

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
&
SMT. BEENA PILLAI, JUDICIAL MEMBER**

**I.T.A .No. 3871/Del/2013
(ASSESSMENT YEAR-2009-10)**

ITO, Ward 1(1), New Delhi.	vs	Ashwani Kumar Malik, 4, Vardan Street No. 4/5, Thapar Nagar, Meerut. AAXPM8541R
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&

**Cross Objection No. 15/Del/2014
(In ITA No. 3871/Del/2013)
(ASSESSMENT YEAR-2009-10)**

Ashwani Kumar Malik, 4, Vardan Street No. 4/5, Thapar Nagar, Meerut. AAXPM8541R	vs	ITO, Ward 1(1), New Delhi.
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Appellant by	Sh. K.K. Jaiswal, DR
Respondent by	Sh. Sandeep Sapra, Adv. & Sh. O.P. Sapra, Adv.

Date of Hearing	11.09.2015
Date of Pronouncement	23.09.2015

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER:

The appeal filed by the Revenue and cross objection by the assessee are directed against the order passed by the ld. CIT(A)-Meerut dated 25.03.2013 for A.Y. 2009-10.

2. Grounds raised by the Revenue in ITA No. 3871/D/2013 are as follows:

1. *“Whether in the facts and circumstances of the case, the ld. Commissioner of Income Tax (Appeals) has erred in law and in facts in holding that reference to Departmental valuation cell cannot be made under clause (b) of sec. 55A of the IT Act, 1961 in the case where assessee has taken cost of asset on the basis of report of a registered valuer regardless the fact that the AO has given cogent reasons to make such reference pointing out certain deficiencies in such report.*
2. *Whether in the facts and circumstances of the case, the ld. CIT(A) has erred in law and in facts in holding that the reasons mentioned by the AO for making reference to valuation cell were not sufficient whereas, there is no such provision in the IT Act, 1961 under which the sufficiency of reasons can be examined.*
3. *Whether in the facts and circumstances of the case, the CIT(A) has erred in law and in facts in holding the report of registered valuer as a valid report and reliable one having unabated powers, ignoring the fact that Part-III-Declaration and annexure to Form O-1 were not enclosed with the valuation report prescribed in Rule 8D of Wealth Tax Rules r/w section 34AB of Wealth Tax Act 1957.*
4. *Whether in the facts and circumstances of the case, the ld. CIT(Appeals) has erred in law and in facts in holding the report of DVO unacceptable inspite of having made the correction by the DVO after taking into consideration the arguments of the assessee during remand proceedings.*
5. *That the appellant craves leave to add, modify and/or delete any grounds of appeal.*
6. *In the facts and circumstances of the case, the order of the ld. Commissioner of Income Tax (Appeals) may be set aside and that of the AO restored.”*

Grounds raised by the Assessee in Cross Objection No. 15/D/14 are as follows:

1. *“That on the facts of the case, the ld. CIT(A) is justified in holding that the reference to the valuation cell as made by the AO u/s 55A for estimating the fair market value of impugned property was untenable/unsustainable in law.*
2. *That the grounds no. 2, 3 & 4 as taken by the AO in the departmental appeal are misconceived and untenable under the facts and circumstances of the case.*
3. *That there is no error, in the decision of ld. CIT(A) which is based on the merits of the case and findings that in the valuation report of the departmental valuation officer there*

were several substantial deficiencies and hence was not reliable compared with that of the approved valuer's report in which there were no error or deficiencies of substance."

3. Brief facts of the case are that the respondent assessee is an individual and received income from salary and house property during the relevant assessment year. The return of income for A.Y. 2009-10 was filed by the respondent assessee on 08/03/2010 declaring a total income of Rs. 3,80,148/-. The case was picked up for scrutiny and notice u/s 143(2) was issued. During the assessment proceedings, the AO observed that respondent assessee has sold commercial premises on 31/07/2008 for Rs. 30,20,000/- and a residential portion on 25/03/09 for Rs. 29,80,000/- of a property bearing no. 180, Khair Nagar, Meerut to Shri Ved Prakash Gupta for an aggregate amount of Rs. 60 lacs, vide two separate sale deeds the respondent assessee declared a long term capital loss of Rs. 8,89,903/- on the sale of residential portion of the building and long term capital gain of Rs. 14,56,178/- in respect of sale of commercial portion of the building. The AO observed that the respondent assessee had adopted the fair market value as on 01/04/1981 on the basis of the report obtained from the Valuation Officer. As per the valuation reports the respondent assessee had taken the fair market value as on 01/04/1981, adopting land rate @ Rs. 1200 per sq. yd. and 1500 per sq. yd. for residential and commercial properties respectively. Besides the fair market value of the construction was taken at the rates of construction prevailing in the year 1981.

4. The assessee computed the capital gain as below:

Residential Building

Sale consideration	3432000
Less: Indexed cost of acquisition	
Value as on 01.04.1981 as per	
Valuation report = 742595	

742595 X 582/100	<u>4321903</u>	
Long Term Capital Gain		(-) 889903
<u>Commercial Building</u>		
Sale consideration	3020000	
Less: Indexed cost of acquisition		
Value as on 01.04.1981 as per		
Valuation report = 268698		
268698X582/100	<u>1563822</u>	
Long Term Capital Gain		<u>1456178</u>
Net Long Term Capital Gain		566275
Less: deduction u/s 54EC for capital gain		
bonds NHAI Rs. 5,00,000/-		
& REC Rs. 5,00,000/- purchases on 29.01.09		<u>1000000</u>
		<u>NIL</u>

5. Disagree with the valuation sought by the respondent assessee the Id.AO recorded that the fair market value should have been considered as per the rates prevailing in the year of construction i.e. 1960 & 1967 respectively. Thereafter, depreciation on the building should have been applied to arrive at the fair market value as on 01/04/1981. Disagreeing with the valuation the AO referred to the Departmental Valuation Cell u/s 55A, for determining the fair market value as on 01/04/1981. The Departmental Valuation Officer(DVO) ascertaining the values and the residential being Rs. 2,51,900/- and for commercial being Rs. 1,24,800/-. The valuation report obtained by the DVO was provided to the respondent assessee. The respondent assessee raised objection on the value so proposed. While dealing with the objections raised by the respondent assessee, the Id. AO assumed the power u/s 55A on the opinion that the value declared by the assessee is more than its fair market value. Accordingly, the AO calculated the capital gains as under:

<u>Residential Building</u>	
Sale consideration	3432000
Less: Indexed cost of acquisition	
Value as on 01.04.1981 as per	

<i>Valuation report = 251900</i>		
<i>251900 X 582/100</i>	<u>1466058</u>	
Long Term Capital Gain		1965942
<i>(against 742595 taken by assessee)</i>		<i>(against loss of Rs.889903)</i>
Commercial Building		
<i>Sale consideration</i>	3020000	
<i>Less: Indexed cost of acquisition</i>		
<i>Value as on 01.04.1981 as per</i>		
<i>Valuation report = 124800</i>		
<i>124800X582/100</i>	<u>726336</u>	
<i>(against 268698 taken by assessee)</i>		
Long Term Capital Gain		2293664
		<i>(against Rs. 1456178)</i>
<i>Less: Deduction u/s 54EC</i>		
		<u>1000000</u>
Net Long Term Capital Gain		<u>12,93,664</u>

6. Aggrieved by the order of the ld. AO the assessee went into appeal before the ld. CIT(A).

7. Before the appellate proceedings, it was submitted by the respondent assessee that a reference to the Valuation Cell had been made without according any opportunity of being heard to the assessee. It was argued that a reference to the Valuation Cell would be made under clause (a) of section 55A, in accordance with the law prevailing for the year under consideration. The reference could be made only where the AO was of the opinion that the value claimed by the respondent assessee was less than its fair market value. The respondent assessee submitted that in the facts of the present case the value claimed was more than its fair market value and for invoking the provisions of section 55A, it was mandatory for AO to demonstrate that such a reference was warranted on the facts of the case. It was submitted by the respondent assessee that the ld. AO did not have the circle rates available with him at the time of making reference to the valuation cell, and as such there was no basis for forming any opinion adverse to the valuation declared by the respondent assessee. The ld. CIT(A) referred the issue to the ld.AO and called for the remand report.

The remand report of the ld.AO dated 17/10/2012, reiterated the arguments made by the ld.AO in the assessment order. The ld. AO also raised a fresh issue that the valuation report furnished by the registered valuer were not valid as per law because the same was not certified to be given to the best of the knowledge and belief of the failure and that the valuer had no direct or indirect interest in the property value and that he had personally inspected the property on a specify date is an essential and integral part of the valuation report. The ld.AO on this basis concluded that the claim of the cost of the acquisition cannot be said to be according to the estimate of a registered value.

The ld. CIT(A) dealt with the submissions of the appellant as well as the objections raised by the ld. AO vide his remand report dated 17/10/2012 in the following manner:

2.5 “The issue under consideration is whether the AO, in the facts of the case, had the power to make a reference to the DVO. This being the case of computation of capital gains, reference, if any, has necessary to be made u/s 55A of the Act. A perusal of the said section reveals that a case has to fall within either clause (a) or clause (b) of the said section to enable the AO to make a reference. In clause (a), as it is stood in the relevant year, it has been stated that the AO can refer the valuation of capital asset to our valuation officer “in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by registered valuer, if the AO is of opinion that the value so claimed is less than its fair market value”. Clause (b) states that “in any other case”, the reference can be made by the AO subject to fulfillment of certain conditions. A plain reading of the aforesaid clauses reveals that a reference can be made in a case, where a report of a registered valuer is available, only under clause (a) and not under clause (b). In the decision in the case of Hiaben Jayantilal (supra), it has been held that clause (b) can only be invoked in a case where the valuation is not supported by a report of the registered valuer. Further, clause (a) can only be invoked, till the 01.07.2012 when the said provision was amended, if the AO is of the opinion that the value so claimed was less than its fair market value. As held in the case of

Bhola Nath Mazumdar (221 ITR 608) by the Gauhati High Court, the purpose of section 55A is not empower the AO to make a roving and fishing enquiries. Reference is also invited to the decision of the Delhi High Court in the case of Dev Kumar Jain (309 ITR 240) which held that in case there was nothing on record to show that an assessee had received a consideration for the sale of property in excess of what had been shown in the agreement to sell, the actual sale consideration recorded in the agreement to sell could not be substituted by the value of property arrived at by the DVO u/s 55A. The rationale of the above decisions is that once the statute recognizes the institution of approved/registered valuer, the report furnished by such valuer is to be treated as correct unless the AO is of the opinion that the value so claimed is less than the fair market value. It was on an analogous logic that the Hon'ble Supreme Court in the case of Sargam Cinema (328 ITR 513) held that the AO had no authority to refer a matter to the DVO without the books of accounts being rejected, albeit in the context of section 142A. It is noted that the stipulation that only when, in the opinion of the AO, the value so claimed was less than the fair market value, provision of section 55A could be invoked, was a lacuna in the statute which has been remedied by the amendment brought in by the Finance Act, 2012. As in the present case, the contention of the AO is that the value of the cost of acquisition determined the by the registered valuer was on the higher side of the actual fair market value, the condition laid down in clause (a) cannot be said to have been satisfied. An argument can be made that clause (a) has tow limbs which were the value of the asset is in accordance with an estimate made by registered valuer and secondly that the AO is of the opinion that such value is less than its fair market value. It can be argued that both the limbs need to be satisfied for a case to fall within clause (a). In the case under consideration, since the value claimed by the assessee was more than the value according to the AO, the second limb of clause (a) is not satisfied. Therefore, reference has been made under clause (b). Such argument can only be treated as fallacious. In the case of Ram Narain vs. State of UP (AIR 1957 SC 18), it was observed that the meaning of words and expressions used in an Act must take their colour from the context in which they appear. Clause (a) commences with the words "in a case where..." and clause (b) commences with the words "in any other case". Obviously, clause (b) can be applied in the only such cases where the report of the

registered valuer does not form the basis of the valuation adopted by the assessee. Therefore, the AO could not have made a reference for the year under consideration to the DVO for the valuation of the property. Even if the amended provision is considered, which lays down that such a reference could be made if the AO was of the opinion that the value declared by the assessee was "at variance with its fair market value", it is noted that before invoking the provision, formation of an opinion was a prerequisite and there ought to have been some cogent material on the basis of which it could be said that a reasonable person would arrive at the opinion. In the case under consideration, the reason given by the AO, that the property had been constructed in 1960 or 1967 and, therefore, the fair market value of the property should have been taken with reference to those years and not as on 01.04.1981, is clearly not tenable in view of clause (iii) of the Explanation to section 48. As regards the reason given that the value of property was inflated as the circle rate in 1981 in Meerut was Rs. 500 per square yard, no such observation was made in the reference made to the DVO. In the reference, it had been only mentioned that the circle rate adopted by the registered valuer was on the higher side. It is only in the assessment order that the AO has mentioned the specific rate of Rs. 500 per square yard which appears to be in the nature of *ex facie* justification after the receipt of the report of the valuation cell. Moreover, even this is a bland statement, which is not supported by any material which the AO has referred to in the assessment order. In view of the above, even if it is assumed that the AO had the power to invoke section 55A, such reference has not been made on the basis of a validly held opinion but is in the nature of fishing and roving enquiries. As in the case of invoking the provisions of section 142A where the rejection of books of accounts has to be on sound reasons, the provisions of section 55A cannot be invoked unless the opinion that the valuation report was deficient in any manner is based on valid grounds. The onus on the AO is particularly heavy where a valuation has to be made for the year 30 years prior to the date on which the valuation is being made. The AO is statutorily bound to demonstrate the validity of non-acceptance of the valuation report before invoking provisions of section 55A. This also answers the point raised by the AO that the statute could not have contemplated acceptance of the report of the registered valuer as the final word in valuation. It is also noted that during the appeal proceedings, a decision of the ITAT Mumbai

C Bench in the case of Chaturbhuj Vallabhdas in ITA No. 3439/Mum/2007 has been brought to my notice wherein it has been held that a valuation report of a DVO is a relevant and admissible evidence irrespective of the question of legality of a reference made by the AO. Thus, the issue of validity or illegality of a reference made by the AO under section 55A is purely academic in nature. In my opinion, the said decision is contrary to the ratio laid down by various case laws discussed above particularly the decision of the Hon'ble Supreme Court in the case of Sargam Cinema. In any case, even if such proposition is accepted, the report of the DVO is only evidence as is the report of the registered valuer. Therefore, the AO has to demonstrate why the report of the DVO is considered acceptable and not the report of the registered valuer. As regards the contention raised during the appeal proceedings by the AO that the valuation report could not be treated as valid for the absence of verification, it is not clear why this issue has not been raised in the assessment order. Moreover, there is no reason given why some deficiency in the report can be treated as fatal particularly when the contents of the report itself confirmed the substantive points critical to the acceptance of the report. It is also noted that the AO, during the assessment proceedings, had recorded the statement of the registered valuer who had confirmed that she had inspected the property and also given other relevant details. The AO has not taken any adverse view of the matter in the assessment order meaning thereby that the deficiencies, noted by the AO, stood rectified in the statements made on oath by the registered valuer. It is noted that even in an important document such as return of income, there is a provision affording opportunity to an assessee to rectify any deficiency. Why such opportunity can be denied in the case of a valuation report cannot be understood. As regards the doubts regarding the date of the valuation report, it is not understood why despite the considerable forensic skills which the AO seems to have exercised during the assessment proceedings, the results thereof had not been incorporated in the assessment order but has only been brought to light during the remand proceedings. It is noted that the differences in the various copies of the valuation report pointed out by the AO relate to the location of the signature and the date on the said document and the manner in which the date had been recorded. Therefore, such differences will not, in the absence of any other material, be sufficient to negate the existence of the valuation report.”

8. The ld. CIT(A) in view of the above findings held that the reference made by the ld. AO u/s 55A was not valid and, therefore, the addition made on the basis of the report cannot be sustained.

9. Aggrieved by the order of the ld. CIT(A) the Revenue is in appeal before us.

10. The ld. DR supports the order and remand report of the ld. Assessing Officer.

11. The ld. AR submits that reference to the valuation cell could not be made under clause (a) of section 55A, in purview of the law as it stood prevalent for the year under consideration. It was only when the AO was of the opinion that the value claimed by the respondent assessee was less than its fair market value the provisions u/s 55A could be applied. The respondent assessee submits that in the present case under consideration the value claimed was more than its fair market value. Therefore, the necessary condition for referring to the Valuation Cell was not satisfied.

12. We have perused the order passed by the authorities below the paper book produced before us and the relevant judgments relied upon by the parties. The issue that needs to be addressed is whether the AO was correct in making a reference to the DVO by invoking the provisions of section 55A. Section 55A as it stood for the relevant assessment year is excerpted herein below:

55A *“With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the AO may refer the valuation of capital asset to a Valuation Officer –*

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the AO is of opinion that the value so claimed is less than its fair market value;

(b) in any other case, if the AO is of opinion –

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset

as so claimed or by more than such amount as may be prescribed in this behalf; or
(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary to so do.....”

13. A perusal of the said relevant section reveals that a case has to fall within either of the clause (a) or clause (b) of the said section for enabling the AO to make a reference u/s 55A to the District Valuation Cell. In clause (a) to sec. 55A as it stood in the relevant year, the AO can refer the valuation of the capital asset in a case where the value of the asset as claimed by the respondent assessee is in accordance with the estimate made by the registered valuer and if the AO is of the opinion that the value so claimed is less than its fair market value. Clause (b) of section 55A states that any other case “the reference can be made by the AO subject to the fulfillment of certain conditions mentioned therein. A plain reading of the aforesaid clause reveals that a reference can be made in a case where report of a registered valuer is available only under clause (a) and not under clause (b). In the present case, as there is a report by the registered valuer, the issue needs to be analyzed under clause (a) of section 55A.

It is also observed that the ld. AO before referring to the DVO in terms of section 55A of the Act has not given an opinion that the value determined by the registered valuer as the fair market value of the property as on 01/04/1981 is less than its fair market value. Only having formed the above opinion, the ld. AO is entitled to call upon the DVO to submit a report with regard to its fair market value as on 01/04/1981. It is necessary that ld. AO gives the opinion consequent to an enquiry by him and not by the DVO that the valuation adopted by the respondent assessee does not amount to a fair market value.

14. In the case of CIT vs. Dulal Mohta (HUF) reported in (2014) 360 ITR 680 the Hon'ble Bombay High Court has dismissed the appeal filed by the Revenue and has held that;

“There was no dispute that the value adopted by the assessee of the property at Rs. 35.99 lacs was much more than the fair market value of Rs. 6.68 lacs even as determined by the DVO. In fact the AO referred the issue of valuation to the Departmental Valuation Officer only because in his view the valuation of the property as on 01/04/1981 as made by the assessee was higher than the fair market value. Therefore, the invocation of section 55A was not justified”.

15. In the case of CIT vs. Puja Prince reported in (2014) 360 ITR 697 the Hon'ble Bombay High Court has held as under:

“The amendments to section 55A of the Act in (2012) by which the words “is less than its fair market value” were replaced by the words “is at variance with its fair market value” was made effective only from July 1st 2012. Parliament has not given a retrospective effect to the amendment. Therefore, the law to be applied in the assessee's case was section 55(a) as existing during the period relevant for the assessment year 2006-07. At the relevant time it is clearly reference could be made to the DVO only if the value declared by the assessee was in the opinion of AO less than its fair market value.”

16. The contention of the Revenue that the amendment to section 55A(a) of the Act is clarificatory, cannot be appreciated to the facts of the present case. Further the contention of the Revenue that the reference to the DVO by the ld. AO is sustainable in view of the fair market value being higher as on 01/04/1981 does not hold good as the sub clause (a) to section 55A is very clear in respect of the fair market value being less.

17. We, therefore, on the basis of the above reasoning and findings do not find any infirmity with the order of the ld. CIT(A). In view of the decisions of the Hon'ble Bombay High Court in the case of Dulal Mohta

(supra) and Puja Prince (supra), we hold that the reference u/s 55A(a) to the DVO by the Id. AO cannot be sustained.

18. In view of the above, the grounds filed by the Revenue are dismissed.

19. In respect of the Cross Objection filed by the assessee being CO No. 15/D/2014, stands infructuous, as no relief has been sought for. The Cross Objection filed by the assessee merely supports the order of the Id. CIT(A)

20. The appeal filed by the Revenue is thereby dismissed and the Cross Objection filed by the assessee also stands dismissed.

The order is pronounced in the open court on 23.09.2015

Sd/-

(S.V. MEHROTRA)

ACCOUNTANT MEMBER

Dated: 23.09.2015

**Kavita, P.S.*

Sd/-

(BEENA PILLAI)

JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

		Date
1.	Draft dictated on	11.09.2015
2.	Draft placed before author	21.09.2015
3.	Draft proposed & placed before the second member	21.09.2015
4.	Draft discussed/approved by Second Member.	22.09.2015
5.	Approved Draft comes to the Sr.PS/PS	23.09.2015
6.	Kept for pronouncement on	23.09.2015
7.	File sent to the Bench Clerk	23.09.2015
8.	Date on which file goes to the AR	
9.	Date on which file goes to the Head Clerk.	
10.	Date of dispatch of Order.	