

यकर अपीलीय अधिकरण “जे” न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH “J”, MUMBAI**

सर्वश्री नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य एवं, विवेक वर्मा, न्यायिक सदस्य के समक्ष

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER,
AND SHRI VIVEK VARMA, JUDICIAL MEMBER**

ITA No. : 1743/Mum/2011

(Assessment year: 2005-06)

The Asst Commissioner of Income-tax -21(1), 6 th Floor, Room No. 601, Pratyakshakar Bhavan, Bandra-kurla Complex, Bandra (E), Mumbai -400 051	Vs	M/s Dilip Nabera (HUF), Jasu, Plot No. 60, Vittal Nagar Society, N S Road No. 12, Vile Parel (E), Mumbai -400 056 स्थयी लेखा सं.:PAN: AAAH 3286 K
अपीलार्थी(Appellant)		प्रत्यर्थी(Respondent)
Appellant by	:	Shri Maurya Pratap
Respondent by	:	Shri Rakesh Joshi

सुनवाईकीतारीख /Date of Hearing : 30-07-2014

घोषणाकीतारीख/Date of Pronouncement : 08-10-2014

**आ दे श
O R D E R**

श्री विवेक वर्मा, न्या. स.

PER VIVEK VARMA, J.M.:

The appeal has been filed by the department against the order of CIT(A) -32, Mumbai, dated 13.12.2010, wherein, the following ground has been taken:

- “1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the addition of Rs. 30,10,999/- u/s 69B of the I.T. Act on the basis of valuation report of DVO and invoking the provisions of section 142A of the I.T. Act, 1961.
2. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.
3. The appellant craves leave to amend or to alter any ground or add a new ground, which may be necessary”.

2. In addition to the above ground raised by the department, the assessee has moved an additional ground under Rule 27 of the ITAT Rules, which reads as under:

“1. On the facts and circumstances of the case, the notice u/s 148 r.w.s. 147 is void, illegal and without jurisdiction as it is based upon reason to suspect/making fishing inquires”.

3. The assessee's case was processed u/s 143(1) of the Income Tax Act. Subsequently, the AO issued a notice u/s 148 on 02.05.2008, which was served on the assessee on 18.05.2009. According to the reasons recorded, the issue was:

“Information has been received that the assessee has purchased property worth of Rs. 90,00,000/- on 14.02.2005. From the details filed by the assessee it has been seen that the value of the property is Rs. 1,65,90,000/- as per stamp duty valuation of the property at flat No. 101, JASU, Plt. No. 326, Vithal Nagar Co-op Housing Society Ltd., N.S. Road 12, J.V.P.D. Scheme, Mumbai 400 049. In addition to this assessee has spent registration charges of Rs. 30,480/- and Stamp duty of Rs. 8,13,000/- on the said property. The cost of flat shown by the assessee is less by Rs. 66,90,000/-. The source of investment to be investigated and the actual cost of the flat to be investigated.

2. From the computation of income it is seen that assessee has shown short term capital gain Rs. 68,10,822/- (sale after 1-10-2004) and paid at the rate of 10%. The transaction is in the nature of trading in shares and the income derived from the same is in nature of speculation profit which has to be taxed as business income of the assessee at higher rate. Therefore, there is escapement of tax to that extent applicable to business income.

3. last six years balance sheet to be examined to verify the source of investments in shares and immovable property/jewellery.

4. Assessee has shown capital gain on sale of old gold jewellery worth Rs. 9,80,002/- and the net LTCG is shown at Rs. 7,49,164/- and the entire LTCG has been claimed exempt u/s 54 F being invested in residential flat. The valuation of gold purchase and sale price for claiming LTCG has to be verified”.

4. The facts in brief are that the assessee purchased a property for Rs. 99,00,000/- on 14.02.2005, whose stamp duty valuation was reported at Rs. 1,65,90,000/-. The AO called for an explanation as to why an addition under section 69B should not be made. The assessee objected to the valuation of the property, based on stamp duty, he, therefore, referred the issue to DVO, who made the valuation at Rs. 1,29,10,999/-. The AO, adopting the valuation done by the DVO, made an addition of Rs. 30,10,999/- (1,29,10,999 – 99,00,000).

5. On this addition on merits as well as on principals of natural justice, that no opportunity was afforded to the assessee to rebut the valuation arrived at by the DVO, the assessee approached the CIT(A).

6. Before the CIT(A), the assessee made an initial objection that because the DVO report was received by the AO on 31.12.2009, the day on which the assessment order was passed, therefore, no opportunity was given to the assessee to object to the DVO's report. On this argument of the assessee, the CIT(A) called for remand report from the AO. In the remand report sent, the AO mentioned that value adopted by the DVO was closed to the stamp valuation and on that basis, the DVO's valuation was taken.

7. Before the CIT(A), assessee not only objected to the adoption of value taken by the AO but also took another legal point that provisions of section 50C do not apply on the *purchase* of property. It was also submitted that to import the deeming provision of section 69B, the AO should have had some independent material, which suggested that there was certain investment, which was not found to be recorded in the books. In his submission, the assessee placed reliance on the a host of decided case laws, which has been reproduced by the CIT(A) in the impugned order.

8. The CIT(A), after considering the submissions of the assessee, observed,

"I have considered the arguments of the WAR. The Caption of stamp duty as the apparent sale consideration is provided only u/s 50C for the purpose of computation of capital gains. The provisions Sec. 50C are deeming provisions and hence these provisions cannot be imported for any other purposes for computation of income under any other section such as 69B. The provisions of Section 50C cannot be extended to the case of purchaser unless the fact of understatement is established by the AO as held

in Sangam Towers 31 DTR (JP) Tribunal 172. The stamp duty rates are the ready reckoner rates applicable to particular area whereas the actual consideration may be more or less than the stamp valuation rates. The mere fact that the purchase consideration is less than the stamp valuation rates does not by itself leads to a conclusion that the assessee had paid the difference over and above. In case of Sanjay Chawla 89 ITD 586 (Delhi), Swami Complex P. Ltd, 111 TTJ (JP) 531, Radheshyam Poddar, HUF 86 TTJ 538, 103 TTJ 843 (Jd), 38SOT 486 (Ahd), it has been held that even if the market value appears to be higher than the consideration declared in the documents, it cannot be itself the sole ground for treating the difference as unexplained investment of the assessee. The stamp duty valuation cannot be treated as purchase price for the purpose of ascertaining unexplained investment, as held in 193 ITR 770 (Aild), 323 ITR 510 (P & H), Raj Kumar Vimaladevi 279 ITR 360 (Alld), K.P. Verghese J31 ITR 597(SC) and Jawajee Nagnathan (1994) 4 SCC 595. The reference made by the AO u/s. 142A was without any evidence that some additional amount has been paid by the assessee over and above the amounts recorded in the agreement. In absence of any evidence the reference u/s.142A was itself void as held by the decisions mentioned above. Before making the reference u/s. 142A, AO has not pointed out any other defect in the books nor he has rejected the of accounts of the assessee, therefore, the reference u/s 142A cannot be said to be a valid reference. The decision of the supreme court in case of Sargam Cinema 328 ITR 513 (SC), Dharia construction Co 328 ITR 515(SC), Smt. Suraj Devi 328 ITR 604(del), Naveen Gera (Delhi) 328 ITR 516(Del), Smt Amar Kumari Surana 89 Taxman 544(Raj) relied by the appellant's AR support the contentions of the appellant that unless there is some positive material to show that there was understatement of investment, addition solely on basis of report of Valuation Officer cannot be upheld. Even otherwise there is huge difference between stamp valuation and the DVO's valuation, which itself suggest that the DVO's report is also an estimate which cannot be taken as gospel truth and straightaway be considered to substitute the actual cost unless there is some evidence to suggest that the assessee was indulging in making payments over and above recorded in the books of accounts. In fact if the stamp duty paid by the assessee is included in the agreement value then the cost recorded by the assessee would be 1,07,44,080/- which is much higher than the value of the property valued by the Registered valuer at Rs. 1,03,50,000/-. Under these circumstances no addition u/s.69B can be made on presumptions and assumptions. Hence the addition on account of

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difference between DVO's report and the agreement value u/s.69B is not tenable legally. Accordingly Rs. 30,10,999 u/s.69B made by the AO is deleted".

9. Against this order of the CIT(A), the department is in appeal before ITAT.

10. Before us DR supported the order of the AO. On the other hand, the AR supported the order of the CIT(A) and pointed out that a legal issue had been raised under Rule 27 of the Income Tax Rules, pertaining to the initiation of reassessment proceedings.

11. We have heard the arguments from either side and we have perused the material and case laws, cited before us. At the outset, we have to demarcate the territory of the case, i.e. application of section 50C and addition to be made u/s 69C. We find that both the sections operate independently i.e. to say that section 50C shall be attracted where there is a transfer of property by the assessee and receives sales consideration. This automatically puts into oblivion the purchase part of the agreement. Hence, the argument of the assessee before the CIT(AO) was correct that provisions of section 50C do not apply on purchase part of the agreement.

12. Coming to application of section 69B, it is attracted if the AO finds that the amount expended on making investment exceeds the amount recorded in the books or the explanation, as made by the assessee is not acceptable. From the orders of the revenue authorities, we have find that the material available with the AO was report of the DVO, and the report of the registered valuer. As seen from the impugned order, the remand report does not talk about any thing factual but it only says that since the DVO valuation is closer to stamp

duty valuation, hence DVO's report is being adopted. As such there is nothing in the report of the DVO. The only acceptable document is the report of the registered valuer, which has same basis.

13. We find that the observation of the CIT(A) that the AO must have some reasonable material to put the leash on the assessee. But the only material available with the AO was the DVO's estimated report, which is based entirely on comparative transactions in the close vicinity. This, cannot become the basis of adoption of financial valuation.

14. We, therefore, hold that there is no infirmity in the order of the CIT(A) to accept the assessee valuation, which ultimately was more than the registered valuer's valuation.

15. Coming to the ground raised by the assessee under Rule 27 of the Income Tax Rules

"The arrangements referred to in sections 194 and 236 to be made by a company for the declaration and payment of dividends (including dividends on preference shares) within India shall be as follows :

- (1) The share-register of the company for all shareholders shall be regularly maintained at its principal place of business within India, in respect of any assessment year from a date not later than the 1st day of April of such year.*
- (2) The general meeting for passing the accounts of the previous year relevant to the assessment year and for declaring any dividends in respect thereof shall be held only at a place within India.*
- (3) The dividends declared, if any, shall be payable only within India to all shareholders".*

From the order of the CIT(A) , the ground raised pertained to non-issuance of notice u/s 143(2) within 12 months of notice u/s 148.

16. From the order of the assessment u/s 143(3)/148, notice u/s 142(1) was issued and served on the assessee on 07.09.2009. Though the date of notice u/s 143(2) is not given in the order, but it is

apparent that either it would have been issued along with 142(1) or subsequent. In either cases, the notice is barred, because as per the proviso the notice should have been issued within the period of expiry of twelve months from the date of filing of the return.

17. In such a circumstance, the issue of notice u/s 143(2) beyond the period of 1 year is barred by limitation, which makes the entire proceedings vitiated.

18. We, therefore, hold that the reassessment proceedings and assessment order passed u/s 143(3) read with section 148 is bad in law, which we quash.

19. We, therefore, allow the ground raised by the assessee under Rule 27 of the Income Tax Rules.

20. In the result, the appeal by the department is dismissed.

Order pronounced in the open Court on 8th October, 2014.

Sd/-
(नरेन्द्र कुमार बिल्लैय्या)
लेखा सदस्य
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(विवेक वर्मा)
न्यायिक सदस्य
(VIVEK VARMA)
JUDICIAL MEMBER

Mumbai, Date: **8th October, 2014**

प्रति/Copy to:-

- 1) अपीलार्थी/The Appellant.
- 2) प्रत्यर्थी/The Respondent.
- 3) The CIT (A)-32, Mumbai.
- 4) आयकरआयुक्त - City -21, Mumbai/The CIT- City -21, Mumbai

- 5) विभागीयप्रतिनिधि “जे” आयकरअपीलीयअधिकरण,मुंबई
The D.R. “J” Bench, Mumbai.
- 6) गार्डफाईल
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आदेशानुसार/By Order

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Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हाणव.नि.स

*Chavan, Sr. PS