* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 27.07.2012

\+ **ITA 195/2012, C.M. APPL.5434/2012**

\+ **ITA 196/2012, C.M. APPL. 5436/2012**

\+ **ITA 197/2012, C.M. APPL.5437/2012**

\+ **ITA 198/2012, C.M. APPL.5439/2012**

\+ **ITA 199/2012, C.M. APPL.5441/2012**

\+ **ITA 203/2012, C.M. APPL.5444/2012**

CIT .....Appellant

Through: Sh. N.P. Sahni, Sr. Standing Counsel
and Sh. Ruchesh Sinha, Advocate, for Revenue.

Versus

M/S. AMBIENCE DEVELOPERS AND INFRASTRUCTURE PVT. LTD.

.....Respondent

Through: Dr. Rakesh Gupta, Sh. Ashwani Taneja, Ms. Rani Kiyala and Sh. Piyush Singh, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

% 1. The revenue has preferred these batch of appeals, claiming to be aggrieved by a common decision of the Income Tax Appellate Tribunal in ITA Nos.2376/Del/2011 to 2381/Del/2011 dated 5-8-2011.

2. The facts necessary to decide these appeals are that there was a search and seizure action under Section 132 on the Ambience Group of Companies, on 10.10.2007. The assessee belongs to the group which was covered in the search. In that year the assessee was in the property construction business i.e. building a mall in the National Capital Region of Delhi. The AO noted that the company was constructing the "Ambience Mall Projects", at NH-8, Gurgaon. Major construction work for the Mall was by M/s Ambience Projects and Infrastructure Ltd. and expenses were accounted for on the basis of bills drawn by the construction company. Certain costs and expenses were incurred directly by the assessee in its project.

3. During the assessment proceedings, the AO, based on certain seized documents mentioned in the assessment order concluded that the expenses incurred on the construction of Ambience Mall project, NH-8, Gurgaon were not completely reflected in the books of account. He therefore, made a reference to the Valuation Officer under Section 142A of the Income Tax Act. The Valuation Officer in his report, stated that the total investment incurred in the said property should have been ₹437,88,53,104/- over various years. As against that the assessee had shown the investment at ₹421,60,56,594/- for the relative period, in its books of account. The comparative year wise details of the expenses shown by the assessee company and as estimated by the Valuation Officer are as under:

Period of Construction	Cost of construction as per returns	Cost of construction as per Valuation Officer	Difference
2002-03	19000000/-	19733655/-	7,33,655/-

2003-04	282586069/-	293497693/-	1,09,11,624/-
2004-05	637415316/-	662028123/-	2,46,12,807/-
2005-06	1074083566/-	1115557644/-	4,14,77,078/-
2006-07	1212635421/-	1259459464/-	4,68,24,043/-
2007-08	990336222/-	1028576525/-	3,82,40,303/-
TOTAL	421,60,56,594/-	437,88,53,104/-	16,27,96,510/-

4. The Assessing Officer made additions to the returned income as a result of the difference between the cost of construction as disclosed in the returns and cost of construction estimated by the District Valuation Officer for each year. Aggrieved, the assessee preferred a first appeal where detailed explanations and documents were filed by it. The CIT(A) called for AO's remand report and after consideration of the material available struck of the additions. It was held by the Commissioner (A) that the reference under Section 142-A (to the valuation officer) was not valid, since the AO did not advert to any specific defects in the books of accounts maintained and audited and his presumption that some expenses mentioned in seized documents on account of construction were not completely recorded in the books of accounts was not found correct when they were explained by the appellant and verified by the Assessing Officer with the supporting evidence corroborating the books of accounts. Since Assessing Officer had also not rejected the books of accounts under Section 145(3), by pointing out any defect, the reference to the DVO was not valid and therefore, his report could not be used for framing assessment under Section 143(3) read with Section 153A of the Act, even if such report were considered valid. The

Commissioner also held that that the difference between the cost of construction as per the books of accounts and the estimated cost of construction (according to the DVO's report) is only in the range of 3.86%, a marginal, and an acceptable one. The report is only an estimation and variation is bound to be there for various reasons/factors as held by several judicial authorities. The order of the CIT (A) was upheld by the Tribunal.

5. Counsel for the revenue argued that since the assessee was not able to demonstrate its cost of construction, the reference to the DVO was justified. It was contended that the AO had authority to make additions without making any pointed mention to specific defects in the books of account. It was argued that there is no obligation under any provision of the Act that before taking such action, the books of accounts or materials furnished by the assessee had to be rejected.

6. It was submitted that the reference to the DVO under Section 142A was valid and proper, because the assessee did not explain the incriminating material seized during the search. In effect, in this case, the additions made by the AO were under Section 69-B of the Act, because the assessee could not explain the documents found during the search.

7. It was next contended that the difference between the DVO's report and the assessee's investment, in percentage terms was very low, i.e. 3.86%. However, the quantum, in monetary or real terms was large. The lower appellate authorities fell into error in directing that the additions made in the case, should be set aside.

8. The appellant's contention was that the Ambience group has many associated concerns all of which were simultaneously searched. During the search, some incriminating material were found and seized which pertained

to all the group entities. The incriminating material was subsequently explained. However, at the time of search, immediate explanation was demanded from the assessee. To avoid this situation, the assessee group agreed to declare an amount of ₹. 40 crores as additional income in various group entities. This was honoured and taxes on that amount were paid. Citing incriminating material, the AO sought to exceed the declaration, ignoring that the amount of ₹.40 crores was declared on the ground of inability to explain. The so called incriminating materials and documents were later explained in writing before AO during assessment. As a result there was no justification for him to seek recourse to reference to DVO, since no unexplained materials existed.

9. It was submitted that during assessment proceedings, the assessee had reconciled the alleged incriminating evidence and explained that they were recorded in the books of account of the various group entities. The AO's order was silent on this and did not discuss this material and relevant facts. Thus, the assessee duly discharged its burden in respect of incriminating materials, as regards the amount of ₹ 40 crores, and by furnishing adequate explanation about the incriminating material which was not controverted or dealt with by the AO. In view of these facts, no addition could be made. The books of account offered by the assessee, were audited. Therefore, the AO could not have sought recourse to valuation under Section 142-A of the Act, without first rejecting it, or at least recording what was wrong or defective with such books (of account).

10. At the outset, this Court notices that the judgment of the Supreme Court in *Sargam Cinema v Commissioner of Income Tax* (2011) 241 CTR (SC) 179, the question of whether the power under Section 142-A could be

invoked, without rejecting – through findings that books of accounts were unacceptable. The Supreme Court held that:

> *"4. 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 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."*

Therefore, in the absence of a finding rejecting the accounts of the assessee in this case, the reference to the DVO could not have been made by the AO in the first place.

11. Apart from the above consideration, the power of the AO to refer the question of valuation of expenses is the subject of binding decisions of this court. The Supreme Court had, in *Amiya Bala Paul v Commissioner of Income Tax* [2003] 262 ITR 407 (of course dealing with powers of the AO to refer the question of valuation, pre-Section 142-A, but in the context of the then prevailing Section 55-A and Section 142 (2)) held that no addition could be made by the AO, exclusively relying upon the value arrived at by the DVO. It was held that:

> *"11. The common feature of Sections 133(6) and 142(2) is that the Assessing Officer is the fact-finding authority. It is his opinion on the basis of the facts as found on an enquiry conducted by himself which results in the assessment order. A report by the Valuation Officer under Section 55A is on the other hand the outcome of an inquiry held by the Valuation Officer himself and reflects his opinion on the evidence before him. Such a report would not be the result of an inquiry by the Assessing Officer under the provisions of Section 133(6) or*

Section 142(2). It is true that the Assessing Officer is not bound by strict rules of evidence and a report of a Valuation Officer under Section 55A may be considered by the Assessing Officer as a piece of evidence if it is relevant. (See CIT v. East Commercial Co. Ltd. : 1967 LXIII ITR 449, 457). However, the power of inquiry granted to an Assessing Officer under Sections 133(6) and 142(2) does not include the power to refer the matter to the Valuation Officer for an enquiry by him."

12. Section 142A, which was introduced in 2004, reads as follows:

" 142A. For the purposes of making an assessment or reassessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B 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."

13. The effect of Section 142-A and the power to make a reference to the DVO, in the context of value of expenditure, was considered by this Court, in another case involving a construction company, in *Commissioner of Income-tax v. Aar Pee Apartments P. Ltd.* (2009) 319 ITR 206, as follows:

"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 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or 69B is required. There is no mention about section 69C 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 the books of account. On the other hand, the provision relates to unexplained expenditure in section 69C.

In the present case, the Assessing Officer had doubts about the expenditure incurred on the project. As pointed out above, the assessee had shown the expenditure on the Yusuf Sarai Project as Rs. 39,69,440. Since the Assessing Officer had doubted this expenditure, he referred the matter to the DVO for the purpose of determining the cost of construction of the said project. However, as pointed out above, for the purpose of getting himself satisfied about the purported unexplained expenditure under section 69C powers under section 142A could not be invoked.

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

We cannot agree with this submission of learned counsel for the Revenue. If investments could include within its fold the expenditure as well which is incurred by a businessman during the course of his business, there was no necessity of having a separate provision under section 69C of the Act which deals with unexplained " 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."*

The scope and ambit of section 69B and 69C are altogether 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 article, etc. If the contention of learned counsel for the Revenue is accepted and the expression is given a wider meaning as sought to be made out, the provisions of section 69C shall be rendered otiose.

The learned counsel for the 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 (No. 2) Act, 2004, it be deemed that the intention of the 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 the existing provision contained in section 131 was inadequate. However, even this Statement of Objects and Reasons 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 the Central Board of Direct Taxes circular issued by it explaining the Finance (No. 2) Bill, 2004, which specifically omits the word " expenditure" as well as section 69C. It is on this basis that section 142A was inserted in the form as it appears on the statute book now. If the intention was to include unexplained expenditure as contemplated in section 69C of the Act as well this provision should have been specifically mentioned in section 142A of the Act.

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 section 69C. The principle of causus 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.

In the present case, except the report of the DVO on which the Assessing Officer relied upon, there was nothing on record to suggest that there was any other evidence to disbelieve 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 ongoing project, was examined and accepted by the Assessing Officer."

14. In the present case, during the time that the assessee's appeal was pending before the Appellate Commissioner, a remand report was sought for. This report was furnished on 28-01-2011. It stated, among other things, as follows:

"*a questionnaire was also issued to the assessee to explain the expenditure as mentioned in these seized documents and the assessee subsequently explained these expenses as mentioned in the various annexures with the supporting evidence vis-à-vis the books of accounts and same were verified."*

15. It is also a matter of record that an Office Note had been made by the AO, when the assessment order was issued. That contained details of what were examined, in respect of the assessee's books and accounts, and also adverted to an Appraisal Report, and stated that:

"as per the Appraisal Report, the bank accounts of the group companies also reveals a large number of other current and saving bank accounts, which need to be investigated. In this case, there are very few transactions which have been examined and found to be normal business transactions with other concerns, and have been explained satisfactorily. Therefore, no adverse inference is drawn…

4. As regards the disallowability of interest as per the provisions of section 36 (1)(iii) of the IT Act, the issue has been examined and no adverse inference is drawn.

5. The seized documents pertaining to this company were duly confronted vide questionnaire dated 08-9-2009 and the reply furnished thereof satisfactorily explains the transactions recorded therein which have been verified vis-à-vis books of account/Balance Sheet."

16. In view of the above, it is evident that the valuation in this case was uncritically accepted by the AO. As can be seen from a comparison of the valuation by the assessee, with that of the DVO, the variation is 3.86 %. This is a very minor variation, having regard to the large amounts involved. Besides, the fact that the AO did not examine the variations, with specific reference to any items of expenditure that were unreasonable, or showed wide variation, these differences can also be put down to differing perceptions, and the practice adopted by the concerned business activity.

17. In view of the above discussion, and having regard to the fact that the variation in valuation, in this case between what was disclosed by the assessee and what was indicated by the DVO is not significant, this court is of opinion that there is no infirmity in the findings contained in the impugned order of the Tribunal. No substantial question of law arises for consideration. The appeals are, therefore, dismissed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

JULY 27, 2012