

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : SMC : NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 2110/Del/2019
Assessment Year : 2012-13

M/S GREEN VALLEY INFRACITY Vs. ITO, WARD 1(4),
PVT. LTD., NOIDA
NOIDA,
C/O NITESH SINGH,
C-190, SECTOR-49,
NOIDA
UTTAR PRADESH -201 301
(PAN: AAFCP8389P)
(Appellant) (Respondent)

Assessee by : Sh. Sunil Kumar Tyagi, CA
Department by : Sh. Pradeep Singh Gautam, Sr.DR.

ORDER

This appeal filed by the assessee is directed against the order passed by the Ld. CIT(A)-I, Noida on 29.10.2019 in relation to the assessment year 2012-13.

2. The brief facts of the case are that assessee filed its return income for the assessment year 2012-13 declaring income at Rs. NIL on 31.3.2014. Later on, the case of the assessee was selected for scrutiny and accordingly, notice u/s. 143(2) of the Income Tax Act, 1961 (in short "Act") dated 03.09.2014 was issued and served upon the assessee. Thereafter queries, notices u/s. 142(1) of the Act were issued and served. In response to the same, the AR of the assessee appeared and produced the books of accounts, balance sheet & its schedule, P&L account, other details and explanation and the same was test checked.

2.1 The Assessee company is a Private Limited Company engaged in the business of real estate development. During the course of assessment proceedings, assessee could not produce the confirmation of balances from 4 creditors in the balance sheet as on 31.3.2012 amounting to Rs. 6,21,454/- i.e. in respect of (i) M/s Megicle India Tour Rs. 1,33,704/- (ii) M/s Gromor Food Nursery Rs. 2,16,600/- (iii) M/s TZ Enterprises Rs. 1,40,000/- & (iv) M/s Wing Travels Rs. 1,31,150/-. Assessee submitted certain account statement in support of sundry creditors, but could not produce supporting bills amounting to Rs. 2,345,750/- i.e. in respect of (i) Neutral Publication Home Limited Rs. 1,34,750/- and (ii) Sahara India Mass Communication Rs. 1,00,000/-. During the assessment year the assessee has shown the addition on account of generator set amounting to Rs. 2,38,000/- and the same was reflected under the head 'Plant & Machinery'. Assessee was unable to produce the bill of such addition and in the absence of the documentary evidences of this addition amounting to Rs. 2.38 lacs, the AO added the same to the income of the assessee, after considering all the details and documents filed by the assessee. The AO finally computed the total income of the assessee amounting to Rs. 6,00,200/- by disallowing the sundry creditors as discussed in para 2 to 4 of the assessment order and completed the assessment u/s. 143(3) of the Act vide order dated 27.03.2015. Aggrieved with the assessment order, the assessee filed the appeal before the Ld. CIT(A), who vide his earlier order dated 27.9.2016 enhanced the income of the assessee by Rs. 4,94,001/- u/s. 69C of the I.T. Act, 1961; by Rs. 12,75,00,000/- u/s. 68 of the Act and by Rs. 20,49,08002/- u/s. 69 of the I.T. Act, 1961 and computed the total income of Rs. 33,35,52,203/- and directed the AO to issue the necessary demand and penalty notice, as per law. Aggrieved by the Ld. CIT(A)'s earlier order dated 27.9.2016, assessee appealed before the Tribunal and the Tribunal vide its order dated 31.5.2018 passed in ITA No.

6272/Del/2016, after hearing both the parties, set aside the issues in dispute to the Ld. CIT(A) to decide the same in dispute afresh, after considering the evidences filed by the assessee as discussed in Tribunal's order dated 31.5.2018 i.e. the assessee's paper book containing page 1-518 and provide adequate opportunity of being heard to the assessee for substantiating its claim. The Bench also directed the assessee to submit all the documentary evidences before the Ld. CIT(A) in order to substantiate its claim.

2.2 In compliance of the Tribunal's order dated 31.5.2018 passed by the ITAT, Delhi Bench, SMC, New Delhi, as aforesaid, the Ld. CIT(A) passed the impugned order dated 29.10.2018 by stating that income of the assessee was earlier determined by this office at Rs. 33,35,52,203/- in accordance with the provisions of section 251(1)(a) of the I.T. Act, 1961 and disposed off the appeal of the assessee by passing the impugned order dated 29.10.2018. Now the assessee is aggrieved against the impugned order dated 29.10.2018 passed by the Ld. CIT(A)-I, Noida and filed the present appeal before the Tribunal.

3. At the time of hearing, Ld. Counsel for the assessee stated that he is filing his written submissions in which he has attached all the facts and circumstances of the case and the case laws and this may be treated as arguments and the case of the assessee may be decided accordingly. He also stated in support of his written arguments, he has also filed the paper book supporting the arguments advanced by the Ld. Counsel for the assessee containing pages no. 1-518 in which he has attached the various documentary evidences for nullifying the impugned order passed by the Ld. CIT(A) and he requested that the appeal filed by the assessee may be accepted and the impugned order dated 29.10.2018 of the Ld. CIT(A) wherein he has enhanced the addition may be cancelled. For the sake of

convenience, the synopsis filed by the Ld. Counsel for the assessee before me is reproduced as under:-

"1. The Appellant is a corporate assessee engaged in the business of real estate development. The returned income declaring loss at (-) 494,0011- under section 139 was filed. The case was selected for scrutiny and the Id. AO made additions of Rs. 10,94,204/- and thus assessed the total income at Rs. 6,00,200/-.

2. The Assessee preferred appeal u/s 246A before the Id. CIT(A), Noida, against the assessment order. During the course of appellate proceedings, the assessee was in receipt of a show cause notice dated 16.05.2016, issued u/s 251(2), read with section 251(1)(a), signed by the Inspector of Income Tax, regarding enhancement of assessment, directing the assessee to furnish reply to the said notice before the undersigned being the Inspector of Income Tax. The copy of the said show cause notice is placed at Page 508 of paper book. The said show cause notice comprised as under :-

"1. The Id. AO has computed your total income Rs. 600,200/- and contesting that you have preferred an appeal against the order of Id. AD and the same is pending is adjudication before this office

"2....on examining your balance sheet, it is found that you have shown reserve and surplus of Rs. (-) 494,001, but reserve and surplus can't be negative. In this regard, you are required to explain the same.

"3 You have taken an "unsecured loans" of Rs. 12,75,50,0001-. In this regard, you are required to prove the genuineness and creditworthiness of this transaction.

"4 You have shown "work-in-progress" of Rs. 20,49,08,0021-. In this regard, you are required to explain why this amount should not transferred to your P&L Alc.

"5 Hence, you are therefore in person or through a representative duly authorized required to show cause why an enhancement of your income by Rs. 33,29,52,003/- (i.e. Rs. 20,49,08,002/- + Rs. 12,75,50,000/- + Rs. 494,00/-) should not be made. In this regard, I am directed to request you to furnish the reply of this notice within 2 weeks of the receipt of this notice before the undersigned.

*Sd/-
(Himanshu Soni)
Inspector
For Commissioner of Income Tax (A)-I
Noida*

3. Following the afore-said show cause notice dated 16.05.2016 issued by the Inspector of Income Tax, the Id CIT -A passed the appellate order dated 27.09.2016 making aggregate enhancement as mentioned in above show-cause notice.

4. The aforesaid Order of the Id CIT(A) was set aside by the Hon'ble SMC Bench of ITAT, Delhi vide judgment dated 31.05.2018, in ITA 62721DEL/2016, remitting the matter back to the Id. CIT -A to decide the issue in dispute afresh after considering all the evidences on records.

5. *The Ld. CIT(A), without issuing fresh show cause notice of enhancement (which he ought to have given if he intended to enhance the assessment in second round of appeal since the Hon'ble ITAT had set aside his earlier order dated 27.09.2016 directing to decide issue in dispute afresh), restored his earlier order with the same enhancement aggregating to Rs. 33,29,52,003 and passed the impugned order dated 29.10.2018, which is null and void since the same is passed without issuing any fresh notice of enhancement under section 251(2) of the Income Tax Act, 1961 and thus the impugned enhancement so made in the said order is without jurisdiction.*

6. *As your honour will kindly appreciate from the show cause notice dated 16.05.2016, the same is illegal, arbitrary and legally untenable, as under :-*

(i) The said show cause notice was issued by the Inspector of Income Tax, directing the assessee to furnish reply thereof before him being the undersigned, having no authority in law to make any enhancement in appellate proceedings and thus he illegally assumed the function of CIT(A), which is bad iri law and thus the said show cause notice is null and void ab-initio.

(ii) The said show cause notice was absolutely unfounded; as no iota of any enquiries or findings were made by office of CIT -A nor any iota of any circumstances exist warranting issue of such notice and thus the same is absolutely arbitrary, bald, unwarranted and without any basis and thus bad and untenable in law, because issue of

said show cause notice is not merely a ritual, but it is very vital and essential being pre-requisite to assume jurisdiction for enhancement of assessment and therefore such impugned and purported enhancement is without lawful assumption of jurisdiction and is liable to be quashed.

(iii) The said show cause notice was issued in most mechanical manner seemingly with a prejudiced view, without pointing out any discrepancy in any of the documents/evidences available on records, which are fully verifiable and accepted by the Id. AO after making all enquiries and thus assessee discharged its onus in terms of section 68, proving the genuineness, identity and creditworthiness in relation to such transactions and thus no iota of any circumstances existed to warrant issue of any such show cause notice.

(iv) The other basis of the show cause notice are also absolutely unwarranted and preposterous as the same were wholly misconceived; as the said show cause notice says that 'the balance of reserve and surplus can't be negative' and that why the balance of 'work-in-progress' should not be transferred to profit and loss account; which having no basis or relevancy for any enhancement as per law. '

7. Without prejudice to the above legal position, the assessee furnished all requisite and cogent documentary evidences on records and has fully discharged its burden in accordance with law by furnishing all requisite documents

before the Id. AO, which are neither disproved nor controverted by the Id. CIT(A).

8. The Id. CIT -A made following enhancement in his order, for which assessee hereby submits as under :-

(i) Rs. (-) 4,94,001 made u/s 69C relating to negative balance of Reserve & Surplus as per the Audited Balance Sheet

Para 23 of CIT(A) order dated 27.09.2016, starting at Page 6 thereof.

The very premise of the Id. CIT(A) that the balance in reserve and surplus cannot be in negative, is preposterous and frivolous; because the negative reserves and surplus represents losses suffered by the assessee, which are fully evident from the profit and loss account as well as from the returned income of the assessee declaring-the said loss, which was examined, verified and accepted by the Id. AO and was made a basis of total income in the assessment order.

Since the afore-said negative balance of reserve and surplus, representing loss for the year, stood fully accounted for in the books of account, as appearing in Audited Balance Sheet under the head "Shareholders' Funds" and thus the source thereof is fully verifiable and explained and the same was also verified by the Id. AO and accepted as such and thus the same does not warrant to make any additions/enhancement under any circumstances and by no stretch of imagination, section

69C has any applicability to the same and therefore the same is liable to be deleted.

(ii) Rs. 12,75,00,000 made u/s 68 relating to 'Short term Borrowings' as appearing in the Audited Balance Sheet:-

Para 24 of CIT(A) order dated 27.09.2016, starting at Page 7 thereof

The Id. CIT -A made the afore--said impugned enhancement in most arbitrary and mechanical manner without any basis, grossly ignoring all requisite and cogent documentary evidences furnished on records to prove the identity, the genuineness of transactions and creditworthiness of the lender, as under :-

(a) Written Confirmation - - Page 17 of paper book

(b) Ledger statement - Page 18-19 of paper book

(c) Income Tax PAN Card - Page 20 of paper book

(d) Income Tax Returns - Page 21-22 of paper book

(e) Bank Statements - Page 23-53 of paper book

(f) Partnership Deed - Page 494-498 of paper book

All such documents were fully examined and verified by the Id. AO. The said short term borrowings were availed by the assessee from a partnership firm namely Green Field Estates, having Income Tax PAN AAIFG6397 A. Assessee also furnished on records the bank statements of the said party and transactions appearing therein are fully verifiable. The Id. AO also made an independent enquiry by taking recourse of section 133(6), which was duly complied with by the lender and after all such examination

and verification, the Id. AO being satisfied with the explanation given by the assessee, accepted the same. The Id. CIT(A) did not make any iota of any enquiries at his end nor he took any recourse of section 133(6) or 131 and therefore he did not have any iota of any basis or findings to make such enhancement. The fact remains that the assessee has fully discharged its onus in accordance with law, duly supported with requisite cogent documentary evidences placed on records, which are neither disproved nor controverted by the Id. CIT(A). The Id. CIT -A abruptly and baldly made the said impugned enhancement, which is made in mechanical manner by taking the balance appearing in balance sheet as on 31.03.2012, which also comprised opening balance of Rs.701,00,000/-, as evident from the ledger statement placed at Page 18 of the paper book, supported with transactions in bank statements, placed at Page 25-28 of paper book, which at any rate without prejudice, cannot be made subject matter of any additions in this year. The fact remains that the Assessee has furnished on records bona-fide, legitimate and verifiable explanation about the nature and source of the said borrowings duly supported with cogent documentary evidences and therefore it is wrong to suggest at the part of Id. CIT(A) that the explanation of the assessee is allegedly not satisfactory and the said purported premise of CIT -A is contrary to the documentary evidences on records, which proves that the assessee has been successfully able to discharge its onus as per law and has shifted the onus to revenue to prove

contrary if any. The Id. CIT(A) did not have any iota of any findings to the contrary and thus the facts and circumstances of the case do not warrant to invoke the provisions of section 68 of the Income Tax Act, 1961 and thus the impugned enhancement made by Id CIT -A is arbitrary, unwarranted, baseless, unlawful, legally untenable and therefore, in most humble submissions of the assessee, the same is liable to be deleted/ quashed.

(iii) Rs. 20,49,08,002 made uls 69 relating to 'work-in-progress' as appearing under 'Current Assets' in the Audited Balance Sheet:-

Para 25 of CIT(A) order dated 27.09.2016, starting at Page 7 thereof

The Id. CIT(A) made the afore-said impugned enhancement in most arbitrary, unlawful and mechanical manner U/S 69, which has no applicability to the same as the assessee has duly accounted for and recorded the 'work-in-progress' in its books of account; as fully evident from the audited balance sheet.

For ready reference, section 69 of the income Tax Act 1961 is reproduced as under:

Unexplained Investments

69. Where in the financial year immediately preceding the assessment year, the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income and the assessee offers no explanation about the nature and

source of the investments or the explanation offered by him is not, in opinion of the assessing officer satisfactory, the value of the investments may be deemed to be the income of the assessee for such financial year.

Emphasis supplied.

The perusal of the above section clearly provides that the provisions thereof are applicable only in case of investments which are not recorded in books of account being the transactions outside the books of account. In this case, the balance of 'work-in-progress of Rs. 20,49,08,002/- is duly appearing in the Audited Balance Sheet under the head 'current assets', relevant page 11 of the paper book, and therefore the same stood duly recorded in books of account, as also admitted by the Id. CIT -A, who himself picked this figure from the Balance Sheet itself and therefore by no stretch of imagination, the said balance of work-in-progress' can be made any basis of any addition/enhancement u/s 69.

Without prejudice to the above, it is also pertinent to point out that para 4 of the show cause notice to the said effect comprised as under :-

You have shown "work-in-progress" of Rs. 20,49,08,0021-. In this regard, you are required to explain why this amount should not transferred to your P&L Alc. It may therefore abundantly clear that the show cause notice was only to re-categorize the said amount so as to transfer the same to profit and loss Alc, which is nothing but a compilation of the books of account and there was no whisper about

invoking provisions of section 69 nor about any part of such expenses being outside books of account and therefore at any rate without prejudice the said enhancement is beyond the scope of show cause notice and therefore is legally untenable on this count too.

Without prejudice to the all above, it is categorically submitted that the assessee furnished on records the nature and source of the said 'work-in-progress' duly verified by the Id. AO, supported with all cogent and documentary evidences placed on records, copies at pages 54-498 of the paper book, comprising the following documents :-

I. Break-up of 'work-in-progress' and title deed of land. Pages 56-96 of paper book

II. Ledger and vouchers pertaining to expenses incurred towards 'work-in-progress'. Pages 99-487 of paper book

III. Location Map and approved Map of the project. Pages 488-491 of paper book

It is therefore submitted that the nature and source of the same stood fully explained and substantiated by the assessee by way of documentary evidences. The Id. CIT(A) misconceived the fact that the land was supposed to appear under 'fixed asset schedule' of balance sheet; whereas in the case of a builder, the land cannot be categorized under fixed asset and therefore such misconceived presumption of Id. CIT -A propelled himself in wrong direction making the impugned unlawful

addition/enhancement, which is not legally tenable and is liable to quashed/deleted.”

4. On the contrary, Ld. DR relied upon the order of the Ld. First Appellate Authority and stated that assessee remain non-cooperative before the AO as well as Ld. CIT(A) and Ld. CIT(A) has decided the issues in dispute against the assessee, as per law, after giving adequate opportunity of being heard to the assessee, which has not been availed by the assessee. Therefore, he requested that the impugned order passed by the Ld. CIT(A) is as per law, hence, no interference is called for in the well reasoned order passed by the Ld. CIT(A) and the same may be upheld and the appeal of the assessee may be dismissed.

5. I have heard both the parties and carefully considered the rival submissions and perused the orders of the authorities below alongwith the Paper Book containing pages 1-518 alongwith the written synopsis filed by the Ld. Counsel for the assessee. I note that the assessee is engaged in the business of real estate development. The returned income declaring loss at (-) 494,001/- under section 139 of the Act was filed by it. The case of the assessee was selected for scrutiny and the AO made the additions of Rs. 10,94,204/- and thus assessed the total income at Rs. 6,00,200/-. Against the assessment order, the Assessee preferred appeal before the Id. CIT(A), Noida and during the course of appellate proceedings, the assessee was in receipt of a show cause notice dated 16.05.2016, issued u/s 251(2), read with section 251(1)(a), signed by the Inspector of Income Tax, regarding enhancement of assessment, directing the assessee to furnish reply to the said notice before him being the Inspector of Income Tax.

5.1 In compliance of the show cause notice dated 16.5.2016 issued by the Inspector, the Assessee filed a reply and given his explanation with the documentary evidences, but the Ld. CIT(A) feeling dissatisfied with the

explanation and documentary evidences and vide his order dated 27.09.2016 enhanced the income of the assessee by Rs. 4,94,001/- u/s. 69C of the I.T. Act, 1961; by Rs. 12,75,00,000/- u/s. 68 of the Act and by Rs.20,49,08,002/- u/s. 69 of the Act and finally computed the income at Rs. 33,35,52,203/- directing the AO to issue necessary demand notice, as per law. Aggrieved with the order dated 27.9.2016, assessee filed the appeal before the Tribunal which came up for hearing before the SMC ITAT, Bench, New Delhi in ITA No. 6272/Del/2016 and the Tribunal vide its order dated 31.5.2018 has set aside the issues in dispute to the Ld. CIT(A) to decide the same afresh, after considering all the evidences as discussed in the paper book filed by the assessee and give adequate opportunity of being heard to the assessee for substantiating its claim. The Assessee was also directed to submit all documents / evidences before the Ld. CIT(A) in order to substantiate its claim and did not take any unnecessary adjournment and fully cooperate with the Ld. CIT(A) in the proceedings for speedy disposal of the matter.

5.2 In compliance of the Tribunal's order dated 31.5.2018, the Ld. CIT(A) fixed the hearing on 20.8.2018 by issuing notice dated 03.08.2018. In response to the same, the AR of the assessee appeared and requested for adjournment on the ground that assessee requested that his counsel is down with fever and requested adjournment in the first week of October, 2018. But the Ld. CIT(A) has discussed the adjournment on various technical issues viz. Vakalatnama was undated and as that was on a non-judicial stamp paper of Rs. 100/- which was sold by a registered stamp vendor on 18.8.2018; the appellant could not attend the hearing on the appointed date of hearing on 17.8.2018 and counsel can make a statement on behalf of its client, converse is not permitted in law and a client cannot make a statement on behalf of its counsel. That would amount to putting the cart before the horse. Further, the Vakalatnama mentioned two counsels being

Sh. Naresh Bhardwaj, FCA and Sh. Pravind Chand, FCA and both the counsels had accepted and executed the Vakalatnama. The letter of the appellant stated only one counsel being down with fever. Therefore, the other counsel was very well in a position to attend the case of the appellant. This is without prejudice to the fact that the appellant did not enclose any corroborative evidence to prove its contention that the said counsel was down with fever and therefore, was unable to attend the proceedings. Ld. First Appellate Authority not convinced with the reasons for adjournment being counsel of the assessee is done with fever and one more opportunity was provided to the appellant and by notice dated 26.9.2018 the case was fixed for hearing for 04.10.2018. The said notice was returned back with the postal remarks that there was no such person on the address written on the envelope in which the notice was sent by the office of the Ld. CIT(A). Again notice was issued for 29.10.2018 which was received by the assessee and on 26.9.2018 another letter was received from the appellant on the letter head of the appellant itself and signed by the Director stating that counsel for the appellant had requested the adjournment preferably hearing in the 2nd week of November, 2018, but again the Ld. CIT(A) not satisfied with the reasons mentioned by the assessee and the Ld. CIT(A) has determined the income of the assessee on already determined income at Rs. 33,35,52,203/- vide impugned order dated 29.10.2018.

5.3 I have perused the impugned order dated 29.10.2018 passed by the Ld. CIT(A), Noida as well as the Tribunal's order dated 31.5.2018 wherein the Tribunal has set aside the issues in dispute to the Ld. CIT(A) with the specific directions to decide the same afresh, after considering all the evidences as discussed in the Tribunal's order dated 31.5.2018 i.e. paper book containing pages 1-518 in which the assessee has attached the copy of income tax return and computation; balance sheet and profit and loss account; letter dated 23.1.2015 filed before AO giving details of WIP and

submission of evidences for unsecured loan of Rs. 12.75 crores alongwith confirmation and bank statement Greenfield Estate; letter dated 13.2.2015 filed before AO giving break up of WIP and title deed of land of the project under work in progress; letter dated 20.2.2015 filed before AO submitted all the ledgers and vouchers pertaining to work in progress; letter dated 26.2.2015 filed before AO submitted location map, brochure and approved map of the project; letter dated 20.3.2015 filed before AO submitted copy of partnership deed of Greenfield estate lender of unsecured loan of Rs. 12.75 crores of loan; letter dated 25.3.2015 filed before AO informing the AO that M/s Greenfield Estate has sent confirmation through speed post after which AO completed the assessment; order sheet of AO evidencing that the AO had raised queries for loan of Rs. 12.75 crores and work in progress and examined and verified the documents submitted; notice of enhancement dated 16.5.2015 issued by CIT(A); reply of the assessee dated 26.5.2016 informing the CIT(A) about intention of the assessee to avail the benefit of Direct Tax Dispute Resolution Scheme 2016; submission of assessee dated 20.6.2016 reiterating intention to avail the benefit of Director Tax Dispute Resolution Scheme 2016; copy of order sheet maintained by the CIT(A) evidencing that before issuing notice of enhancement dated 16.5.2016 assessment records were called for and seen and Direct Tax Dispute Resolution Scheme 2016. The Bench in its order dated 31.5.2018 has also written that the Ld. Counsel for the assessee has certified that all the aforesaid documentary evidences which is a matter of record and assessee has filed before the Ld. CIT(A) as well as before the AO, but the Ld. CIT(A) has not considered the same in a proper manner which are very essential to be considered and needs to be examined by the Id. CIT(A) afresh.

5.4 Keeping in view of the facts and circumstances of the case, I find that the Tribunal vide its order dated 31.5.2018 remitted back the issues in dispute to the file of the Ld. CIT(A) to decide as afresh, after considering

the documents as discussed above. But I have perused the impugned order dated 29.10.2018 passed by the Ld. CIT(A) and I am of the view that Ld. CIT(A) has passed 10 paragraphs of the impugned order in para no. 1 the Ld. CIT(A) has written about the ITAT order and in para 2 & 3 written about the issue of notice to the assessee which was received by the assessee and requested for adjournment. The adjournment of the assessee has been rejected on technical grounds as discussed above and finally refused the adjournment sought by the Id. Counsel for the assessee, which is contrary to the principle of natural justice. In my view Ld. CIT(A) starts its proceedings vide notice dated 03.08.2018 and disposed of the appeal of the assessee by passing the impugned order dated 29.10.2018 which is very short period in passing the impugned order which shows that the same is passed in a haste manner without compliance of the specific directions of the ITAT given vide its order dated 31.5.2018 to the Ld. CIT(A) to decide the issues in dispute afresh, after considering the documentary evidences which the assessee has filed before the Tribunal in the shape of paper book containing pages 1-518 as discussed above. But the Ld. CIT(A) did not bother to examine the same which was already on record as certified by the Ld. Counsel for the assessee. The impugned order has been passed by the Ld. CIT(A) in contravention of the directions of the Tribunal given vide order dated 31.5.2018.

5.5 Keeping in view of the facts and circumstances of the present case and the evidences filed by the assessee before the Ld. CIT(A) and the AO and also before this Bench in the shape of paper book containing pages 1-518, as discussed above, I am of the considered view that Ld. CIT(A) did not bother to consider the documentary evidences filed by the assessee before him. But in the interest of justice, I am considering, perusing and appreciating the said evidences filed in the shape of paper book containing

pages 1-518 as discussed above as well as synopsis filed by the Ld. Counsel for the assessee in the foregoing paragraphs.

5.6 It is noted that Ld. CIT(A), without issuing fresh show cause notice of enhancement, restored his earlier order with the same enhancement aggregating to Rs. 33,29,52,003 and passed the impugned order dated 29.10.2018, which is null and void since the same is passed without issuing any fresh notice of enhancement under section 251(2) of the Income Tax Act, 1961 and thus the impugned enhancement so made in the said order is without jurisdiction and therefore, the same deserve to be cancelled.

5.7 It is also noted that the show cause notice dated 16.05.2016 issued by the Inspector of Income Tax is illegal and untenable, because the said show cause notice was issued by the Inspector of Income Tax, directing the assessee to furnish reply thereof before him, having no authority in law to make any enhancement in appellate proceedings and thus he illegally assumed the function of CIT(A), which is bad in law and thus the said show cause notice is null and void ab-initio. The said show cause notice was absolutely unfounded as no enquiries or findings were made by the Ld. CIT(A) nor any circumstances exist warranting issue of such notice and thus the same is absolutely arbitrary, unwarranted and without any basis and thus bad and untenable in law. It is an admitted fact that issue of said show cause notice is very vital and essential being pre-requisite to assume jurisdiction for enhancement of assessment and therefore such impugned enhancement is without lawful assumption of jurisdiction and is liable to be quashed. It is also noted that the said show cause notice was issued in most mechanical manner seemingly with a prejudiced view, without pointing out any discrepancy in any of the documents/evidences available on records, which are fully verifiable and accepted by the AO after making all enquiries and thus assessee discharged its onus in terms of section 68 of the Act, proving the genuineness, identity and creditworthiness in relation to such

transactions and thus no iota of any circumstances existed to warrant issue of any such show cause notice. The other basis of the show cause notice are also absolutely unwarranted as the said show cause notice says that 'the balance of reserve and surplus can't be negative' and that why the balance of 'work-in-progress' should not be transferred to profit and loss account; which having no basis or relevancy for any enhancement as per law. The assessee has furnished all requisite documentary evidences on records and has fully discharged its burden in accordance with law by furnishing all requisite documents before the AO, which are neither disproved nor controverted by the Id. CIT(A).

5.8 I have also perused the page no. 513 of the Paper Book which is a copy of order sheet 16.5.2016 of the Inspector, Sh. Himanshu Soni and the approval dated 17.5.2016 of the Ld. CIT(A)-I and the copy of the show cause notice issued by the Inspector at Page 508 of paper book. For the sake of clarity the relevant portion of the order sheet dated 16.5.2016 of the Inspector and the approval of the letter for issue of show cause notice dated 16.5.2016 and show cause notice letter dated 16.5.2016 issued by the Inspector of Income Tax are reproduced as under:-

"16/5/2016 Perusal to the oral directions of CIT(A), Noida, It is proposed to issue enhancement notice u/s. 251(2) read with Sec. 251(1)(a) for showing cause, why an enhancement should not be made. The draft letter to the appellant is enclosed for necessary approval.

Sd/-
(Himanshu Soni)
Inspector

CIT(A)-I

As proposed.

Sd/-

17.05.2016.

ITO/OS

**CONTENTS OF SHOW CAUSE NOTICE DATED 16.5.2016
ISSUED BY THE INSPECTOR OF INCOME TAX READ AS
UNDER:-**

"1. The Id. AO has computed your total income Rs. 600,200/- and contesting that you have preferred an appeal against the order of Id. AD and the same is pending is adjudication before this office

"2. On examining your balance sheet, it is found that you have shown reserve and surplus of Rs. (-) 494,001, but reserve and surplus can't be negative. In this regard, you are required to explain the same.

"3 You have taken an "unsecured loans" of Rs. 12,75,50,0001-. In this regard, you are required to prove the genuineness and creditworthiness of this transaction.

"4 You have shown "work-in-progress" of Rs. 20,49,08,0021-. In this regard, you are required to explain why this amount should not transferred to your P&L Alc.

"5 Hence, you are therefore in person or through a representative duly authorized required to show cause why an enhancement of your income by Rs. 33,29,52,003/- (i.e. Rs. 20,49,08,002/- + Rs. 12,75,50,000/- + Rs. 494,00/-) should not be made. In this regard, I am directed to request you to furnish the reply of this notice within 2 weeks of the receipt of this notice before the undersigned.

Sd/-

(Himanshu Soni)
Inspector

5.8.1 After perusing the aforesaid contents of the order sheet, it is crystal clear that the order sheet dated is 16.05.2016 and the show cause notice is also of dated 16.05.2016, however, the approval granted by the Ld. CIT(A)-I, Noida is of dated 17.05.2016, which shows that approval was granted by the Ld. CIT(A)-I, Noida on 17.5.2016 and the notice was issued on 16.5.2016 i.e. one day before the approval granted by the Ld. CIT(A), which is contrary to law and facts of the case, meaning thereby that the Inspector is pre-determined to issue the notice without application of mind. Even otherwise, the Inspector is not competent to issue the notice, hence, the notice dated 16.5.2016 issued by the Inspector of Income Tax on which the enhancement was made by the Ld. CIT(A), is invalid and void ab initio and deserve to be canceled.

5.9 As regards, the merits of the case, the Ld. CIT(A) made following enhancement in his order:-

(i) Rs. (-) 4,94,001 made u/s 69C relating to negative balance of Reserve & Surplus as per the Audited Balance Sheet.

Para 23 of CIT(A) order dated 27.09.2016, starting at Page 6 thereof.

The very premise of the Id. CIT(A) that the balance in reserve and surplus cannot be in negative, is preposterous and frivolous; because the negative reserves and surplus represents losses suffered by the assessee, which are fully evident from the profit and loss account as well as from the returned income of the assessee declaring-the said loss, which was examined, verified and accepted by the Id. AO and was made a basis of total income in the assessment order.

Since the afore-said negative balance of reserve and surplus, representing loss for the year, stood fully accounted for in the books of account, as appearing in Audited Balance Sheet under the head "Shareholders' Funds" and thus the source thereof is fully verifiable and explained and the same was also verified by the Id. AO and accepted as such and thus the same does not warrant to make any additions/enhancement under any circumstances and by no stretch of imagination, section 69C has any applicability to the same and therefore the same is liable to be deleted.

(ii) Rs. 12,75,00,000 made u/s 68 relating to 'Short term Borrowings' as appearing in the Audited Balance Sheet:-

Para 24 of CIT(A) order dated 27.09.2016, starting at Page 7 thereof

The Id. CIT(A) made the afore--said impugned enhancement in most arbitrary and mechanical manner without any basis, grossly ignoring all requisite and cogent documentary evidences furnished on records to prove the identity, the genuineness of transactions and creditworthiness of the lender, as under :-

- (a) Written Confirmation - - Page 17 of paper book
- (b) Ledger statement - Page 18-19 of paper book
- (c) Income Tax PAN Card - Page 20 of paper book
- (d) Income Tax Returns - Page 21-22 of paper book
- (e) Bank Statements - Page 23-53 of paper book
- (f) Partnership Deed - Page 494-498 of paper book

All such documents were fully examined and verified by the AO. The said short term borrowings were availed by the assessee from a partnership firm namely Green Field Estates, having Income Tax PAN AAIFG6397 A. Assessee also furnished on records the bank statements

of the said party and transactions appearing therein are fully verifiable. The AO also made an independent enquiry by taking recourse of section 133(6) of the Act which was duly complied with by the lender and after all such examination and verification, the AO being satisfied with the explanation given by the assessee, accepted the same. The Id. CIT(A) did not make any enquiry at his end nor he took any recourse of section 133(6) of the Act or u/s. 131 of the Act and therefore he did not have any iota of any basis or findings to make such enhancement. The fact remains that the assessee has fully discharged its onus in accordance with law, duly supported with requisite cogent documentary evidences placed on records, which are neither disproved nor controverted by the Id. CIT(A). The Id. CIT(A) abruptly made the said impugned enhancement, which is made in mechanical manner by taking the balance appearing in balance sheet as on 31.03.2012, which also comprised opening balance of Rs.701,00,000/-, as evident from the ledger statement placed at Page 18 of the paper book, supported with transactions in bank statements, placed at Page 25-28 of paper book, which at any rate without prejudice, cannot be made subject matter of any additions in this year. The fact remains that the Assessee has furnished on records bona-fide, legitimate and verifiable explanation about the nature and source of the said borrowings duly supported with cogent documentary evidences and therefore it is wrong to suggest at the part of Id. CIT(A) that the explanation of the assessee is allegedly not satisfactory and the said purported premise of Ld. CIT(A) is contrary to the documentary evidences on records, which proves that the assessee has been successfully able to discharge its onus as per law and has shifted the onus to revenue to prove contrary if any. The Id. CIT(A) did not have any findings to the contrary and thus the facts and

circumstances of the case do not warrant to invoke the provisions of section 68 of the Income Tax Act, 1961 and thus the impugned enhancement made by Id CIT(A) is arbitrary and baseless and deserve to be deleted.

iii) Rs. 20.49,08,002/- u/s. 69 of the Act relating to work in progress as appearing under current assets in the audited balance sheet :-

Para 25 of CIT(A) order dated 27.09.2016, starting at Page 7 thereof

The Id. CIT(A) made the afore-said impugned enhancement in most arbitrary, unlawful and mechanical manner U/S 69, which has no applicability to the same as the assessee has duly accounted for and recorded the 'work-in-progress' in its books of account; as fully evident from the audited balance sheet.

For the sake of convenience, section 69 of the income Tax Act 1961 is reproduced as under:

Unexplained Investments

69. Where in the financial year immediately preceding the assessment year, the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in opinion of the assessing officer satisfactory, the value of the investments may be deemed to be the income of the assessee for such financial year.

The perusal of the above section clearly stipulates that the provisions thereof are applicable only in case of investments which are

not recorded in books of account being the transactions outside the books of account. In this case, the balance of 'work-in-progress of Rs. 20,49,08,002/- is duly appearing in the Audited Balance Sheet under the head 'current assets', relevant page 11 of the paper book, and therefore the same stood duly recorded in books of account, as also admitted by the Id. CIT(A), who himself picked this figure from the Balance Sheet itself and therefore by no stretch of imagination, the said balance of work-in-progress' can be made any basis of any addition/enhancement u/s 69.

It is noted that para 4 of the show cause notice to the said effect comprised as under :-

You have shown "work-in-progress" of Rs. 20,49,08,002/-. In this regard, you are required to explain why this amount should not transferred to your P&L Alc. It may therefore abundantly clear that the show cause notice was only to re-categorize the said amount so as to transfer the same to profit and loss Alc, which is nothing but a compilation of the books of account and there was no whisper about invoking provisions of section 69 nor about any part of such expenses being outside books of account and therefore at any rate without prejudice the said enhancement is beyond the scope of show cause notice and therefore is legally untenable on this count too.

The assessee furnished on records the nature and source of the said 'work-in-progress' duly verified by the Id. AO, supported with all cogent and documentary evidences placed on records, copies at pages 54-498 of the paper book, comprising the following documents :-

I. Break-up of 'work-in-progress' and title deed of land.
Pages 56-96 of paper book

II. Ledger and vouchers pertaining to expenses incurred towards 'work-in-progress'. Pages 99-487 of paper book

III. Location Map and approved Map of the project. Pages 488-491 of paper book

In view of above, the nature and source of the same stood fully explained and substantiated by the assessee by way of documentary evidences. The Id. CIT(A) misconceived the fact that the land was supposed to appear under 'fixed asset schedule' of balance sheet; whereas in the case of a builder, the land cannot be categorized under fixed asset and therefore such misconceived presumption of Id. CIT -A propelled himself in wrong direction making the impugned unlawful addition/enhancement, which is not legally tenable and is liable to deleted.

6. Keeping in view of the facts and circumstances of the case as explained above in the preceding paragraphs, I am of the considered view that the impugned order has been passed by the Ld. CIT(A) without applying his mind and without complying the directions of the Tribunal given vide its order dated 31.5.2018. In my view the Ld. CIT(A) should have issued a fresh notice u/s. 251(2) to the assessee for substantiating its claim in order to prove the documentary evidences and to answer the query raised by the Ld. CIT(A) for the enhancement notice, but the same has not been done by the Ld. CIT(A), which is contrary to law and facts on the file and hence, the impugned order is not sustainable in the eyes of law. Further, the notice dated 16.5.2016 issued by the Inspector of Income Tax where the approval of the Ld. CIT(A)-I, Noida was of dated 17.5.2018, which shows the pre-determined mind of the Inspector and non application of mind of the authorities below and even the Inspector of Income is not competent to issue such notice. Even otherwise, on perusing the documentary evidences

filed by the Ld. Counsel for the assessee in the shape of paper book on the issues in dispute which I have discussed in the preceding paragraphs, I am of the view that the AO has examined all the issues with supporting evidences filed by the assessee which is a matter of record. Therefore, the enhancement notice is not sustainable in the eyes of law and resultantly the enhancement made by the Ld. CIT(A) is not tenable, therefore, I cancel the impugned order dated 29.10.2018 by accepting the appeal filed by the assessee.

7. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced on 02-03-2020.

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 02-03-2020

SRB

Copy forwarded to:

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

AR, ITAT, NEW DELHI.