(2014) 04 GUJ CK 0028

In the Gujarat High Court

Case No : Tax Appeal Nos. 293 and 294 of 2014

Commissioner of Income Tax APPELLANT

Vs

Vijaykumar D. Gupta RESPONDENT

Date of Decision : 15-04-2014

Acts Referred:

Citation : (2014) 365 ITR 470

Hon'ble Judges : Sonia Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Mauna M. Bhatt, Advocate for the Appellant; B.S. Soparkar, Advocate for the Respondent

Judgement

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Akil Abdul Hamid Kureshi, J.—These appeals arise out of a common judgment of the Income-tax Appellate Tribunal (hereinafter referred to as "the Tribunal") dated August 23, 2013, for the assessment year 2005-06. Though the dispute is common since they were cross-appeals before the Tribunal, that the assessee''s appeal having been allowed and that of the Revenue''s having been rejected, the Revenue has preferred these two separate appeals.

The sole question raised by the Revenue for our consideration is as under:

Whether the Appellate Tribunal has substantially erred in law in deleting the addition of Rs. 10,77,724 made under section 69B being the unexplained investment in house property ?

2. From the record it emerges that the Assessing Officer after making a reference to the DVO for ascertaining the assessee''s investment in the house property on the basis of such report added a sum of Rs. 10,77,724 under section 69B of the Act being assessee''s unexplained investment.

3. The assesses carried the matter in appeal. The Commissioner of Income-tax (Appeals) on facts analysed the case of the assessee again and retained part of

the addition but granted partial relief. This order of the Commissioner of Income-tax (Appeals) gave rise to two appeals to the Tribunal. The Tribunal deleted entire addition primarily on the ground that the Assessing Officer could not have made reference to the DVO without reference to the books of account and such reliance on the DVO''s books of account was not justified. The Tribunal held and observed as under:

12.1 Admitted factual position is that the Assessing Officer had not referred any incriminating evidence which was found during the course of search. Although the Revenue Department had found the existence of a building but there was no evidence that the assessee had in fact incurred expenditure on construction of the said property over and above the amount already declared in the books of account. This is not an assessment which was made in the ordinary course of proceedings but admittedly a search under section 132 was carried, therefore, it is expected that the addition consequent thereupon should be corroborated with evidence detected at the time of search, As far as the books of account of the assessee and the recording of the investment in the construction of the house were concerned, the Assessing Officer had not found any discrepancy. For this legal proposition, a decision of the jurisdictional High Court pronounced in the case of Goodluck Automobiles (P) Ltd. Vs. Assistant Commissioner of Income Tax, has been cited wherein the court has held that unless the books of account are rejected the Assessing Officer cannot make a reference to the Valuation Officer, An another case law relied upon was (2010) 328 ITR 513 (SC), Our attention has again been drawn on few case law which was referred before the learned Commissioner of Income-tax (Appeals), viz., Bajranglal Bansal, 241 ITR 64 (Delhi), Ushakant N. Patel Vs. Commissioner of Income Tax, . In the light of these case law and considering the totality of the facts and circumstances of the case, we are of the considered opinion that the learned Commissioner of Income-tax (Appeals) has not considered the fundamental questions as pointed out by the assessee that there was no material, what to say an incriminating material, in the possession of the Revenue Department, therefore, the entire addition being merely based upon the estimation of the DVO was baseless; hence, deserves to be deleted. We hold accordingly. The part addition sustained by the learned Commissioner of Income-tax (Appeals) is hereby deleted.

4. It is undisputed that the Assessing Officer made a reference to the DVO without rejecting the books of account. While retaining part of the additions even the Commissioner of Income-tax (Appeals) did not come to the conclusion that the Assessing Officer had rejected the books of account of the assessee. It was in this background that the Tribunal relied on the decision of the Supreme Court in the case of (2010) 328 ITR 513 (SC). This court in the case of Goodluck Automobiles (P) Ltd. Vs. Assistant Commissioner of Income Tax, , in the context of this issue referring to the decision of the Supreme Court in the case of Sargam Cinema (supra) had observed as under (page 313 of 359 ITR):

The facts of the present case may be examined in the light of the statutory scheme discussed hereinabove as well as the decision of the Supreme Court in Sargam Cinema (supra). In this regard, a perusal of the assessment order reveals that the Assessing Officer has categorically recorded a finding to the effect that the accounts are duly audited and complete details are available. From the tenor of the order of the Assessing Officer, it is apparent that he has made the reference to the Valuation Officer merely to seek expert advice regarding the cost of construction. There is nothing in the assessment order to suggest that the Assessing Officer had any doubt regarding the cost of construction or that he was not satisfied regarding the correctness or completeness of the books of account. Before making the reference to the Valuation Officer for ascertaining the fair price of construction, the Assessing Officer does not appear to have ascertained the correctness or otherwise of the cost of construction shown by the assessee in its books of account. Thus, prior to making the reference to the Valuation Officer, the Assessing Officer has not ascertained as to what was the defect in the cost of construction disclosed by the assessee in its returns of income. Moreover, it is apparent that the only reason for making the addition under section 69 of the Act is that there is a difference in the cost of construction as determined by the Valuation Officer and as shown by the assessee. At no stage of the assessment proceedings does the Assessing Officer appear to have mentioned that the books of account are defective or that the cost of construction as shown in the books of account is not the true cost of construction. Thus, while making the reference to the Valuation Officer, the Assessing Officer has not recorded any defect in the books of account nor has he rejected the same. Except for the difference in the estimated cost determined by the Valuation Officer and the actual cost as shown by the assessee, the Assessing Officer has not brought any material on record to establish that the assessee had made any unaccounted investment in the construction of the building in question and that the books of account do not reflect the correct cost of construction. Under the circumstances, there was no occasion for the Assessing Officer to make a reference to the Valuation Officer. As held by the Supreme Court in the case of Sargam Cinema (supra), unless the books of account are rejected, the Assessing Officer cannot make a reference to the Valuation Officer. The reference made to the Valuation Officer, not being in consonance with the provisions of law, was, therefore, invalid. Accordingly, the report made by the Valuation Officer pursuant to such an invalid reference could not have been made the basis for addition under section 69 of the Act.

5. We are informed that the decision of this court in the case of Goodluck Automobiles (supra) was followed by the Punjab and Haryana High Court in the case of Nirpal Singh Vs. Commissioner of Income Tax, . We may notice that the Allahabad High Court in the case of Commissioner of Income Tax Vs. Lucknow Public Educational Society , had also taken a similar view.

6. We are not oblivious of the fact that the Andhra Pradesh High Court in the case of Bharathi Cement Corporation (P) Ltd. Vs. Commissioner of Income Tax and Others, , had taken a contrary view. However, following the decision of this

court in the case of Goodluck Automobiles (supra), we do not interfere in the findings arrived at by both the authorities. No substantial question of law arises. Resultantly, the tax appeals are dismissed.

