

**ito Vs. Mahavir Builders**

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**Court :** Gujarat

**Decided On :** Jul-25-2002

**Reported in :** (2002)178CTR(Guj)72

**Appeal No. :** Tax Appeal Nos. 212 to 223 of 2002 25 July 2002 A.Ys. 1985-86 to 1987-88

**Appellant :** ito

**Respondent :** Mahavir Builders

**Advocate for Pet/Ap. :** B.B. Naik, *for the Revenue*

**Judgement :**

Judgment

**M. S. Shah, J.**

These twelve tax appeals are filed by the Income Tax Officer, Rajkot, for challenging the common judgment and order dated 29-9-2001, passed by the Income Tax Tribunal, Rajkot, in one group of six appeals filed by M/s Tirupati Builders and the other group of six appeals filed by M/s Mahavir builders in respect of assessment years 1985-86, 1986-87 and 1987-88. Since in all these appeals common questions of fact and law are involved, the same are being disposed of by this common judgment.

2. The respondent-assessee i.e., M/s Tirupati builders and M/s Mahavir builders are two separate partnership firms engaged in the business of construction and selling of flats. M/s Tirupati builders constructed the property known as Ajanta Apartments at Rajkot. The construction was commenced in the year relevant to assessment year 1985-86 and it continued up to the year relevant to assessment year 1987-88. The assessee had declared the cost of construction in the books of account maintained by the firm. While framing the assessment order for assessment year 1986-87 the assessing officer noted that the assessee had understated the cost of construction and, therefore, the matter was referred for determination of the cost of construction to the Departmental Valuation Officer (hereinafter referred to as DVO) under section 131(1)(d) of the Act. The DVO submitted his report dated 28-3-1988, after inspection of the property and after taking into consideration the relevant material and on that basis, the assessing officer reopened the assessment under section 147(b) of the Income Tax Act for assessment years 1985-86 and 1987-88. The assessing officer estimated that cost of construction at Rs. 1,531 per sq. mt. against the cost declared by the assessee at Rs. 1,117 per sq. mt. The assessing officer made addition of the difference of the cost and was of the view that the assessee must have earned profit on unexplained income and, therefore, he added 10 per cent of the unexplained income as profit.

3. Similarly M/s Mahavir Builders also constructed another property known as 'Elora Apartments' at Raikot. The construction activity was commenced in the year relevant to assessment year 1985-86 and completed in the year relevant to assessment years 1987-88. The assessee had declared the cost of construction at Rs. 1,058 per sq.mt. whereas on the basis of DVO's report dated 28-3-1988, the assessing officer estimated the cost of construction at Rs. 1,530 per sq. mt. In this case also the assessing officer had made addition of the difference of the cost of construction for the assessment year 1986-87. In the case of this assessee also, the assessments for assessment years 1985-86 and 1987-88 were reopened under section 147(b) and additions were made in these years also in proportion to the cost of constructions carried out in these years.

4. Aggrieved by the aforesaid orders passed by the assessing officer, both the assesseees went in separate appeals before the Commissioner (Appeals). The Commissioner (Appeals) allowed the appeals of the assesseees and held that the proceedings initiated under section 147(b) for assessment years 1985-86 and 1987-88 in both the cases were invalid and cancelled the reassessments for the assessment years 1985-86 and 1987-88 and deleted the entire amount of addition made on account of unexplained cost of construction and also deleted the further addition of 10 per cent made by the assessing officer on such unexplained cost of construction. However, the Commissioner (Appeals) enhanced the profit to 15 per cent as against 10 per cent declared by the assesseees. This profit has been enhanced on the actual cost of construction declared by the assessee in their books of accounts.

5. The aforesaid orders of the Commissioner (Appeals) were challenged by both the assesseees as well as by the revenue before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). The Tribunal held that reopening of assessments for assessment years 1985-86 and 1987-88 was justified in both the cases and that the assessing officer was also justified in making the reference to the DVO for determining the cost of construction. However, the Tribunal was of the view that the assessing officer had not granted proper and due opportunity of hearing to the assesseees before estimating the cost of construction. The Tribunal accordingly restored the matters back to the assessing officer for determining the actual cost of construction. It was further held by the Tribunal that the assessing officer would also give the assessee or his registered valuer an opportunity to cross-examine the DVO in respect of the various aspects for determining the cost of construction made in the valuation reports. The Tribunal was of the view that this exercise was also necessary to appreciate the contention of the assesseees that the quantity of steel consumed by the assesseees was in conformity with the standard prescribed as per IS code or any other authentic book.

The Tribunal also set aside the order of the Commissioner (Appeals) enhancing the profit margin from 10 per cent to 15 per cent as declared by the assessee and the assessing officer was directed to make the de novo assessments.

6. Pursuant to the aforesaid order of the Tribunal, the matters went back to the assessing officer. The assessing officer was directed to allow an opportunity to the assesseees to cross-examine the DVO. But the assessing officer declined to accept the request of the assesseees vide his letter dated 14-10-1997. The relevant para of the reply is as under :

'As regards your right to cross-examine the DVO, I have to inform you that since the department valuer has done the valuation in advisory capacity, the opportunity of being heard is not given to the assessee by the DVO. As far as cross-examination of the DVO/Valuation Officer by the assessee in presence of assessing officer is concerned, I am of the view that the Valuation Officer is a party to the dispute and is not a witness in the proceedings so far as valuation of property is concerned. The Valuation Officer to whom a reference is made by the assessing officer for determination of cost of construction provides assistance to the assessing officer. The statute gives the Income Tax Officer, Valuation Officer the right to be heard before the appellate authorities', but it does not give any right to the assessee to cross-examine the Valuation Officer before the assessing officer or appellate authority.'

The assessing officer, therefore, made the same assessments.

7. The assesseees thereupon went in appeal before the Commissioner (Appeals) before whom the assesseees made a grievance against the refusal of cross-examination of the DVO in spite of the direction of the Tribunal. In his order dated 21-1-1999, the Commissioner (Appeals) found substance in the said grievance but ultimately took the view that in similar cases his predecessor had taken a view that it is possible that variation of about 10 per cent to 15 per cent may arise on account of various assumptions built in the standard. plinth area method.

The Commissioner (Appeals) made the following observations :

'It is not possible to place an exact figure of the cost of construction and there has already been enough debate and discussion on the subject. The matter is about 13 years old and there has to be an end of the litigation. Under the circumstances, I take an overall view of the matter and in order to serve the ends of justice and

fairness, taking a balanced approach, I hold that the cost of construction be taken at Rs. 1,300 per sq.mt. which is about 15 per cent less than the DVO's estimate. Thus, the total cost of construction of M/s Tirupati Builders works out to Rs. 15,53,929 and that of M/s Mahavir Builders works out to Rs. 15,53,994.

In short as against the cost of construction, disclosed by the assessee namely, Tirupathi Builders and Mahavir Builders at Rs. 1,170 per sq. mt. and at Rs. 1,058 per sq. mt., respectively (against which the DVO estimated the cost of construction at Rs. 1,531 per sq.mt. and at Rs. 1,530 per sq.mt., respectively) the Commissioner (Appeals) estimated the cost of construction at Rs. 1,300 per sq. mt. In this manner, the Commissioner (Appeals) upheld a part of the addition and deleted the rest of it.

8. The above order dated 21-1-1999, of the Commissioner (Appeals) gave rise to one set of appeals by M/s Tirupati Builders and another set of appeals by M/s Mahavir Builders and two sets of cross-appeals by the assessing officer. Thus, in all twelve appeals came to be filed before the Tribunal at Rajkot. The Tribunal referred to the chequered history of the litigation and took serious view of the conduct on the part of the assessing officer in not permitting the assessee to cross-examine the DVO in spite of previous orders of the Tribunal. The Tribunal was of the view that the conduct of the assessing officer was arrogant and warranted contempt proceedings under the Contempt of Courts Act, 1971, but in view of the lapse of more than one year, the same cannot be initiated. The Tribunal accordingly did not make any reference to this court under the provisions of Contempt of Court Act, 1971, but expressed its disapproval of the conduct of the assessing officer which unnecessarily dragged the assessee in second round of litigation. The Tribunal, therefore, dismissed the revenue's appeals and allowed the assessee's appeals with costs quantified at Rs. 2,500 in each appeal of the assessee.

9. As far as merits of the case are concerned, the Tribunal was of the view of that assessments made by the assessing officer on the basis of DVO's report cannot be accepted, and at the same time the Commissioner (Appeals) had no material before him to enhance the cost of construction from that disclosed by the

assessee at Rs. 1,170 per sq. int. and at Rs. 1,058 per sq. mt. to Rs. 1,300 per sq. mt. The Tribunal, therefore, passed the final orders and expressed the view that the even if the difference of actual cost estimated by the DVO and the cost shown by the assessee under section 69C may be assessable as unexplained expenditure as soon as the amount is debited in the P&L; a/c the same is neutralized and the net result is nil addition. To neutralize the P&L; a/c, the legislature has amended section 69C and added proviso to it with effect from 1-4-1999.

The Tribunal also accepted the assessee's contention that the DVO had adopted the plinth area rate method which was an inferior method of determining the cost of construction and also did not accept the defects as pointed out by the assessing officer that the assessee ought to have maintained the consumption and balance of raw material either day-to-day accounts or on any regular interval of any specified period. The Tribunal referred to the observations of the Hon'ble Supreme Court in the case of K.P. Varghese v. ITO and in the case of C. B. Gautam v. Union of India & Ors. wherein it was observed by the Hon'ble Supreme Court that 'a difference up to 15 per cent may be attributable to bona fide error of estimation made by two different experts.'

The Tribunal further observed that assessing officer had not dealt with the construction activities with a realistic approach.

10. Against the aforesaid common judgment and order dated 29-11-2001, the revenue has come in appeal by filing these twelve separate appeals.

11. Mr. B.B. Naik, learned standing counsel appearing for the revenue, has urged that the Tribunal had erred in passing the first order directing the assessing officer to permit the assessee to cross-examine the DVO who is a quasi-judicial authority exercising the power under section 131 of the Act. The DVO gives an opportunity to the assessee to lead the evidence on the question of determination of cost of construction and, therefore, the assessee has the opportunity before the DVO to meet with the material which may ultimately be held against the assessee and it is, therefore, strenuously urged by Mr. Naik that the Tribunal had committed a grave error of law in issuing the previous direction to the assessing officer to permit the

assesseees to cross-examine the DVO.

Mr. Naik has further submitted that even if that opportunity before the DVO was not given to the assessee, the estimate made by the assessing officer about the cost of construction was not invalid. After the remand, the assessing officer had also referred to the other aspects like cost of construction of buildings in the same locality sold to public sector bodies like Dena Bank and IOC and, therefore, the assessing officer had acted bona fide and reasonably in estimating the cost of construction at Rs. 1,531 per sq. mt. for M/s Tirupati Builders and at Rs. 1,530 per sq. mt. for M/s Mahavir Builders and, therefore, neither the Commissioner (Appeals) nor the Tribunal ought to have interfered with the said assessment of the cost of construction. Mr. Naik has also submitted that the marks made by the Tribunal against the assessing officer were not warranted.

12. Having heard the learned standing counsel for the revenue, we are of the view that the submissions made by the learned standing counsel for the revenue might have appealed to us but in the peculiar facts and circumstances of the case, we are of the view that these appeals are not required to be admitted as they do not raise substantial question of law as contemplated by section 260A of the Income Tax Act, 1961.

13. After the order of remand, while the assessing officer proceeded to reframe the assessments, the assessing officer declined the request of the assesseees to cross-examine the DVO stating in his letter dated 14-10-1997, that :

'as regards your right to cross-examine the DVO, I have to inform you that since the department valuer has done the valuation in advisory capacity, the opportunity of being heard is not given to the assessee.'

The learned standing counsel for the revenue was not in a position to state that the DVO had actually given an opportunity of hearing to the assesseees before submitting his valuation reports.

In this view of the matter, it appears to us that in the facts of the two cases at hand, the assesseees did not have a reasonable opportunity of being heard before

the DVO submitted his reports which were important parts of the material relied upon by the assessing officer.

14. it is true that the assessing officer had also referred to the other aspects like cost of construction of the buildings in the same locality, and quality of construction. This would however, warrant exercise of reappraisal of evidence in this regard. But a tax appeal under section 260A is to be entertained only on a substantial question of law.

As regards the prayer made by Mr. Naik for remanding the matters to the assessing officer for reestimating the cost of construction after giving an opportunity of hearing to the assesseees, we are not inclined to accept the said request for two reasons.

In the first place the assessment years for our consideration are 1985-86, 1986-87 and 1987-88, and secondly the tax effect/penalties demanded from the respondent-assesseees are as under :

Year

Mahavir Builders

Tirupati Builders

(Rs.)

(Rs.)

1985-86

25,345

16,322

1986-87

1,32,547

1,20,268

1987-88

27,671

37,136

Total

1,85,563

1,73,726

Looking to the amounts involved and the fact that the period of more than 15 to 17 years has already elapsed, we do not find any justification for passing order of remand at this stage.

15. As far as the observations made by the Tribunal regarding the conduct of the assessing officer are concerned, it appears that the assessing officer over and above relying upon the DVO's report, had also referred to the other material such as the details about the cost of construction of buildings in the same locality, which were sold within less than two years from the apartments in question. Looking to the cost of construction of those apartments which were sold to Dena Bank and IOC the assessing officer cannot be said to have acted mala fide in proceeding on the basis of the cost of construction determined by the DVO, though the Tribunal's direction in the first round was to cross-examine the DVO, and the assessing officer did not grant an opportunity permit the assessee to cross-examine DVO.

16. At this stage, we may deal with the aspect whether the DVO gives any opportunity of hearing to the assessee before submitting his valuation report. We are informed by the learned standing counsel appearing for the revenue that ordinarily the DVO appointed under section 131 of the Act himself gives opportunity of hearing to the assessee in such matters and, therefore, the question of issuing any direction to the assessing officer to permit the assessee to cross-examine the DVO should not ordinarily arise.

Mr. Naik has expressed the apprehension that such directions may again be issued by the Tribunal to the assessing officers to permit the assessee to cross-examine the DVO or any other quasi-judicial authority. We are sure that the Tribunal will keep in mind that when a quasi-judicial authority like the DVO gives an opportunity of hearing to the assessee, the Tribunal would not issue a direction for permitting the assessee to cross-examine the DVO or any other quasi-judicial authority but in the peculiar facts and circumstances of the case indicated hereinabove in para 13 we are not inclined to interfere with the impugned judgment and order dated 29-11-2001, of the Tribunal.

17. Subject to the aforesaid observations made in paras 15 and 16 all the appeals are dismissed.

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