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Jay Bee Properties (P.) Ltd. Vs. Assistant Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Kolkata

Decided On : Apr-26-2002

Reported in : (2003)84ITD698Cal

Judge : G Chowdhury

Appellant : Jay Bee Properties (P.) Ltd.

Respondent : Assistant Commissioner of

Judgement :

1. These are the appeals by the assessee for the assessment years 1986-87 to 1988-89 against the consolidated order of the Ld. CIT(A) dated 28-12-1999. As common points of disputes arc involved in these cases, for the sake of convenience, these appeals are heard together and disposed of by this common order.

2. The original returns for the assessment years under appeal were filed by the assessee on 18-2-1987, 30-5-1988 and 2-8-1989 respectively. Thereafter a revised return was filed for the assessment year 1986-87 on 27-4-1988. The assessments were framed by the A.O.under Section 143(3) of the Act on 15-3-1989 and 22-12-1989 for assessment years 1986-87 and 1987-88 at Rs. 1,75,240 and Rs. 2,050 respectively. For assessment year 1988-89, the A.O. completed the assessment under Section 143(1) of the Act on 8-3-1990 whereby he did not allow carry forward of loss of Rs. 38,648. It appears from the record that the assessee went in appeal before the CIT(A) for assessment year 1986-87, who reduced the

assessed income to Rs. 1,09,960. Thereafter notices under Section 148 were issued on 13-8-1991 for assessment year 1986-87 and on 26-6-1991 for assessment years 1987-88 and 1988-89 on the ground that the cost of construction of the hotel building was not properly shown by the assessee. The assessee appeared before the A.O. and submitted that the report of the D.V.O.cannot be relied upon for the purpose of computing the cost of construction. D.V.O.'s report is for the entire building, whereas 2nd and 3rd floors were constructed by the assessee. Ground and 1st floors were already in existence when the assessee acquired the property. The assessee has also raised several defects in the report of the Valuation Cell of the Department. In the reassessments, the A.O. rejected the explanation of the assessee on the ground that the assessee failed to produce the books of account. The assessee explained before the A.O.that when the original assessments were framed, the books of account were duly produced before the A.O. and examined by him. However, later on the books of account for the three years under appeal were lost in transit for which F.I.R. was lodged with the Siliguri Police Station.

Copy of the said F.I.R. was produced before the A.O. The assessee also produced copy of the Order Sheets of the Sales-tax Department in support of the fact that the books of account were maintained by the assessee. The A.O., however, made additions in respect of cost of construction of Rs. 3,23,929, Rs. 1,47,988 and Rs. 19,525 for the assessment years 1986-87 to 1988-89 respectively.

3. When the matter came up in appeal before the CIT(A), the Ld. CIT(A) came to the conclusion that the additions made by the A.O. were not sufficient and the assessee under-stated the cost of construction for all the three years. Accordingly, he issued notice for enhancement of the income under Section 251(1)(a) of the Act. The assessee explained that the A.O. in the original assessments had already examined the books of account and the details maintained by the assessee. Therefore, no further addition was called for. It was a fact that the books of account were lost. Hence, the same could not be produced before the A.O. during the reassessment proceedings. The first appellate authority held that- o The books of account which were produced before the A.O. were either not proper or no books of account were produced; o No books of account were maintained by the

assessee. Therefore, the question of accepting the figures of investments towards cost of construction as furnished by the assessee does not arise; o A.O. was not justified in giving the assessee benefit of doubt on the basis of the notings in the order sheet of Sales-tax Department.

o The assessee while purchased the property in 1985, two floors were in existence, but for the purpose of construction of the other floors, the assessee must have reinforced those two floors.

Therefore, the report of the D.V.O. for the cost of construction of the entire structure from ground to 3rd floor of Rs. 31,26,254 was justified. The assessee's valuer in his deposition has accepted that the D.V.O.'s report was more acceptable.

Accordingly, the first appellate authority enhanced the cost of construction to Rs. 8,99,466, Rs. 6,03,279 and Rs. 1,23,904 for the three assessment years under appeal.

4. Against the said finding, the assessee moved before the Tribunal.

The impugned order has been challenged by the assessee on merit and also on jurisdiction point to reopen the assessments. Let me first discuss the issue of jurisdiction to reopen the assessment under Section 147 of the Act. The learned counsel appearing on behalf of the assessee has submitted that the A.O. was not justified in reopening the assessments. The assessee was maintaining books of account, where the details of expenditure incurred for construction were duly recorded and the same were examined by the A.O. at the time of original assessments framed under Section 143(3). Copies of the assessment orders for these years have been filed at pages 29 to 35 of the paper book. The assessee also filed the copies of audited accounts along with Audit Report at pages 1 to 28 of the paper book. It was submitted that the notice under Section 143(2) was issued before framing the said assessments and copies of the notices were also filed at pages 36 to 38 of the paper book. The learned counsel has also filed a copy of the D.V.O.'s report at pages 39 to 45 of the paper book. My attention was drawn to the said report to show that the A.O. by letter dated 11-12-1990 made

reference to the Valuation Cell for ascertaining the cost of construction. The Ld. counsel has submitted that the original assessments were framed under Section 143(3) on 15-3-1989, 22-12-1989 and under Section 143(1) on 8-3-1990 for the years under consideration and the reference was made to the Valuation Cell by the A.O. on 11-12-1990 when no proceeding was pending before him. The Ld. counsel has brought to my notice the assessment orders which were annexed along with the paper book.

Accordingly, it was submitted that the reference made by the A.O. was without jurisdiction and the consequential reopening of the assessments on the basis of the D.V.O.'s report is also nonest in law. The Ld.

counsel has further submitted that it is a settled law that on the basis of D.V.O.'s report, reopening cannot be made when the assessee was duly maintaining its books of account properly, which were examined by the A.O. in the original assessment proceedings under Section 143(3) of the Act. Reliance in this connection was placed on the following decisions :- (i) CIT v. Pratapsingh Amrosingh, Rajendra Singh & Deepak Kumar [1993] 200 ITR 788 : [1992] 64 Taxman 585 (Raj.) (ii) Gulabrai Hanumanbux v. WTO/ITO [1989] 178 ITR 519 : 46 Taxman 248 (Gau.) (v) CIT v. Western Estates [1994] 209 ITR 343 (Cal.) (vi) Jawaharlal Darayavbuxmalv. CIT [1982] 137 ITR 54 : 11 Taxman 61 (MP).

On merits of the case, it was submitted that the first appellate authority was not justified in disbelieving the fact that the ground and first floors were already constructed before taking over the property by the assessee. The assessee has pointed out various defects in the D.V.O.'s report which were not considered either by the A.O. or by the CIT(A). My attention was drawn to page-57 of the paper book which is an agreement between the assessee and United Commercial Bank, to whom the ground floor was leased out by the assessee in February, 1976. At page-64 of the paper book, there is an inspection report by the Sr. Regional Planner, Siliguri Planning Organisation, Siliguri, who inspected the building site and found that ground and 1st floors have already been completed. My attention was also drawn on pages 65 and 66 of the paper book, which are site plan and the order sanctioning the plan, to show that ground and 1st floors were already in

existence and the plan was sanctioned for construction of 2nd and 3rd floors of the building. According to the Ld. counsel of the assessee, all these documents were brushed aside by the first appellate authority on the ground that all the books of account could not be produced by the assessee in the reassessment proceedings. The assessee has filed copy of the general diary which was lodged with the Siliguri P.S. on 6-2-1994, which is placed on page-67 of the paper book, wherein a complaint was made that the books of account were lost from the custody of the assessee. According to the Ld. counsel, the first appellate authority has wrongly held that the assessee is not maintaining books of account, whereas the A.O. even in his reassessment proceeding has accepted the fact that at the time of original assessment the books of account were produced by the assessee. Hence, he allowed benefit of doubt to the assessee. Therefore, the enhancement made by the first appellate authority was not proper and the cost of construction shown by the assessee should have been accepted.

5. In reply to that, the Ld. D.R. referring to page-29 of the paper book, which is assessment order passed under Section 143(3) for assessment year 1986-87, submitted that in the original assessment, no enquiry was made by the A.O. It was submitted that the assessee has raised a new ground before the Tribunal to the effect that reference to the Valuation Cell was without jurisdiction and this ground was not submitted before the CIT(A). The ground taken by the assessee is not correct in view of the fact that although assessment was not pending on 11-12-1990, the assessee has filed an appeal. Therefore, it is a continuation of proceeding and the A.O. was justified in referring the matter to the Valuation Cell for ascertaining correct valuation of the property. The assessee could not establish the fact that the books of account were lost. Therefore, the first appellate authority was justified in holding that the assessee was not maintaining books of account. The Ld. D.R. supported the impugned order passed by the Ld.

CIT(A). He also relied upon the decision in the case of Coca Cola Export Corporation v. ITO [1998] 231 ITR 200 : 97 Taxman 475 (SC).

6. After hearing both the sides, considering their rival submissions and perusing the orders of the authorities below as also paper book filed by the assessee, I find

that there is no dispute that the reference to the Valuation Cell was made on 11-12-1990 and before that date, the assessments were already framed by the A.O. This fact has not been disputed by the Ld. D.R. The contention of the assessee is that reference before the Valuation Cell has to be made during pendency of the proceeding. Whereas the Ld. D.R. submitted that since the assessee filed appeal before the CIT(A), there was therefore a continuation of the assessment proceeding and hence the A.O. was justified in referring the matter to the Valuation Cell. In my opinion, the contention of the Ld. D.R. cannot be sustained even if I accept the provision that during pendency of appeal it will be deemed that the assessment proceeding is still continuing, in that event also the matter is pending before the first appellate authority and not before the A.O. Since the A.O. framed the assessments, he became functus officio. He cannot make further enquiry through Valuation Cell in respect of the cost of construction for the assessment which has already been framed by him. There is no specific provision in the I.T. Act for referring to the Valuation Cell by the A.O. However, in my opinion, the A.O. has power in view of Section 133 of the Act to require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters and affairs which will be useful or relevant to any enquiry or proceeding under this Act. On a reading of the aforesaid provision, it is clear that such power can be exercised by the A.O.only when enquiry or proceeding was pending before the A.O. Admittedly, no such proceeding was pending before the present A.O. when he referred the matter to the Valuation Cell. The second proviso has been added in Section 133(6) of the Act to the effect that power in respect of an enquiry, in a case where no proceeding is pending, shall not be exercised by any Income-tax authority below the rank of Director or Commissioner without the prior approval of the Director or, as the case may be, the Commissioner. In the present case, admittedly, no such material was brought on record on behalf of the Revenue that the present reference was covered by the aforesaid proviso and prior approval was obtained from the Commissioner. By inserting the proviso it is clear that the Legislature specifically intended that no such power should be exercised by an authority under the Income-tax Act when the proceeding was not pending before him. The language used therein is very specific and mandatory. Looking to the aforesaid circumstances, I am constrained

to hold that the reference made by the A.O. to the Valuation Cell is bad in law and hence cannot be sustained.

7. The Ld. counsel of the assessee has referred to various decisions of different High Courts, as referred to above, wherein it has been held that merely on the basis of D.V.O.'s report while the assessee was maintaining its books of account and details of expenditure incurred for construction, the reopening of assessment is not proper. It is a settled law and no further discussion is required on this issue as it is already seen that in the present case the reference to the Valuation Cell is without jurisdiction and, consequently, reopening on the basis of such valuation report cannot be sustained. The decision of Hon'ble Supreme Court in the case of Coca Cola Export Corpn. (supra) relied upon by the Ld. D.R. will be of no help to him. In that case, the assessment of Indian branch of a foreign company was completed by allowing deductions for home, office and service charges. Thereafter the assessment was reopened considering the letters issued by the Govt.

of India limiting the Dollar remittance under the provisions of Foreign Exchange Regulation Act. In such a situation, the Hon'ble Supreme Court has held that the letters are not information in possession of the ITO for the purpose of reopening the income-tax assessment. In that view of the matter, I am of the opinion that the reference made by the A.O. to the Valuation Cell and the consequential reopening on the basis of such report of the Valuation Cell are without jurisdiction.

8. The objection raised by the Revenue that the assessee has raised a new ground before the Tribunal is, in my opinion, not correct, because the assessee has raised the ground challenging reopening of the assessment and in support of the said ground it was the submission of the assessee that the reference made by the A.O. to the D.V.O. is bad in law. Therefore, I am of the view that the assessee has only taken support of law while arguing his case and no new ground has been raised before the Tribunal.

9. On merits of the case, I fail to understand how the Ld. CIT(A) recorded a finding that the assessee was not maintaining any books of account. It is true, in the reassessment proceedings the assessee could not produce the books of account on the ground that the same were lost from its custody. The assessee had

produced copy of the information submitted before the Police. There is no material on record that the information given by the assessee to the Police is concocted or has no basis. In the reassessment proceeding itself, the A.O. himself considered the fact that the assessee produced books of account in the original assessment. The assessee had submitted the order sheet of Sales-tax Department to substantiate the fact that the books of account were produced before the Sales-tax authorities. The A.O. himself has mentioned in the reassessment proceeding that the assessee was following mercantile system of accounting. From the original assessment order, which is on page-29 of the paper book, I find that the A.O. has specifically mentioned in the order that "in response to fixation notice books of account and other details as asked for have been produced and there were test checked." The Ld. CIT(A) failed to bring any material on record that the aforesaid finding of the A.O. in the original assessment order was incorrect. In such a situation, I am of the view that the finding of the first appellate authority that the assessee was not maintaining books of account is not correct. From the impugned order I find that the only ground for enhancement of the cost of construction than shown by the assessee and accepting the D.V.O.'s valuation by the first appellate authority was that the assessee was not maintaining the books of account. As already it has been noticed that the aforesaid finding of the first appellate authority is contrary to the materials available on record, the very basis, therefore, for enhancement of the assessment is not supported by materials on record.

Accordingly, I am of the view that the first appellate authority was not justified in making the assessments by way of enhancement.

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