आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पॉल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No.751/JP/2015
निर्धारण वर्ष/Assessment Year : 2006-07

| Sh. Jagdish Narayan Sharma, Vill. Goner, 98 Pujari Mohalla, Teh. Sanganer, Jaipur | बनाम Vs. | ITO Ward-7(2), Jaipur |
|---|---|---|
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AXZPJ7922L | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

आयकर अपील सं./ITA No.752/JP/2015
निर्धारण वर्ष/Assessment Year : 2007-08

| Sh. Jagdish Narayan Sharma, Vill. Goner, 98 Pujari Mohalla, Teh. Sanganer, Jaipur | बनाम Vs. | ITO Ward-7(2), Jaipur |
|---|---|---|
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AXZPJ7922L | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

आयकर अपील सं./ITA No.753/JP/2015
निर्धारण वर्ष/Assessment Year : 2008-09

| Sh. Jagdish Narayan Sharma, Vill. Goner, 98 Pujari Mohalla, Teh. Sanganer, Jaipur | बनाम Vs. | ITO Ward-7(2), Jaipur |
|---|---|---|
| स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AXZPJ7922L | | |
| अपीलार्थी/Appellant | | प्रत्यर्थी/Respondent |

निर्धारिती की ओर से/ Assessee by : Shri Rajeev Sogani (CA)
राजस्व की ओर से/ Revenue by : Shri R. A. Verma (Addl.CIT)
Smt. Seema Meena (JCIT)

सुनवाई की तारीख/ Date of Hearing : 13/04/2018
उदघोषणा की तारीख/Date of Pronouncement: 25/05/2018

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आदेश / ORDER

PER BENCH:

These are appeals filed by the assessee against the respective orders of the ld CIT(A) Alwar for A.Y 2006-07, A.Y 2007-08 and A.Y 2008-09 respectively. All these appeals were heard together and are being disposed off by this consolidated order.

2. Firstly, we shall take up appeal in ITA No. 751/JP/2015 for A.Y 2006-07 against the order of the ld CIT(A)- 3, Jaipur dated 31.08.2015 wherein the assessee has taken the following grounds of appeal:-

*"1. In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in making addition of Rs. 12,93,175/- towards alleged unexplained deposits in the bank account of the assessee. The action of ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 12,93,175/-.*

*2. In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of ld. AO in making addition of Rs. 1,59,32,450/- although having decided that the entire transaction of alleged sale of land do not pertain to the AY 2006-07 and pertain to the AY 2007-08.*

*3. (a) In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in making addition of Long Term Capital Gain at Rs. 23,41,244/-. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 23,41,244/-.*



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*(b) In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the action of the ld. AO in applying the provisions of section 50C of the Income Tax Act, 1961 and adopting the sale consideration at Rs. 23,57,148/- against the declared sale consideration of Rs. 18,46,095/-. The action of the ld. CIT(A) is illegal, unjustified arbitrary and against the facts of the case. Relief may please be granted by accepting the sales consideration at Rs. 18,46,095/- as evidenced by the sale deed.*

*(c) In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of ld. AO in taxing the capital gain amounting to Rs. 23,41,244/- arising out of sale of land. The land sold was agricultural land, which is not a capital asset as per section 2(14) of the Income Tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 23,41,244/- and accepting the land being agricultural land and not a capital asset as per section 2(14) of the Income Tax Act, 1961."*

3. The facts of the case are that pursuant to issuance of notice u/s 148, the assessee filed his return of income disclosing agricultural income of Rs. 1,10,000/- and prior to that, no return of income was filed by the assessee. The assessment thereafter was completed u/s 147 read with 143(3) at a total income of Rs. 1,95,71,930/-. On appeal, the assessee got partial relief from the ld CIT(A) and for the additions so sustained by the ld CIT(A), the assessee is in appeal before us.

4. Firstly, we take up the additional ground of appeal which has been taken by the assessee wherein the assessee has challenged the reopening of the assessment u/s 147 of the Act. The ld. AR has submitted that it is a purely legal ground, all relevant facts are available on record and no new facts are required to be evaluated nor any further enquiry is needed. It was submitted that the provisions of law are to be applied on the facts as already available



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on record. It was submitted that the omission to raise this legal ground while filing the appeal before the Tribunal was inadvertent. In support, the assessee has drawn reliance on the decision of Hon'ble Supreme Court in case of NTPC Ltd. [1998] 229 ITR 383 (SC). Further, the ld. AR submitted that the above ground was taken by the assessee before the ld. CIT(A) and even though this ground was not pressed before the ld. CIT(A), the assessee is not precluded from taking the said legal ground before the Tribunal. In support, reliance was placed on the decision of Hon'ble Punjab and Haryana High Court in the case of Vijay Kumar Jain v. CIT [1975] 99 ITR 349 wherein it was held that by giving up the ground, the assessee could not confirm jurisdiction on the Income Tax Officer where he had none and it was further held in that case that the Tribunal was bound to hear the appeal of the assessee and could not reject the appeal on the ground that certain grounds were not agitated before the appellate ACIT and thus could not be permitted to be agitated before the Tribunal.

5. We find that the additional ground of appeal which has been taken by the assessee wherein the assessee has challenged the reopening of the assessment u/s 147 of the Act is a purely legal ground and the same is admitted following the Hon'ble Supreme Court decision in case of NTPC (supra).

6. Now, coming to the merits of the additional ground and the contentions advanced by the ld AR, it was submitted by the ld. AR that it is a settled legal proposition that the reasons to believe should be based on some relevant material and there should be a live link between the material and the formation of belief that income has escaped assessment. In the present case, from perusal of the reasons recorded by the AO, it is evident that the AO, as per information available i.e. copies of sale deed, formed a belief that income has escaped assessment. It was submitted that the ld. AO recorded the reasons in most arbitrary manner because the sale took place in AY 2007-08



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i.e. subsequent year and not in AY 2006-07 i.e the year under consideration. It was submitted that ld. CIT(A) has accepted this fact that the sale took place in AY 2007-08 and has relied on the date of stamp paper, date of execution of documents, date of registry of the document. It was submitted that the documents relied upon by the ld. CIT(A) are different pages of the same sale deed which was available with the ld. AO at the time of framing the reasons to believe. It was submitted that the only reasonable inference that can be drawn is that the ld. AO has recorded the reasons in most casual and carefree manner without applying his mind as ld. AO while recording reasons did not even cared enough to flip pages of only information in form of sale deed which was available with him. It was submitted that complete proceedings are triggered on the basis of sale deed and ld. AO failed to refer to the same. In support, reliance was placed on the decision of Hon'ble Allahabad High Court in case of CIT and another vs. Dr. Ajay Prakash (2014) 89 CCH 085 All. It was further submitted that the other precondition for reopening u/s 147 is contained in section 151 which states that no notice u/s 148 can be issued unless a superior authority is satisfied that the reasons recorded are correct. It was submitted that the superior authority is expected to discharge his duties in a diligent manner after application of his mind. In the present case, from perusal of reasons recorded, the ld. AO has made a patent error as stated above and the ld. JCIT has also granted the sanction to the AO u/s 151 and the only inference which can be drawn is that ld. JCIT has not seen the underlying document on the basis of which reasons are recorded. It was submitted that where he would have seen the sale deed, he would never have granted the sanction for reopening the case of AY 2006-07 as it is very evident that sale took place in AY 2007-08 and it was submitted that the basic requirement of invoking the provisions of section 147 is not complied with and the safeguards were treated lightly by ld. AO as well as ld. JCIT and, therefore, the reopening is bad in law and lacks jurisdiction. In support, reliance was placed on the decision of Supreme Court in the case of



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Chhugamal Rajpal v. S.P. Chaliha [1971] 79 ITR 603 (SC). Further reliance was placed on the decision of Bombay High Court in the case of Smt. Kalpana Shantilal Haria vs. ACIT. It was further submitted by the AR that in terms of provisions of section 148 of the Act, the impugned notice can be issued only to the assessee and if we analysed the definition of the term "assessee" as defined in section 2(7) of the Act, the appellant does not fall into the cited categories and therefore the notice issued u/s 148 is bad in law. In support, reliance was placed on the provisions of section 142(1) where the legislature has used the term "person" as well as section 153A which again refer to any "person". It was accordingly submitted that where the legislature has clearly made reference to the term "assessee" u/s 148 of the Act, it is obligatory on the part of the AO to comply with the same and the appellant not falling in the definition of the term "assessee", the present proceedings are without any legal justification and the same deserves to be quashed.

7. In order to appreciate the contentions so advanced by the ld. AR, it would be relevant to refer to the reasons which have been recorded by the AO before issuance of notice u/s 148 of the Act and the same are reproduced as under:-

"As per information available (copies of sale deed) with this office, the assessee has sold the following properties during the year under consideration.

| Date of transaction | Sold to | Sale Consideration | Details | Location of land & Cost of acq. |
|---|---|---|---|---|
| 11/01/2006 | Narangi Devi W/o Chhaju Lal & Jamna Devi W/o Kaluram | Rs. 21,44,000/- | Khasra No. 774 & 782-0.67 hectares | Village-Goner, Tehsil-Sanganer, |



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|---|---|---|---|---|
| | | | | Jaipur |
| 11/01/2006 | Narangi Devi W/o Chhaju Lal & Jamna Devi W/o Kaluram | Rs. 78,24,000/- | Khasra No. 85,111 & 739- 1.63 hectares | Village- Goner, Tehsil- Sanganer, Jaipur |
| 11/01/2006 | Narangi Devi W/o Chhaju Lal & Jamna Devi W/o Kaluram | Rs. 63,04,000/- | Khasra No. 142, 143, 144, 147 & 148- 1.97 hectares- village Goner | Village- Goner Tehsil- Sanganer, Jaipur |

The location of the lands sold is at village Goner, which is situated within 8 Kms. of municipal limits. Thus, the lands sold by the assessee falls within the ambit of the definition of capital asset in terms of provisions of section 2(14) of the Income Tax Act, 1961 and accordingly, the capital gain arising on sale of these lands is chargeable to tax. Considering the amount of sale consideration, the capital gain chargeable to tax in the hands of the assessee is more than the maximum amount not chargeable to tax and exceeding Rs. 1,00,000/-.

Besides, during the year, the assessee has deposited a sum of Rs. 22,55,000/- in his bank account no. 3801 with Punjab National Bank. Sources of these deposits are not explained. Thus, the income of Rs 22,55,000 has also escaped assessment. Thus, I have reasons to believe that income has escaped assessment. "

8. Firstly, we note that reasons recorded before issuance of notice are two-fold. Firstly, the sale of the land situated at village Ginor in respect of



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which capital gains has been stated to be chargeable to tax and which has escaped taxation. Secondly, the unexplained deposits found in assessee's bank account maintained with PNB which have also escaped taxation. Regarding the first ground, on perusal of the sale deed executed by the assessee with Jamna Devi and Narangi Devi, it is observed that the date on which the sale deed has been executed has been stated as 11.01.2006, the date of purchase of the stamp paper has been mentioned as 11.01.2007 and the date on which the sale deed was presented for registration with the stamp authorities and finally registered has been stated as 12.01.2007. Identical fact pattern exist in respect of other sale deeds so executed by the assessee with Jamna Devi and Narangi Devi. There could be two possible scenarios that we can visualise in this regard. Firstly, where there was an agreement to sell dated 11.01.2006 which was subsequently converted into a sale deed on 11.01.2007 and while doing so, the original text along with the date of execution of agreement to sell has been blindly copied. However, it is not the case of the Revenue and even there is nothing on record to suggest that there was an agreement to sell which was executed on 11.01.2006, therefore, this scenario doesn't exist. The other scenario which seems to exist in the present case is that the stamp paper was purchased on 11.01.2007, thereafter, while typing the contents of the sale deed, there is a clerical/typographical mistake which has happened whereby date of execution of the sale deed has been wrongly typed as 11.01.2006 instead of 11.01.2007. No doubt, there is a mistake on part of the assessee while executing the sale deed, the question is should the Assessing officer before assuming jurisdiction under section 148 should have examined the sale deed properly in order to at least determine whether the sale transaction which has escaped taxation fall in A.Y 2006-07 or A.Y 2007-08. The Courts have held from time to time that sufficiency of material is not relevant for determining assumption of jurisdiction under section 147 so long as there is nexus between the material and the formation of belief. The formation of belief has



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to be based on prima facie reading and appreciation of the material available on record which in this case is the registered sale deeds which have been executed by the assessee. On a prima facie reading of such sale deeds, it is apparent that the sale deeds have been executed and registered with the stamp authorities on 12.01.2007 and therefore, any escapement of capital gains on such sale transaction shall fall in financial year 2006-07 relevant to Assessment Year 2007-08 and not Assessment Year 2006-07. We are, therefore, of the view that as far as the first ground for reopening the assessment proceedings is concerned, there is lack of nexus between the material and the formation of prima facie belief that the income has escaped taxation for the impunged assessment year. The decision of the **Hon'ble Allahabad High Court in case of Dr Ajay Prakash (supra)** where it was held that where the entries are dated 29.08.1998, reopening of assessment proceedings for AY 1998-99 are clearly invalid, supports the case of the assessee.

9. Now, coming to second ground for reopening which has been stated to be unexplained deposits found in assessee's bank account maintained with PNB which have also escaped taxation, there has been no dispute and no contentions have been raised by the ld AR as well. It is a case where no return of income has been filed prior to issuance of notice u/s 148 of the Act and therefore, where the AO has found certain unexplained deposits in the assessee's bank account, the AO is well within his jurisdiction to form a prima facie view that such deposits have escaped taxation. In light of the same where the second ground of reopening has been held to be a valid ground for reopening, the assumption of jurisdiction by the AO under section 147 cannot be held invalid and the same is upheld. It is not a case that first ground is the main ground and the second is the ancillary ground for reopening the assessment. In our view, both grounds carry equal weight and importance



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and it cannot be said that if the first ground is held invalid, by default, the second ground has to be held invalid.

10. Further, we have gone through the contention regarding issuance of notice under section 148 to an assessee and not to any person and the fact that in the instant case, the appellant is not an assessee. If we look at the definition of "assessee" as defined in section 2(7), it talks about a person by whom any tax or any other sum of money is payable under the Act and includes every person in respect of whom any proceedings under this Act has been taken for the assessment of his income. In our view, the appellant clearly falls in the definition of an assessee as so defined and the contention so raised is clearly devoid of any merits and is hereby rejected. In the result, the additional ground of appeal is hereby dismissed and the assumption of jurisdiction by the AO u/s 147 of the Act is held to be valid.

11. Now coming to the first ground of appeal where the assessee has challenged the addition of Rs. 12,93,175 on account of unexplained deposits. During the course of assessment proceedings, the AO made the addition on account of unexplained deposits considering that the assessee has failed to furnish necessary explanation of source of such deposits. It was submitted by the ld AR that affidavits of the persons namely Sitaram, Ramprasad, Hanuman, Gopal and Bajrang Lal from whom advance of Rs. 18,00,000/- was received by the assessee, were provided during the appellate proceedings. It was submitted that the affidavits were further substantiated by providing source of cash available with these persons. It was submitted that both the lower authorities have not disputed the contents of the affidavits and therefore have accepted the same. It was submitted that the assessee belongs to a rural and illiterate background and was, therefore, not aware that any agreement has to be executed for proposed sale. It is worth mentioning that even today, in rural areas, by way of mutual understanding and verbal agreements, many proposed transactions take place



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and it was submitted that since no agreement was executed, the same could not be produced and by giving affidavits, the assessee has made reasonable compliance and duly discharged his onus. It was further submitted that in the affidavits so submitted, the address of the persons were also clearly mentioned and the authorities in their wisdom did not exercise their powers to enforce attendance of the said persons and where there were any doubt about the transactions, summons u/s 131 could have been issued to these persons. Regarding the finding of the ld. CIT(A) that assessee has cooked up a story and an afterthought to explain unexplained deposits and affidavits of these persons are merely self serving documents, it was submitted that the ld. CIT(A) has not pinpointed any defects in the documents and she has also not explained as to how she felt that assessee has cooked up a story. Regarding the observations of the ld. CIT(A) that no evidence/details were filed regarding failure of sale transactions, it was submitted that disputes are not documented unless taken up in Civil Court and therefore not evidence for the same can even exists. It was further submitted that when after negotiations, some disputes arose with the persons who gave advances, the deal was cancelled and the land was sold to some other persons whose details were submitted. Regarding observations of ld. CIT(A) that a common cash flow summary along with Smt. Jamna Devi and Smt. Narangi Devi having independent identity and carrying separate transaction, it was submitted that the sale deeds so executed with the two ladies were sham documents and the same were executed to protect the interests of the family in the property. It was accordingly submitted that all the sale transactions were entered into by the assessee only and the bank accounts of Jamna Devi and Narangi Devi were also used by the assessee as he was the actual owner of the properties. It was further submitted that the relation of Jamna Devi, Narangi Devi and the assessee is that of daughter-in-law and father-in-law. Therefore there cannot be any doubt that the assessee was having access over the accounts of Smt. Jamna Devi and Smt. Narangi Devi. It was finally submitted that the



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contention of the assessee is duly supported by the affidavits of the parties from whom the advances were received and were refunded later on as evidenced from the cash book and therefore the finding of the ld. CIT(A) is not factually correct. The addition made of the ld. AO and confirmed by the ld. CIT(A) deserves to be deleted.

12. We have heard the rival contentions and perused the material available on record. On perusal of records, it is noted that there was a total cash deposits of Rs 30,75,000 which were found deposited in the assessee's bank account. The assessee has submitted that Rs 18,46,095 has been received as sale consideration towards sale of land which has already been brought to capital gain tax by the Assessing officer and the remaining amount comes to Rs 12,28,905 as against a figure of Rs 12,93,175 which has been brought to tax as unexplained cash deposits by the AO. The assessee's explanation in this regard is that there were advances received towards the sale of land totalling to Rs 18,00,000 which were deposited in his bank account and the said sale transactions were subsequently cancelled and the said amount was refunded. In support, the assessee has submitted the affidavits of these persons, namely Sitaram, Ramprasad, Hanuman, Gopal and Bajrang Lal along with source of cash available with these persons. The Revenue has not disputed the receipt and refund of money to these persons. Further, where there is no further enquiry conducted by the AO calling for these persons and examining the contents of these affidavits, it cannot be held that these affidavits were false or doesn't represent the correct state of affairs. In light of the same, we find that the assessee has provided the necessary explanation regarding the source of these deposits. Hence, the addition so made is hereby deleted. The ground no.1 taken by the assessee is allowed.

13. The Ground No. 2 is regarding addition of Rs. 1,59,32,450/- as long term capital gains on sale of land. The said ground was not pressed by the ld. AR during the course of hearing as the said addition was deleted by the ld.



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CIT(A) for the impunged assessment year and confirmed in AY 2007-08. The ground is therefore dismissed as not pressed.

14. In Ground No. 3(a) read with 3(b), the assessee has challenged the action of the AO in invoking provisions of section 50C and adopting sale consideration of Rs. 23,41,244/- instead of actual sale consideration of Rs. 18,46,095/-. In this regard, it was submitted that the value adopted by the Sub-Registrar for stamp duty purposes is not final value which has to be taken for tax purposes. It was submitted that where the assessee claims that the fair market value is less than the stamp duty value, then in terms of section 50C(2), the AO is required to refer the matter to the Valuation Officer. It was submitted that the ld. CIT(A) has erred in holding that the assessee has not requested the AO for making reference to the Valuation Officer and it was submitted that the assessee before the ld. CIT(A) claimed that AO should have referred the case to Valuation Officer and thus specific request was made. It was submitted that it is a settled legal proposition that the ld. AO while discharging his duties is bound to refer the matter to the Valuation Officer where the assessee has disputed the value adopted by the stamp duty authorities even if the assessee has not made a specific request for the same. In support, reliance was placed on the decision of Hon'ble Calcutta High Court in case of Sunil Kumar Agarwal [2014] 47 taxmann.com 158, Smt. Kamlesh Tiwari *(ITA No. 587/JP/2013)* and Vijay Kumar Patni *(ITA No. 202/JP/2012)* and others. It was accordingly submitted that the lower authorities have erred in adopting the stamp duty valuation without referring the matter to Valuation Officer and therefore, the capital gains so computed should be with reference to the actual sale consideration of Rs. 18,46,095/- instead of Rs. 23,57,148/-.

15. We have heard the rival submissions and purused the material available on record. Section 50C(2) talks about an assessee making a claim before the Assessing officer that the valued adopted by the stamp valuation authority exceeds the fair market value of the property as on the date of transfer and in



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such a scenario, the matter has to be referred by the AO to the Valuation officer. The ld CIT(A) has returned a finding that from the perusal of material available on record, it is found that during the course of assessment proceedings, the assessee neither objected to the value determined by the sub-registrar nor had requested the AO for making reference to valuation officer. We have also gone through the material available on record and we donot find any such claim made by the assessee before the AO. Though there is no prescribed form or manner for making the claim, the trigger point for referring the matter to Valuation Officer is whether the assessee has made any such claim or objection raised before the AO and unless the same is made, the AO cannot invoke the provisions of section 50C(2) suo-moto. The AO has thus acted within four corners of law where he has brought to tax deemed sales consideration as per stamp duty authority under section 50C instead of actual sale consideration as so claimed by the assessee. In the result, ground no. 3(a) read with 3 (b) is dismissed.

16. In Ground No. 3(a) read with 3(c), the assessee has challenged the action of the AO in treating the land sold as capital assets instead of agricultural land and therefore levying capital gains on the same. It was submitted that the ld. CIT(A) while holding that the land in question as capital asset has placed reliance on the remand report submitted by the AO who has in turn relied upon the certificate of Tehsildar. It was submitted that the enquiry with Tehsildar was conducted at the back of the assessee and no opportunity of cross examination was given to the assessee. In support, reliance was placed on the decision of Hon'ble Supreme Court in case of Andaman Timber Industries, Civil Appeal No. 4228 of 2006, dated 2$^{nd}$ Sept 2015 and Hon'ble Delhi High Court in case of CIT vs. Ashwani Gupta [2010] 322 ITR 396 (Delhi). It was further submitted that the assessee, in order to support his contention has submitted a certificate of Gram Panchayat and as per the said certificate, village Goner is situated at a distance of 9 k.m from



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the municipality limits of Jaipur Nagar Nigam. It was submitted that the ld. CIT(A) has failed to appreciate the said certificate by placing reliance only on the Tehsildar report and where he had any doubt on the said certificate of the Gram Panchayat, summons u/s 131 could have been issued or the assessee could have been asked to produce him.

17. We have heard the rival contentions and purused the material available on record. The ld CIT(A) has returned a finding which reads as under:

*"6.3.2 From the perusal of remand report dt. 7.8.2015 and report of the Tehsildar, which are forming part of this order, it is clear that this land is a capital asset, being situated within 8 Kms from the end of the municipal limits of Jaipur Nagar Nigam. Further the appellant has not brought to any evidence to prove that the agricultural land is situated beyond 8 Kms even as on the date of CBDT notification mentioned by him. Though the appellant filed the Certificate of Gram Panchayat however, the Tehsildar report as given above is final as he is the final land revenue authority to assessee the nature of the land. In view of the above discussion, the findings of the AO appears to be very reasoned one and in the absence of anything contrary to such findings/facts the action of the AO in taxing the long term capital gains from the sale of such land by holding the land as capital asset is confirmed."*

18. The only grievance of the assessee is that he has not been granted a right to cross-examine the Tehsildar who has given the report about the exact location of the land. In our view, the Tehsildar is a Government official and where he has given a report and a copy of such report is made available to the assessee, the assessee has got all rights to examine such report and he can challenges the contents thereof. Where the assessee is ceased of such a report and doesn't point out any defect in such a report, he cannot say that his rights have been violated as he has not got a right to cross-examine the Tehsildar. Further, we agree with the findings of the ld CIT(A) that certificate of Gram Panchayat cannot take precedence over the report of the Tehsildar


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who is the appropriate land revenue authority to assess the nature and location of the land. In the result, we donot find any infirmity in the order of the ld CIT(A). The ground of assessee's appeal is therefore dismissed.

19. In the result, the appeal of the assessee is dismissed.

***ITA No. 752/JP/2015***

20. In his appeal (ITA No. 752/JP/2015) for A.Y 2007-08, the assessee has taken the following grounds of appeal:-

*"1. In the facts and circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the Ld. AO in reopening the assessment u/s 147 of Income Tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the reassessment proceedings, being illegal and without any basis.*

*2. In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of the ld. AO in making addition of Rs. 3,80,000/- of alleged unexplained deposits in the bank account of the assessee. The action of ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 3,80,000/-.*

*3. (a) In the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in enhancing the income and charging the Long Term Capital Gain at Rs. 1,62,72,000/-. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 1,62,72,000/-.*

*(b) In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in taxing the capital gain amounting to Rs.*



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*1,62,72,000/- arising out of sale of land. Since the land sold was the agricultural land, which is not a capital asset as per section 2(14) of the Income Tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 1,62,72,000/-and accepting the land being agricultural land and not a capital asset as per section 2(14) of the Income Tax Act, 1961.*

*(c) In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in exercising the powers of enhancement. The action of ld. CIT(A) is illegal, unjustified arbitrary and against the facts of the case. Relief may please be granted by quashing the vary action of enhancement being illegal and outside the scope of powers of CIT(A) in the instant case.*

*4. (a) In the facts and circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of the ld. AO in making addition of Long Term Capital Gain at Rs. 14,62,758/-. The action of the ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 14,62,758/-.*

*(b) In the facts and circumstances of the case and in law, the Id.CIT(A) has erred in confirming the action of the ld. AO in applying the provisions of section 50C of the Income Tax Act, 1961 and adopting the sale consideration at Rs. 14,88,000/- against the declared sale consideration of Rs.13,20,000/-. The action of the Id. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by accepting the sale consideration at Rs. 13,20,000/- as evidenced by the alleged sale deed.*

*(c) In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of the Id. AO in taxing the*



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*capital gain amounting to Rs. 14,62,758/- arising out of sale of land. Since the land sold was the agricultural land, which is not a capital asset as per section 2(14) of the Income Tax Act, 1961. The action of the ld. CIT (A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 14,62,758/- and accepting the land being agricultural land and not a capital asset as per section 2(14) of the Income Tax Act, 1961."*

21. The facts of the case are that the assessee has not filed any original return of income and subsequently on receipt of notice u/s 148, a return of income was filed disclosing agriculture income of Rs. 1,20,000/-. The assessment u/s 147 r.w.s 143(3) was thereafter completed at a total income of Rs. 18,51,320/-.

22. Regarding ground No. 1 of assessee's appeal, the assessee has challenged the action of the AO in reopening the assessment proceedings u/s 147 of the Act. The AO, on observing that a sum of Rs. 16,50,000/- has been deposited in the bank account of the assessee, formed the belief that income to the tune of Rs 25,55,000 has escaped assessment and, thereafter, the assessment was reopened u/s 147 by issuance of notice u/s 148 of the Act. The said action of the AO has been confirmed by the ld. CIT(A) and regarding the error in figure of escapement of income committed by the AO, the same was treated as inadvertent error and procedural defect curable u/s 292B.

23. During the course of hearing, the ld. AR submitted that the proceedings of section 147 are punitive in nature and therefore, the AO is duty bound to carry out confirmation of belief with due diligence and not in a casual and mechanical manner. In the present case, from the perusal of the reasons recorded, it is evident that the reasons have been recorded in most mechanical manner. The AO on finding that deposits of Rs. 16,50,000/- have been made in the bank account of the assessee formed a belief that income



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of Rs. 25,55,000/- has escaped assessment. It is established beyond doubt that the AO has not applied his mind and has copy pasted the figure from the reasons recorded for AY 2006-07 in which AO had the material to base his belief of escapement of income of Rs. 25,55,000/-. It was submitted that the other pre-condition for reopening u/s 147 is contained in section 151 which states that no notice u/s 148 can be issued unless a superior authority is satisfied that the reasons recorded are correct. It was submitted that the ld. JCIT has not even cared to go through the reasons recorded before granting sanction and ld. JCIT has mechanically accorded permission. It was submitted if he had read the reasons carefully, he would have at least noted the apparent discrepancy in the reasons recorded of considering escapement of Rs. 25,55,000/- instead of Rs. 16,50,000/-. It was submitted that the basic requirements of invoking the provisions of section 147 are not complied with and the safeguards were treated lightly by ld. AO as well as ld. JCIT and in support, the decision of the Hon'ble Supreme Court in the case of Chhugamal Rajpal v. S.P. Chaliha [1971] 79ITR 603 (SC) and the decision of Bombay High Court in the case of Smt. Kalpana Shantilal Haria vs. ACIT was relied upon. It was further submitted that while carrying out file inspection, it was noted by AR that there is no copy of such approval which have been obtained u/s 151 before reopening the assessment and it was submitted that if the Bench deem fit, it may call the record to ascertain correct facts. In support, the reliance was placed on the decision of Hon'ble Rajasthan High Court in case of Dhadda Exports vs. ITO [2015] 58 taxmann.com 176 (Rajasthan). It was further submitted that the appellant does not fall in the definition of the term ' assessee' as defined in section 2(7) of the Act and therefore, the notice issued u/s 148 is void in substance. It was further submitted that during the course of appellant proceedings, the copy pasted error was brought to the notice of the ld. CIT(A). However, ld. CIT(A) in very casual manner held that the error committed by the AO is inadvertent error which could be cured u/s 292B of the Act.



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24. In order to appreciate, the contention so raised by the ld. AR, it would be relevant to refer to the reasons which have been recorded before issuance of notice u/s 148 of the Act and the same are reproduced as under:-

*"Return of income has not been filed by the assessee. During the year under consideration, the assessee has deposited a sum of Rs. 16,50,000/- in his bank account no. 3801 with Punjab National Bank. Sources of these deposits are not explained. Thus, the income of Rs. 25,55,000/- has escaped assessment. Thus, I have reasons to believe that income has escaped assessment."*

25. It is a case where no return of income has been filed by the assessee prior to issuance of notice u/s 148 of the Act and therefore, where the AO has found certain unexplained deposits in the assessee's bank account, the AO is well within his jurisdiction to form a prima facie view that such deposits have escaped taxation. Regarding the contention of the ld AR that the AO has not applied his mind and has copy pasted the figures from the reasons recorded for AY 2006-07, we find that there is a specific information in possession of the AO in terms of assessee depositing a sum of Rs. 16,50,000/- in his bank account no. 3801 with Punjab National Bank and source of these deposits remain unexplained and hence has escaped taxation. Initially, the AO has mentioned the figure of Rs 16,50,000 in the reasons so recorded before the issuance of notice u/s 148 of the Act. The formation of belief that the income has escaped assessment has thus a live nexus with such material in possession with the AO. In we look at the reasons in that context, in substance, the quantum of income which has escaped is Rs 16,50,000 and not Rs 25,55,000/-. The ld CIT(A) is therefore right in holding that when the AO has stated the figure of Rs 25,55,000/- in the subsequent sentence (though initially, he has written the figure of Rs 16,50,000) and both figures



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find mention in the reasons so recorded, the latter figure of Rs 25,55,000 is a clerifical and a copy/paste mistake by the AO which is curable under section 292B of the Act.

26. Further, we have gone through the contention regarding issuance of notice under section 148 to an assessee and not to any person and the fact that in the instant case, the appellant is not an assessee. If we look at the definition of "assessee" as defined in section 2(7), it talks about a person by whom any tax or any other sum of money is payable under the Act and includes every person in respect of whom any proceedings under this Act has been taken for the assessment of his income. In our view, the appellant clearly falls in the definition of an "assessee" as so defined and the contention so raised is clearly devoid of any merits and is hereby rejected.

27. Regarding contention of the ld AR that no sanction was taken by the AO from the appropriate authority u/s 151 before issuance of notice under section 148, during the course of hearing, the assessment records were called for and it was noted that the approval u/s 151 is duly placed on record. Hence, the said contention has been duly addressed and doesn't support the case of the assessee. In the result, the ground of appeal is hereby dismissed and the assumption of jurisdiction by the AO u/s 147 of the Act is held to be valid.

28. Regarding Ground No. 2 of the assessee's appeal, he has challenged the addition of Rs. 3,80,000/- made by the AO on account of unexplained deposits. During the course of assessment proceedings, the AO observed that there is a total deposits of Rs. 17,00,000/- in the bank account of the assessee consisting of 1.5 lacs in cash and Rs. 15.5 lacs through cheque/demand draft. The assessee submitted that an amount of Rs. 13,20,000/- was received from M/s Fine Tech Macro Developers Pvt. Ltd. for sale of land and copies of sale deed were produced. However, in respect, the



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balance deposits of Rs. 3,80,000/-, no explanation was furnished by the assessee and the same was treated by the AO as made out of the said unexplained source and brought to tax in the hands of the assessee company.

29. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the said addition and her findings are contained at Para 2.3 of her order which are reproduced as under:-

*"2.3 I have carefully considered the facts of the case and also submission of the appellant and material available on record. The appellant claimed in this year that cash deposits were out of the old advances received against the proposed transactions of sale of land which stood cancelled in last year i.e. in AY 2006-07 however, he expressed his inability to produce those persons. Assessee also claimed the receipt of cash from the sale of land made during the year. The assessing officer has given due credit of the sale consideration received during the year. Regarding remaining cash deposit of Rs. 380000/- the appellant, has failed to bring any other plausible explanation about the source of cash deposit. AO's inference is correct because the appellant has no funds for deposits as sale proceeds received in AY 2006-07 stood deposited in that year only for which the necessary credit has already been given by the AO in AY 2006-07 itself and appellant was left with no cash which could be deposited in this year. Therefore the claim of the appellant is devoid of any merits and thus cannot be accepted. In view of these facts and also considering the facts mentioned in the detailed discussion made by me on the same issue in AY 2006-07 in Appeal No. 75/14-15, the addition of Rs. 3,80,000/- made in this year is upheld."*

30. During the course of hearing, the ld. AR reiterated the submissions made before the ld. CIT(A) and the ld. DR relied on the findings of the lower authorities.



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31. We have gone the rival contentions and the material available on record and we do not find there is any infirmity in the order of the ld. CIT(A) as the assessee has failed to explain the source of such deposits in his bank account and which has rightly been brought to tax by the AO. In the ground no. 2 of the assessee's appeal is hereby dismissed.

32. Regarding Ground No. 3, the facts of the case are that during the appellate proceeding for AY 2006-07, the ld. CIT(A) noticed that sale transactions entered into by the assessee with his two daughter-in-laws pertains to AY 2007-08 instead of AY 2006-07. The ld. CIT(A) thereafter, exercising the power of enhancement u/s 251(2)(a) enhanced the income by Rs. 1,62,72,000/- for impugned assessment year and correspondingly, she directed the deletion of the said addition of an equivalent amount in AY 2006-07.

33. In this regard, the ld. AR submitted that ld. CIT(A) has erred in making enhancement as the power of enhancement has to be distinguished from the power of reassessment. Section 251 therefore, has not included the power to reassessment while describing the scope of powers of CIT(A) in appeal.

34. It was submitted that it is a settled legal proposition that ld. CIT(A) is not open to travel outside the record while enhancing the income. She has to restrict herself to the source of income which has been subject matter of consideration by AO from the point of view of taxability. In the present case, ld. CIT(A) has accepted the fact that enhancement can be made only when the AO has discussed the transaction in assessment order [CIT(A) page 34]. However, ld. CIT(A) only after considering that the transaction of sale of land has been discussed, made enhancement in the year under appeal. Ld. CIT(A) also mentioned that in para 6 of AO order for A.Y. 2007-08 i.e. the year under



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appeal, ld. AO has discussed about the capital gains for sale of the land in question and, therefore, it is not a new source of income.

35. In view of above, it was submitted that the only dispute which arises is that whether mere mention of a line will amount to discussion? In this regard, it is submitted that ld. CIT (A) has confused herself with the meaning of error and discussion. Mention of one line in AO order where there is no corresponding enquiry is an error and not discussion. Attention is drawn towards pages 5-7 of AO order of A.Y. 2006-07. Further attention is drawn towards page 9 of AO order of A.Y. 2006-07 para 6 wherein the working of Capital Gains is made for the sales referred to in page 5-7 above. Now, attention is drawn towards page 3-4 of AO order of AY 2007-08. From perusal of the above paragraphs, it is evident that ld. AO has discussed only one transaction of sale for which total consideration received by the assessee is Rs. 13,20,000 and the value adopted by the Sub-Registrar is Rs. 14,88,000. Now attention is drawn towards para 6 on page 6 of AO order for AY 07-08. In the above background attention is drawn towards Para 6 of A.Y. 2006-07 and Para 6 of A.Y. 2007-08 together and from perusal of the same, it is evident that both the paragraphs are word to word same. In AY 2007-08 ld. AO has committed a patent error by concluding that the assessee has sold land for Rs. 1,86,26,148 (1,62,72,000+23,57,148) whereas at the lower side of the para he has taken sale consideration of Rs. 14,88,000.

36. It was submitted that the complete assessment order does not even whisper about the sale of land for Rs. 1,62,72,000 and Rs. 23,57,148, thus, it is not known how AO has considered and discussed the same for calculating capital gains. In the above background, it is established beyond doubt that mere copy-paste error committed by ld. AO has been considered as discussion by ld. CIT (A). The argument of ld. CIT(A) that ld. AO discussed the transactions, however inadvertently, skipped to make addition is devoid of



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merits. If contention of ld. CIT(A) is accepted it will lead to a conclusion that ld. AO was intending to make additions in both the years which is not possible as same income cannot be brought to tax twice.

37. Our reference was drawn to the order of the ld. CIT (A) at page 35 of her order where it was held as under:

*"Further, the action u/s 251 (1)(a) is also strengthened by the fact that the AO could have taken remedial action for which direction could be given u/s 150 (1) of IT Act."*

It was submitted that section 150 and section 251 are independent of each other. Section 150 empowers the AO to issue notice u/s 148 to give effect to any finding or direction contained in an order passed by any authority whereas section 251 defines the powers of CIT (A). Thus, section 150 and section 251 have different play areas. When a direction u/s 150 is given to issue notice u/s 148, ld. AO is again bound to take approval of higher authority in spite of the fact that some higher authority has given direction. Reliance is placed on Hon'ble Allahabad High Court Judgment in the case of Smt. Maya Rastogi vs. CIT [2011] 196 Taxman 283 (All) which held as under:

*"Section 148 (see below) 5 is titled 'Issue of notice where income has escaped assessment'. The notices are issued in case income escapes assessment. This is irrespective of the fact that the case is covered by section 149 or section 150.*
*52. Section 151(2) (see footnote 3) provides that 'no notice will issue under section 148 by an Assessing Officer...' This shows that section 148 is subject to section 151 of the Act. The condition mentioned therein will apply to cases covered by section 150 of the Act.*



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*53. The aforesaid intention is also clear from section 150 of the Act. This section provides 'Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time....; subject to the conditions mentioned in section 150. If the legislature wanted section 151 of the Act not to apply to cases covered under section 150 then words would have been 'Notwithstanding anything contained in section 149 and section 151'.*

*54. The fact that the section 151 as indicated in the preceding paragraph is not mentioned in section 150 shows that section 151 of the Act is applicable to the cases covered not only under section 149 but also to the cases covered under section 150 of the Act.*

*55. It is correct that section 149(2) of the Act (see below)6 provides that notice under section 149(1) is subject to section 151 of the Act and there is no such provision in section 150 but it does not make any difference. Section 149(2) of the Act is merely clarificatory even if it was not there, the result would have been the same.*

*56. In our opinion, if a case falls under section 150 then the notice can be issued at any time, without regard to the time-limits mentioned in section 149. However, the previous satisfaction/sanction of the Joint Commissioner must be procured if the notice is issued after the lapse of the specified period mentioned in section 151 of the Act namely four years.*

38. In view of the ratio as laid by Hon'ble Allahabad High Court, the contention of ld. CIT (A) that action u/s 251 (1) (a) is also strengthened by the fact that the AO could have taken remedial action for which direction could be given u/s 150(1) of IT Act has no legal force. Ld. CIT(A) cannot by herself enhance the income when a separate machinery has been provided in law. In support, reliance was placed on the decision of the Hon'ble Supreme Court in case of CIT vs. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC) and it was submitted that the ratio laid down by the said decision of the Hon'ble Supreme Court



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is clearly applicable in the instant case and which has not been appreciated by the ld CIT(A).

39. On merits, the ld AR raised various contentions as contained in the written submissions and the same are reproduced as under:

I. "Submissions made before ld. CIT (A) may please be considered in correct perspective.

II. Before ld. CIT (A) it was conclusively established that the owner of the land Shri Jagdish Narayan Sharma was facing serious family disputes. Claims and counterclaims from different relatives were made over the land inherited by Jagdish Narayan Sharma. Complete documentary evidences to substantiate these facts were placed before the ld. CIT (A). None of these factual aspects are disputed by ld. CIT (A).

III. Shri Jagdish Narayan Sharma, in this background, in order to safeguard his land, on wrong legal advice, executed a sale deed in favour of his daughter-in-laws. The reason leading to execution of sale deed has not at all been countered by the ld. CIT (A)

IV. Ld. CIT (A) disregarded the submissions mainly for the solitary reason of a sale deed having been executed amongst the parties leading to presumption that sale has taken place. She has further herself admitted the fact that the sale deed is not conclusive evidence and the said presumption is rebuttable by the assessee through effective evidence. In this regard it is submitted that during the appellate proceedings affidavits of the purchasers were submitted in which the purchasers have confirmed to the fact that there was no transfer of funds and the sale deed represents a sham document executed only to protect the interest of the



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family. Ld. CIT(A) has erred in holding that assessee has failed to produce evidence for rebuttal of presumptions because all the possible evidences were placed on record. Ld. CIT(A) further failed to specify as to how assessee has failed to discharge his obligation. Vague observation made by ld. CIT(A) are baseless.

V. Ld. CIT(A) has failed to appreciate the background of the parties. The family (buyers and seller) had a rural and illiterate background having no knowledge of such legal issues nor having any experience of such matters. They did not have access to proper legal consultation. All this resulted into their ending up with a wrong choice of documentation. To a literate person like the ld. CIT(A), this may appear hypothetical but the ground realties in Rural India are otherwise which need no proof.

VI. It is further submitted that ld. CIT (A) had all the powers u/s 131 to summon to these deponents to find out the veracity of these affidavits. Ld. CIT (A) for the reasons best known to her did not exercise her statutory powers and yet disbelieved the affidavits. Any affidavit unless controverted has to be accepted. Reliance is placed on Hon'ble Supreme Court judgment in the case of Mehta Parikh & Co. vs CIT [1956] 30 ITR 181 (SC) [CLC 85-89], wherein it was held as under:

*"..The cash book of the appellants was accepted and the entries therein were not challenged. No further documents or vouchers in relation to those entries were called for, nor was the presence of the deponents of the three affidavits considered necessary by either party. The appellants took it that the affidavits of these parties were enough and neither the Appellate Assistant Commissioner, nor the Income-tax Officer, who was present at the hearing of the appeal before the Appellate Assistant Commissioner, considered it necessary to call for them in order to cross-examine them with reference to the statements made by them in their*



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*affidavits. Under these circumstances it was not open to the Revenue to challenge the correctness of the cash book entries or the statements made by those deponents in their affidavits…"* [CLC 86]

VII. Ld. CIT (A) has further erred in considering that since the sale deed is witnessed, it shall be presumed that witness has attested the contents of the instruments also. As submitted above the sale deed in the present case is a sham document. Ld. CIT (A) has further erred in observing that the Sub-Registrar has endorsed in the sale deed that consideration has been passed on in his presence. It is submitted that as evident from the sale deed PB 389 which is also reproduced by ld. CIT (A) at page 38 of her order, the endorsement by Sub- Registrar is highly mechanical from which no conclusion can be drawn as the Sub- Registrar has not strike off the irrelevant portions. It is not clear whether the consideration has flown and passed before him. Therefore, the contention of ld. CIT (A) is devoid of merits.

VIII. Admittedly sale deed can be persuasive evidence but for sure cannot be conclusive evidence. Any persuasive evidence has to be weighed with reference to other allied/circumstantial evidences and, thereafter, in totally a conclusion can be drawn. In the present case, the following specific evidences before the lower authorities were enough to prove that apparent was not real and it can be concluded that sale deed is a sham document :

a. Affidavits,
b. Documentary evidences of multiple disputes,
c. No evidence of source of income of the buyers

IX. Attention is drawn towards the bank statement of the assessee, Narangi Devi and Jamna Devi. From perusal of the same, a reasonable inference



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which can be drawn is that Jamna Devi and Narangi Devi were not in a capacity to purchase a land worth Rs. 1,67,20,000. There is no evidence of payment or receipt of such huge sum. If the alleged transaction would have taken place then it must have left some traces of it. However, in absence of the movement of cash, the allegation of ld. AO and ld. CIT(A) is devoid of merits. Further, it is not the case of ld. Lower authorities that these people had other bank accounts in which the transaction took place.

X. Ld. Lower authorities have further failed to answer that if money was received by the assessee then where it went. Such huge money could not be kept at home. Further, even ld. Lower authorities failed to establish that the money so received was consumed. In the above background, ld. Lower authorities have grossly erred in considering the sale deed as a valid and conclusive evidence.

40. It was submitted that the ld. CIT(A) further erred in holding that ld. AO is supposed to look into the substance only when the assessee has shown that the apparent is not real. It is submitted that the provisions of the Income Tax Act are to be applied on the basis of substance and not the form assigned to the transaction or the way transaction is structured. The contention is further supported by the introduction of ICDS in the IT Act, 1961. Even if contention of ld. CIT(A) is considered then also ld. AO should have looked into the substance as the assessee by way of plethora of evidences already proved that apparent is not real.

41. Reliance is placed on the following judicial pronouncements:

- Hira Lal Ram Dayal v. Commissioner of Income Tax [1979] 2 Taxman 579 (Punj. & Har.)
- Hira Lal Ram Dayal vs ITO [1983] 16 TTJ 300 (CHD.)
- Mrs. K. Atma Ram vs. Income Tax Officer [1987] 27 TTJ (Chd) 99



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- Smt. Chinimilli Venkata vs. ITO *(I.T.A. No. 1923/HYD/2014 dated 02.09.2016)"*

42. The ld DR is heard who has vehemently argued the matter and relied on the findings of the ld CIT(A) and submitted that the ld CIT(A) was well within her jurisdiction to bring to tax the sale transactions in the impunged assessment year consequent to the relief given to the assessee for A.Y 2006-07. It was submitted that the assessee cannot expect to get scot-free and donot pay tax at all in either of the years when the transaction of sale of land is evidenced by the registered sale deeds. Our reference was drawn to Para 4 of the ld CIT(A)'s order giving the factual background and issue of enhancement notice which reads as under:

*"During the course of appellate proceedings, it was noticed that the appellant has conducted a sale transaction of land wherein he has sold land to his two daughters in law, Jamna Devi and Narangi Devi in this year for Rs. 1,62,72,000/- The AO has discussed this issued in the assessment order for this year at page no. 6 of his order as under: "Working of income under the head capital gains : The assessee has sold his land during the year under consideration for Rs. 18629148/- (16272000 + 2357148/) the Village- "Goner,Tehsil-Sanganer, Jaipur….."*
*This Capital Gain transaction was inadvertently not added by AO to appellant's income in this year. Therefore an enhancement notice was issued to the appellant on this issue which reads as under:*

*"The present appeal is filed against order u/s 143(3)/ 147 of IT Act dated 24 022014 passed by the. Income Tax Officer, Ward 7(2), Jaipur. It has been noted, during appellate proceedings that as per the registered sale deed dated 11.01.2007 vide which the land was sold by you to Smt. Jamna Devi and Smt. Narangi Devi, the transaction concluded pertained to AY 2007-08. Prom the perusal of record and*



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*assessment order it is found that inadvertently the AO has taken the taxability of Capital Gain of this land in AY 2006-07 instead of AY 2007-08. However the AO has correctly mentioned this transaction in page 6 in his order for the AY 2007-08 dated 24.02.2014. Since this transaction has taken place in AY 2007-08 you are to show cause as to why the Capital Gain from sale of this land should not be treated as the income of AV 2007-08 i.e. the correct assessment year and your income should not be enhanced by Rs. 1,62,72,000/- arising from transfer of such property relevant to such A 2007-08.*

*Your reply should reach the undersigned by 21.08.2015 failing which the matter shall be decided as per merits, as this is a limitation matter by order of Hon'ble Rajasthan High Court."*

43. Further, the ld DR drawn our reference to the findings of the ld CIT(A) regarding enhancement of income which reads as under:

*"Regarding the enhancement of income on account of long term capital gains from the sale of land to the daughter-in-law for Rs. 1,62,72,000/-, I have carefully considered the facts of this case and also submission of the appellant. The appellant contention that no enhancement could be made in this year cannot be accepted because the transaction of sale of this land has been discussed in the assessment order by the AO who inadvertently left out the addition of the long term capital gains arising from this transaction of sale. It is not the case where the enhancement was proposed for an issue not considered in the assessment order, thus proposal for the enhancement is justified.*

*The AR cited the case of CIT vs. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC) where it was held as under:-*

*"CIT (A)'s power of enhancement is restricted only to income which was subject matter of consideration for purposes of assessment by ITO."*

*However, as stated above, since the AO has mentioned in para 6 of his order for AY 2007-08 about the capital gain for sale of this land, this is not a new source of*



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*income not discussed by AO. Hence the above mentioned case is distinguishable and not applicable.*

*Further, the action u/s 251(1)(a) is also strengthened by the fact that the AO could have taken remedial action for which direction could be given u/s 150(1) of IT Act. Looking to the facts and circumstances of the case I hereby proceed to enhance the income of the appellant in terms of the decision given below."*

44. We have heard the rival contentions and purused the material available on record. The issue which arise for consideration is whether the ld CIT(A) was justified in bringing to tax long term capital gains, on sale of land by the assessee to his two daughter-in-laws, by way of enhancement of income in terms of provisions of section 251(1)(a) of the Act which reads as under:

" *251(1) In disposing of an appeal, the Commissioner(Appeals) shall have the following powers:*

*(a) In an appeal against an order of assessment, he may confirm, reduce, enhance or annual the assessment."*

45. Regarding the powers of the ld CIT(A) by way of enhancement of income in hands of the assessee, the matter had come up for the consideration before the **Hon'ble Supreme Court** in case of **CIT vs Shapoorji Pallonji Mistry** reported in 44 ITR 891 wherein the question framed for consideration was "whether in an appeal filed by an assessee, the Appellate Assistant Commissioner can find a new source of income not considered by the Income-tax Officer and assess it under his powers granted by section 31 of the Income-tax Act ?

46. The legal proposition laid down by the Hon'ble Supreme Court reads as under:



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*"There is no doubt that the Appellate Assistant Commissioner can "enhance the assessment". It is admitted also by the assessee that within the four corners of the sources processed by the Income-tax Officer, the Appellate Assistant Commissioner can enhance the assessment. This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory. The controversy in this case is about his discovering new sources, not mentioned in the return and not considered by the Income-tax Officer. The High Court held following its earlier view in Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909, that the Appellate Assistant Commissioner has revisional powers, but that they are confined to what was before the Income-tax Officer and considered by the latter. The correctness of this view is challenged in this appeal by the Commissioner of Income-tax, Bombay.*

*The earliest case, which considered the meaning of section 31(3), was Jagarnath Therani v. Commissioner of Income-tax AIR 1925 Pat. 408 decided by the Patna High Court. In that case, the assessee had three businesses at Purnea, Jalpaiguri and Calcutta. His income from Purnea only was assessed by the Income-tax Officer. On appeal by the assessee, the Appellate Assistant Commissioner assessed him with regard to the income from the other two businesses. The head of income was the same within section 6 of the Income-tax Act, but the sources of income were different. The Patna High Court observed :*

*"Now this section relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject-matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject-matter. The appellate authority has no power to travel beyond the subject-matter of the assessment and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income."*



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*The view of the Patna High Court receives support from a decision of the Madras High Court in Gajalakshmi Ginning Factory v. Commissioner of Income-tax [1952] 22 ITR 502 where, at page 510, the Divisional Bench observed as follows:*

*"Of course, it would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for purposes of assessment by the Income-tax Officer."*

*In Bishwanath Prasad Bhagwat Prasad v. Commissioner of Income-tax [1956] 29 ITR 748, the Appellate Assistant Commissioner had actually remanded the case, but while considering the powers of the Appellate Assistant Commissioner, the Divisional Bench appears to have approved of the above-quoted passage from the Madras case. The observations in that case may be treated as obiter. In Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909 is to be found the earlier case of the Bombay High Court, which was followed in the judgment under appeal. In that case, the assessee was carrying on business in Bombay and also in Rajkot. The profits from the Rajkot business were assessed by the Income-tax Officer at Rs. 1,17,643. The Income-tax Officer also found remittances to the extent of Rs. 4 lakhs from Rajkot to Bombay, but did not include that amount in the assessment in view of the concession allowed by the Part B States Taxation Concession Order. The assessee appealed with respect to the sum of Rs. 1,17,643, contending that the Rajkot business had no profits but only loss. The Appellate Assistant Commissioner accepted this contention, but set aside the assessment and remanded the case to the Income-tax Officer for reassessment with a view to assessing the sum of Rs. 4 lakhs. In dealing with the case, the High Court held that the powers of remand were extremely wide, but it quoted with*



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*approval the decision of the Patna High Court in Jagarnath Therani v. Commissioner of Income-tax AIR 1925 Pat. 408 and also the above observation of the Madras High Court. The learned Chief Justice on that occasion added that there was a distinction between the subject-matter of the appeal and the subject-matter of the assessment, and that the Appellate Assistant Commissioner's powers under section 31 were not confined to the subject-matter of the appeal but extended to the subject-matter of the assessment. Those powers included a power of remand to include in the assessment something which ought to have been so included by the Income-tax Officer, and a remand in that case was, therefore, proper.*

*The matter also came before this court in Commissioner of Income-tax v. McMillan & Co. [1958] 33 ITR 182 (SC); but the question, with which we are concerned, was left open. There is, however, a passage in the judgment, approving of the observations of Chagla, C.J., in Narrondas Manordass v. Commissioner of Income-tax [1957] 31 ITR 909 to the following effect:*

*"It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decisions of the Income-tax Officer; a revising authority not in the narrow sense of revising what is the subject-matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the Income-tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various incomes or deductions which came in for consideration of the Income-tax Officer."*



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*The learned Chief Justice in the judgment under appeal considers that this court has thus given approval to his view and also the view of the Patna High Court in the earlier case.*

*In our opinion, this court must be held not to have expressed its final opinion on the point arising here, in view of what was stated at pages 709 and 710 of the report. This court, however, gave approval to the opinion of the learned Chief Justice of the Bombay High Court that section 31 of the Income-tax Act confers not only appellate powers upon the Appellate Assistant Commissioner in so far as he is moved by an assessee but also a revisional jurisdiction to revise the assessment with a power to enhance the assessment. So much, of course, follows from the language of the section itself. The only question is whether in enhancing the assessment for any year he can travel outside the record that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. It is contended by the Commissioner of Income-tax that the word "assessment" here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words "enhance the assessment" are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be over looked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal.*



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*The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years.* ***In view of the provisions of sections 34 and 33B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended section 31 and specified the other intention in express words. The Income-tax Act was amended several times in the last 37 years, but no amendment of section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible."***

47. The **Hon'ble Rajasthan High Court** in case of **Commissioner of Income-tax vs. Associated Garments Makers** reported in 64 Taxman 215, following the above decision of the Hon'ble Supreme has held as under:

*"7. Appeals are provided under section 246 of the Act before the AAC and the Commissioner (Appeals). These appeals are by the assessee aggrieved by the orders mentioned therein. Any order made under section 143(3) is appealable and the powers of the appellate court are provided in section 251 of the Act wherein appellate authority has power to confirm, reduce, enhance or annul the assessment or he may set aside the assessment and refer the case back to the ITO for making fresh assessment in accordance with directions given in appeal and after making such further enquiry as may be necessary. These powers are, inter alia, mentioned in the other powers. According to sub-section (2) of section 251, the AAC has no power to enhance assessment or a*



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*penalty, or reduce the amount or refund unless the appellant has a reasonable opportunity for showing cause against such enhancement or reduction. An explanation has been provided according to which the AAC may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding the fact that such matter was not raised before him.* ***A perusal of sections 246 to 251 of the Act makes it clear that any questions arising out of the assessment orders in an appeal by the assessee can be possible and wide powers are given to the appellate authority, but these powers are circumscribed by the assessment order in the matters arising thereof or a matter arising out of the proceedings. Even the appellate authority has suo motu power to consider the questions arising thereof but there is no provision to go beyond the matter arising out of the proceedings before the assessing authority, more particularly as separate provisions for that are made in the Act. The Tribunal has elaborately discussed the provisions of the Act and the case law on the subject and has rightly come to the conclusion that new sources not mentioned in the return or considered by the ITO are beyond the scope of powers of the AAC.*** *The case relied on by the learned counsel for the petitioner about the power of setting aside the assessment order remanding the case for re-consideration of the whole matter including the evasion by the assessee, is not applicable to the facts of the present case because the matter arising in that case was one which arose out of the proceedings before the ITO. The question was not about new and fresh material for the purposes of enhancement. On the contrary, the case is clearly covered by the decisions of the Supreme Court in CIT v. Shapoorji Pallonji Mistry's case (supra) wherein it has been held that, "In an appeal filed by the assessee the Appellate Assistant Commissioner has no power to enhance the assessment by discovering new sources of income not mentioned in the return of the assessee or considered by the Income-tax Officer in the order*

*appealed against", and in the case of Rai Bahadur Hardutroy Motilal Chamaria (supra) wherein it has been held that, "It is not therefore open to the Appellate Assistant Commissioner to travel outside the record, i.e., the return made by the assessee or the assessment order of the Income-tax Officer, with a view to finding out new sources of income and the power of enhancement under section 31(3) is restricted to the sources of income which have been the subject-matter of consideration by the Income-tax Officer from the point of view of taxability". Their Lordships considered the meaning of the word 'consideration' and held that, " 'consideration' does not mean 'incidental' or 'collateral' examination of any matter by the Income-tax Officer in the process of assessment. There must be something in the assessment order to show that the Income-tax Officer applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection". In the instant case, the AAC had himself, after issuing notice, considered the new material and had gone into new sources of income for the consideration of which he had no jurisdiction.*

*8. In fact, we fail to understand as to why when the order was brought to the notice of the Commissioner he proceeded into wrong direction when he had ample powers under other provisions of this Act. There are various other provisions under the Act which can be invoked in cases of escaped income or such situation where the new sources had been left to be considered, but that would not give powers to the AAC to transgress his jurisdiction."*

48. In case of **CIT v. Sardari Lal & Co.** [2001] 251 ITR 864 (Delhi) (FB), the matter again came up for consideration before the **Full Bench of the Hon'ble Delhi High Court** regarding the first appellate authority's power to take into account a new source of income and to consider the correctness of the view expressed earlier in case of CIT v. Union Tyres [1999] 240 ITR 556,



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and the Full Bench of the Hon'ble Delhi High Court has held that the view expressed in Shapoorji Pallonji Mistry's case (supra) still holds the feet and it was further held as under:

*"8. Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147/148 and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, decision in Union Tyres' case (supra) of this Court expresses the correct view and does not need re-consideration. This reference is accordingly disposed of."*

49. We have also look at the recent decisions on the subject and find that the **Hon'ble High Court of Kerala** in case of **Commissioner of Income Tax, Thrissur v. B.P. Sherafudin** reported in [2017] 87 taxmann.com 330 (Kerala) had an occasion to examine a similar issue as to whether the Appellate Authority has the power under section 251 of the Act to add income not at all considered by the AO? Referring to the catena of decisions including the decisions of Hon'ble Supreme Court in case of CIT vs Shapoorji Pallonji Mistry (supra) and in case of CIT v. Rai Bahadur Hardutory Motilal Chamaria [1967] 66 ITR 443 (SC), the decision of the Full Bench of the Hon'ble Delhi High Court in case of CIT v. Sardari Lal & Co. [2001] 251 ITR 864 (Delhi) (FB), besides various other decisions, it held that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148 and 263. We deem it appropriate to reproduce the discussions and the relevant findings of the Hon'ble High Court as under:

*"The Ambit of Appellate Power:*



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***37.*** *To begin with, let us examine section 251 of the Act. As the assessment year was 1995-96, we will examine the provision as stood then. Before the amendment by Act 18 of 2008, section 251 read as:*

*251. Powers of the [* * *] Commissioner (Appeals).—*

*(1) In disposing of an appeal, the [* * *] Commissioner (Appeals) shall have the following powers—*

*(a) in an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment; [* * *]*

*(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;*

*(c) in any other case, he may pass such orders in the appeal as he thinks fit.*

*(2) The [* * *] Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.*

*Explanation.—In disposing of an appeal, the [* * *] Commissioner (Appeals) may consider and decide any matter arising out of proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the [* * *] Commissioner (Appeals) by the appellant.*

***38.*** *The provision clarifies that in an appeal against an order of assessment, the Appellate Authority may confirm, reduce, enhance, or annul the assessment. In an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty. The explanation to the provision further emphasizes that the Appellate Authority may consider and decide any matter arising out of*



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*proceedings in which the order appealed against was passed, though such matter was not raised before him by the appellant.*

*Precedential Position:*

***39.*** *A Full Bench of this Court in the CIT v. Best Wood Industries & Saw Mills [2011] 33 ITR 63/11 taxmann.com 278 has examined the powers of the AO, but not the Appellate Authority. It has held that once the assessment is reopened for any valid reason recorded under Section 148(2), then the entire assessment is open for the AO to bring to tax any item of escaped income which comes to his notice in such reassessment.*

***40.*** *Under the old Income Tax Act, the corresponding provision is section 31. Interpreting that provision, the Supreme Court in CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 has held that under section 31(3)(a), in disposing of an appeal, the Appellate Authority may confirm, reduce, enhance or annul the assessment; under clause (b), he may set aside the assessment and direct the Income-tax Officer [now AO] to make a fresh assessment. The Appellate Authority has, therefore, plenary powers in disposing of an appeal. "The scope of his power is conterminous with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do."*

***41.*** *As we can see, CIT v. P. Mohanakala [2007] 291 ITR 278/161 Taxman 169 (SC) deals with the powers of High Court in interfering with the findings of fact— and concurrent findings, at that—by re-appreciating the evidence. The Supreme Court has held in the negative. The Supreme Court in Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688/[1990] 53 Taxman 85 has stated that the declaration of law is clear that the power of the Appellate Authority is co-terminus with that of the Income Tax Officer, and if that is so, there appears to be no reason why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken, held the Supreme Court in CIT v. Nirbheram Deluram [1997] 224 ITR 610/91 Taxman 181 to this view as*



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*the Act places no restriction or limitation on exercising appellate power. Even otherwise, an appellate authority while hearing the appeal against the order of a subordinate authority, has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitation, if any, prescribed by the statutory provisions. Absent any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have.*

***42.** In CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC) the assessment year was 1947-1948, and the case was finally decided in 14.02.1962. So the Act considered was pre-Independence enactment. Examining section 31 of the old Act, the Supreme Court has held that there is no doubt that the appellate authority can "enhance the assessment". This power must, at least, fall within the words "enhance the assessment", if they are not to be rendered wholly nugatory.*

***43.** Now, we may examine the authorities that also have dealt with the powers of the appellate authority but seem to have taken a divergent path.*

***44.** In CIT v. Rai Bahadur Hardutroy Motilal Chamaria,[1967] 66 ITR 443 (SC) a three-Judge Bench of the Supreme Court has observed that it is only the assessee who has a right conferred under section 31 to prefer an appeal against the order of assessment made by the Income-tax Officer. If the assessee does not appeal the order of assessment becomes final subject to any power of revision that the Commissioner may have under section 33B of the Act. Therefore, it would be wholly erroneous to compare the powers of the appellate authority with the powers possessed by a court of appeal, under the Civil Procedure Code. The Appellate Assistant Commissioner is not an ordinary court of appeal. It is impossible to talk of a court of appeal when only one party to the original decision is entitled to appeal and not the other party, and because of this peculiar position the statute has conferred very wide powers upon the appellate authority once an appeal is preferred to him by the assessee.*



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***45.*** *Chamaria goes on to hold that the appellate authority has no jurisdiction under section 31(3) of the Act to assess a source of income not processed by the Income-tax Officer "and which is not disclosed either in the returns filed by the assessee or in the assessment order," and therefore the appellate authority cannot travel beyond the subject-matter of the assessment. In other words, the power of enhancement under section 31(3) of the Act is restricted to the subject-matter of assessment or the sources of income considered expressly or by clear implication by the Income-tax Officer from the viewpoint of the taxability of the assessee.*

***46.*** *A question regarding powers of the first Appellate Authority came up for consideration before the Supreme Court recently in Nirbheram Daluram (supra). Following the earlier decisions in Kanpur Coal Syndicate and Jute Corporation of India, the Supreme Court reiterated that the appellate powers conferred on the Appellate Commissioner under Section 251 could not be confined to the matter considered by the ITO, as the Appellate Commissioner is vested with all the plenary powers which the Income Tax Officer may have while making the assessment.*

***47.*** *Indeed, examining Daluram's holding, a Division Bench of the Delhi High Court in CIT v. Union Tyres [1999] 240 ITR 556/107 Taxman 447, has observed that Daluram did not comment whether these wide powers also include the power to discover a new source of income. So, Union Tyres concludes that the principle of law laid down in Shapoorji and Chamaria still holds the field.*

***48.*** *The principle emerging from various pronouncements of the Supreme Court, Union Tyres observes, is that the first Appellate Authority is invested with very wide powers under Section 251(1)(a) of the Act and once an assessment order is brought before the authority, his competence is not restricted to examining only those aspects of the assessment about which the assessee makes a grievance and ranges over the whole assessment to correct the Assessing Officer not only regarding a matter raised by the assessee in*



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*appeal but also regarding any other matter considered by the Assessing Officer and determined in assessment.*

***49.*** *There is a solitary but significant limitation, according to Union Tyres, to the power of revision: It is not open to the Appellate Commissioner to introduce in the Assessment a new source of income and the assessment must be confined to those items of income which were the subject-matter of the original assessment.*

***50.*** *In course of time, Union Tyres was doubted. In. Sardari Lal & Co.,(supra) the same issue—whether the appellate authority has the power under section 251 to discover a new source of income—was referred to a Full Bench. After examining the authorities holding the fielding on that issue, the learned Full Bench has held that the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the assessing officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under section 147, or section 148, or even section 263 of the Act if requisite conditions are fulfilled. It is inconceivable, according to Sardari Lal, that in the presence of such specific provisions, a similar power is available to the first appellate authority. Eventually, Sardari Lal upheld the decision in Union Tyres.*

***51. Undeniably, the precedential position on the powers of the first appellate authority under section 251 undulates. There are seeming contradictions. But, as held by Union Tyres, and as affirmed on reference by Sardari Lal, there is a consistent judicial assertion that the powers under section 251 are, indeed, very wide; but, wide as they are, they do not go to the extent of displacing powers under, say, sections 147, 148, and 263 of the Act.***

***52.*** *Therefore,* ***we are in respectful agreement with the view taken by the Full Bench of the High Court of Delhi in Sardari Lal.*** *As a corollary, we hold that the Tribunal's deleting the enhancement of Rs. 22,15,116/- and canceling the order of the CIT (A) on that issue call for no interference."*



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50. The issue which is being disputed before us has to be considered and decided in light of facts on record and the legal proposition which emerges from the above referred decisions. In the instant case, the enhancement of income by the ld CIT(A) relates to long term capital gains on sale transactions executed through the registered sale deeds of even date i.e, 11.01.2007 whereby the assessee has sold certain plots of land at Village Goner, Tehsil Sanganer, Jaipur to his two daughters-in-law namely Narangi Devi w/o Chhaju lal and Jamna Devi w/o Kaluram for a total consideration of Rs 1,62,72,000. Now, if we look at the return of income filed by the assessee, it is noted that pursuant to issuance of notice u/s 148, the assessee had filed his return of income disclosing agricultural income of Rs. 1,10,000/- and prior to that, no return of income was filed by the assessee. The notice issued under section 148 dated 15.03.2013 talks about an amount of Rs 16,50,000 deposited in assessee's bank account maintained with PNB, the source of which has not been explained and the same has thus escaped assessment. On perusal of the assessment order passed under section 143(3) read with section 147 of the Act, it is noted that the said deposits in assessee's bank has been examined however, there is no linkage with the impunged sale transactions which are the subject matter of enhancement by the ld CIT(A). Further, there is a sale transaction which is the subject matter of assessment which relates to sale of ancestral land situated at the same village Goner, Village Goner, Tehsil Sanganer, Jaipur vide sale deed dated 26.12.2006 to M/s Fine Tech Macro Developers Pvt. Ltd for a consideration of Rs 13,20,000 and which has been valued by the stamp duty authorities at Rs 14,88,000. The said transaction has been brought to tax by the Assessing officer after providing the index cost of acquisition. We thus find that the impunged sale transactions relating to sale of land by the assesee to his two daughters-in-law for a total consideration of Rs 1,62,72,000 was neither the subject matter of notice issued under section 148 and the subsequent return filed by the assessee nor



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the subject matter of assessment order passed by the Assessing officer. It is clearly a new source of income which has been discovered by the ld CIT(A) while adjudicating the matter and not a matter arising out of the assessment proceedings. Our view is fortified by the fact that the impunged sale transactions relating to sale of land by the assesee to his two daughters-in-law for a total consideration of Rs 1,62,72,000 was the subject matter of reopening of assessment for preceding A.Y. 2006-07 whereby these transactions were identified with specific particulars in the reasons recorded before issuance of notice under section 148 for the said assessment year. Subsequently, the AO while passing the assessment order for A.Y. 2006-07 has discussed the taxability of such transaction in the body of the assessment order and has brought the same to tax. It is therefore a case where the impunged transactions are subject matter of assessment and arising out of the assessment order for A.Y 2006-07 and not that of A.Y 2007-08. It is not a case that the additions in respect of the said transactions are made on substantive basis in A.Y 2006-07 and on protective basis in A.Y 2007-08. The ld CIT(A) while adjudicating the matter for A.Y. 2006-07 had determined that the said transaction pertains to A.Y 2007-08 and not to A.Y 2006-07 and has deleted the additions in A.Y. 2006-07 and brought the same to tax in the impunged A.Y 2007-08 by way of exercising her enhancement powers under section 251(1)(a) of the Act which is clearly beyond her powers. In light of the legal propositions so laid down by the Hon'ble Supreme Court and other High Courts referred supra, the powers of the ld CIT(A) are circumscribed by the assessment order in the matters arising thereof or a matter arising out of the proceedings. As held by the Courts, even though, the ld CIT(A) has suo motu power to consider the questions arising thereof but there is no provision to go beyond the matter arising out of the proceedings before the Assessing officer, more particularly as separate provisions for such eventuality are provided in the Act. In light of the same, the enhancement so done by the ld CIT(A) whereby the impunged sale transactions are brought to tax in the year



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under consideration are beyond the scope of her powers envisaged under section 251(1)(a) and the same thus cannot be accepted. However, the AO shall be free to take action as per law.

51. In light of the above discussions, having decided against the exercise of powers of the ld CIT(A) in bringing to tax the subject transaction, we donot deem it appropriate to examine and the address the arguments and contentions so raised by both the parties on merits of the taxability of the subject transaction.

52. In the result, the ground of appeal is allowed in favour of the assessee .

53. Regarding Ground No. 4 of the appeal, the assessee has challenged the action of the AO in invoking the provisions of section 50C whereby the AO has considered sale consideration of Rs. 14,88,000/- instead of actual sale consideration of Rs. 13,20,000/-.

54. In this regard, it was submitted that the sale consideration of the property as per the registered sale deed was Rs. 13,20,000 as against the value adopted by the stamp valuation authority amounted to Rs. 14,88,000. The difference between the two was Rs. 1,68,000 i.e. 12.7%. The provisions of Section 50C are punitive in nature and are for taking care of the undervaluation of the properties sold. In such a situation, Section 50C provides for replacement of the stamp duty valuation in place of the declared sale consideration if the stamp duty value is higher than the declared sale consideration. It is without dispute that stamp duty valuation is only an estimate. Where difference in stamp duty valuation vis-a-vis stated sale consideration exceeds the tolerable band then only stamp duty valuation should be substituted. It was for this reason that Hon'ble Supreme Court, in the case of C.B. Gautam vs. Union of India (1993) 199 ITR 530 has recognized a tolerance limit for preemptive purchase of property under



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Chapter XXC, at 15% of variation, even though no such tolerance band was prescribed in the statue. Thus the judicially accepted tolerable range is 15%. In the present case since the difference is within tolerable range, value as declared in sale deed should be considered.

55. Without prejudice to above, it is submitted that the value adopted by the sub registrar for stamp duty purpose is not the final value which has to be taken. There is a proper machinery in law for calculating the value of sales consideration if assessee claims that Fair Market Value is less than the Stamp Duty Value. Section 50C(2) provides for such situation under which ld. AO is required to refer the matter to Valuation Officer. The said sub-section provides following two conditions:

a) the assessee claims before any Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

b) the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court.

It was submitted that neither any specific manner nor any particular Form in Income Tax Rules is prescribed for requesting the AO to refer the matter to Valuation Officer. The basic condition is "claiming" before the AO that value adopted by Stamp Valuation Authorities exceeds the Fair Market Value at which the transaction of sale has taken place. Subsequent condition is that no appeal is filed under Stamp Duty Law.



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56. It was submitted that the ld. CIT(A) has erred in holding that the assessee has not requested ld. AO for making reference to the valuation officer. It is submitted that the assessee before ld. CIT(A) claimed that AO should have referred the case to valuation officer. Thus, a specific request was made. It is a settled legal proposition that ld. AO while discharging his duties is bound to refer the valuation to the valuation officer when the assessee has disputed the value adopted by the Stamp Authorities, even if the assessee has not made a specific request for the same.

57. Reliance was placed on the following judicial pronouncements:

- Sunil Kumar Agarwal [2014] 47 taxmann.com 158 (Cal.)
- Smt. Kamlesh Tiwari, ITA No. 587/JP/2013
- Vijay Kumar Patni, ITA No. 202/JP/2012
- Sarwan Kumar v. ITO [2014] 45 taxmann.com 16 (Delhi – Trib.)
- Anil Kumar Jain vs. ITO [2013] 34 taxmann.com 258 (Delhi-Trib.)
- Raj Kumari Agarwal vs. DCIT [2014] 47 taxmann. Com 88 (Agra-Trib.)

58. We find that the facts and circumstances of the case are identical to the facts as in ITA No. 751/JP/2015 and similar contentions have been raised by the ld AR. Our findings and directions contained in **Para 15 in *ITA No. 751/JP/2015 (Supra)*** shall apply *mutatis mutandis* to this matter as well. The ground of assessee's appeal is therefore dismissed.

59. Regarding Ground No. 4(a) read with 4(c), the assessee has challenged the action of the AO in treating lands sale as capital assets instead of agricultural land and tax the long term capital gains of Rs. 14,62,758/-. It was submitted that the ld. CIT(A) while holding the land in question as capital assets has placed sole reliance on remand report submitted by the AO who has in turn relied on the certificate of Tehsildar. It was submitted that the enquiry with the Tehsildar was conducted at the back of the assessee and no



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opportunity of cross-examination was given to the assessee. In support, reliance was placed on the Supreme Court in case of Andaman Timber Industries, Civil Appeal No. 4228 of 2006, dated 2nd Sept 2015 and Delhi High Court in decision of CIT vs. Ashwani Gupta [2010] ITR 396 (Delhi).

60. It was further submitted that the assessee has submitted a certificate of Gram Panchayat wherein it has been stated that Village Goner is situated at a distance of 9 k.m from the municipality limits of Jaipur Nagar Nigam and it was submitted ld. CIT(A) failed to appreciate the said certificate by placing reliance only on Tehsildar's report having any doubt on the certificate of Gram Panchayat should have issued summon u/s 131 or should have been issued which has not been done in the instant case. It was accordingly submitted that the addition made by the AO and confirmed by the ld. CIT(A) may be deleted.

61. In this regard, the finding of the ld. CIT(A) are contained at Para 3.3 which is reproduced as under:-

*"3.3 Regarding ground no. 3(a), 3(b) and 3(c): The appellant has raised two grounds, first that the subject land is an agricultural land and second that the provisions of section 50C are not applicable. Both the grounds raised are already decided against the appellant while deciding the assessee's appeal for AY 2006-07 in ITA No. 75/14-15. Since the facts of the case in the year under appeal are similar as existed in AY 2006-07 and* ***the land under question is contiguous to the same land / located in the same area as the land which was sold in the preceding assessment year thus under these circumstances I am inclined to follow the observations made and the order passed in AY 2006-07-in ITA No. 75/14-15 supra*** *and accordingly both the grounds raised by the appellant in this year are decided against the assessee and the addition of Rs. 14,62,758/- is confirmed."*



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62. We find that the facts and circumstances of the case are identical to the facts as in ITA No. 751/JP/2015 and similar contentions have been raised by the ld AR. Our findings and directions contained in **Para 18 in *ITA No. 751/JP/2015 (Supra)*** shall apply *mutatis mutandis* to this matter as well. The ground of assessee's appeal is therefore dismissed.

***ITA No. 753/JP/2015***

63. In this appeal *(ITA No. 753/JP/2015)* for A.Y 2008-09, the assessee has taken the following ground of appeal:

> *"In the facts and circumstances of the case and in law, the ld. CIT(A) has erred in confirming the action of ld. AO in making addition of Rs. 18,15,462/- towards alleged unexplained deposits in the bank account of the assessee. The action of ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by deleting the said addition of Rs. 18,15,462/-."*

64. Further, the assessee has moved an application for admission of an additional ground of appeal which reads as under:-

> *"In the facts and circumstances of the case and in law, ld. AO has erred in reopening the assessment u/s 147 of the Income Tax Act, 1961. The action of the ld. AO is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted by quashing the reassessment proceedings being illegal and without jurisdiction."*

65. Regarding additional ground of appeal, it was submitted that the above ground is a legal ground. All relevant facts are available on record. No new facts are required to be evaluated nor are any further enquiry needed. The provisions of law are to be applied on the facts already available on record.



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The omission of the above ground was inadvertent and the reliance was placed on the judgment of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. [1998] 229 ITR 383 (SC). It was further submitted that the above ground was taken before ld. CIT(A), however, the same was not pressed but placing reliance on the judgement of Hon'ble Punjab and Haryana High Court in the case of Vijay Kumar Jain v. CIT [1975] 99 ITR 349, it was submitted that the said ground even though not pressed before ld. CIT(A) can still be taken before us.

66. We find that in the additional ground of appeal, the assessee has challenged the reopening of the assessment u/s 147 of the Act, the same being a purely legal ground and the same is admitted following the Hon'ble Supreme Court's decision in case of NTPC (supra).

67. Now, coming to the merits of the additional ground of appeal, the ld. AR submitted that the notice u/s 148 can be issued only to assessee and in the instant case, the appellant does not fall in the category 'assessee' as defined in section 2(7) of the Act. We have already examined the said contention and have not found the same acceptable in context of ITA No. 751/JP/2015 and our finding and directions contained therein shall apply with equal force in the present appeal.

68. It was further submitted by the ld AR that a request was made to carry out filing inspection of assessment records and on such inspection, it was noted that there is no copy of sanction obtained u/s 151 before reopening the assessment. In this regard, the ld AR submitted that if the Bench deem fit, it may call the record to ascertain correct facts. During the course of hearing, the assessment records were called and it was noted that the approval u/s 151 is duly placed on record. Hence, the said contention has been duly addressed and doesn't support the case of the assessee.



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69. In the result, the additional ground of appeal is dismissed.

70. Now, coming to other ground of appeal wherein the assessee has challenged the addition of Rs. 18,15,462/- on account of unexplained deposits where AO observed that the assessee has failed to produce necessary explanation of the source of such deposits.

71. During the course of assessment proceedings, the AO observed that there are cash deposits of Rs. 17,95,000/- and cheque deposits of Rs. 20,462/- totalling to Rs. 18,15,462/- in the assessee's bank account. The assessee was asked to explain the source of deposits made by him in his bank account and in absence of any explanation furnished by the assessee, the said deposits were treated as made out of unexplained source and brought to tax in the hands of the assessee.

72. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the said addition and her findings are contained at Para 2.3 which are reproduced as under:-

*"2.3 I have carefully considered the facts of the case and also submission of the appellant and material available on record. The appellant claimed in this year that cash deposits were out of the old advances received against the proposed transactions of sale of land which stood cancelled in AY 2006-07 however, he expressed his inability to produce those persons. The appellant, besides relying upon the so called cancelled agreements has failed to bring any other plausible explanation about the source of cash deposit. AO's inference is correct because the appellant has no funds for deposits as sale proceeds received in AY 2006-07 stood deposited in that year only for which the necessary credit has already been given by the AO in AY 2006-07 itself and appellant was left with no cash which could be deposited in this year.*



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*Therefore the claim of the appellant is devoid of any merits and thus cannot be accepted. In view of these facts and also by following my decision on the same issued in AY 2006-07 in Appeal No. 75/JP/14-15, the addition of Rs. 18,15,462/- made in this year is upheld. Accordingly this ground of appeal is dismissed."*

73. During the course of hearing, the ld. AR reiterated the submissions made before the ld. CIT(A). It was further submitted that cash book was presented to substantiate the availability of cash for deposit in bank and no error has been pointed out in such cash book. It was further submitted that amount of Rs 20,462 was some erroneous transfer by the bank and the same was debited on the very same date by the bank and thus, there is no basis for such addition. Per contra, the ld. DR relied on the order of the lower authorities.

74. We have gone the rival contentions and the material available on record and do not find any infirmity in the order of the ld. CIT(A) except for an amount of Rs 20,462 which was a wrong credit and later on rectified by the bank itself. In the result, the ground taken by the assessee is partly allowed.

75. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 25/05/2018.

| Sd/- | Sd/- |
|---|---|
| (विजय पॉल राव) | (विक्रम सिंह यादव) |
| (Vijay Pal Rao) | (Vikram Singh Yadav) |
| न्यायिक सदस्य / Judicial Member | लेखा सदस्य / Accountant Member |

Jaipur
Dated:- 25/05/2018
*Ganesh Kr



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आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Shri Jagdish Narayan Sharma, Jaipur
2. प्रत्यर्थी/The Respondent- ITO Ward-7(2), Jaipur
3. आयकर आयुक्त/CIT
4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/Guard File (ITA No. 751, 752 & 753/JP/2015)

आदेशानुसार/ By order,

सहायक पंजीकार/ Assistant. Registrar.



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