आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

(Conducted through Virtual Court)

ITA No.27/Ind/2020
Assessment Year: 2013-14

DCIT(Central)-II, Bhopal	**बनाम/** Vs.	Shri Agarwal Education & Welfare Society Bhopal
(Appellant / Revenue)		(Respondent / Assessee)
PAN: AACTS 0481 M		
Assessee by	Shri S.S. Deshpandey, AR	
Revenue by	Shri P.K. Mitra, CIT-DR	
Date of Hearing	14.10.2022	
Date of Pronouncement	19.10.2022	

आदेश / O R D E R

Per B.M. Biyani A.M.:

Feeling aggrieved by appeal-order dated 08.11.2019 passed by learned Commissioner of Income-Tax (Appeals)-3, Bhopal **["Ld. CIT(A)"]**, which in turn arises out of assessment-order dated 30.03.2016 passed by learned ACIT, Central-II, Bhopal **["Ld. AO"]** u/s 143(3) of the Income-tax Act, 1961 **["the Act"]** concerning Assessment-Year **["AY"]** 2013-14, Revenue has filed this appeal on following solitary ground:

> *"1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting the addition of Rs. 1,51,29,975/- made by the Assessing Officer on account of income over expenditure.*

2. On the facts and circumstances of the cases, the Ld. CIT(A) erred in deleting the addition of Rs. 10,41,64,945/- made by the assessing officer on account of unexplained expenditure u/s 69B of the Income-tax Act, 1961."

2. Heard the learned Representatives of both sides at length and perused the case-records.

3. Briefly stated the facts are such that the assesee-society filed return of income of relevant AY 2013-14 at a total income of Rs. Nil. The case was selected for scrutiny and the assessment was finalized u/s 143(3) at a total income of Rs. 11,93,72,920/- after making certain additions. Aggrieved by assessment-order, the assessee filed appeal to Ld. CIT(A) and got relief qua the addition. Now, the revenue has filed this appeal against the order of Ld. CIT(A).

4. We proceed to adjudicate grounds in seriatim.

Ground No. 1:

5. In this Ground, the revenue claims that the Ld. CIT(A) has erred in deleting the addition of Rs. 1,51,29,975/- made by Assessing Officer on account of excess income over expenditure.

6. The precise facts qua these grounds are such that on the basis of statement of one Shri Ramesh Kumar Yadav, the revenue-authorities found that Shri Ramesh Kumar Yadav was a security-guard receiving annual salary of Rs. 78,000/- from one school run by assessee-society but his services were in fact being utilized by the members of society (Shri Sudhir Agarwal and Smt. Archana Agarwal) for their personal benefit, which is a violation of section 13(1)(d) of the act. Finding so, Ld. AO went on concluding that the entire benefit of section 11 / 12 claimed by the assessee-society is forfeited and the whole income of Rs. 1,51,29,975/- being excess of income over expenditure shall be taxable. While passing assessment-order, Ld. AO

not only made an addition of Rs. 78,000/- but also denied exemption u/s 11 / 12 and assessed a further sum of Rs. 1,51,29,975/-.

7. During first-appeal, Ld. CIT(A) sustained addition of Rs. 78,000/-but, however, deleted the addition of Rs. 1,51,29,975/- made by Ld. AO on account of denial of exemption u/s 11 / 12. In short, Ld. CIT(A) held that the value of benefit i.e. Rs. 78,000/- alone shall be taxable but the entire exemption of section 11 / 12 cannot be denied to the assessee. Now, the grievance of revenue is that the Ld. CIT(A) ought to have confirmed the addition of Rs. 1,51,29,975/-.

8. We observe that the Ld. CIT(A) has elaborately considered the legal issue as to whether the whole exemption u/s 11 or 12 is lost because of violation of section 13(1)(d) or only relevant income *qua* the benefit extended to members, has to be taxed in the light of legal provisions as well judicial rulings. Therefore, it would be better to reproduce the relevant paragraphs of the appeal-order of Ld. CIT(A) as under:

> **"*4.2.4*** *I have duly considered the facts of this case inter alia arguments advanced by the appellant. These grounds have two parts one is related to addition of Rs. 78,000/- on salary paid to guard u/s 13(2)(d) {AO wrongly used sec 13(1)(d)} by treating it as personal benefit to member trustee (specified person). Another aspect is consequential to first part. The AO disallowed the entire exemption claimed u/s 11 & 12 of the Act due to operation of section 13(1)(d) {correct section 13(2)(d)} of the Act. With regard to first aspect, it is seen that the contention of the appellant that services of guard was provided to the trustee in lieu of his services rendered for the trust and since no other benefit/remuneration/fees was given to Shri Sudhir Agarwal, salary paid to guard should be allowed as deduction. I find the argument self-defeating and devoid of any merit. Provision of section 13(2)(d) is very clear which says that if services of trust are made available to specified person without adequate remuneration or other compensation, then such sum shall be "deemed to have been used" for the benefit of specified person. Admittedly these services were provided by assessee trust to Shri Sudhir Agarwal, without any payment and for free, hence, such expenses are hit by the provision of section 13 of the Act. There is no documentary evidence or otherwise to presume that such services were made available to the specified person in lieu of his service to assessee trust, so argument remained to be theoretical, nothing more. Therefore, in view of categorical provision*

of disallowance of Rs. 78,000/- added by the AO in AY 2013-14 is ***upheld."***

9. We find that the Ld. CIT(A) has passed a well-reasoned order holding that the entire exemption u/s 11 / 12 is not lost. We do not find any infirmity in the order of Ld. CIT(A). Hence the same is uphold and Ground No. 1 of revenue is dismissed.

Ground No. 2:

10. In this Ground, the revenue claims that the Ld. CIT(A) has erred in deleting the addition of Rs. 10,41,64,945/- made by Ld. AO u/s 69B.

11. Apropos this addition, the facts are such that during assessment-proceeding, Ld. AO observed that the assessee has made investment in construction of building of Sagar Institute of Science and Technology (SISTec-R), Ratibadi, Bhopal. In order to ascertain the exact quantum of such investment, Ld. AO made a reference dated 06.08.2013 to Departmental Valuation Officer (DVO), whereupon the DVO submitted his report dated 11-12-2013 estimating the cost of construction. Ld. AO observed that there were differences in the value of construction as declared by assessee and as estimated by DVO, the year-wise differences were as under:

F.Y	A.Y.	Declared by the Assessee	Estimated by valuation cell	*Difference (In Rs.)*
2008-09	2009-10	85,66,920/-	3,03,59,124/-	*2,17,92,204/-*
2009-10	2010-11	1,01,44,402/-	3,55,94,969/-	*2,54,50,567/-*
2010-11	2011-12 '	62,47,714/-	2,21,40,411/-	*1,58,92,697/-*
2011-12	2012-13	1,21,67,141/-	4,31,17,450/-	*3,09,50,309/-*
2012-13	2013-14	4,09,49,173/-	14,51,14,118/-	*10,41,64,945/-*

12. When the Ld. AO confronted the assessee about the differences, the assessee submitted that it is a society running educational institutions; its accounts are audited; it had maintained complete records of construction expenses for various items; and that all expenses are fully supported by proper bills and vouchers. Therefore, in absence of any specific defect or evidence, it was against the law to assume the difference of the amount recorded in the books of accounts and the amount mentioned in the valuation-report of DVO as undisclosed income of the assessee. Ld. AO, however, rejected assessee's contentions and made additions for various assessment years. Presently we are concerned with AY 2013-14 in which the Ld. AO made addition of Rs. 10,41,64,945/-.

13. During first-appeal, the assessee challenged the addition and made a detailed submission, which is reproduced in the order of Ld. CIT(A). Ld. CIT(A) considered the submissions of assessee and finally deleted the addition by holding as under:

> *"4.1.16 This is important to mention that in the case of appellant itself for assessment years 2009- to 2012-13 having similar facts and circumstances, additions made u/s 69B on the basis of DVO's report have already been deleted by my Ld. predecessor vide order of appeal Nos.CIT(A)-3/BPL/IT-287 to 290/2014-14 dated 29.08.2017 and CIT(A)-3/BPL/IT-291 to 296/2014-15 dated 16.07.2018. Therefore, following the "rule of consistency" order passed by my Ld. Predecessors in the case of the assessee and other assessee of the same group is also followed and thereby issue is treated as covered. It has been held in the case of CIT vs. Velimalai Rubber Co. Ltd. (Ker) 181 ITR 299 that through the principal of res judicata is not applicable to income tax proceedings but when a question of law or fact was decided in assessee's own case for an earlier assessment year and an identical question came up for consideration for a later year, tribunal was justified in placing reliance on earlier decision. In view of above discussion, it is held that reference made to the District Valuation Officer u/s 142A of the Act by the AO for valuation of college building was not legally valid. The AO resorted to making reference u/s 142A to DVO without pointing out any defects in books of accounts and without even rejecting the books which is a sine qua non for making reference to DVO as held by* ***Hon'ble Supreme Court in Sargam Cinema*** *case and other cases by numerous other High Courts. As the reference is held to be bad in law non-maintainable, all consequential actions including the additions made by the AO on account of difference in*

valuation, between value estimated by DVO vis-à-vis shown in books are not sustainable. Additions made on the account with respect to reference to DVO in all the assessment years are therefore deleted. Besides this, it has been held in numerous cases that addition cannot be made simply on the basis of DVO's report without having any other material to corroborate the addition and without rejecting the regular books of accounts. On this count also, additions cannot be sustained.. Therefore, addition made by the AO amounting to Rs.10,41,64,945/- u/s 69B is deleted. Therefore, appeal on these grounds is allowed."

14. During hearing before us, Ld. DR supported the order of Ld. AO.

15. Per contra, Ld. AR vehemently argued that the reference made by Ld. AO to DVO without rejecting books of accounts was itself beyond the scheme of section 142A and therefore illegal. Ld. AR relied upon several judicial rulings which have already been discussed by Ld. CIT(A) in his order, the leading being the direct authority by Hon'ble Supreme Court in **Sargam Cinema Vs. CIT (2010) 328 ITR 513 (SC)**, wherein it was categorically held thus:

"3. 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 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.

4. 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."

The assesse also relied upon **Goodluck Automobile Pvt. Ltd. 359 ITR 306 (Guj)**, wherein it was held that the rejection of books of accounts should precede reference to DVO and, therefore, report of DVO cannot form the foundation for rejection of books of accounts. The Gujarat High Court held that once it was apparent from the records that while making the reference to DVO, the Assessing Officer had not rejected the books of account, then the reference made to DVO was not in consonance with the provisions of law and hence such reference was invalid. With these submissions, Ld. AR

argued that when the reference made u/s 142A without rejecting the books of account is in itself invalid, consequently the addition made is also invalid.

16. That brings us to understand the law of section 131(1)(d) and 142A of the Income-tax Act, 1961. With the able assistance of learned Representatives of both sides, we are able to understand the legislative history of these sections. It is observed from submissions that initially there was no specific provision in Income-tax Act, 1961 to enable the assessing authorities to make reference to DVO for ascertaining value / cost of investment, etc. However, the Assessing Authorities used to make reference u/s 131(1)(d) but such action was held be non-maintainable in **Amiya Bala Paul 130 taxmann 511 (SC).** Thereafter, the Union Legislature introduced section 142A in Income-tax Act, 1961 by Finance Act, 2004, which again generated a new controversy as to whether the Ld. AO can make a reference to DVO without rejecting books of accounts of assessee or not? The matter travelled upto Hon'ble Supreme Court in **Sargam Cinema (supra)** wherein, relevant paragraph of decision re-produced earlier, the apex court categorically held that the assessing authority cannot make a reference to DVO without rejecting books of assessee. Thereafter, the Legislature again substituted a new version of section 142A w.e.f. 01.10.2014 whereby sub-section (2) in the section reads as under:

> **"The Assessing Officer may make a reference to the Valuation Officer under sub-section (1) whether or not he is satisfied about the correctness or completeness of the accounts of the assessee"**

Learned Representatives fairly admitted that the latest version of sub-section (2), as reproduced above, which empowers the assessing authority to make reference to DVO without rejecting books of accounts, is effective from 01.10.2014 and not retrospectively. The effect of this legislative wisdom, as accepted by the learned representatives, is that the Assessing Officer was precluded from referring any matter to the DVO without the books of accounts being rejected by him and it is only after 01.10.2014 that sub-

section (2) of section 142A empowers the Assessing Officer to make reference without rejecting books of account.

17. Now we are in a position to consider the implications in assessee's case. We observe that the Ld. AO has not rejected books of assessee. We further observe that the Ld. AO made reference to DVO on 06.08.2013 and DVO submitted report on 11.12.2013. Thus, the events of making reference to DVO have taken place before 01.10.2014 and that too without rejecting books of account. In such a situation, we suffice it to say that the Ld. AO was not justified to make a reference in the light of decision of Hon'ble Supreme Court in **Sargam Cinema (supra)** and the provision of sub-section (2) of section 142A. Thus, we find no infirmity in the order of the Ld. CIT(Appeals) on this aspect. Resultantly we uphold the order of Ld. CIT(A) by and Ground No. 2 of revenue is also dismissed.

18. In the result, this appeal of revenue is dismissed.

Order pronounced as per Rule 34 of I.T.A.T. Rules, 1963 on 19/10/2022.

Sd/- Sd/-

(SIDDARTHA NAUTIYAL) (B.M. BIYANI)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Indore
दिनांक /Dated : 19.10.2022
Patel/Sr. PS

Copies to: *(1) The appellant*
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore

1.	Date of taking dictation	
2.	Date of typing & draft order placed before the Dictating Member	
3.	Date on which the approved draft comes to the Sr. P.S./P.S.	
4.	Date on which the fair order is placed before the Dictating Member for pronouncement	
5.	Date on which the file goes to the Bench Clerk	
6.	Date on which the file goes to the Head Clerk	
7.	Date on which the file goes to the Assistant Registrar for signature on the order	
8.	Date of dispatch of the Order	