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IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'A' BENCH
BEFORE SHRI U.B.S.BEDI, JM & SHRI A.N. PAHUJA, AM

ITA no.4460/Del/2010 Assessment year:2006-07		
DCIT,Central Circle-20 , Room no. 333,E-2,ARA Centre, Jhandewalan Extension New Delhi	**V/s.**	Mr.Abhinav Kumar Mittal V-287, Rajouri Garden New Delhi [PAN : AAAAH2567C]
(Appellant)		(Respondent)

Assessee by	Ms. Rano Jain & shri Venkatesh Mohan, ARs
Revenue by	Shri D.K. Mishra, DR

Date of hearing	20-06-2012
Date of pronouncement	29-06-2012

ORDER

A.N.Pahuja:- This appeal filed on 6th Oct. 2010 by the Revenue against an order dated 30th July, 2010 of the Ld. CIT(A)-1,New Delhi, raises the following grounds:

1. *The order of the Ld. CIT(A) is not correct in law and facts.*

2. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and facts in deleting the addition of ₹. 59,78,938/- on account of difference in the investment as shown by the assessee and as ascertained by DVO on valid and legal reference made by AO u/s 142A of Income Tax Act, 1961 which has no requirement for AO to bring record any material to justify understatement of purchase consideration.*

3. *On the facts and in the circumstances of the case, the order of the Ld. CIT(A) is perverse as it disregarded legal provision of section*

142A while holding that AO failed to bring on record any material to justify understatement of purchase consideration.

4. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and facts in deleting the addition of ₹.5978938/- on account of difference in the purchase consideration as shown by the assessee and as ascertained by DVO without holding such references as void or beyond jurisdiction.*

5. *The appellant craves leave to add, alter or amend any all of the grounds of appeal before or during the course of the hearing of the appeal."*

2. Facts, in brief, as per the relevant orders are that return declaring income of ₹.39,90,410/- was filed by the assessee on 18th July, 2006. Subsequently on 26th April, 2007, a search u/s 132 of the Income Tax Act 1961, (hereinafter referred to as the Act) and a survey u/s 133A of the Act was conducted in the premises of M/s A.K. Capital Services Ltd and its group companies as also in the premises of Directors of these companies and their relatives.Consequently, a notice u/s 153 C of the Act was issued on 7th Oct. 2009 .In response, the assessee replied vide their letter dated 13th Oct. 2009 that return already filed on 18th July 2006 may be treated as return in response to notice u/s 153 C of the Act. During the course of assessment proceedings, the Assessing Officer (AO in short) referred the valuation of following premises to DVO u/s 142 A of the Act :-

i. Office Premises no. 101, Kaivana Building Malkans, Near Polytechnic Ahmedabad.;
ii. Office Premises no. 102, Kaivana Building, Malkans, Near Polytechnic, Ahmedabad;and
iii. Commercial Property at Chowranghee, Kolkata.

2.1 The valuation report of the DVO was handed over to the assessee on 14th Dec. 2009 in respect of Ahemdabad properties and on 24th Dec. 2009 in respect of Kolkata property. In his report, DVO determined the value of the property as under:

Sl.No.	Address of the property	Value determined by DVO[In ₹	Value declared by the assessee [In ₹]	Difference [In ₹]
i.	101, Kaivana Building Malkans, Near Polytechnic Ahemadabad	44,00,600/-	18,00,000	26,00,600
ii	102, Kaivana Building, Malkans, Near Polytechnic, Ahemdabad	41,57,300/-	17,36,000	24,21,300
iii	Commercial Property Chowranghee, Kolkata	43,19,800	32,11,680	11,08,120

2.2 To a query by the AO, seeking to add the aforesaid difference in terms of provisions of sec. 69 of the Act, the assessee replied that the comparative instances adopted by the DVO in respect of Ahmedabad properties pertained to the period 1999, 2000 and 2002 where as the assessee purchased the property on 16th Feb. 2006 .Moreover, no evidence was found during the search that the assessee paid more than the cost reflected in purchase deed. Inter alia, the assessee furnished a copy of report of registered valuer, determining fair market o the property at ₹34,89,930/- in respect of two properties at Ahmedabad. As regards property at Kolkatta, the assessee pleaded that the valuation was based on estimates and no document was found during the search, suggesting that the assessee paid more than what is reflected in the document. However, the AO did ot accept the submissions of the assessee on the ground that comparable sale instances in respect of Ahmedbad properties were appropriate and cost of property in 2006 was more than the cost in 1999. Accordingly, the AO added the aforesaid difference of ₹.50,21,900/- in respect of Ahmedabad properties and an amount of ₹ 9,57,038/- in respect of Kolkata property u/s 69 of the Act.

3 On appeal, the ld. CIT(A) deleted the aforesaid additions, holding as under:

> *"The contentions raised by the assessee as well as the findings of the Assessing Officer and the material on record has been carefully perused. It is seen that the assessee has purchased two properties*

at Ahemdabad as well as the property at Kolkata during the instant year by way of registered sale deeds. It is also seen that the source of declared investment in these properties has been found to be fully explained in the hands of the assessee. It is further seen that no material has been found during the course of search on the basis of which it could be said that the assessee has made any investment over and above the amount declared by him and as evidenced by the registered sale deeds. The Assessing Officer has also not given any justifiable reason for referring these properties to valuation u/s 142A of the Act. I have also perused the order of jurisdictional bench of ITAT in the case of Rajeshwar Nath Gupta (HUF) and Sunil Kumar Jain as cited by the A.R. wherein it has been held as under:

"We have considered the rival submissions and also perused the relevant material on record. It is observed that the addition in dispute on account of alleged unexplained investment made by the assessee in the property was made by the AO on the basis of valuation report obtained from the DVO by making a reference u/s 142A, the provisions of which read as under:-

"(Estimate by Valuation Officer in certain cases.

142A.(1) For the purposes of making an assessment or reassessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.

(2) The Valuation Officer to whom a reference is made under sub section (1) shall, for the purposes of dealing with such reference, have all the powers that he has under section 38A of the Wealth Tax Act, 1957 (27 of 1957).

(3) On receipt of the report from the valuation Officer, the Assessing Officer may, after giving the assessee an opportunity of being heard take into account such report in making such assessment or reassessment:

Provided that nothing contained in this section shall apply in respect of an assessment made on or before the 30th day of September 2004 and where such assessment become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A.

Explanation – In this section, "Valuation Officer" has the same meaning as in clause ® of Section 2 of the Wealth Tax Act 1957 (27 of 1957.)"

A perusal of the aforesaid provisions shows that Section 142A is attracted, inter alia, where the assessee is found to have made investment outside the books of accounts or where any such investment made by him is not fully disclosed in the books of account. The condition precedent for making the reference by invoking the provisions of Section 142A thus is that there should be something on record to show that the assessee in first place has made such investment outside the books or the investment so made by him is not fully disclosed in the books of account and once this condition is satisfied, the quantum of such investment made can be ascertained by the Assessing Officer by making reference u/s 142A in order to make the addition u/s 69 or 69B, whichever is applicable. In the present case, the relevant property was purchased by the assessee during the year under consideration for Rs.15 lakhs and the amount of the said consideration was paid out of its disclosed sources as accepted even by the Assessing Officer in the reassessment. A perusal of the assessment order, however, shows that there was no reference whatsoever made by the Assessing Officer to any material/evidence/information on the basis of which it could be said that the said consideration shown by the assessee was understated and that anything above what was disclosed by the assessee had actually been paid as consideration. The condition precedent for making a reference to the DVO by invoking the provisions of Section 142A thus was not satisfied in the present case and neither the said reference nor the addition made on the basis of report obtained from the DVO in response to the said reference, in our opinion, was sustainable in law as rightly held by the learned CIT(A). In the case of Subhash Chand Chopra vs. ACIT-92 TT J 1087, this Bench of the Tribunal has held that no material or evidence having been recovered during the course of search showing investment in construction, the AO was not competent to make a reference to the DVO u/s 142A and to make addition on that basis.

Respectfully following the interpretation of principles of law in those cases, it is held that the provisions of section 142A of the Act can be invoked only where the assessee is first found to have made investment outside the books of accounts or where any such investment made by him is not fully disclosed in the books of accounts. It is only once this condition is satisfied, then the Assessing Officer is entitled to make a reference u/s 142A to ascertain the quantum of such investment for making the addition u/s 69 or 69B of the Act. In the instant case however, a perusal of the assessment order shows that no reference whatsoever has

been made by the Assessing Officer to any material/evidence/information on the basis of which he could have found that the consideration shown by the assessee was less than the amount actually paid by him. Thus in my considered opinion the condition precedent for making a reference to the DVO is not satisfied in the instant case. In view of above facts and circumstances the contention of the A.R. that the reference made by the Assessing Officer to the DVO itself is wholly wrong, is accepted and upheld. I also agree with the A.R. that for invoking provisions of section 69 of the Act burden is on the Revenue to prove that the real investment exceeds the investment shown in the books of accounts of the assessee and in this case such burden has not been discharged. It is seen that there is no positive evidence to show that the assessee has paid any amount over and above the declared consideration. No such material was found even during the course of search and the A.O. has also failed to bring on record any such material which could have enabled him to invoke the provisions of section 69 and then to make a reference u/s 142A of the Act. In my considered view the consideration declared by the assessee is verifiable from the registered sale documents and in the absence of any contrary material, the Assessing Officer has erred in making the impugned additions u/s 69 of the Act. I have also gone through the valuation report submitted by the DVO and apart from my finding that these reports cannot be admitted as an evidence in view of the fact that the reference made u/s 142A of the Act itself is wholly wrong and untenable in law, it is also seen that the same are based on wholly incomparable sales instances which are neither proximate in time nor proximate in characteristics. It is a settled principle of law that only likes can be compared with likes and in this case it is found that the DVO at Kolkata as well as Ahemdabad have estimated the fair-market-value of the property of the assessee on the basis of incomparable sales instance and therefore also these valuation reports cannot be considered reliable. It is also seen that the Assessing Officer has failed to take into account the valuation report submitted by the assessee from a registered valuer, who has given various sales instances which are proximate both in time as well in characteristics with the property of the assessee. The learned Assessing Officer has not given any basis for not accepting such sales instance and the valuation report of the registered valuer. On these facts and circumstances the addition as made by the A.O. without bringing on record any material to show that any investment over and above the amount declared by the assessee has actually been paid by the assessee, the addition as made of ₹.50,21,900/- in respect of Ahemdabad property and ₹.9,57,038/- in

respect of Kolkata property u/s 69 of the Act cannot be sustained and is deleted.

4. The Revenue is now in appeal before us against the aforesaid findings of the ld.. CIT(A). The ld. DR while carrying us through the assessment order and findings of the Ld.CIT(A) argued that even though no incriminating material was found during the course of search, the AO was competent to make a reference u/s 142A of the Act. While supporting the comparable instances adopted by the DVO in his report ,the ld. DR argued that nothing prevented the ld.CIT(A) to ascertain comparable instances when he felt that the instances referred to by the DVO in his report, were not appropriate. Inter alia, the ld. DR relied upon decisions CIT vs. Om Prakash Bagria, HUF, 155 Taxman 427(MP) & CIT vs. Achamma Chacko, 326 ITR 258 (Kerala) .

5. On the other hand, the ld. AR while supporting the findings of the ld..CIT(A) relied upon decisions in CIT Vs. Mahesh Kumar,196 TAXMAN 415(Delhi); CIT Vs. Smt. Shakuntala Devi,316 ITR 46(Delhi); Shri Devinder Kumar Vs. DCIT, in ITA no.1141 & 1142/Del./2008; ITO vs. M/s Rajeshwar Nath Gupta, HUFin ITA no.4295/del./2005; Smt. Seema Gupta Vs. DCIT, in ITA no. 1619/Del./2008;DCIT Vs. Smt. Baleshwari Devi in ITA nos. 1618&1775/Del./2008; DCIT Vs. Shri Mahesh Kumar in ITA nos. 1042 &1785/Del./2008 &; CIT Vs. Rajendra Seclease Ltd. in ITA no.791/2009 dated 25.11.2011.

6. We have heard both the parties and gone through the facts of the case as al the aforesaid decisions relied upon by both sides. The issue before us is as to whether reference made by the AO to DVO u/s 142A of the Act is valid reference and whether the AO was justified in making addition on the basis of report of the DVO. Prior to insertion of Sec. 142A by Finance (No.2) Act, 2004 with retrospective effect from 15th Nov. 1972, a reference to DVO in assessment proceedings other than as permissible under s. 55A was held to be invalid as held by Hon'ble Apex Court in Smt. Amiya Bala Paul vs. CIT, 262 ITR 407 (SC). Under sec. 142A, a reference can be made for assessment or reassessment where an estimate of value of any investment referred to in s. 69 or s. 69B or the

value of any bullion, jewellery or other valuable articles referred in s. 69A or 69B is required to be made. The AO may require the DVO to make an estimate of such value and report the same to him. In the instant case,. there is nothing to suggest that any incriminating document was found and seized during the course of search or survey on 26-04-2007 in the premises of the aforesaid group. In the original return filed, the assessee declared income from salary and House Property. A mere glance at the assessment order reveals that there is no reference to any material/evidence/information on the basis of which it could be said that the cost of construction shown by assessee was understated or anything above what was disclosed by assessee. In terms of provisions of sec.142A of the Act, reference to DVO can be made only when a requirement is felt by the AO for making such reference and such a requirement would arise or could be felt only when there is some material with the AO to show that whatever estimate assessee has shown is not correct or not reliable. The use of word 'require' is not superfluous but signifies a definite meaning whereby some preliminary formation of mind on objective basis by the AO is necessary, which requires him to make a reference to the DVO u/s 142A. The burden is on the Revenue to prove that the real investment exceeds the investment shown by the assessee and that burden has to be discharged objectively. There is nothing in the assessment order nor the ld. DR brought to our notice any material, suggesting that the assessee paid any amount over and above the declared consideration. No such material was found even during the course of search while the A.O. has also failed to bring on record any such material which could have enabled him to invoke the provisions of section 69 and then to make a reference u/s 142A of the Act. The ld. CIT(A) also found that report of the DVO was based on wholly incomparable sales instances which were neither proximate in time nor proximate in characteristics. The AO did not adduce any reasons as to why the report of registered valuer submitted by the assessee was faulty nor even cared to analyse the said report vis-à-vis report of the DVO. In these circumstances, there is no apparent basis to negate the findings of the ld. CIT(A).A co-ordinate Bench in the case of ITO vs. Rajeshwar Nath Gupta in their

decision dated 4.5.2008 in ITA no. 4295/Del./2005, in the context of provisions of sec. 142A of the Act, held as follows:

"15. A perusal of the aforesaid provisions shows that section 142A is attracted, inter alia, where the assessee is found to have made investment outside the books of account or where any such investment made by him is not fully disclosed in the books of account. The condition precedent for making the reference by invoking the provisions of section 142A thus is that there should be something on record to show that the assessee in the first place has made such investment outside the books or the investment so made by him is not fully disclosed in the books of account and once this condition is satisfied, the quantum of such investment made can be ascertained by the Assessing Officer by making a reference under section 142A in order to make the addition under section 69 or 69B, whichever is applicable. In the present case, the relevant property was purchased by the assessee during the year under consideration for Rs. 15 lakhs and the amount of the said consideration was paid out of its disclosed sources as accepted even by the Assessing Officer in the reassessment. A perusal of the assessment order, however, shows that there was no reference whatsoever made by the Assessing Officer to any material/evidence/ information on the basis of which it could be said that the said consideration shown by the assessee was understated and that anything above what was disclosed by the assessee had actually been paid as consideration. The condition precedent for making a reference to the DVO by invoking the provisions of section 142A thus was not satisfied in the present case and neither the said reference nor the addition made on the basis of report obtained from the DVO in response to the said reference, in our opinion, was sustainable in law as rightly held by the learned Commissioner of Income-tax (Appeals). In the case of Subhash Chand Chopra v. Asst. CIT [2005] 92 TTJ 1087, this Bench of the Tribunal has held that no material or evidence having been recovered during the course of search showing investment in construction, the Assessing Officer was not competent to make a reference to the DVO under section 142A and to make addition on that basis.

In the case of K.P. Varghese v. ITO [1981] 131 ITR 597 cited by learned counsel for the assessee, the hon'ble Supreme Court had an occasion to consider a similar aspect in the context of computation of capital gains and it was held by their Lordships that the burden to prove that the consideration for the transfer of a capital asset has been understated by the assessee or in other words the full value of consideration in respect of the transfer is shown at a lesser figure than that actually received by the assessee as alleged, is on the Revenue. Following the said decision of the hon'ble Supreme Court in the case of K.P. Varghese v. ITO [1981] 131 ITR 597, the hon'ble High Court of Delhi has held in the case of CIT v. Gulshan Kumar [2002] 257 ITR 703 that there being no material on record to show that the sale consideration was understated or that the assessee had received anything directly or indirectly over and above the declared value of the shares, the addition made on account of deemed capital gains was not sustainable."

6.1 Following the aforesaid decision, a similar view was taken in Seema Gupta(supra) & Mahesh Kumar(supra).Another co-ordinate Bench in their decision dated 28.1.2011 in Devinder Kumar in ITA no.1141/del./2011 held that a reference u/s 142A of the Act is invalid in the absence of any material found during the course of search. It was held by the Bench as under:

"29. In view of the preceding discussion, the ld. CIT(A) has clearly erred in holding that the AO was within his jurisdiction to invoke the provisions of section 142A of the Actiin this case. There is no denying the fact that the AO can seek the help of a specialist to determine the correct value. However, as discussed hereinbefore, the primary condition of section 69B needs to be met first, so as to enable the invocation of section 142A of theAct. To reiterate, the AO can make a reference to the Departmental Valuation Officer, 'for the purpose of making assessment or reassessment'only where the assessee has 'made investment which are not fully disclosed in the books of account'. Sans the fulfillment of this condition of section 69B, section 142A cannot be taken recourse to, particularly when after the phrase 'for the purpose of making an assessment or reassessment under this Act', it has been enacted that 'where an estimate of the value of any investment referred to in section 69B.....is required to be made'. Since section 69B envisages only value of investment not fully recorded in thebooks of account to be deemed to be the assessee's income, where there is no finding that the investment made by the assessee does not stand fully recorded in the books of account, obviously, the value of such investment would not require to be estimated, as such value cannot be deemed to be the income of the assessee and it is, therefore, that the provisions of section 142A cannot be invoked in such a case.

30. The ld. CIT(A) has further erred in observing to the effect that since section 142A only refers to 'for the purpose of making assessment or reassessment', the AO can requisition the Departmental Valuation Officer to estimate the value of the property and hence, before making such a reference, understatement of purchase consideration is not required to be established. There is no question of the understatement of purchase consideration requiring to be established before making the reference. Rather, the requirement is that the AO be in possession of some material showing that the investment was not fully disclosed in the books. As held in 'M/s. Rajeshwar Nath Gupta, HUF' (supra), it is only then that the question of ascertaining such investment by making a reference u/s 142 A, would crop up. Moreover, it cannot be gainsaid that 'K.P.Varghese'(supra), still holds the field and the onus of the Department to prove understatement of sale consideration, has not been discharged in this case."

6.2 It is well settled that the primary burden of proof to prove the understatement or concealment of income is on the revenue and it is only when such burden is discharged that it would be permissible to rely upon the valuation given by the DVO. [K.P. Varghese v. ITO,131 ITR 597 (SC) and CIT v. Smt. Shakuntala Devi, 316 ITR 46 (Delhi)]. Hon'ble jurisdictional High Court while adjudicating an identical issue in Mahesh Kumar(supra) held as under:

"10. Moreover, in the present case, no evidence much less incriminating evidence was found as a result of the search to suggest that the assessee had made any payment over and above the consideration mentioned in the registered sale deeds. In any event, the final fact-finding authority, namely, the Tribunal has arrived at a finding that the instances of the sale taken into account by the Valuation Officer were not comparable as they were situated far away from the location of the plots purchased by the respondent-assessee. Consequently, we find that no substantial question of law arises in these two appeals which, bereft of merit, are dismissed in limine."

6.3 As regards decisions relied upon by the ld DR, in Om Prakash Bagria,HUF(supra) , the issue was as to whether the Tribunal was justified in holding that the AOhad no jurisdiction to take into account and rely upon the valuation submitted by the Valuation Officer in respect of the house property belonging to the assessee.Hon'ble High Court held that the assessment having not become final and conclusive on or before September 30, 2004, particularly when the very issue with regard to valuation of the investment made on construction of Bagria Towers for the purpose of section 69 of the Act and for the purpose of assessment is still pending before the High Court,, the AO had the jurisdiction u/s 142A to make the reference to the Valuation Officer to determine the estimate of the value of the construction of Bagria Towers. In Mrs. Achamma Chacko(supra), Hon'ble High Court held that introduction of section 142A with retrospective effect may validate the reference by the AO for valuation, no matter whether the assessment was pending after remand by the CIT (Appeals) or not. Apparently, the issues in these two cases were quite different and thus, these decisions,in our opinion, are not relevant to the issues in the instant appeal before us. Even otherwise, the ld. DR did not demonstrate before us as to how these decisions are relevant in the instant case. In these circumstances, we are

of the opinion that the aforesaid decisions relied upon by the ld. DR are not of any assistance to the Revenue.

6.4 In the light of view taken in the aforesaid decisions referred to in para 6 to 6.2, especially when the ld. DR did not place before us any material controverting the aforesaid findings of the ld. CIT(A) so as to enable us to take a different view in the matter, we are of the opinion that, the reference made by the AO by invoking the provisions of section 142A is without justification and consequently, no addition can be made on the basis of valuation made by the DVO. Therefore, ground nos. 2 to 4 in the appeal are dismissed.

7. Ground no. 1 in the appeal being general in nature, does not require any separate adjudication while no additional ground having been raised before us in terms of residuary ground no. 5 in the appeal. accordingly, both these grounds are dismissed.

8. No other plea or argument was raised before us.

9. In the result, appeal is dismissed.

Order pronounced in open Court

Sd-

(U.B.S BEDI)
(Judicial Member)

Sd-

(A.N. PAHUJA)
(Accountant Member)

NS Dt. 29-6-2012

Copy of the Order forwarded to:-

1. Assessee
2. DCIT, Central Circle-20, New Delhi
3. CIT concerned.
4. CIT(A)-1 New Delhi
5. DR, ITAT, 'A' Bench, New Delhi
6. Guard File.

BY ORDER,
Deputy/Asstt.Registrar
ITAT, Delhi

सहायक पंजीकार
Assistant Registrar
आयकर अपीलीय आधकरण
Income Tax Appellate Tribunal
नई दिल्ली/ New Delhi