



* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA No. 1411 of 2008

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Decided on : August 28, 2009

Commissioner of Income Tax, Delhi – XVII

. . . Petitioner

through :

Ms. P.L. Bansal, Advocate

VERSUS

Aar Pee Apartments (P) Ltd.

. . . Respondent

through :

Mr. Satyam Sethi and Johnson
Bara, Advocates.

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

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1. Admit.
2. Following two substantial questions of law arise for consideration:
 - a. Whether ITAT was correct in law in deleting the addition of Rs.19,68,881/- made by Assessing Officer and adopting the figure of cost of construction of Yusuf Sarai Project at Rs.19,99,559/- as against Rs.39,69,440/- declared by the assessee?
 - b. Whether ITAT was correct in law in holding that the



determining cost of construction was not justified ever after insertion of Section 142 A by the Finance Act 2004 with retrospective effect from 15.11.1972?

3. Learned counsels for the parties are ready to argue. Accordingly, we heard the arguments.
4. The assessee is a Construction Company. It had taken up three projects in the earlier years than the assessment year in question i.e. 1998-99. These three projects are as Yusuf Sarai Project, Jaina Tower II and Jaina Tower III. The assessee is adopting completion of project method of accounting the Assessment Year in question, the assessee completed Yusuf Sarai Project and declare some profits of this project. Cost of construction of this project was shown as 39,69,440/-. The Assessing Officer referred the matter to Departmental Valuation Officer (DVO) to determine the cost of construction whose report showed the cost at Rs.19,99,559/-. On the basis of this DVO report the said cost of construction was adopted. In these circumstances the Assessing Officer made accepting low cost of construction than what was shown by the assessee and making addition of Rs.7,50,811/-.
5. CIT appeal confirmed the action of Assessing Officer. However, ITAT reversed the aforesaid decision on the ground that it was not permissible for the Assessing Officer to refer the matter to DVO for obtaining the cost of construction. The Tribunal held that even if insertion of Section 142 A by Finance (No.2) Act, 2004 was with retrospective effect



Officer as the said provision does not deal with the un-e
expenditure under Section 69 (C) of the Act.

6. Before we advert to the interpretation to the aforesaid provision we deem it proper to reproduce the following discussions detained in the order of ITAT on this aspect:-

"The next point to be determined is whether the AO is justified in referring to the DVO for computing cost of construction claimed as revenue expenditure. Prior to insertion of Section 142 A by finance (No.2) act, 2004 with retrospective effect from 15.11.72, the reference to DVO in assessment proceedings other than as permissible under Section 55A was held to be invalid as held by Hon'ble. Supreme Court in the case of Amiya Bala Paul, 262 ITR 407. Section 142 A was inserted with retrospective effect from 15.11.72, however, even under Section 142 A, a reference can be made for assessment or reassessment where an estimate of value of any investment referred to in section 69 or 69 B or the value of any bullion, jewellery or other valuable articles referred in Section 69A or 69 B is required to be made. The AO may require the valuation officer to make an estimate of such value and report u/s 142 A (1), for the purpose of making as assessment under Act, where an estimate of the value of any investment referred to in section 69 A or 69 B or the value of any bullion, jewellery or other valuable article referred to in section 69 A or 69 B is required to be made, the AO may require the valuation officer to make an estimate of such value and report the same to him. Thus the power available u/s 142 (1) is requiring the valuation officer to value any investment or bullion, Jewellery or other valuable article referred in Section 69,69A or 69B of the Act. These powers do not extend to estimate the amount of unexplained expenditure referred in Section 69C of the Act. Admittedly, in the present case the expenditure on construction are claimed and allowed as revenue expenditure and cannot be considered as an investment or bullion, Jewellery etc. referred in Section 69, 69A or 69B, of the Act. We accordingly hold that the reference to DVO is not in accordance with the provisions of Section 142 A. Hence the decision of Hon'ble Supreme Court in the case of Amiya Bala Paul will still apply to hold that no addition can be made merely relying upon



deleted.

7. We are in agreement with the aforesaid interpretation given by the Tribunal to Section 142 (A) of the Income Tax Act. Our discussion on this aspect proceeds as under.

8. Section 142 (A) is to the following effect:

“142A. For the purposes of making an assessment of reassessment under this Act, where an estimate of the value of any investment referred to in Section 69 or Section 69 B or the value of any bullion, jewellery or other valuable article referred to in Section 69A or Section 69 B is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.”

9. It is clear from the reading of sub-section (1) of this provision that it enables the Assessing Officer to get the valuation done from the Valuation Officer in certain specific types of cases. These would be the cases wherein an estimate of the value of any investment referred to in Section 69 or 69 B or the value of any bullion, jewellery or other valuable articles referred to in Section 69 A or 69B is required. There is no mention about Section 69 C of the Act. As is clear from the above, Section 69A deals with unexplained money. Section 69B likewise relates to the amount of investment etc. not fully disclosed in books of accounts. On the other hand, the provision relates to unexplained expenditure is in Section 69C.

10. In the present case the Assessing Officer had doubts about the



shown the expenditure on the Yusuf Sarai Porject as Rs.39,69,440/.

Assessing Officer had doubted this expenditure, he referred the matter to DVO for the purpose of determining the cost of construction of said project. However, as pointed out above, for the purpose of getting himself satisfied about the purported un-explained expenditure u/s 69 (1.) powers under Section 142A could not be invoked.

11. Learned Counsel for revenue submitted that such a power could be traced to Section 69B of the Act which relates to amount of investment etc. not fully disclosed in the books of accounts. .

12. Her submission was that the "expenditure" incurred should be considered as coming within the expression 'investment'.

13. We cannot agree with this submission of learned counsel for Revenue. If investments could include within its fold the expenditure as well which is incurred by a business man during the course of his business, there was no necessity of having a separate provision under Section 69C of the Act which deals with un-explained 'expenditure' and reads as under:-

"69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year."



14. The scope and ambit of Section 69 B and 69 C are different. The connotation to the investment appearing in Section 69B has to be in the context of investments made in some property or any other type of investment and it could not be the business expenditure. The word 'investment' contained in Section 69B deals with investment in Bullion, Jewellery or other valuable articles, etc. If the contention of learned counsel for revenue is accepted and the expression is given wider meaning as sought to be made out, the provisions of Section 69C shall be rendered otiose.

15. The learned counsel for Revenue however took another plea to buttress her submission. She submitted that having regard to the circumstances under which Section 142A was inserted by the Finance Act, 2004 it be deemed that the intention of Legislature was to include even those un-explained expenditure stipulated in Section 69C. No doubt the need behind inserting Section 142A was to empower the Assessing Officer to make a reference to the Valuation Officer as there were no such specific power and existing provision contained in Section 131 were inadequate. However, even this Statement of Object and Reason clearly confined and limited the reference "to hold a scientific, technical and expert investigation etc." Learned Counsel for the assessee has drawn our attention to CBDT circular issued by it explaining the Finance Bill 2004 which specifically omits the word 'expenditure' as well as Section 69C. It is on this basis that the Section 142A was inserted in the form as it appears on the Statute Book now. If the intention was to include un-explained expenditure as



been specifically mentioned in Section 142A of the Act.

16. From the reading of Sub Section (1) of Section 142A, it is clear that the legislature referred to the provisions of Section 69, 69A and 69B but specifically excluded 69C. The principle of *casus omissus* becomes applicable in a situation like this. What is not included by the legislature and rather specifically excluded, cannot be incorporated by the Court through the process of interpretation. The only remedy is to amend the provisions. It is not the function of the court to legislate or to plug the loopholes in the law.

17. In the present case except the report of DVO on which the Assessing Officer relied upon, there was nothing on record to suggest that there was any other evidence to dis-believe the expenditure shown by the assessee. In fact during the course of arguments, learned counsel for the Assessee produced the assessment order which clearly demonstrates that the expenditure shown by the assessee from the time, when it was an on-going project, was examined and accepted by the Assessing Officer.

18. In these circumstances we answer the question formulated above in favour of the assessee and against the Revenue. As a consequence, this appeal is dismissed, being devoid of any merits.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

August 28, 2009