

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "I", MUMBAI

Before Shri Joginder Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.5198/Mum/2016  
(Assessment year: 2012-13)

ITO, 31(3)(4), Mumbai	vs	Smt. Surekha Vilas Soudagar 4D/2, Ashokraj CHS Ltd, S.V. Road, Goregaon (W), Mumbai-62 PAN : BJJPS5982F
<b>APPELLANT</b>		<b>RESPONDENT</b>

Appellant by	Shri Virender Singh
Respondent by	Shri Kamlesh N Doshi

Date of hearing	12-06-2018
Date of pronouncement	20-06-2018

**ORDER**

Per G Manjunatha, AM :

This appeal filed by the revenue is directed against the order of the CIT(A)-42, Mumbai dated 19-05-2016 and it pertains to AY 2012-13.

The revenue has raised the following grounds of appeal:-

“1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has not erred in directing the Assessing Officer to refer a property for valuation to the Valuation Officer and to assess the Capital Gains, thereafter, in the manner as prescribed under section 50C(2) of the Income Tax Act, 1961.

2. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has nor erred by not appreciating that the power of the CIT(A) is coterminous with that of the AO, and he could have referred the property for valuation by the Valuation Officer, as the direction to this effect to the AO, tantamount to setting aside of the assessment order.

3. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has nor erred in not considering the fact that during the assessment proceeding the assessee did not file any objection to the proposal of the AO to invoke the provisions of section 50C of the Act in the case of the assessee to value the property in question, thereby, leaving no option than to value the property as per section 50C of the Act.”

2. The brief facts of the case are that the assessee is an individual, filed her return of income for AY2012-13 on 26-07-2012 declaring total income at Rs.1,46,409. The assessment was completed u/s 143(3) on 04-03-2015 determining the total income at Rs. 57,96,409 by making addition towards long term capital gain derived from sale of immovable property by taking into account differential sale consideration by applying provisions of section 50C of Income-tax Act, 1961. During the course of assessment proceedings, the AO observed that the assessee has transferred an immovable property for a sale consideration of Rs.1,35,00,000, whereas the market value of the said property was determined at Rs.1,86,50,000 and accordingly, differential value has been considered to arrive at long term capital gain by invoking provisions of section 50C of the Act

3. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee submitted that the AO has invoked provisions of section 50C without referring valuation of the property to the Valuation Officer as required u/s 50C(2) of Income-

tax Act, 1961. The assessee further submitted that during the course of assessment proceedings, the AO never gave an opportunity to put forth her objections for invoking provisions of section 50C, therefore, the matter may be referred to the valuation officer to determine correct market value of the property. The assessee has given reasons for transferring the property for a consideration of Rs.1.35 crores. According to the assessee, the property did not have proper approach roads and the building was in a dilapidated condition. Therefore, she was forced to sell the property for a consideration which is less than the market value determined by the registering authorities.

4. The CIT(A), after considering relevant submissions of the assessee and also relying upon various judicial precedents, including the decision of Hon'ble Calcutta High Court in the case of Sunilkumar Agarwal vs CIT 225 Taxman 211 directed the AO to refer the valuation of property to the DVO and to assess capital gain thereafter in the manner as prescribed u/s 50C(2) of the Act. The relevant portion of the order of CIT(A) is extracted below:-

**Decision:**

The facts of the case, as summarized above, and the relevant orders and written submissions made are all duly considered. As all the ground of appeal relate to the addition made to the returned income on account of the sale consideration deemed u/s 50C of the Act all the grounds of appeal are decided together as under.

The assessee has argued that the plot of land had no access to the road and she had requested her neighbour to allow her access through a 8 feet height strip passing through the neighbour's plot. It was claimed that since

the adjoining area and plots had been purchased in due course by Shri Mukesh Bhandari and his concerns there were no other buyers for the assessee's property. It was also claimed that the building was in a dilapidated condition and the cost of repairs was mounting *j* for the assessee. It is also claimed that the title of the assessee was not perfect since the conveyance of the plot was not given to her by the original sellers and for this reason the developer buyer retained Rs. 5 lacs from the consideration agreed upon. The AR has claimed that the AO was apprised of these problems in the sale of the property.

In the submissions the assessee has mentioned that she is a senior citizen with no fixed income and she only draws income from other sources. The assessee has claimed that she has . complied with all the notices issued by the AO but the alleged show cause letter dated 19.02.2015 issued by the AO whereby the AO had asked to explain as to why the provisions of Section 50C of the Act not be invoked in her case was never received by her. Further the date of compliance of the alleged show cause notice was 04.03.2015 which is also the date of passing of the assessment order. The assessee has filed copies of her replies addressed to the AO dated 25.08.2013 (filed on 02.09.2013), 05.11.2014 (filed on 11.11.2014) & 27.01.2015. It was mentioned that her AR had attended on 23.01.2015 and on 30.01.2015 but there was no hint that Section 50C was to be invoked in her case. The assessee has claimed that there was no reason for her to avoid a show cause notice which had the potential of increasing her tax liability to a huge extent. The assessee has claimed that she was denied proper opportunity and has been deprived to natural justice as a result. The assessee also mentioned that the calculation of the LTCG is not also correctly computed by the AO.

The facts of the case arc considered. There are two issues involved namely whether the AO was under a legal obligation to refer the property for valuation to the DVO u/s 50C(2) of the Act even when there is no claim made by the assessee that the value assessed by the Stamp Valuation Authority is excessive and the second issue is whether the CIT(A) has the power to direct the AO to refer the matter to the DVO at the appellate stage.

**Issue No. 1: Analysis of case laws on power of CTT(A) to refer the matter to DVO:**

\ It has been held by the various decisions of the Supreme Court that the CIT(A) has the power - to correct the errors of the A.O. as his power is co-terminus. The case laws are discussed below.

1. The Supreme Court in the case of **CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 (SC)** was seized of the matter whether under the Income Tax Act it is only the A.O. who can decide the status of an assessee. The Supreme Court observed that deciding the status of an assessee is part of the process of assessment. The assessee can object to it in appeal because the assessee denies his liability to be assessed under the Act in the circumstances of his case. The expression "denial of liability" is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case the denial is a denial of liability to be assessed under the provisions of the Act. In appeal the Appellate Authority, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment i.e. he has 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.

2. In the case of **Jute Corpn. of India Ltd. v. CIT (1990) 187 ITR 688 (SC)** the

Supreme Court again analysed the powers of the CIT(A). During the hearing of the appeal, the assessee had raised an additional ground claiming deduction of Rs. 11,54,995 on the ground of liability of purchase tax based on the decision of the Supreme Court in *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363. The AAC permitted the assessee to raise the additional ground and allowed the deduction. The Tribunal held that the AAC had no jurisdiction to entertain an additional ground or to grant relief to the assessee on a ground which had not been raised before the ITO. The Tribunal set aside the order of the AAC placing reliance on the decision of the Supreme Court in *Addl. CIT v. Gurjargravures (P.) Ltd.*, [1978]. A Division Bench of the Calcutta High Court held that the Tribunal was right in rejecting the assessee's application. The Supreme Court observed that the question is whether the AAC while hearing an appeal under section 251(I)(a) has jurisdiction to allow the assessee to raise an additional ground in assailing the order of the assessment before it. The Act certainly does not contain any express provision debarring an assessee from raising an additional ground in appeal and there is no provision in the Act placing restriction on the power of the appellate authority in entertaining an additional ground in appeal. In the absence of any statutory provision, general principle relating to the amplitude of appellate authority's power being co-terminus with that of the initial authority should normally be applicable.

3. In the case of **Commissioner of Income-tax v. Nirbheram Deluram** [1997] 224 ITR 610 (SC) the Supreme Court again discussed the powers of CIT(A) u/s 251 of the Income-tax Act, 1961. The Court held that it had previously held in *Jute Corpn. of India Ltd. v. CIT* [1991] 187 ITR 688, that the declaration of law is clear that the power of the AAC is coterminous with that of the ITO and if that is so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the ITO. The scope of his power is coterminous with the ITO. He can do what the ITO can do and also direct him to do what he has failed to do. The Court further held that having regard to the aforesaid decision it must be held that the High Court was in error in holding that the appellate power conferred on the AAC under section 251 was confined to the matter which had been considered by the ITO and that the AAC exceeded his jurisdiction in making an addition of Rs. 2,30,000 on the basis of the other 10 items of hundies which had not been explained by the assessee. Therefore, even if it was not held that the sum of Rs. 2,30,000 was added by the AAC as new sources of income, not considered by the ITO from the point of view of assessability, the AAC had jurisdiction or power to add the sum of Rs. 2,30,000 in the facts and circumstances in which he had added the same. Accordingly, the appeal was to be allowed.

**In view of the above, it is required to be seen whether the omission by the A.O. to refer a matter to the Valuation Officer can also be corrected at the CIT(A) level. This has been explained in the following cases:-**

A. In the case of **C.W.T. v. Prasad Productions (P) Ltd** [2003] 259 ITR 88 (Mad.) the Court was seized of the question as under:

*"Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that referring the matter to the Valuation Officer under section 16A of the Wealth-tax Act, 1957, is a discretion given by the statute to the Assessing Officer only and hence the*

*Commissioner of Income-tax (Appeals) cannot direct the Assessing Officer to redetermine the value of the property after referring the matter to the Valuation Cell ?"*

The Court observed that the scope of the appellate power under the provisions of the Income- tax Act was considered in the decisions rendered by the Supreme Court in the cases of CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 ; Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688<sup>1</sup> and CIT v. Nirbheram Daluram [1997] 224 ITR 610. That the power of the appellate authority is as wide as that of the Assessing Officer was emphatically stated and reiterated in the decisions. The Court further held that what was said by the Apex Court in relation to the appellate power under the Income-tax Act is equally applicable to the scope of the appellate power under the Wealth-tax Act, as in that Act also, no restriction or limitation has been placed on the appellate power. Section 23, sub-section (5), of the Wealth-tax Act, inter alia, provides that the Commissioner (Appeals) "may pass such order as he thinks fit which may include an order enhancing the assessment or penalty". The proviso there under requires the Commissioner to give reasonable opportunity to the assessee to show cause against any proposed enhancement of the assessment or penalty. There is no other restriction placed upon the powers of the Commissioner (Appeals). The Commissioner (Appeals), when he entertains the appeal under the provisions of the Wealth-tax Act, is, therefore, as competent as the Wealth-tax Officer is in relation to all matters concerning the assessment which are within the scope of the Wealth-tax Officer while making the assessment.

B. In the case of ITO V M/s Narendra G Kanakia (HUF) ITA No. 190/Mum/2011 dated 19.4.2013 the ITAT has held that the action of the CIT(A) in directing the A.O. to refer the matter to DVO for the purposes of Section 50C is correct. In this case the CIT(A) had overruled the objections of the AO and his Addl. CIT to the effect that reference to valuation officer is not r mandatory but discretionary.

C. Similarly in the case of Pramod Kumar Joshi v. Deptt of Income Tax in ITA No. 5881/ Mum/2011 dated 12.10.2012 one of the question before the Bench was "2. On the facts and in the circumstances of the case and in law, the Ld CIT (A) as erred in directing the Assessing Officer to refer the matter of valuation of property to Valuation Cell appreciating the fact the assessee had not claimed before the Assessing Officer that the value adopted by Stamp Valuation Authority exceeds the Fair Market Value of the property as on the date of transfer."

The IT AT has noted that the CIT(A) had relied on the decision of IT AT in the case of M/s. Ajmal Frangrances & Fashion (P) Ltd. vs. ACIT (2009) 34 SOT 57 Mumbai and held that as per the provisions of section 50C(2) of the Act, AO should have referred the matter to the Valuation Cell and the Revenue's ground was rejected.

D. In the case of Income-tax Officer, Ward 2(1) v. Smt. Manju Rani Jain[2008] 24 SOT 24 (DELHI) the Delhi bench of the IT AT has held that the CIT(A) was correct in directing the AO to make a reference to the DVO u/s 50C(2).

Issue No. 2: The second issue is whether the reference to the DVO can be made when there is -no objection from the assessee on record of the AO:

There is a direct decision in this regard from the Kolkata High Court in the case of Shri Sunil Kumar Agarwal V CIT, Siliguri, (2014) 225 Taxman 211 (Cal) where the High Court has held l that in all such cases where the AO seeks to take the assessed for Stamp

Duty purposes as the full value of the sale consideration, the AO is under a bounden duty to give the assessee an option to get p -the property valued by the Valuation Officer as prescribed u/s 50C(2) of the Act. The High Court had directed as under:

"For the aforesaid reasons, we are of the opinion that the valuation by the departmental valuation officer, contemplated under Section 50C, is required to avoid miscarriage of justice. The legislature did not intend that the capital gain ! should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no .  
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reason why the machinery provided by the legislature should not be used and the i benefit thereof should be refused. Even in a case where no such prayer is made by i the learned advocate representing the asscssee, who may not have been properly instructed in law, the assessing officer, discharging a quasi judicial function has the bounden duty to act fairly and to give a fair treatment by giving him an option ; to..follow the course provided by law." (emphasis supplied)

As the decision in the case of Sunil Kumar Agarwal V CIT, Siliguri (2014) 225 Taxman 211 (Cal) is by far the only High Court judgment on this issue and there is no jurisdictional High Court decision to the contrary, it has to be respectfully considered. In view of the above decisions and discussion, it is held that the CIT(A) can direct the A.O. to refer a property for valuation and since in this case there is a discernible deprivation of najural iustice the AO is directed to refer the property to the Valuation Officer and to assess the Capital Gains thereafter in the manner as prescribed under section 50C(2) of the Act. All the grounds of appeal of the assessee are treated as allowed for statistical purposes.

In the sum, the appeal of the assessee is treated as allowed for statistical purposes."

5. The Ld.DR submitted that the Ld.CIT(A) was erred in directing the AO to refer the property valuation to the valuation officer without appreciating the fact that the CIT(A) is having co-terminus powers with that of the assessing officer, and he could have referred the property for valuation instead of directing the AO to refer it for valuation. The Ld.DR further submitted that when the Ld.CIT(A) was having co-terminus powers, he should have decided the issue in accordance with provisions of Act, by referring the matter to the valuation officer; however, he has set aside the issue to the file of the AO which tantamount to setting aside

the order of the assessing officer which is not permissible under the law. The Ld.DR further submitted that the assessee never opposed to the proposal of the AO to invoke the provisions of section 50C of the Act during the course of proceedings, therefore, the AO left with no option but to invoke the provisions of section 50C to determine the correct market value of the property. Hence, there is no error in the order of the AO in applying provisions of section 50C and accordingly, his order should be upheld.

6. On the other hand, the Ld.AR for the assessee strongly supported the order of CIT(A). The Ld. AR further submitted that there is no cause of grievance for the revenue to file this appeal, as the Ld.CIT(A) has directed the AO to recompute capital gain by ascertaining the correct market value of the property in accordance with provisions of section 50C(2). Therefore, there is no error in the directions given by the Ld.CIT(A) and his order should be upheld.

7. We have heard both the parties and perused the material available on record. The AO has recomputed long term capital gain derived from transfer of immovable property by applying the provisions of section 50C. According to the AO, the assessee never opposed to the proposal for invoking provisions of section 50C. It is the contention of the assessee that in a case where the AO seeks to adopt the value of property

assessed for stamp duty purpose as the full value of sale consideration, then the AO is under obligation to give the assessee an option to get the property valued by the valuation officer or he shall refer the matter to valuation cell to determine the correct value of the property. Since the AO has determined the value of the property without following due procedure as provided u/s 50C(2), the CIT(A) was right in directing the AO to determine the value of the property in accordance with provisions of section 50C(2). We find that the Hon'ble Calcutta High Court in the case of Sunil Kumar Agarwal vs CIT (supra) has held that in all such cases where the AO seeks to take the value of the property assessed for stamp duty purpose as the full value of consideration as a result of transfer, then the AO is under a bounden duty to give the assessee an option to get the property valued by the valuation officer as prescribed u/s 50C(2) of the Act. The Ld.CIT(A) by following the decision of Hon'ble Calcutta High Court has directed the AO to refer the valuation of the property to the valuation officer and to assess capital gain thereafter in the manner as prescribed u/s 50C(2) of the Act. We find that there is no cause of grievance for the revenue; hence, we are of the considered opinion that the Ld.CIT(A) was right in directing the AO to determine the value of property in accordance with provisions of section 50C(2) of the Act. Hence, we are inclined to uphold the findings of the CIT(A) and

dismiss the appeal filed by the revenue.

8. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 20<sup>th</sup> June, 2018.

Sd/-

sd/-

(Joginder Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 20<sup>th</sup> June, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Sr.PS, ITAT, Mumbai