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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

ITA No.212 of 2013
Date of decision:23.04.2015

Commissioner of Income Tax-II, Amritsar

....Appellant

Versus

M/s Freedom Board & Paper Mills, Amritsar

......Respondent

ITA No.210 of 2013

Commissioner of Income Tax-II, Amritsar

....Appellant

Versus

M/s Freedom Board & Paper Mills, Amritsar

......Respondent

ITA No.211 of 2013

Commissioner of Income Tax-II, Amritsar

....Appellant

Versus

M/s Freedom Board & Paper Mills, Amritsar

....Respondent

ITA No.213 of 2013

Commissioner of Income Tax-II, Amritsar

....Appellant

Versus

M/s Freedom Board & Paper Mills, Amritsar

......Respondent

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE G.S.SANDHAWALIA

Present: Mr.Denesh Goyal, Advocate, for the appellant.

Mr.S.K.Garg Narwana, Sr.Advocate
with Mr.Karan Garg, Advocate, for the respondent.

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G.S.Sandhawalia J.

This judgment shall dispose of ITA Nos.212, 213, 210 & 211 of 2013, pertaining to assessment years 2004-05, 2005-06, 2007-08 & 2009-10, respectively, involving common questions of law and facts. However, to dictate orders, facts have been taken from ITA No.212 of 2013, pertaining to the assessment year 2004-05.

2. The Revenue is aggrieved against the decision of the Income Tax Appellate Tribunal, Amritsar Bench (for short, the 'Tribunal') passed in ITA No.468 (Asr)/2012 dated 19.03.2013 (Annexure A-3) vide which, it set aside the re-assessment proceedings, on the ground that without rejecting the books of account of the assessee and by making reference to only the report of the Departmental Valuation Officer (for short, the 'DVO'), the action of the Assessing Authority to make the addition was not justified and thus, allowed the appeals of the assessee. The substantial questions of law which have, thus, been sought to be raised by the Revenue, for admission of the appeals, read as under:

> "(i) Whether on the facts and circumstances of the case, the Hon'ble ITAT was correct in law in quashing the reassessment proceedings for the assessment year 2004-05 by holding that the reassessment proceedings were initiated solely on the basis of report of DVO. Whereas the reassessment proceedings were initiated on the basis of DVO as also on the basis of addition made in assessment proceedings for the assessment year 2007-08.
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> (ii) Whether on the facts and circumstances of the case, the Hon'ble ITAT was correct in law in holding that the AO should have rejected the books of account of the assessee before referring the matter to the DVO. Whereas the AO had referred the matter to the DVO after considering the valuation as per the report of the approved valuer submitted by the assessee to be on the lower side."

3. The facts of the case show that during the course of assessment for the year 2007-08, it was noticed that the assessee had been raising construction of

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the factory building from the year 2003-04 to the year 2008-09. The matter was referred to the valuation cell by the Assessment Officer (for short, the 'AO') and on account of the difference of ₹4,12,136/- in the construction of the factory building, notice under Section 148 of the Income Tax Act, 1961 (for short, the 'Act') was issued on 23.03.2011, by coming to the conclusion that the income had escaped assessment. While filing the return on 14.11.2011, in pursuance of the notice, the assessee took the objection that account books were regularly maintained with all details of bills/vouchers and the report of the DVO had already been challenged in appeal before the Commissioner of Income Tax (Appeals) (for short, the 'CIT'). The said appeal had been disposed of with a direction to dispose of the objection of the assessee after giving an opportunity of being heard. Accordingly, the difference in the valuation was determined at ₹3,79,248/-, for the period 2003-04, relevant to the assessment year 2004-05. Similar additions were also made for the subsequent years and the total difference was ₹73,49,607/-.

4. In the appeal filed by the assessee before the CIT, the plea taken was that the complete set of account books and the vouchers had been produced and no discrepancy was pointed out in the same. Reliance was, accordingly, placed upon the judgment of the Apex Court in ***Sargam Cinema Vs. Commissioner of Income Tax 2010 (328) ITR 513***, apart from other precedents. The CIT, however, dismissed the appeal on the ground that the matter had been referred to the DVO, who, after hearing the registered valuer of the appellant, had granted the benefit of ₹6,37,755/- towards the construction of the existing boundary walls, gate, watchman etc. Accordingly, it was held that sufficient opportunities had been given to the assessee and the AO was well within her jurisdiction to make the additions and there was vast variation between the cost of construction valued, by the DVO and in the books of account of the assessee. By the

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determination of the value, there was implied and underlined rejection of the books of account under Section 145(3) of the Act, which were suffering from various discrepancies and variations, as available on the assessment records.

5. As noticed, the appeals have been allowed by the Tribunal by placing reliance upon the judgment of the Apex Court in the case of **Sargam Cinema** (supra) and by holding that the case of the assessee could not be reopened solely on the basis of the report of the DVO, without rejecting the books of account.

6. Counsel for the Revenue has sought to place reliance upon the judgment of the Andhra Pradesh High Court in ***Bharathi Cement Corporation (P) Ltd. Vs. Commissioner of Income Tax & others [2013] 356 ITR 74*** to submit that the judgment of the Apex Court in the case of **Sargam Cinema** (supra) had been considered in the order of the Tribunal and not applied in favour of the assessee.

7. Counsel for the assessee, on the other hand, supported the reasoning given by the Tribunal and submitted that the assessee was maintaining books of account and in the absence of any rejection, the matter could not have been referred to the DVO and it was a settled principle before this Court.

8. After hearing counsel for the parties, we are of the opinion that the above questions of law are liable to be decided against the Revenue. A Division Bench of this Court in ***Commissioner of Income Tax Vs. Chohan Resorts [2013] 359 ITR 394***, in similar circumstances, held that where books of account in respect of cost of construction are maintained, reference to the DVO can only be made on the basis of rejection of the books of account on some legal or justified basis. Relevant observation reads as under:

> "5. Learned counsel for the revenue was unable to justify that when the books of account in respect of cost of construction have been

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> maintained by the assessee and the same were not rejected, how the matter could be referred to the DVO for assessing the value. Wherever the books of account are maintained with respect to the cost of construction, the matter can be referred to the DVO after the books of account are rejected by the revenue on some legal or justified basis. In the absence of the same, the reference to the DVO cannot be upheld. In view of the above, we do not find any substance in the appeal. No question of law arises in this appeal for consideration of this Court. Dismissed."

Thereafter, in ***Nirpal Singh Vs. Commissioner of Income Tax [2013] 359 ITR 398***, the said view was followed.

9. Subsequently, in ***Dr.Raghuvendra Singh Vs. Commissioner of Income Tax (2014) 267 CTR (P&H) 376***, the provisions of Section 142A of the Act were taken into consideration, including the circular No.5 of 2005, issued by the Central Board of Direct Taxes, to come to a similar conclusion that without rejecting the books of account, the matter should not be referred to the DVO. Relevant observation reads as under:

> "13. Section 142A of the Act has been incorporated primarily for verification of the value of any investment in respect of cases enumerated therein. The Assessing Officer would not be justified in invoking the aforesaid provision in every case and in a routine manner. Where the assessee maintains regular books of account for the purpose of construction of the asset and produces the vouchers, it would not be appropriate for the Assessing Officer to refer the matter to the DVO without first rejecting the books of account by prima facie concluding that the valuation appears to be more than what has been depicted in the books of account. However, wherever the assessee has not maintained the regular books of account of cost of construction of the asset and claims its valuation on the basis of estimate of the report of the registered valuer, the Assessing Officer is empowered to make a reference to the DVO after forming a prima facie opinion that the value of the investment is not genuinely disclosed and is required to be assessed for the purposes of Sections 69, 69A or 69B of the Act. In other words, Section 142A of the Act, thus, cannot be invoked where valuation of the cost of construction is bonafide and based

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> on books of account which has not been rejected. The report of the DVO would be dealt with by the Assessing Officer under sub section (3) of Section 142A of the Act. There is logic and reasoning for adopting the aforesaid view. There appears to be no occasion for the revenue not to accept the valuation of the cost of construction of an asset without rejecting the books of account maintained by the assessee. It would not only be unfair but against the public policy as well to assume that the assessee is dishonest and he must have submitted an incorrect account of expenses/investment."

10. However, an exception was carved out in that case that since it was a case of search and seizure and disclosure of concealed income was made by way of surrender, in the said circumstances, the cost of construction shown in the books of account were rightly inferred to be incorrect. In the present case, the proceedings have been sought to be opened by way of re-assessment, during the subsequent assessment proceedings, without following the prescribed procedure of rejecting the books of account which had been maintained by the assessee and thus, the questions of law necessarily have to be decided against the Revenue, in view of the settled principles, discussed above.

Accordingly, by holding that the Tribunal was correct in deleting the additions made by the AO who never rejected the books of account before referring the matter to the DVO and on the basis of her report, the re-assessment proceedings could not have been initiated, the present appeals are dismissed.

(S.J.Vazifdar)
Acting Chief Justice

(G.S.Sandhawalia)
Judge

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