

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE MS. ASTHA CHANDRA, JUDICIAL MEMBER
AND
SHREE G.D. PADMAHSHALI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA Nos.1128, 1129 & 1130/PUN/2023
निर्धारण वर्ष / Assessment Years : 2012-13, 2013-14 & 2014-15

Royal Swan Charitable Minority Trust, Rajashree Niwas, Saibaba Mandir Taroda BK, Nanded - 431605	Vs.	ITO (Exemption), Nanded
PAN : AACTM6057H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

Assessee by :	Shri Rajendra Agiwal
Department by :	Shri Sourabh Nayak
Date of hearing :	16-05-2024
Date of Pronouncement :	18-07-2024

आदेश / ORDER

PER ASTHA CHANDRA, JM :

These three appeals filed by the assessee are directed against three separate identical orders dated 31.08.2023 of the Ld. Commissioner of Income Tax (Appeals)-11, Pune [**"CIT(A)"**] pertaining to Assessment Years (**"AYs"**) 2012-13, 2013-14 and 2014-15 respectively. Since the common issues are involved, these were heard together and are being disposed of by this common order.

2. We take up the appeal for AY 2012-13 as the lead case.

3. The assessee has raised the following grounds:-

- “1. *In the facts and circumstances of the case and in law the Ld. CIT(A) erred in upholding the order passed by the Ld. ITO (Exemption) assessing the total income at Rs.22,24,130 as against the returned income Rs. NIL.*
2. *The Ld. ITO erred in making the addition of Rs.22,24,126 to the total income based on construction cost as determined in valuation report of Departmental Valuation Officer (DVO).*

3. *Without prejudice if addition is upheld it should be allowed as application of income on the objects of the trust and income be reduced to NIL.*
4. **Basis the survey u/s 133A at the premises of charitable trust before the amendment in the law by the Finance Act, 2017**
 - 4.1. *The Ld. CIT(A) failed to appreciate that the entire addition is bad in law, as it is emanating from the survey action u/s 133A on 06.09.2013 at the premises of the trust, The Ld CIT(A) failed to appreciate the implication of pre and post amended law w.r.t section 133A.*
 - 4.2. *The Ld. CIT(A) failed to appreciate that the survey in the premises of charitable trust was void ab initio in view of pre amended law. The addition is liable to be deleted.*

5. Reference to DVO

- 5.1. *The Ld. CIT(A) erred in not appreciating that the reference to the DVO is illegal/invalid when no assessment or reassessment was pending before Ld. ITO (Exemption). The reference to the DVO was contrary to the provisions of the law as per provisions of section 142A(1). The addition is liable to be deleted which is emanating from invalid reference to the DVO.*
- 5.2. *The Ld. CIT(A) erred in confirming the addition on the basis of DVO's report which was made without rejection of books of account.*

6. Reopening of assessment

- 6.1. *The reassessment is bad in law as it is made in consequence to DVO's report. The reassessment merely based on DVO's report is liable to be quashed.*
- 6.2. *That for such and other reasons the assessment is liable to be set aside.*

7. Initiation of proceedings u/s 271(1)(C)

The Ld. ITO erred in initiating penalty u/s 271(1)(c).

8. *The appellant craves, leave to add, alter all, or any of the grounds of appeal on or before hearing."*

4. Vide application dated 23.04.2024 the assessee has requested for admission of additional legal grounds not expressly taken before the Ld. CIT(A) but were raised in written submissions filed before him. It is stated that ground No. 3 as per appeal memo has been raised for the first time before the Tribunal which is on merits. As per this ground if addition made is held to be applied on the objects of the trust, then the addition would be nullified. In the context of admission of additional evidence, reliance was placed on the decision of Hon'ble Supreme Court in the case of National Thermal Power Company Ltd. Vs. CIT (1998) 229 ITR 383 (SC).

5. We have heard the Ld. Representative of the parties on the issue of admittance of additional grounds. The order of Ld. CIT(A) would reveal that he has recorded his observations and findings on the legal contentions raised and submissions made before him. The same contentions / submissions have now been taken by way of additional grounds before the Tribunal as ground Nos. 4, 5 and 6. In our opinion since the Ld. CIT(A) has already decided these grounds they do not partake the character of additional grounds and cease to be categorized as such. Only Ground No. 3 taken before the Tribunal was neither raised nor argued before the Ld. CIT(A). In the light of the decision (supra) of the Hon'ble Supreme Court, we hereby admit the new additional ground No. 3 for adjudication. For the sake of ready reference it reads thus :-

“3. Without prejudice if addition is upheld it should be allowed as application of income on the objects of the trust and income be reduced to NIL.”

6. The brief facts are that the assessee is a charitable trust registered u/s. 12AA of the Income Tax Act, 1961 (**the “Act”**). Its main object is to carry educational activities. For AY 2012-13 it e-filed return on 30.03.2023 declaring total income at Rs. Nil. A survey u/s 133A of the Act was conducted on the assessee on 05.09.2013 during which it was noticed that the assessee trust has constructed school building named “Horizon Discovery Academy” and cost of construction during the year was shown at Rs.1,55,09,965/-. To determine the correct value of cost of construction of the school building, the matter was referred to the Departmental Valuation Officer (**“DVO”**), Bhopal who in his report valued the cost of construction for the year at Rs.2,08,60,752/-. There was thus difference of Rs.53,50,787/- which escaped assessment. Hence notice u/s 148 of the Act dated 23.12.2015 was issued with prior approval of the Joint Commissioner of Income Tax (**“JCIT”**) which was duly served on 11.01.2016 on the assessee. In response thereto, the assessee filed a letter stating that return filed on 30.03.2013 be accepted as return filed u/s 148 of the Act. The case was selected for scrutiny and statutory notice(s) along with questionnaire were issued/served. The Ld. Assessing Officer(**“AO”**) found that the assessee has shown Nil profit after claiming deduction u/s 11 to the extent of Rs.5,10,330/-. The Ld. AO sought justification with documentary evidence for the difference of Rs.53,50,787/- between cost of construction of the said school building as shown by the assessee and as valued by the DVO. The assessee gave explanation reproduced by the Ld.

AO in para 5 of the assessment order along with copy of order u/s 144A dated 16.03.2016 of the Ld. JCIT for AYs 2008-09 and 2010-11 to 2014-15 in the case of M/s Precious Enterprises. After considering the explanation of the assessee, the Ld. AO completed the assessment on 30.12.2016 u/s 143(3) r.w.s. 147 of the Act at Rs.22,24,126/- to the income returned by the assessee at Rs. Nil with the observations recorded in para 7 which is reproduced below :-

-6-

Royal Swan Charitable :A.Yr. 2012-13:U/s 143(3)RWS 147 ,dt.30-12-2016.

valuation as per the DVO and the assessee, and difference in valuation of the building in question is as under:

Sr. No	Asstt. year	Valuation as per DVO	Value shown by the assessee	Difference	Valuation as per books
01	2012-13	Rs. 2,08,60,752	Rs. 1,55,09,965	Rs. 53,50,787	Rs. 1,49,80,265
02	2013-14	Rs. 4,83,22,337	Rs. 3,65,46,487	Rs. 1,17,37,226	Rs. 3,65,85,111
03	2014-15	Rs. 88,40,659	Rs. 65,00,000	Rs. 38,47,531	Rs. 49,93,128
	TOTAL	Rs. 7,80,23,748	Rs. 5,85,56,452	Rs. 2,09,35,544	Rs. 5,65,58,504

The DVO, in his valuation report, adopted the rate of self supervision charges @ 2.50%, however, applying the ratio, as discussed in para 6 above, the same is taken at 10%. As the DVO has already considered the same at 2.5%, therefore, the difference of 7.5% for self supervision is considered for calculating the supervision charges. Further, as discussed in para 5 above, adjustment of 10% is made due to difference in CPWD rate and local PWD rate. In view of this, the working is as under:

Cost as per DVO of school building ...	Rs. 7,80,23,748/-
Less:Supervision charges 7.5%....	Rs. 58,51,781/-

	Rs. 7,21,71,967/-
Less:10% difference in estimate as discussed in Para 6 above..	Rs. 72,14,196/-

	Rs. 6,49,57,771/-

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Less: Valuation as per books... Rs. 5,65,58,504/-

Total difference in cost of construction of school building. Rs. 83,99,267/-
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In view of this, proportionate difference in cost of construction of the school building, year-wise is as under:

A.Yr.	Total cost as per books	Cost of construction	Per centage of cost of construction
2012-13	Rs.5,65,58,504	Rs.1,49,80,265	26.48%
2013-14	Rs.5,65,58,504	Rs.3,65,85,111	64.68%
2014-15	Rs.5,65,58,504	Rs.49,93,128	8.84%

Thus , in view of this calculation, year-wise corresponding cost of construction of the school building, as per DVO, which is treated as difference in cost of valuation of the building of Horizon Discovery Academy and is taxed in the hands of the assessee trust alongwith initiation of penalty proceedings u/s 271(1)(c) of the I.T.Act,1961 for concealment of income, will be as under.

A.Yr.	Total cost as per DVO	Per centage of cost of construction	Amount
2012-13	Rs.83,99,267	26.48%	Rs. 22,24,126
2013-14	Rs.83,99,267	64.68%	Rs. 54,32,646
2014-15	Rs.83,99,267	8.84%	Rs. 7,42,495

7. Aggrieved, the assessee challenged the impugned addition of Rs.22,24,126/- before the Ld. CIT(A) based on construction cost as determined by the DVO. It was contended in written submissions dated 22.08.2023 filed before the Ld. CIT(A) that –

(i) the action of the Department to carry out the survey proceedings at the trust place is not as per the provisions of the Act at the time of survey. Provisions of section 133A prior to its amendment by the Finance Act, 2017 w.e.f. 01.04.2017 and after the said amendment was brought to the notice of the Ld. CIT(A). It was contended that the survey was conducted on the assessee on 06.09.2013 which date is prior to the amendment enabling survey on charitable institution u/s 133A of the Act and thus material impounded or gathered cannot be used or form the basis of any

proceedings nor does the statement on oath during the survey have any legal sanctity or legal basis.

(ii) the reference to the DVO was contrary to the provisions of law provided u/s 142A(1) of the Act and that the Ld. AO could not refer the matter to the DVO without pointing out any defects in the books of account and without rejecting it.

8. The Ld. CIT(A) was not convinced with the above legal contentions / submissions raised before him which he rejected. As no submissions on merits of the impugned addition was made, the Ld. CIT(A) was of the view that the assessee accepted the difference between cost of construction as estimated by the DVO (with suitable adjustment by the Ld. AO) and the cost of construction declared in the books of account. The observations and findings of the Ld. CIT(A) are reproduced below :-

"9. I have considered the above argument of the appellant. The validity of a survey operation u/s 133A cannot be challenged before CIT (A) as same is not an appealable action u/s 246A of the Act. Therefore, the contention regarding the validity of survey operation in the present case cannot be accepted by the undersigned and rejected, being inadmissible. Even otherwise, it is a well' settled legal position that evidences collected in an invalid search/survey can be used by the income tax authorities against the assessee. This proposition has been held by the Hon. Supreme Court in the case of **Pooran Mal v. Director of Inspection 93 ITR 505 (SC)**. The relevant portion of the said decision is as under:

"In that view, even assuming, as was done by the High Court, that the search and seizure were in contravention of the provisions of section 132 of the Income-tax Act, still the material seized was liable to be used subject to law before the income-tax authorities against the person from whose custody it was seized and, therefore, no writ of prohibition in restraint of such use could be granted. It must be, therefore, held that the High Court was right in dismissing the two writ petitions. The appeals must also fail and are dismissed with costs."

In view of the above discussion, the contention of the appellant that the survey is invalid and the evidences collected during this survey cannot be used in an assessment proceeding, is rejected.

10. The second legal contention raised by the appellant is that the Assessing Officer could not have referred the matter to the OVO without rejecting the books of accounts. In this regard, the appellant has relied on the decision of Hon. Supreme Court in the case of **Sargam Cinema vs CIT 328 ITR 0513 (SC)**. I have perused the said decision as well as the facts of present case. It is a well settled legal position that any judgment delivered by a Court in the specific facts of a case, cannot be applied to any other case, unless the facts are identical. In the present case, during the survey operation, the trustee of the appellant trust admitted that the value of cost of construction of Horizon Discovery Academy as declared in the books of accounts is not correct and an additional income of Rs.1,00,00,000/- was declared on this account. The said statement has not been retracted till date. Therefore, the fact that the cost of construction declared in the books of accounts is incorrect, stands

admitted by the appellant. The Assessing Officer after the survey, referred the matter to DVO for ascertaining the correct value of cost of construction. Since in the present case, it is an admitted fact that the cost of construction shown in the books of accounts is incorrect, the ratio laid down by Hon. Supreme Court in the case of Sargam Cinema (supra) shall not be applicable because the defect in books of accounts stands admitted by the appellant.

11.1 The third argument of the appellant is that the reference u/s 142A of the Act could have been made only during the course of assessment proceedings. For this proposition, the appellant has relied on the decision of **ITO vs Vijeta Educational Society 118 ITD 382 (Lucknow Tribunal)**. I have perused the decision relied upon by the appellant and it is seen that following observations are made by the Hon. Tribunal in the said case :

“.....This also shows that a reference to valuation officer under section 142A can be made only when a requirement is felt by the Assessing Officer for making such reference. Requirement would arise or could be felt only when there is some material with the Assessing Officer to show that whatever estimate assessee has shown is not correct or not reliable. The use of word 'require' is not superfluous but signifies a definite meaning whereby some preliminary formation of mind by the Assessing Officer is necessary which requires him to make a reference to the DVO under section 142A.....”

11.2 Thus, the Hon. Tribunal has held that reference to DVO can be made when there is some preliminary formation of mind by the Assessing Officer which requires him to make a reference to DVO. In the present case, during the survey operation, it was found that the cost of construction declared in the books of accounts was under-valued and an amount of Rs.1,00,00,000/- was declared as additional income on this issue. Therefore, the Assessing Officer was having sufficient material to feel the necessity of making a reference to DVO. Therefore, the action of the Assessing Officer is in consonance to the observations of Hon. Tribunal, in the case relied upon by the appellant. Hence, the decision of Hon. Tribunal in the case of Vijeta Educational Society (supra) will be of no help of the appellant.

12. During the appellate proceedings, the appellant has raised only above discussed legal issues and has not filed any submission on merits of the addition. This shows that the appellant accepts the difference between the cost of construction of Horizon Discover Academy as estimated by the DVO (with suitable adjustment by the Assessing Officer) and the cost of construction declared in the books of accounts. The legal contentions raised by the appellant have been rejected as discussed above. Therefore, considering the totality of facts of the case, the addition of Rs.22,24,130/- made by the Assessing Officer is upheld. The ground no. 1 raised by the appellant is DISMISSED.”

9. Dissatisfied, the assessee is in appeal before the Tribunal and all the grounds including the additional ground No. 3 relate thereto.

10. The Ld. AR drew our attention to the submission made by the assessee on 29.12.2016, a copy of which appears at pages 1-2 of the paper book. It is stated therein that up to the date of valuation by the DVO i.e. upto 10.10.2013 the assessee had incurred expenditure of Rs.5,65,58,504/- towards construction as per the regular books of account whereas the DVO determined the valuation of construction of building at

Rs.7,80,23,748/-. There is thus net difference of Rs.2.15 crores. The assessee pointed out certain deficiency in the valuation report. The Ld. AR submitted that though before the Ld. CIT(A), the assessee had challenged the impugned addition but in its submission dated 22.08.2023 (copy at pages 3 to 6 of the paper book), the assessee raised legal contentions in paras 6 to 18 thereof duly supported by precedents, copies of which are placed in Legal paper book.

11. The Ld. AR fairly admitted that ground No. 3 taken up before the Tribunal was neither raised before the Ld. CIT(A) nor any contention / submission in that regard was made. He therefore urged that the additional ground No. 3 taken before the Tribunal, after admittance thereof, may be remitted to the Ld. CIT(A) to decide it on merits.

12. The Ld. DR strongly supported the order of the Ld. CIT(A).

13. We have considered the submission of the parties and perused the records. The facts are not in dispute. The assessee is registered charitable trust carrying on educational activities. It is also a fact that the assessee had filed its return and survey u/s 133A of the Act was conducted on 06.09.2013. During the course of survey, the statement of Mr. Sanjay Ramrao Ruikar, Secretary of the assessee trust and Partner of M/s Hotel City Pride, Nanded was recorded on oath. In Q. No. 5 he was asked to produce the bills/vouchers for expenses incurred on building construction to which he replied that the issue has been decided by the Ld. JCIT, R-3, Nanded during the survey action in the case of Hotel City Pride, in which he is a partner. In submission dated 22.08.2023 filed before the Ld. CIT(A) it was stated in para 3 thereof that in statement recorded u/s 133A of one of the trustees on 07.09.2023, the trustees have made the declaration of Rs.1,00,00,000/- under the head 'construction of trust building'.

14. It is in the above factual matrix of the assessee's case, let us now consider the grounds taken by the assessee before us.

14.1 Ground No. 1 is general in nature.

14.2 Ground Nos. 2 and 6 are taken up together. It is contended that the impugned addition is based on construction cost as determined in valuation report of the DVO. This is an error and reassessment made in

consequence to the DVO's report is bad in law. In our opinion, it is not so. During the survey operation, the trustees have impliedly conceded that cost of construction as per the books of account was not correct and declared additional income of Rs.1,00,00,000/- on this account. There is no evidence on record that the statement of trustees recorded during the survey has been retracted. It was in this background that reference was made to the DVO and his report was obtained. The assessment order reveals that the Ld. AO has taken care of the deficiency pointed out by the assessee in the report of the DVO and made suitable adjustment in respect of self supervision charges and difference in CPWD rates and local PWD rates. In para 12 of the appellate order, the Ld. CIT(A) observed that the assessee has not filed any submission on merits of the addition and therefore drew the inference that the difference between the cost of construction as estimated by the DVO (with suitable adjustment by the Ld. AO) and cost of construction declared in the books of account is acceptable to the assessee. Nothing has been brought before us to rebut the same. We therefore hold that the impugned addition based on the DVO's report with adjustment as sought by the assessee during reassessment is justified. Ground Nos. 2 and 6 are therefore rejected.

14.3 Ground No. 4 relates to implication of pre and post amended law with reference to section 133A and survey being void ab-initio in view of pre amended law which the Ld. CIT(A) failed to appreciate. The Ld. CIT(A) has discussed this issue in para 8 of his appellate order and recorded his finding thereon in para 9 thereof. We have considered the amended law which provides that a place, at which an activity for charitable purpose is carried on may also be surveyed by an Income Tax authority. It does not convey that during the pre amended era no such survey was conducted and/or could be conducted. By amended law such survey has been clothed with legal sanctity. The Ld. CIT(A) has, in our view, rightly held that validity or otherwise of survey under consideration cannot be the subject matter of challenge in appeal proceedings as law does not so provide. However, it is well settled that material found during illegal survey/search can also be used as evidence as held by the Hon'ble Supreme Court in the case of Pooran Mal Vs. Director of Inspection (1974) 93 ITR 505 (SC) if it could be established to be relatable to the assessee. We therefore endorse the view of Ld. CIT(A) and reject this ground.

14.4 Ground No. 5 relates to legality or otherwise of the reference to the DVO. The Ld. CIT(A) has dealt with this issue in paras 10 and 11 of the appellate order. The contention of the assessee was that without rejecting the books of account, the Ld. AO could not have referred the matter to the DVO on the strength of the Hon'ble Supreme Court's decision in the case of *Sargam Cinema Vs. CIT 328 ITR 513 (SC)*. We have perused the decision of the Hon'ble Supreme Court (supra) and are of the view that the Ld. CIT(A) has rightly held that it is distinguishable on facts. In that case the Tribunal had recorded a categorical finding that the books were never rejected. This fact had not been considered by the High Court. In the case at hand, it is an admitted position that the cost of construction recorded in regularly maintained books of account was understated which led the trustees to surrender additional sum of Rs.1,00,00,000/- under the head 'construction of trust building'. It is only after rejecting the cost of construction as reflected in the books of account that the Ld. AO made reference to the DVO to value the correct cost of construction of the building. As regards the contention of the assessee that reference u/s. 142A of the Act could have been made only during the course of assessment proceedings, we are inclined to agree with the findings of the Ld. CIT(A) that the Ld. AO had sufficient material before him which convinced him to make reference to the DVO and that reliance by the assessee on the decision of Lucknow Bench of Tribunal in the case of *ITO Vs. Vijeta Educational Society 118 ITD 382 (Lucknow Tribunal)* is misconceived. We, therefore, decide ground No. 5 against the assessee.

14.5 Ground No. 7 regarding the initiation of proceedings u/s 271(1)(c) is pre-mature.

14.6 The remaining ground No. 3 relates to allowability or otherwise of the addition as application of income on the object of the trust. Admittedly this contention raised before us was neither part of submission dated 22.08.2023 made before the Ld. CIT(A) nor was argued before him. As stated earlier, we have admitted this ground for adjudication. After hearing the Ld. Representative of the parties, we are inclined to accept the request of the Ld. AR to remit the issue to the Ld. CIT(A) to decide on merits. Accordingly, we remit this issue alone to the Ld. CIT(A) with a direction to him to decide it on merits in accordance with law after allowing adequate opportunity of being heard to the assessee and to present its case. We order accordingly.

15. Our decision in appeal for AY 2012-13 apply mutatis mutandis to appeals for AYs 2013-14 and 2014-15 which involve identical issues.

16. In the result, appeals of the assessee for all the three AYs 2012-13, 2013-14 and 2014-15 are treated as partly allowed for statistical purposes.

Order pronounced in the open court on 18th July, 2024.

Sd/-
(G.D. Padmahshali)
ACCOUNTANT MEMBER

Sd/-
(Astha Chandra)
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 18th July, 2024.
रवि

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-11, Pune.
4. The Pr. CIT concerned.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune