48,225 hence, it cannot be accepted.

11. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that no addition could be made on the basis of DVO report as held in number of case laws including Berry Plastic (P) Ltd. 217 Taxman 1 (Gujarat) and others. How the figures of Rs. 36, 00,000 is arrived is not known. The construction has been undertook from 96-97 to 99-2000, how the addition is made in one year. Whereas reason for reopening of assessment states that, the construction has been carried out in four years. The assessee has also filed details for 4 years. The Nakal of registry obtained from Sub Registrar gives the registry of sale deed executed between 5.3.1997 to 20.8.1998 (PB-87 to 103) hence; construction could not have taken place during A.Y. 1999-2000. Further, DVO has adopted CPWD rates hence, DVO report cannot be accepted. Further, cost of construction as per books of accounts of

the assessee was at Rs. 61,64,541 and not Rs. 36,00,000 and therefore, there was difference of only Rs. 10,07,000 between the cost of construction as shown by the assessee and as determined by the DVO has to be ignored being less than 15% in the light of decision of Hon`ble Supreme Court in the case of C.B Gautam 199 ITR530 (SC) and Nitesh Maheshwari 53 DTR 413.

12. *Per contra*, the ld. Sr. D.R. vehemently supported the order of lower authorities. She has further submitted that the assessee has not cooperated during original assessment proceedings as well as during set-aside proceedings before the AO. The assessee has not made any compliance to notice issued and produce books of accounts. Hence, lower authorities were justified in making addition in one year.

13. We have heard the rival submissions and perused the relevant material on record. The perusal of original assessment order and fresh assessment order made in compliance to TRIBUNAL order dated 31.01.2012 shows that the assessee has not cooperated in A.Y. assessment proceedings. The assessee has not made any compliance before the AO inspite of having given various notice to him. The assessee has failed to adduce any evidence of cost of construction before the DVO. The perusal of DVO report showed that the AO even

try to stop the DVO for making inspection of property and it was done in the presence of Inspector of Department. Therefore, the objection relating to DVO Report is not correct hence, it is not acceptable. It is further, seen that the construction was started from 1996-97 and reached finality in the A.Y. 1999-2000. The assessee has not shown any work in progress as no return for A.Y. 1996-97 to 1999-2000 has been ever filed. The Xerox copies of balance sheet filed before the AO, wherein the assessee has claimed that it has incurred cost of construction at Rs.61,54,541 during A.Y. 96-97 to 99-2000. Thus, cost of construction of the project has been claimed at Rs. 61, 64, 541 as per balance sheet, and Profit & Loss Account. This was further supported by the valuation report dated 14 March 2006 (PB-24) filed by the assessee for Registered Valuer , which worked out cost of construction at Rs. 60,97,500. Thus, the assessee has shown project completion method, hence, the profit is liable to be taxed in the assessment year under consideration only , hence, we hold the same. In the Registered Valuer report, the assessee shown rate of construction at 325 per Sq. Ft. for the total construction area of 16980 sq. Ft. However, these figures are not supported by the books of accounts as the assessee failed to produce any books of accounts before the income-tax authorities as well as DVO. The assessee has

not cooperated with DVO also nor filed any details. The assessee has not established its claim of cost by producing books of accounts before the AO. Therefore, in such circumstances and non corporative attitude of the assessee, the AO could not do justice with the assessee. Since, this being second round of litigation, we are therefore, taking a holistic view and considering all circumstances are of the view that difference arrived by taking figures at Rs. 36,00,000 and DVO report figure at Rs. 71,71,225 is also not correct for the reason that cost of Rs. 36,00,000 considered by the AO is also not supported by the books of accounts. Therefore, considering the nature of business, some profit rate is to be adopted for arriving at correct taxable income in the hands of the assessee. The claim of the assessee that how the addition can be made in one year is not tenable as the assessee has not filed any supporting evidence for year wise income and no return of income for assessment years including assessment year under consideration is also not filed. However, the point taken by the Learned Counsel that CPWD rate is to be applied and some weightage be given to cost figures submitted by the assessee. We find that the assessee himself has total cost at Rs. 66,77,000 and expenses at Rs. 65,97,000 of which difference comes to Rs. 87,000 which is the net profit according to the assessee.

However, same is also not disclosed as no return of income was filed. Similarly, in such type of project where 21 flats have been constructed, it would be reasonable to adopt Net Profit Rate as applicable to construction business. It is settled law that entire receipts cannot be taxed. In the light of these facts, only net profit is required to be taxed not the entire receipts. Therefore, real income is only to be taxed. We have considered the case laws, relied by the Learned Counsel, but find them not applicable in peculiar circumstances of the case and dealing the case on factual aspect, as the assessee has not filed return of income nor any evidence to substantiate its stand. Considering the circumstances of the case and taking Net Profit Rate in construction business, we are of the considered opinion that it would meet the end of justice if 5% of net profit rate is to be applied to gross receipts of Rs. 67,31,225, considered after reducing land cost i.e. [total receipts Rs.71,71,225 less land cost of Rs. 4,40,000 as per table given before tribunal para 9 of this order = net receipts Rs. 67,31,225]. Accordingly, net taxable income is worked out to Rs.3,36,561. Accordingly, addition of Rs.3,36,561 is sustained and balance addition of Rs.36,,11,663 is deleted. In view of this matter, the above grounds of appeal are allowed partly allowed.

14. In the result, the appeal of the assessee is partly allowed.

15. The order pronounced in open court on 04.02.2020.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER

Surat: Dated: February 4th, 2020/opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/
Guard file of ITAT.

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By order

Assistant Registrar, Surat