



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

% Order reserved on : 04th October, 2013
Order pronounced on: 05th February, 2014

+ **WPC No. 7514 of 2010**

M/S MAHASHAY CHUNNILAL Petitioner

Through Mr. Jainendra Maldahiyar
and Mr. Amit Bhanot,
Advocates

Versus

DY. COMMISSIONER OF INCOME TAX & ORS

...Respondents

Through Mr. Abhishek Maratha, Sr
Standing Counsel with Mr.
Anshul Sharma Advocates
for R – 1,

Mr. Ruchir Mishra and Mr.
Mukesh K. Tiwari,
Advocates for R – 2.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA



SANJEEV SACHDEVA, J.

1. The petitioner has filed the present petition challenging the order dated 23.08.2010 rejecting the objections filed by the petitioner against two notices, both dated 30.03.2010, under Section 148 of the Income Tax Act, 1961 seeking to re-assess the income of the petitioner for the assessment years 2005-06 and 2006-07.
2. The petitioner is a charitable trust and runs hospitals and schools.
3. The assessment for the assessment years 2005-06 and 2006-07 was originally completed under Section 153A/143(3) of the Income Tax Act, 1961 (hereinafter referred to, 'the Act').
4. For the assessment year 2005-06, the assessment was framed on 31.12.2008 at a loss of



Rs.1,77,03,110/- and for the assessment year 2006-07, the assessment was framed on 31.12.2008 at a loss of Rs.1,53,90,490/-.

5. On 30.03.2010, i.e., before expiry of four years of the assessment year 2005-06 and 2006-07, notices were issued to the petitioner under Section 148 of the Act seeking to reassess the income of the Petitioner for the said assessment years. In reply to the said notices, the petitioner stated that the original return of income may be treated as returns filed in response to the notice under Section 148 of the Act. The Petitioner further requested for the supply of reasons to believe recorded for issuance of the said notices.
6. The following reasons were supplied for the respective assessment years:

Assessment Year 2005 – 06



“30.03.10. REASONS FOR ISSUANCE OF NOTICE UNDER SECTION 148 OF THE INCOME TAX ACT 1961 IN THE CASE OF M/s MAHASHAY CHUNNILAL CHARITABLE TRUST FOR THE A.Y. 2005-06

The assessment under section 153(A)/143(3) of the I.T. Act 1961 was completed in this case on 31.12.2008 at assessed loss of Rs.1,77,03,110/-. The assessee had invested in Property “MDH School Building”, Byadgi, District Haveri, Karnataka. The property was referred for valuation u/s 142(A) to the Valuation Officer, Bangalore.

The Valuation Report of the said property has been received vide letter dt. 19.06.09 received in this office on 29.06.09. The valuation officer has worked out the value of the property at Rs.75,86,800/- against the declared value of Rs.24,41,776/- lakhs as shown in the balance sheet as on 31.03.06. since the breakup of expenditure year wise was not submitted by



the assessee, the Valuation Officer estimated the overall expenditure spent by the assessee in the proportionate amount in the ratio of 47.8% i.e. Rs.36,26,490/- in the F.Y.2004-05 relevant to A.Y.2005-06 and 52.2%, i.e., Rs.39,60,310/- in the F.Y.2005-06 relevant to the A.Y.2006-07.

The assessee was asked the following details as per questionnaire:

1. At Sl. No.3 of the questionnaire—Copy of Return of Income for the A.Y.2005-06 with all Annexures as was filed u/s 139(1) of the I.T.Act.
2. At Sl.No.17 of the questionnaire— Please file details of investments made and also confirm that the investments have been made in the specified assets mentioned in section 11(5) of the I.T.Act.

On perusal of record it is seen that assessee has not shown any amount of investments made during the year in school at Byadgi. The



valuation of school at Byadgi by Valuation Officer in his report the property has been shown at Rs.36,26,490/- as against NIL shown by assessee. Therefore the investment of Rs.36,26,490/- has escaped assessment.

In view of the above, I have reason to believe that by reason of failure on the part of assessee to fully disclose investment in property No. "MDH School Building", Byadgi, Distt. Haveri, Karnataka, income to the tune of Rs.36,26,490/- has escaped assessment for the assessment year 2005-06.

Assessment Year 2006 – 07

30.03.10. REASONS FOR ISSUANCE OF NOTICE UNDER SECTION 148 OF THE INCOME TAX ACT 1961 IN THE CASE OF M/s MAHASHAY CHUNNILAL CHARITABLE TRUST FOR THE A.Y. 2006-07

The assessment under section 153(A)/143(3) of the I.T.Act 1961 was completed in this case on



31.12.2008 at assessed loss of Rs.1,77,03,110/-.
The assessee had invested in Property "MDH School Building", Byadgi, District Haveri, Karnataka. The property was referred for valuation u/s 142(A) to the Valuation Officer, Hubli.

The Valuation Report of the said property has been received vide letter dt. 19.06.09 received in this office on 29.06.09. The valuation officer has worked out the value of the property at Rs.75,86,800/- against the declared value of Rs.24,41,776/- lakhs as shown in the balance sheet as on 31.03.06. Since the breakup of expenditure year wise was not submitted by the assessee, the Valuation Officer estimated the overall expenditure spent by the assessee in the proportionate amount in the ratio of 47.8% i.e. Rs.36,26,490/- in the F.Y.2004-05 relevant to A.Y.2005-06 and 52.2%, i.e., Rs.39,60,310/- in the F.Y.2005-06 relevant to the A.Y.2006-07. On perusal of record the assessee has shown an amount of



Rs.24,41,776/- in the assets side of balance sheet under the head 'School building' of Byadgi unit. Hence, as per books of the assessee and the information given by Valuation Officer in his report the property has been undervalued by the assessee by Rs.51,45,024/- (75,86,800/- Minus 24,41,776/-) in its return of income. The income of Rs.36,26,490/- has been held, on the basis of details filed by the assessee, to have escaped in the A.Y.05-06. Thus, the balance amount of Rs.15,18,534/- (51,45,024/- minus 36,26,490/-) has escaped assessment in this year.

Therefore, in view of the above, I have reason to believe that by reason of failure on the part of assessee to fully disclose investment in property No."MDH School Building", Byadgi, Distt. Haveri, Karnataka, income to the tune of Rs.15,18,534/- has escaped assessment for the assessment year 2006-07. "



7. The petitioner filed objections to the notices under Section 148 of the Act vide objections dated 10.05.2010. The objections filed by the petitioner were rejected vide impugned order dated 23.8.2010. The initiation of the proceedings by issuances of notices under Section 148 of the Act and the order dated 23.08.2010 is challenged by the Petitioner.
8. The petitioner had objected to the proposed re-assessment primarily on the ground that if an assessment was framed under Section 153A pursuant to search then the assessment so framed was not an assessment under Section 143(3) and as such was beyond the purview of re-assessment under Section 147/148. The contention of the petitioner is that Section 147 refers to an assessment framed under Section 143(3) and not an assessment framed under Section 153A of the Act. The second objection raised by the petitioner was that the basis or reason for



issuance of notices, primarily was the report of the Valuation Officer of the Income Tax Department and the report of the Valuation Officer per se cannot be a basis of issuance of notice under Section 148 of the Act. Another ground raised by the petitioner was that the entire material was before the assessing officer at the time of original assessment and the assessing officer had applied his mind to the same and hence issuance of notice amounted to change of opinion which was not permissible under law. The petitioner had further raised the objection the petitioner Trust, was registered under Section 12A of the Act and as such any income that was applied towards construction of the school building was an application of income towards charitable object and would be exempt from levy of income tax under Section 11 of the Act so there was no question of any escapement of income and even if the investment in the building



were to be taken at a higher figure, it would amount to an application of income and would in any case be exempt from levy of tax.

9. Having heard learned counsels for the petitioner and the respondent we are of the view that the Writ Petition has merit and the reassessment proceedings initiated by the respondent are not sustainable, for the reasons set out below.
10. The original assessment orders under Section 153A for both the assessment years 2005 – 06 and 2006 – 07 are identical in their wording except for the amount of loss assessed. For the purposes of record, we would refer to one of the two assessment orders. The assessment order framed under Section 153A for the assessment year 2005 – 06 reads as under:

"ASSESSMENT ORDER



A search & seizure action u/s 132 of the Income-tax Act was conducted on the premises of the assessee on 22.11.2006. Accordingly, notice u/s 153A was issued and duly served upon the assessee requiring him to file the return for the AY 2005-06.

The assessee filed return u/s 153A declaring loss of Rs.1,77,03,110/- on 17.03.2008. Notice u/s 143(2) & 142(1) dated 24/09/08 were served upon the assessee to file the requisite details. In response to statutory notices Mr. Pradeep Dhingra CA and Authorized representative of the assessee attended the proceedings and filed details and documents called for from time to time.

The assessee is a trust and the main objects are to establish hospital, clinic, laboratories for providing medical relief to needy and poor persons and also to establish educational institutions and other related objects. There is a hospital by the name of M/s. Mata Channan Devi Hospital and four schools Mata Dharam Pal Vidya Mandir, Shishu Vibhag, Mata Vidya Mandir (Bal Vibhag), MDH International School



(LKG/UKG), MDH International School (I/VIII). Requisite documents were called for and produced for verification. After discussion, assessed at a loss of Rs.1,77,03,110/-. This order issues with the prior approval of Addl. Commissioner of Income-tax, Central Range-I, New Delhi.”

11. The Deputy Commissioner of Income Tax while rejecting the objections has recorded that the documents relating to undisclosed income being invested in construction of school at Byadgi were found during the search and the assessing officer came to the conclusion that the value of the school declared by the assessee was less than the actual value and, therefore, during the assessment proceedings, the assessing officer referred the matter of valuation of the school to the District Valuation Officer (DVO).



12. Perusal of the assessment order above shows that the assessing officer while framing the said assessment at a loss Rs.1,77,03,110/- had issued notice to the assessee requiring the assessee to file the requisite details and documents from time to time. The assessing officer after perusal and verification of the documents had passed the assessment order.
13. The Assessing Officer at the time of original assessment was fully conscious and aware of the construction undertaken, the extent of construction and the expenditure declared/claimed. In case of doubt, he should have obtained valuation report before the assessment order was passed. He did not obtain the valuation report and completed the assessment, without making any addition on the said ground. The valuation report was received subsequently and became the sole ground for reopening.



14. A Division Bench of **DELHI HIGH COURT IN SHRI BAWA ABHAI SINGH VS. DY. COMMISSIONER OF INCOME TAX (2002) 253 ITR 83 (DEL)** had observed that valuation report received after assessment can constitute a valid basis for initiation of reassessment proceedings after 1989 amendment. It was held that information, however, must be more than mere rumour, gossip or a hunch and there should be some material which may be regarded as justification for action under Section 147. At this stage, meticulous examination is not required as in-depth enquiry has to be made, post issue of notice. The Assessing Officer must examine the information and realise its implications to determine whether the said facts or material can constitute basis for initiation of proceedings. Subsequent decision of the Supreme Court in Dhariya Construction (supra) observes and holds that the reasons to believe recorded by the Assessing Officer



under Section 147 must disclose due application of mind by the Assessing Officer after he receives the valuation report and the valuation report should not become an automated exercise or a blind and undiscerning consequence. Application of mind by the Assessing Officer, who records reasons, should be demonstrable and satisfied. The valuation report is a starting point for application of mind and one can advert to the same, but the exercise and examination of the relevant aspects by the Assessing Officer should be palpable and perceivable.

15. In the present case, the valuation report is per se tentative and vague. It stands observed that State PWD plinth area rate after the year 1985 had not been published. No cost index was worked out or approved by the competent authority but cost indexes had been approved by the competent authority, Central Board of Direct Taxes (CBDT) every year for important places



in the State of Karnataka. It is also stated that CBDT approved plinth area and cost index method were more authentic than PWD rates. At the same time, it was observed that since the standard weightage for labours and materials were given, the cost index at the specific place of construction could be worked out, if assessee produces bills and vouchers. In paragraph 8.0 it was mentioned that the assessee has not submitted any details of expenditure vouchers for purchased material, labour payment, transportation charges. It was stated that the plinth area rate of 01.01.1992 as base 100 was approved by the CBDT vide circular No. 1671 and as per instructions dated 13.12.1998 for working out basic cost of building. This cost has to be enhanced on the basis of weighted average cost index worked out of the locality based on then prevailing rate of men and materials and also bills/ vouchers produced by the assessee. On this



basis, weighted average cost index was taken as 210 and by this method cost of construction of building on local market rate was arrived. The period of construction as per valuation report was between May,2004 to March,2006 and as per the break-up furnished, 47.8% of the construction cost was incurred in the financial year 2004-2006 and 52.2% of the expenditure was incurred in the financial year 2005-06.

16. The valuation report of this nature requires some statement or an averment by the Assessing Officer as to what was the basis and why he should proceed on the valuation report, its contents and why he should rely on the same while recording reasons to believe. This in the present case is lacking and absent.
17. The contention of the Revenue that the report submitted by the District Valuation Officer was material on the basis of which the reopening proceedings could



be initiated in the facts of the present case is not sustainable.

18. In the case of **COMMISSIONER OF INCOME TAX V. PUNEET SABHARWAL; (2011) 338 ITR 485 (DELHI)**, a Division Bench of this Court relying on the decision of **COMMISSIONER OF INCOME TAX VS. SMT. SURAJ DEVI; (2010) 328 ITR 604 (DELHI)** held that the primary burden of proof to prove understatement or concealment of income is on the revenue and it is only when such burden is discharged that it would be permissible to rely upon the valuation given by the DVO. It was further held that the opinion of valuation officer, *per se*, was not an information and could not be relied upon without the books of accounts being rejected which had not been done in that case. The Division Bench also referred to the decision in **CIT v. NAVEEN GERA (2010) 328 ITR 516 (DEL)** to hold that opinion of the District Valuation Officer *per se* was



not sufficient and other corroborated evidence was required.

19. The Supreme Court in the case of **ASSISTANT COMMISSIONER OF INCOME TAX VS DHARIYA CONSTRUCTION Co. 2010 (328) ITR 515 (SC)** observed:-

"Having examined the record, we FIND THAT IN THIS CASE, THE DEPARTMENT SOUGHT REOPENING OF THE ASSESSMENT BASED ON THE OPINION given by the District Valuation Officer (DVO). The opinion of the DVO per se is not an information for the purposes of reopening assessment under section 147 of the Income Tax act, 1961. The Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment."



20. The ratio discernible from the aforesaid decision is that the Assessing Officer has to apply his mind to any information in form of the valuation report and must form a belief thereon that there is escapement of income. The opinion of the DVO is per se not an information for the purpose of reopening of an assessment. The Assessing Officer has to apply his mind to the report of the DVO and only if on application of mind, if he forms a belief that there is escapement of income, he can seek to reopen the assessment under section 147 of the Act.
21. In the reasons recorded for the year 2005 – 06 the Assessing Officer has recorded that the valuation officer has worked out the value of the property at Rs.75,86,800/- against the declared value of Rs.24,41,776/- lakhs as shown in the balance sheet as on 31.03.06. The A.O. has further recorded that on perusal of record it is seen that assessee has not



shown any amount of investments made during the year in school at Byadgi and that the valuation of school at Byadgi by Valuation Officer in his report the property has been shown at Rs.36,26,490/- as against NIL shown by assessee. The A.O. has thus recorded that the investment of Rs.36,26,490/- has escaped assessment.

22. In the reasons recorded for the year 2006 – 07 the Assessing Officer has recorded that the valuation officer has worked out the value of the property at Rs.75,86,800/- against the declared value of Rs.24,41,776/- lakhs as shown in the balance sheet as on 31.03.06. The A.O. has further recorded that on perusal of record the assessee has shown an amount of Rs.24,41,776/- in the assets side of balance sheet under the head 'School building' of Byadgi unit and that as per books of the assessee and the information given by Valuation Officer in his report the property



has been undervalued by the assessee by Rs.51,45,024/- (75,86,800/- Minus 24,41,776/-) in its return of income. The A.O. has thus held that the income of Rs.36,26,490/- has been held, on the basis of details filed by the assessee, to have escaped in the A.Y.05-06 and that the balance amount of Rs.15,18,534/- (51,45,024/- minus 36,26,490/-) has escaped assessment in this year.

23. For the report of the Valuation Officer to become a basis for the reopening, the Assessing Officer should have applied his mind to the report of the Valuation Officer. The Assessing officer has clearly not applied his mind to the report of the Valuation Officer. Perusal of the Balance Sheet of the Assessee for the year ending 31.03.2005 shows that the Assessee has shown an amount of Rs. 21,95,849/- as an expenditure of capital nature on the Bayadgi Unit towards the School building. The Assessing Officer



has taken the amount shown as nil. For the year ending 31.03.2006 the Assessee has shown an investment of Rs. 2,45,927/- as expenditure of capital nature on the Bayadgi unit and the value of the school building as on 31.03.2006 at Rs. 24,41,776/-. The reasons recorded are contradictory to the record.

24. In view of the above we are of the considered opinion that the assessing officer has merely intended to revisit the said concluded assessment and it is a clear case of change of opinion which is not permissible in law. The Impugned order dated 23.08.2010 is hereby set aside and the proceedings initiated pursuant to the two impugned notices dated 30.03.2010 are hereby quashed. The Writ Petition is allowed with no orders as to costs.

25. Since we have held that the Assessing Officer has not applied his mind to the valuation report and has simply



accepted the same and made it the basis for reopening which is not permissible in terms of the law as laid down by the Supreme Court in **DHARIYA CONSTRUCTION Co. (SUPRA)** and have quashed the reassessment. We have not gone into the plea raised by the Petitioner that as the assessment was framed under Section 153A pursuant to search, the assessment was beyond the purview of re-assessment under Section 147/148. The said question is left open.
No Costs.

SANJEEV SACHDEVA, J.

**FEBRUARY 05, 2014
SV**

SANJIV KHANNA, J.