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.34 & 33/PUN/2024
निर्धारण वर्ष / Assessment Years : 2011-12 & 2012-13

Income Tax Officer, Ward – 1(5), Aurangabad	**Vs.**	Royal Estates, D-55, Gajanan Vaibhav Commercial Complex, CIDCO, Cannought Place, Aurangabad-431003 PAN : AAIFR7080D
अपीलार्थी / Appellant		**प्रत्यर्थी / Respondent**

Assessee by :	Shri Suhas P. Bora
Department by :	Shri Sourabh Nayak
Date of hearing :	15-05-2024
Date of Pronouncement :	22-07-2024

आदेश / ORDER

PER ASTHA CHANDRA, JM :

Two appeals filed by the Revenue are directed against the two separate orders both dated 08.11.2023 of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi **["CIT(A)"]** pertaining to Assessment Years **("AYs")** 2011-12 and 2012-13. Since the issue(s) involved are identical, these were heard together and are being disposed of by this common order.

2. The Revenue has raised the following common grounds (except the amount of addition made) :-

"1. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in deleting addition of Rs2,45,86,962/- made to the total income of the assessee u/s 69 of the Act for the year under consideration.

2. (a) The order of the CIT(A) is erroneous and not tenable in law on facts.

(b) The appellant craves leaves to add, alter or amend any/all of the grounds of appeal before or during the hearing of the appeal.

3. The Ld. CIT(A) NFAC erred in considering the fact that the information in the case of the assessee for the year under consideration was received from Valuation officer to whom the reference for valuation for the whole project was made during the assessment proceedings for A.Y.2013-14. On the basis of the Information received in this office it was observed that assessee for the year under consideration has declared cost of Investment in property at Rs.2,57,21,478/- whereas

in the valuation report the cost of investment in property was Rs.5,03,08,440/-. Hence, during the assessment proceedings the books of the assessee were rejected u/s.145(3) of the Income Tax Act and it was concluded that the assessee has made unexplained investment to the tune of Rs.2,45,86,962/- i.e. (Rs.5,03,08,440 - Rs.2,57,21,478/-) and the same was added to the Income of the assessee u/s.69 of the Act.

4. Ld. CIT(A), NFAC erred in considering the fact that as the reference to the Valuation officer was not made during the year under consideration hence, the decision of the Apex Court in the case of Sangam Cinema Vs. CIT (2010) is not applicable to the present case as the facts of the case were clearly distinguishable.

5. The order of the Ld. CIT(A), NFAC be vacated and order of the AO be restored."

3. Briefly stated the assessee is a firm engaged in the business of "Builder & Developer" under the name and style as "M/s Royal Estate". The assessee has filed its original return on 14.01.2012 and 28.09.2012 declaring income at Rs.Nil for AYs 2011-12 and 2012-13 respectively. During the course of assessment proceedings u/s 143(3) of the Income Tax Act, 1961 (**the "Act"**) for AY 2013-14, the Ld. Assessing Officer **("AO")** noticed that the assessee had carried a housing project at CIDCO, Mahanagar, Waluj, Aurangabad under the name "SARA KIRTI". The project was approved as per CIDCO letter dated 30.03.2007 and the project was completed as per completion certificate dated 30.03.2012. The Ld. AO further found that as per the assessee's books the cost of construction worked out to Rs.650/- per sq. ft. which according to him was very low. So the matter was referred to Departmental Valuation Officer (**"DVO"**) on 22.02.2016 to know the exact cost of construction. But during the assessment proceedings the DVO's report was not received. So the assessment order for AY 2013-14 was passed on 30.03.2016 u/s 143(3) of the Act.

4. The Ld. AO received the valuation report of the DVO on 06.09.2016 as per which the estimated cost of investment in property was as under :

Financial Year	**Declared by the assessee (Rs.)**	**Assessed Valuation (Rs.)**	**Difference between (3-2)**
1	2	3	4
2006-07	18,54,721/-	36,27,634/-	17,75,913/-
2009-10	73,76,220/-	1,44,27,092/-	70,50,872/-
2010-11	2,57,21,478/-	5,03,08,440/-	2,45,86,962/-
2011-12	3,95,75,541/-	7,74,05,494/-	3,78,29,953/-
2012-13	6,70,456/-	13,11,340/-	6,40,884/-
Total	**7,51,98,416/-**	**14,70,80,000/-**	**7,18,81,584/-**

5. It would be seen from the above that the assessee had declared the cost of investment at Rs.2,57,21,478/- and Rs.3,95,75,541/- whereas it was estimated by the DVO at Rs.5,03,08,440/- and Rs.7,74,05,494/- in AYs 2011-12 and 2012-13 respectively. The difference of Rs.2,45,86,962/- and Rs.3,78,29,953/- in the cost of investment declared by the assessee and estimated by the DVO in AYs 2011-12 and 2012-13 was sought to be taxed by reopening the assessment of both the years u/s 147 of the Act by issue of notice(s) u/s 148 on 30.03.2017 which was duly served upon the assessee.

6. The assessee requested the Ld. AO to communicate reason for reopening the assessments which was done. Vide letter dated 18.08.2017 the assessee submitted to the Ld. AO that the rate per sq. ft. for construction as per the DVO was Rs.1,600/- per sq. ft. The actual cost incurred by the assessee was Rs.796/- per sq. ft. on built up area which is Rs.672/- per sq. ft. on saleable area. The cost estimated by the DVO is more than the double cost i.e. 238% times more which should be discarded.

7. The submission of the assessee was not acceptable to the Ld. AO and he asked the assessee through notice dated 18.08.2017 u/s 142(1) of the Act to explain the source of additional investment. In response thereto, the assessee submitted that the investment made by it is as per its books of account and produced details of construction expenses. However, the Ld. AO was not satisfied as according to him the assessee had not maintained day-to-day quantitative details of consumption of raw material as well as construction details in the absence of which the cost of construction shown in the books of account is not open to verification. He, therefore, rejected the books of account u/s 145(3) of the Act and accepting the cost of construction estimated by the DVO added the above mentioned difference of Rs.2,45,86,962/- and Rs.3,78,29,953/- in AYs 2011-12 and 2012-13 respectively between cost of construction declared by the assessee as per the books and cost of construction estimated by the DVO, to the income of the assessee.

8. Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A). Before the Ld. CIT(A) the assessee submitted written arguments / contentions through ITBA which the Ld. CIT(A) reproduced in his appellate

order in para 4 at pages 10 to 34. It was contended – (i) that cost of construction was referred to the DVO for AY 2013-14 and no proceedings under the Act for AYs 2011-12 and 2012-13 were pending at the time of reference made to the DVO regarding ascertainment of cost of construction of the project for AYs 2011-12 and 2012-13; (ii) that provisions of section 142A of the Act do not confer any unfettered discretion on the Ld. AO to make a reference for the sole reason that the assessee has shown investment in a property. He cannot make a reference u/s 142A for making roving and fishing enquiries and (iii) that the cost of construction in the project has been declared in the books of account and the Ld. AO never doubted the correctness and accuracy and reliability of the books of account and did not reject the same. Without rejecting the books of account no reference can be made to the DVO as per section 142A of the Act as held by the Pune Bench of the ITAT in Mainadevi Saklecha Developer's case in ITA No.344-347/PN/2011 and ITA No. 700-702/PN/2011 dated 20.11.2013.

9. The Ld. CIT(A) relying on the decision of Ahmedabad Bench of the Tribunal in the case of Umiya Co-operative Housing Society Ltd. Vs. ITO (2005) 94 TTJ 392 (Ahd.), affirmed by the Hon'ble High Court in Tax Appeals No. 1496 to 1498 of 2005 dated 12.07.2006 held that reference u/s 142A of the Act can be made only when the proceedings under the Act are pending and not otherwise. The SLP of the Revenue filed before the Hon'ble Supreme Court against the decision of Hon'ble High Court has been dismissed in SLP No. CC 187 of 2007 dated 07.03.2007.

10. Applying the ratio laid down by the Hon'ble Supreme Court in Sargam Cinema Vs. CIT (2010) 328 ITR 513 to the facts of the assessee's case, the Ld. CIT(A) recorded the finding that the Ld. AO failed to reject the books of account of the assessee for AY 2013-14 before making reference to the DVO for verifying the cost incurred for the project undertaken by the assessee and therefore no addition can be made on the basis of difference of cost of construction between the amounts declared by the assessee in the books and that determined in DVO's report.

11. Accordingly, the Ld. CIT(A) deleted the impugned addition in both the AYs 2011-12 and 2012-13 presently under consideration.

12. Dissatisfied, the Revenue is in appeal before the Tribunal and all the common grounds in both the AYs 2011-12 and 2012-13 relate thereto.

13. The Ld. DR drew our attention to the reasons recorded for reopening of the assessments for AYs 2011-12 and 2012-13 and submitted before us a copy thereof. He contended that on the basis of information in the form of report of the DVO the assessments were reopened u/s 147 of the Act. According to him, the Ld. AO may make a reference whether or not he is satisfied about the correctness or completeness of accounts of the assessee. He also submitted that the Ld. CIT(A) erred in placing reliance on the decision of the Hon'ble Supreme Court in Sargam Cinema's case (supra).

14. The Ld. AR reiterated the same arguments which were advanced before the Ld. CIT(A). He laid emphasis on the fact that without rejecting the books of account the Ld. AO made reference to the DVO which is invalid. Moreover, the amended provisions of section 142A apply prospectively. The assessee's case pertains to pre-amendment era. He submitted a copy of order of ITAT Lucknow Bench in the case of Dy. CIT Vs. M/s Nisha Narendra Construction (P) Ltd. (2022) TaxCopr (A.T.) 97561 (ITAT-Lucknow) in support thereof.

15. We have considered the submissions of the Ld. Representative of the parties and perused the records. It is not in dispute that the assessee firm had filed voluntary return for AYs 2011-12 and 2012-13 on 26.09.2011 and 28.09.2012 and assessments u/s 143(3) of the Act were passed on 17.02.2014 and 13.11.2014 determining the total income of the assessee at Rs.45,000/- and 1,36,200/- respectively. It is also not in dispute that it was during the course of assessment proceedings for AY 2013-14 that the Ld. AO noticed that the "SARA KIRTI" project launched in the Financial Year 2006-07 by the assessee was completed in the Financial Year 2011-12 at the total cost of Rs.7,51,98,416/- declared by the assessee in his books of account and considering such cost as very low, he referred the matter to the DVO on 22.02.2016 to know the exact cost of construction. It is an admitted fact that during the assessment proceedings for AY 2013-14 the report of the DVO was not received and the assessment was completed on 30.03.2016. The report of the DVO was received by the Ld.

AO on 06.09.2016 and he issued notice u/s 148 on the basis of DVO's report on 30.03.2017.

16. Two fold contentions were raised before the Ld. CIT(A) namely that reference to the DVO was made without rejecting the books of account and that cost of construction was referred to the DVO in AY 2013-14 when no proceedings under the Act for AYs 2011-12 and 2012-13 were pending at that time. Both these issues have been decided by the Ld. CIT(A) in favour of the assessee and in our considered opinion, he is justified in doing so. In the impugned reassessment orders the Ld. AO himself admitted that various details/information and financial statements were furnished. The books of account and bills/vouchers produced were verified by him and returned back. Para 6 of the Ld. CIT(A)'s order refers. Thereafter to adopt the valuation made by the DVO the Ld. AO observed that valuation shown by the assessee is not open to verification as the assessee is not maintaining day-to-day quantitative details of consumption of raw material as well as construction details. In our view this approach of the Ld. AO is not just and fair. No such finding was recorded by the Ld. AO that books of account were rejected u/s 145(3) of the Act during assessment proceedings of AY 2013-14 when reference to the DVO was made by him. In fact, the Ld. AO had no valid and cogent reason to reject the books of account maintained by the assessee and audited u/s 44AB and as per section 80IB(10) of the Act.

17. On the second issue of reference to the DVO for AY 2013-14 when no proceedings under the Act were pending for AYs 2011-12 and 2012-13 the Ld. CIT(A) referred to the provisions of section 142A(1) of the Act, analyzed it and recorded his findings to the effect that reference u/s 142A of the Act can be made only when the proceedings under the Act is pending and not otherwise. For ready reference the observations and findings of the Ld. CIT(A) are reproduced below :

> *"5.1 .....The starting words of the section is that for the purpose of making an assessment or reassessment under this Act, once the process of assessment is initiated, the word 'making' should be presumed to be associated with both 'assessment' or 'reassessment', the reference u/s. 142A of the Act can be made. When there is process of assessment, which is initiated after filing of the return of income or issuance of notice u/s. 142(1) and similarly, the process of reassessment could be initiated only after issuance of notice u/s. 148(1) after duly fulfilling the formalities mentioned therein, the reference u/s.142A of the Act can be made. It clearly shows that the invoking of Sec. 142A is a process after the initiation of the assessment*

proceedings. Further, it is mentioned in this Sec. that 'where estimate of the value of any investment referred to in Sec. 69 is required to be made. This also shows that a reference to DVO u/s. 142A can be made only when a requirement is felt by the AO for making such reference. Requirement would arise or could be felt only when here is some material with the AO 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 142A. It can only be during the course of pendency of assessment or reassessment that the AO frame his mind to refer the property to valuation cell of the Department. Such mind can be framed if there is a basis to think that the assessee may have understated the cost of construction or whatever is declared by him in this regard is not believable. Therefore, it is quite apparent that reference to valuation cell u/s.142A can be made during the course of assessment and reassessment and not for the purpose for initiating reassessment. This view is clearly supported by the decision of Ahmedabad Bench in the case of UmiyeCo-operetive Housing Society Ld. vv ITO (2005) 94 TT J 392 (Ahd), wherein it is held as under:-

> *"7. From the above, it is evident that s. 142A empowers the AO to require the valuation officer for making the estimate of the value of any asset provided the AO, required the same for the purpose of making the assessment or reassessment. He above provision does not empower the AO to refer the matter to the DVO for gathering information for reopening of assessment. Making the reassessment and reopening of assessment are two different things.*
>
> *8. When the process of reopening of assessment ends and the assessment is validly reopened thereafter the process of making reassessment starts. Therefore even after the insertion of s. 142A, the AO should have reason to believe that any income chargeable to tax has escaped assessment as provided under s. 147 and thereafter only the notice for reassessment can be issued under s. 148. Even after the insertion of S.142A, there is no amendment in the language of s. 147. Therefore, the condition prescribed under s. 147 for reopening of assessment still exits. The Hon'ble Gauhati High Court in the case of Bhola Nath Majumdar and the Tribunal, Jodhpur Bench, in the case of Vijay Kumar (supra) have taken the view that the valuation report is only an opinion of the valuer and an opinion of a third party cannot be a reason to believe of the ITO. The Hon'ble Bombay High Court in the case of Jamnadas Madhavji & Co. (supra) has held that the AO cannot issue summons under s. 131 for the purpose of making investigation for reopening of the assessment."*

5.2 This decision of the Tribunal has been confirmed by the Hon'ble jurisdictional High Court in the case of CIT v. Umiya Co-operative Housing Society Ltd. in Tax Appeals No. 1496 to 1498 of 2005 dated 12-07-2006, wherein it is held as under:-

> *"The short controversy involved in these appeals whether the Assessing Officer can refer any matter for valuation of the property of an assessee though assessment and/or reassessment proceedings are not pending. The Tribunal is of the view that when the assessment proceedings are not pending the Assessing Officer has no jurisdiction and is not empowered to refer any property for valuation to the Valuation Officer. The Tribunal has discussed this issue as under: a-S8 When the process of reopening of assessment ends and the assessment is validly reopened thereafter, the process of making reassessment starts. Therefore, even after the insertion of section 142A, the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment as provided u/s.*

> *147 and thereafter only the notice for reassessment can be issued u/s. 148. Even after the insertion of section 142A there is no amendment in the language of section 147. Therefore, he condition prescribed u/s. 147 for reopening of assessment still exists."*

18. In our view, the Ld. CIT(A) has validly found substance in the plea of the assessee that the Ld. AO cannot make a reference u/s 142A for making roving and fishing enquiries as held in numerous decisions cited by the Ld. CIT(A) in para 5.3 of his appellate order.

19. The impugned additions in AYs 2011-12 and 2012-13 have been made by the Ld. AO u/s 69 of the Act which reads thus :

> ***"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 the opinion of the [Assessing] Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year."*

20. A bare reading of the above provision shows that it is sine-qua-non that the assessee must have made investments which are not recorded in the books of account. That the assessee has made investments must be proved first by the Ld. AO then only the burden shifts upon the assessee to prove the source of investments. Such investments outside the books must be proved by the Ld. AO. If it is not so proved, the assessee cannot be called upon to prove the source of such hypothetical investments. Perusal of the impugned orders of reassessment in the case of assessee reveals that except relying on the DVO's report, nothing has been brought on record to indicate that the assessee made investments in "SARA KIRTI" project over and above that declared in the regularly maintained books of account. The impugned additions are thus not sustainable.

21. With regard to the contention of the Ld. DR that satisfaction of Ld. AO as to the correctness or completeness of the books of account is not necessary for making reference to the DVO, we are not inclined to agree with him as his submission is based on the amended provision of section 142A w.e.f. 01.10.2014. The amended provision is applicable prospectively. Hence, it will not apply to the assessee's case in which AYs involved are 2011-12 and 2012-13. Similar view has been taken by the

ITAT Lucknow Bench in M/s Nisha Narendra Construction (P) Ltd.'s case (supra).

22. In our opinion, the Ld. CIT(A) has correctly relied upon the decision of the Hon'ble Supreme Court in Sargam Cinema's case (supra) as on verification of books of account produced by the assessee before the Ld. AO duly supported by the bills/vouchers to prove the cost of construction declared in the books of account, no defects could be found so as to reject the books of account u/s 145(3) of the Act.

23. For the reasons setout above, we hold that there is no substance in the appeal filed by the Revenue for AYs 2011-12 and 2012-13. Accordingly, we reject both the appeals of the Revenue.

24. In the result, the appeals of Revenue for AYs 2011-12 and 2012-13 are dismissed.

Order pronounced in the open court on 22nd July, 2024.

Sd/-	Sd/-
(G.D. Padmahshali)	(Astha Chandra)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 22nd July, 2024.
रवि

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

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

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

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