IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 832 of 2016
TO
TAX APPEAL NO. 837 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH sd/-
and
HONOURABLE MR.JUSTICE B.N. KARIA sd/-

==

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**NO**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

==

PRINCIPAL COMMISSIONER OF INCOME TAX....Appellant(s)
Versus
SANJAY HIRALAL THAKKAR....Opponent(s)

==

Appearance:
MR. MANISH R. BHATT SR. ADV WITH MRS MAUNA M BHATT, ADVOCATE for the Appellant(s) No. 1

==

CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 22/12/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.0. As common question of law and facts arise in this group of appeals and arising out of the common impugned judgment and order passed by the learned Income Tax Appellate Tribunal, all these appeals are decided and disposed of by this common judgment and order.

2.0. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the learned Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad passed in IT(SS) A No.828/AHD/2010 (for AY 2001-02), IT(SS) A No.849/AHD/2010 (for AY 2001-02), IT(SS) A.No.829/AHD/2010 (for AY 2002-03), IT(SS) A No.850/AHD/2010 (for AY 2002-03), IT(SS) A No. 836/AHD/2010 (for AY 2003-04) and CO No.16/AHD/2011 in IT(SS) A No.836/AHD/2010 (for AY 2003-04), the Revenue has preferred present Tax Appeals with the following proposed questions of law.

> "A.Whether the Income Tax Appellate Tribunal has erred in law and on facts in holding that the AO's action of invoking Section 142A of ht Act without rejecting books of accounts stating the cost of construction of residential property in question as well as the land appurtenant thereto is not based on any incrimination material found or any infirmity being pointed out?
>
> B. Whether the Income Tax Appellate Tribunal has erred in law and on facts in deleting the addition of Rs.74,20,963/- on account of undisclosed investment in the cost of land and cots of construction?
>
> C. Whether the Income Tax Appellate Tribunal has erred in law and on facts deleting the addition of Rs. 24,31,000/- being unexplained investment in cost of construction?"

3.0. For the sake of convenience, the facts in Tax Appeal No. 832 of 2016 for AY 2001-02 are considered, which are as under:

3.1. That the assessee is an individual engaged in the business of construction and hotel. The department carried the search in the case of assessee as well as that of one M/s. Dharamdev Builders Group on

09.02.2005. The same culminated in notice under Section 153 A of the Act dated 17.04.2015. The assessee filed return of income in response to the said notice declaring total income as 2,37,.230/-. Thereafter, order under Section 153A(b) of the Act was passed on 29.12.2006 computing the total income at Rs. 1,29,41,510/- after making various additions. It appears that during the course of assessment proceedings, the Assessing Officer made the reference under Section 142 A of the Act to the Departmental Valuation Officer(hereinafter referred to as the DVO). The DVO filed its report on 15.12.2006 making valuation of residential property at Rs.1,46,28,300/- as on 31.03.2005 as against that shown in books at Rs.64,51,242/-. The DVO ascertained cost of land appurtenant to the house at Rs.30,97,500/- as on 13.10.2000 turning out to be much higher than that declared at Rs.6,17,100/-. The Assessing Officer therefor, adopted the DVO's value and as on 31.03.2005 as the basis for determining cost of construction on 31st March of each relevant previous year. That resulted in differential amount of cost of construction of Rs.49,40,563/- and Rs. 28,80,400/- relevant to land cost being added to the total income of the assessee.

3.2. On an appeal, the learned CIT(A) restricted the addition to Rs.14,68,810/- on account of cost of construction and deleted the entire addition of Rs.28,80,400/- on account of land cost. Aggrieved by the order of the CIT(A), revenue filed an appeal before the Appellate Tribunal. The assessee also filed the appeal challenging the order passed by the learned CIT(A) in so far as restricting the addition of Rs.14,68,810/-. The learned Appellate Tribunal has allowed the appeal preferred by the assessee and the has dismissed the appeal preferred by the revenue and by impugned judgment and order has deleted the entire addition of Rs.74,20,963/-.

3.3. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the learned Tribunal in deleting the addition of Rs. 74,20,963/- (for AY 2001-02), the Revenue has preferred present Tax Appeal Nos. 832 of 2016 and 833 of 2016 with the following proposed question of law.

> “A.Whether the Income Tax Appellate Tribunal has erred in law and on facts in holding that the AO's action of invoking Section 142A of ht Act without rejecting books of accounts stating the cost of construction of residential property in question as well as the land appurtenant thereto is not based on any incrimination material found or any infirmity being pointed out?
>
> B. Whether the Income Tax Appellate Tribunal has erred in law and on facts in deleting the addition of Rs.74,20,963/- on account of undisclosed investment in the cost of land and cots of construction?
>
> C. Whether the Income Tax Appellate Tribunal has erred in law and on facts deleting the addition of Rs. 24,31,000/- being unexplained investment in cost of construction? “

4.0. Heard Shri Manish Bhatt, learned counsel for the Revenue. Perused the impugned common judgment and order passed by the learned Tribunal. At the outset, it is required to be noted that while deleting the addition made by the Assessing Officer which was made relying upon the DVO's report, the learned Tribunal has heavily relied upon the decision of the Hon'ble Supreme Court in the case of Sargam Cinema vs. Commissioner of Income Tax reported in (2010) 328 ITR 513 and it is held that before making a reference to the DVO under Section 142A of the Act, if the Assessing Officer has not rejected the books of account and therefore, the reference under Section 142A of the Act itself was bad in law and therefore, DVO's report cannot be the basis to make addition. From the material on record, it does not seem to be any dispute that while making the reference to the DVO under Section 142 A of the Act, the Assessing Officer did not first rejected the books of account. Therefore, considering the requirement of law which was prevailing at the time of years under consideration and considering the decision of the Hon'ble Supreme Court in the case of **Sargam Cinema (supra)** the reference itself can be said to be bad in law. In the case of **Sargam Cinema (supra)**, the Hon'ble Supreme Court has observed and held that unless and until the books of account are first rejected by the Assessing Officer, the Assessing Officer is not justified in making the reference to the DVO's under Section 142 A of the Act. While reference is held to be bad in law, the DVO's report has to be ignored and cannot be basis to make the addition. It is true that subsequently, there is amendment to Section 142 A of the Act however, considering the provision of law prevailing at the time of years under consideration and the decision of the Hon'ble Supreme Court in the case of **Sargam Cinema (supra)** before making reference to DVO, the Assessing Officer was required to reject the books of account.

5.0. Similar view has been taken by the Division Bench of this Court in the case of Goodluck Automobiles Pvt. Ltd vs. Assistant Commissioner of Income Tax reported in **(2013) 359 ITR 306(Guj)** as well as in the case of Commissioner of Income Tax vs. Vijaykumar D Gupta reported in (**2014) 365 ITR 470 (Guj).**

6.0. Considering the aforesaid facts and circumstances and the decision of the Hon'ble Supreme Court in the case of **Sargam Cinema (supra)** and the decision of the Division Bench of this Court in the case of **Goodluck Automobiles Pvt. Ltd (supra)** and **Vijaykumar D Gupta (supra)**, it cannot be said that the learned Tribunal has committed any error in deleting the addition made by the Assessing Officer which was made on the basis of valuation department by the DVO. We see no reasons to interfere with the common impugned judgment and order passed by the learned Income Tax Appellate Tribunal. We are in complete agreement with the view taken by the learned Tribunal.

7.0. In view of the above and for the reasons stated above, all these appeals fail and same deserve to be dismissed and are accordingly dismissed.

sd/-
(M.R. SHAH, J.)

sd/-
(B.N. KARIA, J.)

Kaushik