

K.K. House Vs. Ito

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Court : Income Tax Appellate Tribunal ITAT Hyderabad

Decided On : Mar-29-2006

Judge : D Manmohan, J S Reddy

Appellant : K.K. House

Respondent : ito

Judgement :

1. I.T.A Nos. 208/Hyd./2005, 818 and 819/Hyd./2003 are appeals which pertain to the Association of Persons, M/s K.K.House, Hyderabad, which comprises of six members who are involved in a joint venture of construction. I.T.A. No. 208/Hyd./2005 is filed by the assessee, directed against the order of the Commissioner (Appeals) VI, Hyderabad, dated 10-12-2004. I.T.A. Nos. 818 and 819/Hyd./2003 are appeals filed by the revenue against the order of the Commissioner (Appeals), Guntur, Camp at Hyderabad, dated 19-2-2003. I.T.A. Nos. 201, 203, 205, 209, 211 and 213 / Hyd./2005 are appeals filed by the members of the AOP in their individual status for the assessment year 1998-99.

ITA Nos. 202, 204, 206, 210, 212 and 214/Hyd./2005 are appeals filed by the Members of the AOP in their individual status for assessment year 2001-02. As the issues involved in all these appeals are common, the appeals are heard together and disposed of by way of this common order for the sake of convenience.

2. Facts of the case have been given in detail in the order of the Commissioner (Appeals) dated 10-12-2004 from paragraph 2 to paragraph 3(a) at pages 2 to 4. In the earlier round of proceedings, the Commissioner (Appeals), vide her order dated 19-2-2003 in the case of the AOP and its members for the assessment years 1999-2000 and 2000-01, arrived at cost of construction of the said property at Rs. 30.75 lakhs. She decided that the entire difference in cost of construction of Rs. 3.3 lakhs should be taxed in the assessment year 2000-01 only and in view of this decision, she had given a further direction that no addition should be made in any other year on this ground. This decision of the Commissioner (Appeals) dated 19-2-2003 was accepted by the assessee. The revenue, however, filed appeals against this order before the Income-tax Appellate Tribunal, Hyderabad, in I.T.A. Nos. 816 to 829/Hyd./2003. Hyderabad Bench 'B' (SMC) of the Tribunal, vide order dated 8-9-2004, dismissed the appeals of the revenue on the ground that the revenue effect in each of the cases is below Rs. 1,00,000. The Bench was of the view that CBDT Instruction No. 1979, dated 27-3-2000 was binding on the assessing officer and all the appeals were filed in contravention of the Board's instruction, consistent with the view of this Tribunal as stated in the case of Dy. CWT v. Nb. Syed Jaffar Ali Khan (2005) 94 ITD 21 (Hyd.). Further, miscellaneous petition filed by the revenue in M.P. Nos. 29 to 41 /Hyd./2005 in the said I.T.As. were dismissed by the Tribunal vide order dated 20-5-2005. In other words, the order of the first appellate authority dated 19-2-2003 had attained finality. In the said order dated 19-2-2003 had given decision as follows: (1) The Commissioner (Appeals) considered the working submitted by the assessee with regard to the cost of construction and also indicated the relief the assessee was entitled to, vide paragraphs 5(a) to (f) of the order.

(2) In paragraph 7, the Commissioner (Appeals) had not worked out the unexplained investment at Rs. 3.3 lakhs in round sum manner but adopted the cost at Rs. 30.75 lakhs and as the assessee had declared the cost of construction at Rs. 27.45 lakhs, the Commissioner (Appeals) directed the assessing officer to adopt the unexplained investment at Rs. 3.3 lakhs for assessment year 2000-01 and to apportion it among the members of the AOP. There was a further direction not to assess any undisclosed income for any other assessment years from 1998-99 as the aggregate cost of construction spread over four assessment years from

1997-98 to 2000-01 was considered in the year of completion i.e., assessment year 2000-01.

3. The Commissioner V, Hyderabad, passed an order under Section 263 dated 22-7-2002 setting aside the order of the assessing officer passed under Section 143(3) on 30-3-2001 for the assessment year 1998-99. In fresh assessment proceedings under Section 143(3) read with Section 263, the assessing officer made certain additions based on the valuation report for the assessment year 1998-99. Further, as the assessments for the assessment year 2001-02 were alive, he had made addition in those assessments also based on the valuation report.

Aggrieved, the assessee carried the matter in appeal. The first appellate authority, who passed the impugned appellate order dated 10-12-2004, disagreed with the order of the earlier Commissioner (Appeals) dated 19-2-2003 and gave elaborate reasons for disagreement, at pages 6 to 21 of his order. He upheld the action of the assessing officer in making addition of unexplained investment in accordance with the provisions of Section 69 of the Income Tax Act, 1961, in the assessment years 1998-99 and 2001-02 in the hands of the AOP and all the members of the AOP.⁴ The learned Counsel for the assessee reiterated the contentions raised by him before the first appellate authority. The crux of his argument is that in the impugned order, the Commissioner (Appeals)-VI, Hyderabad, was wrong in stating that he was not in agreement with the findings of his predecessor, i.e., Commissioner (Appeals), Guntur, Camp at Hyderabad, order dated 19-2-2003. He vehemently contended that the Commissioner (Appeals), Guntur, had considered each and every fact of the case in detail and after applying the decision of the Hyderabad Bench of the Tribunal in the case of *Asstt. CIT v. Vinod Kumar Agarwal* (2002) 257 ITR (AT) 65, and after comparing the rates adopted in the valuation report with the rates adopted by the very same Valuation Cell in certain other cases in respect of buildings constructed during the period 1999-2000 and which are situated in the heart of the city of ,Hyderabad, had come to a reasonable conclusion that the differential cost is around Rs. 3.3 lakhs. Further, she had specifically directed the assessing officer to consider the entire differential cost as an addition under Section 69 for the assessment year 2000-01. She also directed

the assessing officer not to make addition in any of the other assessment years because she had considered the entire undisclosed investment under Section 69 in the assessment year 2000-01. The learned Counsel for the assessee vehemently contended that this factual finding of the first appellate authority is binding on the assessing officer specifically when the jurisdictional Bench of the Tribunal has refused to entertain the appeals filed by the assessing officer as they were in violation of the Board's Instruction No. 1971. He submitted that the spirit of the Board's Instructions is that there should be a finality of issues on facts and whatever may be the view of the assessing officer, he is bound to accept the orders of the first appellate authority when the tax effect is below the limit prescribed in this regard by the Board. He took this Bench through the order of the Commissioner (Appeals), Guntur, dated 19-2-2003, and relied on the same. He prayed that as the order has attained finality and as even on facts the Commissioner (Appeals), Guntur, had come to the correct conclusion, that order should be applied and relief be granted to the assessee for these assessment years.

5. The learned departmental representative, on the other hand, relied heavily on the order of the Commissioner (Appeals)-VI, Hyderabad, dated 10-12-2004, and submitted that the order of the Commissioner (Appeals) dated 19-2-2003 was not accepted by the revenue and appeals had been filed before the Tribunal. He relied heavily on the order of the first appellate authority dated 10-12-2004 and submitted that the Tribunal had in fact, dismissed the appeals of the revenue on technical ground and not on merits. Thus, he submitted that it cannot be said that the order of the Commissioner (Appeals) dated 19-2-2003 had attained finality. On the issue of cost of construction, he took this Bench through pages 6 to 21 of the order of the Commissioner (Appeals). The sum and substance of his submissions are as follows: (1) The rates prescribed by the State PWD are not for the purpose of determination of cost of construction but for the purpose of determining the fair market rent of a property and that it is not appropriate to adopt State PWD rates for arriving at the cost of construction.

(2) The earlier Commissioner (Appeals), who granted relief, had no basis for holding that indexed rates adopted by CPWD were higher.

(3) The Commissioner (Appeals), Guntur, who had granted relief had given decision without taking into consideration the fact that the Valuation Officer had based his report on the inspection carried out by him when the building was still under construction and it cannot be said that the CPWD had wrongly estimated the cost of polished granite flooring when Varun Motors carried out the work of laying granite after that date.

(4) There was no evidence before the first appellate authority in the earlier round of appeal, to show that the assessee used polished marble stone or polished Tandur stone.

(5) The observations of the Commissioner (Appeals), Guntur, are general in nature and do not point out any defect in the valuation report of the CPWD. (6) Even for the sake of argument, the item-wise relief allowed by the Commissioner (Appeals), Guntur, is accepted, the assessee would be entitled to relief of Rs. 14,09,833 only out of the value worked out by the Valuation Officer and accordingly the Commissioner (Appeals) should have adopted the cost of construction at Rs. 44,83,167 and not Rs. 30.75 lakhs.

(7) In the impugned order, the first appellate authority has rightly corrected the factual judgment error that had crept into the earlier appellate order by following the decision of the Apex Court in the case of Distributors Baroda (P.) Ltd. v. UOI . He relied heavily on the order of the Hyderabad Bench of the Tribunal in the case of G. Pulla Reddy (I.T.A. Nos. 65/Hyd./2003 to 71 /Hyd./ 2003, order dated 29-10-2004), and pleaded that the same be applied to the facts of the case.

He further submitted that the decision in the case of Vinod Kumar Agarwal (supra) is not applicable to the facts of the case, as in that case the Valuation Officer could not take measurement of some of the rooms as the keys were not readily available and no documents or details were obtained from the assessee and it was concluded that the valuation could not be done in such a hurried manner. He prayed that the impugned appellate order be upheld.6. We have heard rival contentions. On a careful consideration of the facts and circumstances of the case, we hold as follows. In the impugned appellate order, at page 6, first paragraph, the learned Commissioner (Appeals) stated, respectfully disagree with this decision of

the learned Commissioner (Appeals) and my reasons for disagreement are mentioned hereunder." After this, the entire order proceeds as if the first appellate authority is sitting in judgment against the order of the Commissioner (Appeals) dated 19-2-2003. The issues before both the appellate authorities and the facts are the same and they pertain to the same assessee and to the same building. Distinguishing an order of a coordinate appellate authority is different from totally disagreeing with the order of a co-ordinate appellate authority. In the case on hand, the first appellate authority in his order dated 10-12-2004, had totally disagreed and differed from the order of his predecessor dated 19-2-2003 and, in fact, a reading of the impugned appellate order shows that the coordinate first appellate authority had found fault with and reversed the factual findings given by his predecessor. This, to our mind, is not proper.

7. The issue of cost of construction has been held to be a factual finding by various High Courts. CBDT Instruction No. 1894, dated 16-6-1992 states that the Commissioner (Appeals)'s order on facts should be accepted by the Commissioner. In this instruction on the issue of finality of findings of fact by the first appellate authority, the CBDT referred to Instruction No. 1493 (F. No. 279/189/82-ITS), dated 18-11-1982. In the case of Asstt. CIT v. Justice Motilal B. Naik (2004) 91 ITD 384, Hyderabad Bench 'A' of the Tribunal observed as follows. Therefore, as prescribed in the instruction, the order of the Commissioner (Appeals) should have been strictly adhered to and followed but not questioned. Our view that the CBDT's instruction has got binding effect on the department is also strengthened by the decision of the jurisdictional High Court not only in the case of CIT v. T. V Ramanaiah & Sons but also by the decision of the Apex Court in the case of CCE v. Usha Martin Industries Ltd. (1977) 7 SCC 47. The relevant portion of the Supreme Court's decision is worthwhile to be extracted as hereunder: 21. Through a catena of decisions this Court has pronounced that the revenue cannot be permitted to take a stand contrary to the instructions issued by the Board. It is a different matter that an assessee can contest the validity or legality of a departmental instruction. But that right cannot be conceded to the department, more so when others have acted according to such instructions, (vide CCE v. Jayant Dalal (P.) Ltd , Ranadey Micronutrients v. CCE ; Poulouse and Mathen v. CCE ; British Machinery Supplies Co. v. Union of India . Of course the

appellate authority is also not bound by the interpretation given by the Board but the assessing officer cannot take a view contrary to the Board's interpretation.

Similarly, it will also be further worthwhile to extract from the decision of the jurisdictional High Court in the case of TV Ramanaiah & Sons (*supra*).

Whenever instructions given by the Central Board of Direct Taxes to relieve hardship to an assessee are violated and if such instructions are issued in exercise of the powers vested in the Central Board of Direct Taxes under Section 119 of the Act, it is certainly open to the court to compel the income-tax officer to follow the instructions of the Central Board of Direct Taxes. This is not so that this Court is bound by the instructions of the Central Board of Direct Taxes. All that is required to be said is that so far as the officials of Income-tax department are concerned, it is not open to them to say that they would not follow the instructions of the Central Board of Direct Taxes and carry matters in appeals and references.

While it is so, in this case the assessing officer totally disregarded the directions of the Commissioner (Appeals) in her order dated 19-2-2003 and made additions for the assessment years 1998-99 and 2001-02. This, to our mind, is not correct. The earlier Commissioner (Appeals), vide her order dated 19-2-2003, had arrived at a certain decision on the cost of construction and directed that the estimated difference in the cost of construction be added under Section 69 of the Act for the assessment year 2000-01. Such direction clearly eliminates the jurisdiction of the assessing officer to once again estimate the cost of construction of the very same building for the purpose of addition of undisclosed investment under Section 69 of the Act, when in fact the entire undisclosed investment has already been added in the assessment year 2000-01. What the assessing authority cannot do, the first appellate authority also cannot do.

8. On a careful consideration of both the appellate orders, we are of the considered opinion that the order of the Commissioner (Appeals), Guntur, dated 19-2-2003 has to be sustained for the reason that the Commissioner (Appeals) had gone in a lot more analytical manner and had relied on comparable rates adopted by the Valuation Cell itself for the building construction during the period 1998-2000 under the name and style of "Centre Point", situated at Begumpet in

the heart of the city.

On this comparative data and on applying the propositions laid down by the Hyderabad Bench of the Tribunal, she had come to a conclusion that the cost of construction could reasonably be estimated at Rs. 30.75 lakhs as against the disclosed investment of Rs. 27.45 lakhs. After arriving at such a conclusion, the Commissioner (Appeals) held as follows: 7 (iii) While the various figures have to be reconciled, it is not possible to arrive at the cost as a mathematical deduction. I am therefore not strictly beginning with the figure of the Cell and scaling it down. Considering all the factors highlighted by the counsel and also the flaws in his calculation, and the comparable cases, I am adopting the cost at Rs. 30.75 lakhs, which amounts to an enhancement of 12 per cent of the disclosed cost. The differential cost of Rs. 3.30 lakhs (30.75 - 27.45) is to be assessed as unexplained investment. It is seen that no addition has been made for the first year of construction (assessment year 1998-99) and the construction is negligible in the final year 2000-01 (assessment year 2001-02). It can therefore be deemed that the construction was substantially completed in the year relevant to assessment year 2000-01. I therefore direct that the differential cost of Rs. 3.30 lakhs shall be apportioned among the members for the assessment year 2000-01, as unexplained investment. No further addition is warranted for the assessment year 1998-99 or subsequent years, as the aggregate cost of construction for the entire period 1997-98 to 2000-01 has been considered in the year of completion 1999-2000 (assessment year 2000-01).

On the other hand, in the impugned order, the Commissioner (Appeals) has not followed the propositions that were laid down by various Benches of the Tribunal and courts. The deficiencies are pointed out hereunder: (a) It is wrong to state that detailed estimation method cannot be adopted while estimating the cost of construction in this age of advanced technology. We are of the considered opinion that any Civil Engineer with basic knowledge would be able to prepare a detailed estimate of any building with the data that could be gathered from a variety of sources. The argument that it is impossible to estimate the cost of any structure by way of detailed estimate method cannot be countenanced, especially in this age when vast pool of data is available both on the Internet and with various

governmental and non-governmental agencies and where it is always possible to ascertain and measure each and every element of the structure of a particular building with the aid of proper scientific and technical apparatus. The only problem we foresee in this method is that a lot of labour and hard work have to be put in by the concerned Valuation Officer. We cannot understand why the CPWD says that it is unable to estimate the cost of the building on the basis of detailed valuation method.

(b) It is surprising to note that the rates prescribed by State PWD are not purpose of determination of cost of construction but for the purpose of determining fair market rent of a property. This is not true. It is common knowledge that State PWD also executed a number of housing projects and has its own mechanism of prescribing detailed rates for construction of such buildings. In fact, both the CPWD and the State PWD draw up detailed estimates for the purpose of tendering. CPWD finds fault with rates prescribed by State PWD as well as detailed estimate rates on the ground that specifications were not given. Courts and the Tribunal have consistently held that wherever State PWD rates have been published by the State Government, those rates are more relevant than those of CPWD and there is nothing wrong in applying those particular rates of State PWD in estimating the cost of construction of a particular building in that particular State. If any authority is required in this regard, we refer to the decision of the Tribunal in the case of Vinod Kumar Agarwal (*supra*). Hyderabad Bench of the Tribunal in the case of Smt. Salma A. Mehdi (IT Appeal Nos. 687 and 688 (Hyd.) of 1993), had laid down the proposition that State PWD rates take into account the special conditions in a particular area or the territories of the State, whereas CPWD rates are general in nature, and thus suggested a reduction of 15 per cent from the CPWD rates.

9. Thus, on conspectus of the matter, we are of the considered opinion that the order of the Commissioner (Appeals), Guntur, dated 19-2-2003 is factually correct and it has to be upheld in preference to the order of the Commissioner (Appeals)-VI, Hyderabad, dated 10-12-2004. The Commissioner (Appeals)-VI, Hyderabad, should not have differed with the order of the Commissioner (Appeals), Guntur, Camp at Hyderabad. The order of the Commissioner (Appeals), Guntur, dated 19-

2-2003 had attained finality and it was not open for the assessing officer to make an addition on account of undisclosed investment in any of the assessment years under consideration. The revenue has not substantiated its argument that the Commissioner (Appeals), Guntur, had granted excess relief by determining the cost of construction at Rs. 30.75 lakhs whereas on the basis of various issues considered by her to be in favour of the assessee, the cost of construction was worked out at a much higher figure ie., Rs. 44.83 lakhs. No calculation sheet or other data has been furnished to us in support of this argument. On the other hand, the assessee has furnished the following calculations which, to our mind, explain the mode of calculation of cost of construction by the Commissioner (Appeals), Guntur, Camp Hyderabad: The valuation cell adopted cost of excavation of basement separately after ascertaining plinth area rates which is not correct. This is to be reduced.

The valuation cell adopted brick work separately. There cannot be a separate item of brick work when plinth area rate is adopted.

The valuation cell adopted the cost of Mezzanine floor also at Rs. 3,628 per sq. mtr. Even for the ground floor the valuation cell adopted a rate of Rs. 3,370 per sq. mtr. The aggregate of the amounts worked out to Rs. 11, 87,490. The floor height of this areas is only 2.45 mtrs. and 2.50 mtrs. respectively. Further it is a hall type construction and therefore, the valuation cell ought to have adopted a lesser rate than the rate applied for the first floor with a floor height of 3.145 mtrs. at Rs. 2,360 per sq. mtr. Therefore, 50 per cent of the total cost estimated for ground and Mezzanine floors should have been reduced.

The third floor construction is accepted as partly hall type and, therefore, the valuation cell ought not to have taken the entire floor at Rs. 4,653 per sq. mtr. Where the hall type construction is there, the valuation cell has adopted Rs. 2,360 per sq. mtr. Therefore, the cost would have been estimated as under: The aggregate of the above works out to Rs. 8,20,521 as against which the valuation cell adopted Rs. 10,89,826. Therefore, the difference is to be reduced.

The valuation cell adopted stilt and cellar floors at Rs. 6,39,750 taking the cost of construction at Rs. 3,393. As there is no construction of rooms, partition walls,

toilets, etc. is available, the valuation cell would have taken only 50 per cent of the normal rate.

The reduction on this account comes to Rs. 3,19,875.

The valuation cell estimated the cost of electrical fittings, etc. for the stilt, ground the Mezzanine floors at Rs. 2,28,405. For all other areas, the valuation cell adopted the cost of construction to be Type-IV quarter. Having adopted the rate treating it as Type-IV quarter, the valuation cell should not have estimated the cost at 12.5 per cent. Further, insofar as stilt, ground and Mezzanine floors are concerned, the separate walls and rooms are not there. Therefore, a separate addition for electrical fittings is not required - 50 per cent thereof should have been taken. The difference comes to Rs. 1,14,202.

In respect of Tandur flooring the valuation cell adopted extra for polished Tandur stone flooring at Rs. 52,540. The specifications of the Government constructed building include mosaic flooring and the cost of the Tandur stone flooring is less than mosaic flooring and therefore, no addition should have been made.

The valuation cell adopted the cost of polished granite slab at Rs. 1,800 per sq. mtr. whereas the granite is available for about Rs. 80 per sq. ft. It is further submitted that the cost of mosaic flooring has to be reduced which was not done by the valuation cell. Granite used is black, the cost of which is much lesser which varies between Rs. 50 to Rs. 80 per sq. ft. and therefore, the assessee requests that 50 per cent thereof may please be reduced.

In respect of marble stone flooring, the valuation cell adopted rate at Rs. 1,090 per sq. mtr. or Rs. 100 per sq. ft. The marble stone is available at Rs. 40 to Rs. 50 per sq. ft. and cost of mosaic flooring should be reduced to arrive at the additional cost. Therefore, the assessee requests that 50 per cent of sum be allowed as a deduction : Deduction towards rate difference between CPWD rates and local rates - 15 per cent of Rs. 42,74,759 In any event, valuation is an opinion and minor variations have to be looked into in that perspective.

10. Coming to the legal propositions, though there are a number of judgments on the issue of construction, we draw strength from the following orders in support of the propositions stated above: *K. Damodaraswamy Naidu v. Asstt. CIT* The main contention on behalf of the assessee is that for the purpose of estimating the valuation of the properties the Valuation Officer ought to have followed the State PWD rates instead of Central PWD rates. In support of this contention the assessee has submitted a comparative chart showing the State PWD rates, which was adopted in the proceedings by the Superintending Engineer, PWD, Coimbatore for the purpose of taking accommodation on lease for Government Officers. According to the department those rates are not the exact PWD rates because those rates were followed for the purpose of fixation of rent for taking accommodation on lease. On the other hand a chart showing the State PWD rate was also filed on behalf of the revenue. We find from the said chart that the difference between the State PWD rate and the Central PWD rate is not so much as that of the chart, which was supplied on behalf of the assessee. It is true that generally the Central PWD rates are being followed for the purpose of valuing the properties by the Valuation Officer. In the case of *Sheikhar Chand Jain & Sons v. Inspecting Asstt. CIT* (1988) 32 TTJ (Del) 570 the Tribunal held that when the rates notified by a local authority and that too by a Government one are available, it is the rate approved by that authority which should be given credence than the authority like the CPWD. In that case the Tribunal directed the assessing officer to follow the valuation adopted by the assessee on the basis of local PWD rate, whereas the Valuation Officer followed CPWD rates. The case referred to on behalf of the assessee reported in *Raj Kumar* also supports the aforesaid contention. Under Section 16A of the Wealth Tax Act when a reference is made to the Valuation Officer, the Valuation Officer values the property under the aforesaid provision of law after giving notice to the assessee and giving opportunity to file any objection on behalf of the assessee. Nowhere in the Act or in the Rules it has been prescribed that only the CPWD rates are to be followed for the purpose of arriving at the valuation of the properties. On the other hand the local PWD rates which are based on the local conditions differ from one State to another. It is also true that for the purpose of construction of a building the same cost cannot be incurred if one building is constructed in a metropolitan city like Bombay and the

other building is constructed in a mofussil area. Therefore, if the Valuation Officer adopts the State PWD rate, which is a recognised rate by the State Government, for the purpose of valuing the property, it cannot be said to be erroneous. Now the question is that both the assessee as well as the revenue are submitting two types of rates claiming that those rates are State PWD rates. It is very difficult for us to come to a conclusion that which rate is the actual State PWD rate. Accordingly, we remit the matter back to the file of the Commissioner (Appeals) to revalue the property after ascertaining and following the State PWD rates. The first appellate authority shall give opportunity of being heard to both the sides for coming to a conclusion in accordance with law. Asstt. CIT v. Shri Vinod Kumar Agarwal Before parting with this order, we note with concern that the departmental Valuation Officers are not following the judgments of this Tribunal. If so, he would have himself given 15 per cent overall rebate due to rate variations among different places, as held by this Tribunal in the case of Salma A. Mehdi (supra). This attitude is enormously increasing the infructuous work of the department and the Tribunal and also causing unnecessary harassment and anxiety to the taxpayers. We should seriously consider awarding costs on the officers of the Valuation Cell in all such cases in future wherein the propositions laid down by the various courts and Tribunals of this country are not followed. In all such cases, where properties have been referred to valuation, the following propositions of law can be stated to have been laid down by various High Courts and Tribunals.

(1) Reference should be made to the Valuation Cell only after proper application of mind by the officer concerned. Courts have held that reference cannot be made without rejecting books of account maintained by the assessee, which gives details of the construction expenditure. It is a settled proposition that evidence in the form of regular books is certainly more reliable than an estimate by an expert. This necessarily means that reference made on the arrival of the search party to the assessee's premises without even going into the books of account or other details available and filed with the department, is obviously a reference made without application of mind- 118 Taxman 187,200 ITR 788 (Raj.),.

(2) Inspection of the properties should not be done during the course of search and seizure operations, as during that period the assessee would be under

psychological pressure and no proper defence can be advanced by the assessee during that period of time.

Inspection of the property should be done by giving adequate notice and opportunity to the assessee and preferably in his presence.

(3) When there are more than one method to estimate the cost of construction, the method most favourable to the assessee should be followed by the Valuation Cell. The material that is sufficient for arriving at the cost of construction by a registered valuer by following a particular method, should be the material sufficient for arriving at the cost for the same method if adopted by the Valuation Cell. Private individuals constructing residential houses cannot be expected to have all the types of drawings, designs etc. maintained by the Government Contractors nor can they be expected to have stock books, log books etc. Non-availability of these records should be no reason to apply plinth area method of estimation. Empanelled valuer's report itself should be sufficient material to the Valuation Officer to evaluate the cost of construction on that particular method (refer 107 ITR 477).

(4) When two sets of rates are prescribed, one by the CPWD and the other by State PWD and as none of these can be considered unrealistic and wrong, the rates that are more favourable to the assessee have to be applied by the valuation cell. Only local rates are to be adopted. (Refer Income Tax Act, 1961 Nos. 697 & 698/Hyd./95 and Income Tax Act, 1961 Nos. 806 & 807/Hyd./93, in the case of Salma A. Mehdi, Visakhapatnam, order of this Bench dated 20-6-1994).

(5) The Valuation cell is confronted with the report of the empanelled registered valuer and if the Valuation Officer is not in agreement with the report of the registered valuer, he should give item-wise reasons for such disagreement. The quantities and rates should be necessarily controverted item-wise with evidence and reasons, after detailed investigation. (refer 49 TTJ 530).

(6) It is obligatory on the part of the Valuation Officer to furnish to the assessee, in the interest of natural justice, his working of the cost of index and the rates adopted by him for various material considered in working out the cost index.

11. Thus, applying these propositions to the facts of this case and for all the reasons stated in this order and specifically on the ground that no addition is possible for the impugned assessment years 1998-99 and 2001-02, especially when the addition in question on account of undisclosed investment has been directed to be made only in the assessment year 2000-01 by the Commissioner (Appeals), Guntur, Camp at Hyderabad, and as she had already quantified the quantum of undisclosed income, and her order has attained finality as the Tribunal enforced the CBDT instructions and held that the revenue cannot challenge that order, and as on facts we agree with the order of the Commissioner (Appeals), Guntur, we allow all the appeals of the assesseees.

12. Coming to the appeals filed by the department in the case of the AOP, we have necessarily to dismiss the same. Firstly, there is no tax effect as the total income determined by the assessing officer in the 'case of AOP is Rs. Nil He submitted that the entire income determined in the case of AOP for both the assessment years is divided among the members of the AOP. Further, the question whether the income of the AOP is assessable in the assessment of the AOP itself or is assessable in the assessment of the individual members is not in dispute. The assessing officer accepted that the income is assessable, in the assessment of the individual members and not in the assessment of the AOP. Such a question as raised by the revenue does not emanate from the assessment order and the order of the learned Commissioner (Appeals).

Further, such an argument cannot be raised before the Tribunal by the revenue as the assessing officer accepted the income admitted in the assessment of the members of AOP. We refer to the provisions of Section 26 of the Income Tax Act, 1961, which read as under: Where property consisting of buildings or buildings and lands appurtenant thereto is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with Sections 22 to 25 shall be included in his total income.

From a reading of the above provision, it is clear that in a case where the assessee individually derived income from house property, there will not be any AOP in existence. The words used are such persons shall not in respect of such property be assessed as AOP. These words clearly indicate that the AOP shall not exist insofar as the property jointly owned is concerned. When the assessments are to be made on the members, such association of persons cannot exist in respect of the said property. Therefore, in view of Section 26, the difference, if any, has to be considered in the assessment of the individuals.

13. The case of the assessee is that the investment in construction of the property was made by the individual joint owners and not by the AOP. The AOP does not have any source of income. It did not invest any amount of its own in the construction of the property and the AOP by itself never possessed any source for investment in the property. The investment made by the individual members is identifiable. The total investment in the construction of the building is also known. It can be seen that the entire investment in the construction has gone from the individual joint owners. Therefore, Sections 69, 69A and 69B are clearly applicable in the case of the persons who have invested the amount. In these sections, the reference made is to the person making an investment in the property. In the case of the assessee, the investment was made by the individual joint owners and, therefore, Section 69 or any other provision has application to the individual joint owners and not to AOP as no investment was made by the AOP. Therefore, the provisions of Section 69 have no application at all in the assessment of the AOP. If at all it is to be applied it can at best be applied only in the assessment of the individual joint owners.

Further Section 69 or any other provision pre-supposes that there is an income for the assessee making an investment. The Hon'ble Supreme Court in the case of CIT v. P.K. Noorjehan , held that it is not enough to find out that there was investment not explained and it has to be examined whether such assessee could have earned any income which was not disclosed to the department. In that case, the Hon'ble Supreme Court decided that the assessee was not having any possibility to have earned any income outside the books of account and, therefore, observed that addition under Section 69 cannot be made. The case of the

assessee is on all fours with the facts of the case decided by the Apex Court. The assessee has no source of income of its own. Therefore, Section 69 has no application to the case of the AOP even based on the decision of the Supreme Court mentioned above. Therefore, the contention of the revenue that the amount is assessable in the hands of the AOP is not correct.

14. For the reasons mentioned above, we dismiss the appeals of the revenue.

15. In the result, the appeals of the assesseees are allowed and the appeals of the revenue are dismissed.

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