

IN THE INCOME TAX APPELLATE TRIBUNAL	
COCHIN BENCH, COCHIN	
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM	
I.T.A. Nos. 374 to 379/Coch/2017	
Assessment Years : 2008-09 to 2012-13 & 2014-15	

The Assistant Commissioner of Income-tax, Central Circle-1, Kozhikode.	Vs.	M/s. Ardra Associates, Capital Towers, Thiruambady P.O., Patturaikkal, Thrissur-680 022. [PAN:AAIFA 2325E]
(Revenue-Appellant)		(Assessee-Respondent)

I.T.A. Nos. 495 to 499/Coch/2016 & ITA No. 241/Coch/2018)
Assessment Years : 2008-09 to 2012-13 & 2013-14

M/s. Ardra Associates, Capital Towers, Thiruambady P.O., Patturaikkal, Thrissur-680 022. [PAN:AAIFA 2325E] .	Vs.	The Assistant Commissioner of Income-tax, Central Circle-1, Kozhikode.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri Sherry Samuel Oommen, Adv.
Revenue by	Shri Alok Mitra, CIT(DR)

Date of hearing	13/03/2019
Date of pronouncement	30/04/2019

### **ORDER**

Per CHANDRA POOJARI, AM:

The appeal filed by the assessee in ITA No. 241/Coch/2018 is directed against the order passed u/s. 263 of the Act by the Pr. CIT (Central), Kochi

dated 15/03/2018 for the assessment year 2013-14. The appeals filed by the assessee in ITA Nos.495 to 499/Coch/2016 are directed against the different orders passed u/s. 263 of the Act by the Pr. CIT(Central), Kochi dated 04/03/2016. The appeals filed by the Revenue in ITA Nos. 374 to 375/Coch/2017 are directed against the different orders passed under section 143(3) r.w.s. 263 of the Act by the CIT(A)-IV, Kochi dated 12/05/2017.

2. First we shall take up the assessee's appeal in ITA No.241/Coch/2018. The facts of the case are that on examination of the assessment records, it was seen that while completing the assessment the Assessing Officer omitted to look into the following issue:

During the period 2006-07 to 2013-14, the assessee had constructed a building called 'Capital City' which was referred to the DVO for valuation. The valuation report was received on 03/04/2014. As per the DVO's report the cost of the building was Rs.9,85,39,000 as against the value adopted by the assessee of Rs.6,11,60,510/-. There was a difference of Rs.3.74 crores between the value declared by the assessee and the report of the DVO. The proportionate unaccounted expenditure for AY 2013-14 was Rs.33,63,288/-. This issue was not considered while completing the assessment.

Hence, the CIT held that the assessment order dated 10/03/2016 was erroneous in so far as it was prejudicial to the interests of the Revenue. Accordingly, he invoked the provisions of section 263 of the Act.

3. Against this the assessee is in appeal before us. The Ld. AR submitted that the assessee is a partnership firm engaged in the business of real estate and construction work. The CIT passed order u/s. 263 of the Act whereby the assessment was set aside and a fresh assessment was directed to be framed. There was a search in the business premises of the assessee on 02/09/2013 and the books of accounts, vouchers, bills and other documents were scrutinized for the assessment years 2006-07 to 2012-13. The assessee received a notice of summons from the Assessing Officer u/s. 131 of the Act on 05/10/2011 wherein the assessee was required to give evidence and produce books of accounts and other documents. In response, the assessee produced books of accounts and documents which contained details of transactions in respect of construction of Flats, Commercial buildings, including the assessee's project 'Capital City'. Thereafter, the assessee received an order u/s. 131 of the Act dated 07/10/2011 impounding the following documents produced for further verification and quantification of the income of the assessee:

- i) One page classe notebook containing misc. expenses of the project capital court – Sl. No.15.
- ii) One Zebra office file containing details of payments to M.H. Constructions for the project Capital Court – Sl. No. 38.
- iii) One Enson office file containing receipts and payment details – Aayilyam Constructions for the project Capital Court – Sl. No.43.

3.1 The assessee submitted further details with respect to assessee's project Capital Horizon, Capital lotus, Capital Heritage, Capital Village, Thrissur, Capital Village, Palakkad, Capital Galaxy, Capital Symphony, Capital Saffron and construction details of Capital City/Court, Thrissur. Further, on perusal of the income tax returns made by the assessee, the Assessing Officer issued assessment orders u/s. 143(3) r.w.s. 153A of the Act for the above mentioned assessment years dated 28/03/2014. It was submitted that the time limit for completion of assessments was 31/03/2014.

3.2 During the course of assessment proceedings, the assessee's project 'Capital City' was referred to the District Valuation Officer for valuation u/s. 142A of the Act on 15/01/2014. It was submitted that the assessee received the report from the DVO dated 28/03/2014 on 18/11/2015, much after the time limit prescribed for completion of assessment. The DVO valued the property at Rs.9,85,39,000/- as against Rs.6,11,60,510/- declared by the assessee and the valuation made by the DVO, the cost of which was spread over the period of construction from 2006-07 to 2012-13 relevant to the assessment years 2008-09 to 2014-15. The assessments for A.Y. 2008-09 to 2012-13 without considering the DVO report had rendered the assessments erroneous and prejudicial to the interests of the revenue, thereby invoking the provisions of section 263 by the CIT vide order dated 04/03/2016. The details of the

assessment years and amounts invested as declared by the assessee and as per the DVO report is as follows:

Financial Year	Cost of Construction declared by the Assessee/Appellant	Proportionate of total cost declared by the Appellant	Proportionate Cost as per DVO	Difference in cost between the DVO and the Appellant
2006-07	78,677	0	0	0
2007-08	1,18,72,387	19.55	19264375	7313311
2008-09	1,03,01,925	16.84	16593967	6292042
2009-10	70,21,086	11.48	11312277	4291191
2010-11	1,23,14,410	2013	19835901	7521761
2011-12	1,05,39,899	17.23	16978270	6438371
2012-13	55,05,222	9.00	8868510	3363288
2013-14	35,27,174	100	98539000	37378490

3.3 It was submitted that the CIT(A), Kochi vide order dated 07/05/2015 deleted the additions proposed by the Assessing Officer. It was submitted that the CIT(A) vide order dated 12/05/2017 for the assessment years 2006-07 to 2012-13 had deleted all the additions made by the AO based on the said DVO report. It was submitted that the Assessing Officer adopted the cost incurred in construction of 'Capital City' as the figure arrived in the assessee's books of account instead of the figure arrived at by the DVO. In reply, the assessee objected to the wrongful application of rates, standards by the DVO in determining the value of 'Capital City'. When asked to furnish the difference in the cost of construction as per DVO's figure and the cost disclosed in the books of accounts of the assessee, the assessee maintained that the value of the building disclosed in his books of accounts was correct. It was submitted that

the assessee received a letter dated 17/02/2016 from the Assessing Officer asking him to furnish the difference in cost of construction as per DVO's figure and the cost disclosed in books of accounts, vouchers and bills of the assessee to which the assessee replied vide letter dated 19/02/2016 demonstrating the rationality of the assessee's value of the building disclosed in his books of accounts against the non-viable valuation of the DVO. The Ld. AR suited that the action of the Assessing Officer in referring the matter to the DVO while not rejecting the books of the assessee is not in accordance with the established law. It is a settled position of law that for a reference to the District Valuation Officer, the condition precedent must be to reject the book of accounts of the assessee. For this purpose, he relied on the judgment of the Supreme Court in the case of CIT vs. Sargam Cinema 197 taxman 203 (SC) wherein it was held as under:

*"In the present case, we find that the Tribunal decided the matter rightly in favour of the Assessee inasmuch as the Tribunal came to conclusion that the assessing authority could not have referred the matter to the Departmental Valuation Officer(DVO) without the books of accounts being rejected. In the present case, a categorical finding is recorded by the Tribunal that the books were rejected. This aspect has not been considered by the High Court. In the circumstances, reliance place on the report of the DVO was misconceived."*

In CIT vs. Chohan Resorts (2013) 359 ITR 39/134 taxmann.com 644), the High Court of Punjab & Haryana held as under:

*"Learned counsel for the revenue was unable to justify that when the books of account in respect of cost of construction have been maintained by the assessee and the same were not rejected, how the matter could be referred*

*to the DVO for assessing the value. Wherever the books of account are maintained with respect to the cost of construction, the matter can be referred to the DVO after the books of account are rejected by the revenue on some legal or justified basis. In the absence of the same, the reference to the DVO cannot be upheld. In view of the above, we do not find any substance in the appeal. No question of law arises in this appeal for consideration of this Court. Dismissed."*

3.4 In the case of Dr. Raghuyendra Singh v. CIT [2014] 49 taxmann.com 544/12015] 229 Taxman 554 (Punj. & Har.) the provisions of Section 142A of the Act were taken into consideration, including the Circular No.5 of 2005, issued by the Central Board of Direct Taxes, to come to a similar conclusion that without rejecting the books of account, the matter should not be referred to the DVO.

Relevant observation reads as under:

*"Section 142A of the Act has been incorporated primarily for verification of the value of any investment in respect of cases enumerated therein. The Assessing Officer would not be justified in invoking the aforesaid provision in every case and in a routine manner. Where the assessee maintains regular books of account for the purpose of construction of the asset and produces the vouchers, it would not be appropriate for the Assessing Officer to refer the matter to the DVO without first rejecting the books of account by prima facie concluding that the valuation appears to be more than what has been depicted in the books of account. However, whenever the assessee has not maintained the regular books of account of cost of construction of the asset and claims its valuation on the basis of estimate of the report of the registered valuer, the Assessing Officer is empowered to make a reference to the DVO after forming a prima facie opinion that the value of the investment is not genuinely discussed and is required to be assessed for the purpose of Sections 69, 69A or 69B of the Act. In other words, Section 142A of the Act, thus, cannot be invoked when valuation of the cost of construction is bonafide and based on books of account which has not been rejected. The report of the DVO would be dealt with by the Assessing Officer under sub section (3) of Section 142A of the Act. There is logic and reasoning for adopting the aforesaid view. There appears to be no occasion for the revenue not to accept*

*the valuation of the cost of construction of an asset without rejecting the books of account maintained by the assessee. It would not only be unfair but against the public policy as well to assume that the assessee is dishonest and he must have submitted an incorrect account of expenses/investment."*

It was submitted that the above-mentioned dictum has also been upheld in the following judgments:

- Andhra Pradesh High Court in the case of Lakshmi Constructions [2014] 369 ITR 271.
- Gujarat High Court in the case of Goodluck, Automobiles Private Limited (2012) 254 CTR 1
- Punjab & Haryana High Court in the case of Nirpal Singh [2013] 359 ITR 398
- Allahabad High Court in the case of Lucknow Public Educational Society (2011) 339 ITR 588
- Jodhpur ITAT in the case of Prithvi Raj Vohra (2012) 150 TTJ 57
  
- Ahmedabad ITAT in the case of Shree Ridhi Corporation (TS-5605-ITAT-2012 (Ahmedabad)
  
- Madras High Court in the case of Family of SP. S.S. SP. Subramanian Chettiar (2015) 59 Taxmann.com 182

3.5 It was also submitted that the reference to the report of DYO cannot be made sans recording any finding that the books of accounts maintained by the assessee are not genuine or lacks credibility either by the CIT or by any authority till date. This has been affirmed in the following judgments:

- > *Madras High Court in the case of KK Seshaiyer (2001) 166 CTR 527*
  
- > *Rajasthan High Court in the case of CIT Vs Hotel Joshi (2000) 242 ITR 478;*

3.6 It was submitted that the Assessing Officer had grossly erred in relying on the decision laid down in the case of Messrs Indira Hospital Research and Diagnostic Centre Vs ACIT (2012) 208 Taxman 12 (Karnataka). The ratio laid down in the said case mandates that any reference to the DVO and subsequent additions to the total income based on the DVO report can only be made if the Assessing Officer frames and opinion that the books of accounts maintained by the assessee are unreliable. On the contrary, no doubt has been expressed by the learned Assessing Officer. Further, the books of accounts of the Appellant have also been accepted by the Department and confirmed by this Tribunal.

3.7 It was submitted that the AO had grossly erred in placing reliance on the judgment of the Kerala High Court in the case of B Indira Devi (2003) 133 Taxman 595, where a valuation report called for under section 142(2) of the Act. It was submitted that the said judgment has been reversed by the Supreme Court in the case of Amiya Bala Paul [2003] 130 Taxman 511. Additionally, in the present case, the valuation report was called for under section 142A of the Act, where the related procedure has been upheld by the Supreme Court in the case of CIT vs. Sargam Cinema cited supra.

3.8 It was further submitted that for the purpose of making a reference to the valuation officer it is required to make an estimation of the investment made by

the assessee. However, in the present matter there is no requirement for estimation of the investment. As the assessee was maintaining the books of account for the purpose of construction and all the transactions were recorded in the books of account there was absolutely no requirement for making a reference to the DVO for the purpose of estimating the cost of construction. It was submitted that as the books of accounts of the assessee had not been rejected, the same was accepted by the Assessing Officer and since the assessee's books of accounts are meticulously maintained, the very reference to the DVO was not justified.

3.9 It was submitted that the Pr. CIT (Central) erred in exercising his jurisdiction under Section 263 of the Income Tax Act, 1961. To assume revisionary jurisdiction under Section 263 of the Income Tax Act, the Principal CIT must be satisfied of the following:

- The order of the Assessing Officer sought to be revised is erroneous,  
AND
- It is prejudicial to the interests of the Revenue.

The Ld. AR relied on the judgment of the Supreme Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC) wherein the Court crystallized

the revisionary power of the Commissioner u/s. 263 of the Act by holding as under:

*“ A bare reading of section 263 of the Income-tax Act, 1961, makes it clear that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the Income-tax Officer is erroneous but is not prejudicial to the or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act. The provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind. The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of the Revenue, for example,, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue unless the view taken by the Income-tax Officer is unsustainable in law.”*

The Ld. AR also relied on the following decisions:

- i) CIT vs. Gabriel India Ltd. (1993) 114 CTR (Bom) 81.
- ii) Iron Trading Co vs. CIT [(2003) 263 ITR 437 (P & H)]

iii) CIT vs. Sunbeam Auto Ltd [(2011) 332 ITR 167 (Delhi)]

3.9.1 The Ld. AR submitted that it is a crystallized position of law that when two opinions are possible, revisionary jurisdiction u/s. 263 of the Act must not be exercised. He relied on the judgment of the Supreme Court of India in the case of CIT vs. Amitabh Bachchan reported in 2016 (3) KLT SN 4 (C. No.3) wherein it was held as under:

*"There can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under S. 263 of the Act merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from."*

3.9.2 It was submitted that the CIT erred in requiring the consideration of the DVO report, when nothing incriminating was unearthed during the search. It is a trite position of law that when nothing incriminating has been uncovered during the search, the assessing officer is not required to refer the matter to the Department Valuation officer, especially when the books of accounts of the Appellant are correctly maintained. The High Court of Delhi in CIT vs. Abhinav Kumar Mittal reported in [2013] 351 ITR 20 (Delhi) held as under:

*"However, we find that the Income Tax Appellate Tribunal as well as the Commissioner of Income Tax (Appeals) had concluded, on facts, that there was no material found during the search to justify the reference to the DVO for his valuation of the said properties. The Tribunal held that there must be*

*some material to show that the investment made by the assessee was outside the books o. This, according to the Tribunal, was a condition precedent for making a reference to the DVO. The Tribunal also held that, in any event, the DVO's report was based on incomparable sales and, therefore, could not be relied upon. The Tribunal also held that the burden was on the revenue to show that the real investment in the said properties was greater than the apparent investment, as disclosed by the respondent assessee. The Tribunal held on facts, that the said burden had not been discharged by the revenue. Consequently, the Tribunal held in favour of the assessee and against the revenue and found that the reference to the DVO itself was not in accordance with law.*

Furthermore, it was submitted that the Income Tax Appellate Tribunal, Mumbai in M/s. Ideal Appliances Co. Pvt. Ltd. vs. DCIT dated 31.12.2015 reiterated the above mentioned legal position. The ITAT held that:

*"From the above settled legal position of the issue that in the absence of any incriminating material found during search, additions made on the assessed income are unsustainable in law, we are of the considered opinion that the additios ade in the instant case are not sustainable and accordingly, we delete the same. Considering our decision o the legal issue in favour of the assessee, the other grounds demand no specific adjudication. Thus, on the legal ground the assessee succeeds and rest o the grounds are dismissed as academic."*

3.9.3 The Ld. AR submitted that the CIT erred in exercising his revisionary jurisdiction by holding the order u/s 143(3) read with section 153A Of the Act for the AY 2008-09 solely on the ground the Department Valuation Report was not considered by the Assessing officer. It was submitted that this exercise of revisionary power by the Principal Commissioner under Section 263 of the Act is erroneous for the reason that the Department Valuation Report was received by

the Assessing officer after the time limit prescribed for completion of assessment. Furthermore, it was submitted that the same could not be considered as a part of the "record" for the purpose of revising any order under Section 263 of the Act. According to the Ld. AR, the act of the CIT in directing the Assessing Officer to consider the DVO report, which came into existence after the time limit prescribed for completion of assessment, vitiates the well known principles relating to the strict interpretation of taxing statutes. It was submitted that the act of the Respondent in directing the Assessing Officer to consider the DVO report, which came into existence after the time limit prescribed for completion of assessment would result in extending the time limit prescribed for completion of assessment, thereby vitiating the binding dictum on the finality of an assessment proceeding. The Ld. AR relied on the judgment of the High Court of Calcutta in *Reliance Jute Industries Ltd vs. Income Tax Officer* [1984] 150 ITR 643 (Cal.) wherein it was held that the purpose for which alone a valuation report could be utilised, namely for completion of assessment in conformity with the valuation report was no longer existent, the assessment having been completed in the meantime. In such circumstances, to allow the assailed valuation proceedings to continue, would mitigate against well known canons of strict construction of statutes. A similar view was also upheld in *Prakash Chand Vs Deputy Commissioner of Income-tax* (2004) 269 1TR 260. It was submitted that the ITAT, Kolkata in *Machinery Agencies (India) v. Deputy Commissioner of*

Income Tax in [2012] 27 taxmann.com 168 (Kolkata-Trib) held that if the DVO report, which was received subsequent to the assessment order, was to be accepted, then the concept of finality of assessment will have to be buried deep and time limit for framing the assessments will have to be ignored all together. The scheme of the Income Tax Act, does not visualise unfettered discretions being conferred upon the Commissioners to tinker with the completed assessments. A similar view was upheld in the case of ACIT Vs Navalkishor Guruprasad Jaiswal and Others (ITA Nos. 274,275/Nag/2013 and 274/Nag/2014) The Ld. AR also relied on the decision of the ITAT, Hyderabad Bench in the case of M/s. Legend Estates Pvt. Ltd. vs. DCIT (ITA No. 1542/Hyd/2010 wherei it was held as follows:

*"It is a clear cut case that the assessee has produced the books of account but the Assessing Officer has not rejected or no defect was pointed out in the books of account regarding cost of construction of the project before reference to the DVO. We further find from the case records that even before verifying the books of account regularly maintained and without pointing out any defects in the books the cost of construction was referred to DVO. We are of the view, on the basis of evidences produced before us, that the assesses has regularly maintained books of account and various records along with supporting evidences of various raw materials like cement, steel, bricks, sand, wood, labour cost, sanitarywares etc. but the AO has not found out any defect in the books/records/bills etc. and has not rejected books of account. Without causing any defects in books regularly maintained and without rejecting the books u/s.145 of the Act there is no reason to add any amount on the presumption that the cost/investment in construction is low. Thus, without rejecting the books of account regularly maintained, the addition cannot be made only on the basis of the DVO's report."*

3.9.4 Reliance was also placed on the decision of Chennai Bench of the ITAT in C.R. Selvaraj vs. ITO (ITA No.100/Mds/20150. Furthermore, no incriminating evidence was unearthed from the assessee's premises which would suggest any anomaly in the books of accounts. The Ld. AR relied on the decision of the ITAT,, Patna in Binoy Kumar Singh vs. Assistant Commissioner of Income Tax reported in (2014) 164 TTJ (Pat) 786 wherein it was held that where the DVO's report was, however, received after the completion of assessment proceedings and finalization of the assessment order the addition so confirmed by the CIT(A) is bad in law and the AO is directed to delete the addition so made. Similar views were also upheld by the Special Bench in the case of Shanti Complex [1997]

3.9.5 The Ld. AR submitted that the valuation report was never a part of the record which was sought to be revised by the Principal Commissioner. If the Principal Commissioner's order under Section 263 were allowed to prevail, then the same extend the period of assessment, which cannot be permitted under the Act. Furthermore, even if the DVO report were in the records of the Assessing Officer, the Assessing Officer is duty bound to afford opportunity to the assessee to object to the findings of the Report and only then finalize the assessment after considering the objections of the assessee. The assessee submitted that the DVO report was never a part of the record during the finalization of the assessment proceedings and is a document which has been

received at a much later time (much after the time limit prescribed for completion of assessment).

3.9.6 It was submitted that by directing the Assessing Officer to consider the DVO report (which was received much after the finalization of the assessment, i.e., 03.04.2014), the Assessing Officer had reopened a finalized assessment and the same would be without considering the objections of the assessee to the findings of the DVO.

3.9.7 It was further submitted that as per Sub-clause (c) Section 263 of the Act, if the order passed by the Assessing Officer has been the subject matter of any appeal filed, the powers of the Principal Commissioner shall extend only to such matters as had not been considered and decided in such appeal. As mentioned above, the DVO's report and the books of accounts of the assessee had already been the subject matter of an appeal. It was submitted that the CIT(A) in the assessee's own case deleted all the additions made by the assessing officer based on the said DVO report. It was submitted that since the present subject matter has already once been considered in appeal, the Assessing Officer was barred from exercising powers u/s 263 of the Act at least with regard to the subject matter. According to the Ld. AR, the DVO's report is bad in law and presents a fanciful valuation as it adopts the CPWD rates for

valuation and not the state PWD rates while valuing the property of the assessee. He relied on the judgment of the Jurisdictional High Court in the case of CIT vs. Smt. Vasantha (ITA No. 109 of 2008 decided on 21.10.2008) wherein it clarified the position of law that when there is variation between CPWD rates and PWD rates prevailing in the State and since the building that is constructed is within the State, naturally, the Department is expected to take into consideration the PWD rates prevailing in the State. Furthermore, he relied on the decision of the Jurisdictional High Court in the case of C.S Daniel v. DCIT (ITA No.251 of 2012 decided on 11/11/2013) wherein it was held as follows:

*"We place reliance on an earlier decision of this Court in I.T.A. No.109 of 2008 dated 21.10.2008 wherein their Lordships at paragraph 5 onwards opined that the valuation of property has to be made keeping in view the Kerala PWD rates and not Central PWD rates. It is also pertinent to mention that in each State depending upon the scarcity of the material available as well as the cost of labour, the cost of construction may vary from State to State, therefore it is just and proper to place reliance on the local PWD rates rather than Central PWD rates in order to arrive at the valuation of the property. Ultimately the assessing officer will have the other materials supplied by the assessee to know what exactly was the material used and what was the prevailing rate of such material apart from ascertaining the rates from PWD department which rate varies from time to time. Ultimately the assessing officer would take into consideration what was the prevailing rates of PWD in the State of Kerala adopted for the particular assessment year in order to arrive at the cost of renovation and construction claimed by the assessee for the assessment year 2006-07."*

3.9.8 It was submitted that similar views akin to the above had been upheld in CIT vs K Jayakumar [2013] 35 Taxmann.com 179 and recently by the Supreme Court in Sunita Mansingha [2017] 80 Taxmann.com 258. In addition, the

assesses have consistently reiterated that the DVO's report suffers from the following grave factual infirmities:

- The building has foundation in column footing and not raft footing. In raft footing the entire coverage of the building will be thick RCC slab whereas in column footing it is only columns erected on footings underneath each column and not on the entire coverage of the building. Mistakenly the DVO has adopted the value for raft foundation and rate adopted is CPWD rate. For raft foundation the quality of material will be much more than what is required for the foundation in column footing. The average value adopted for the framed structure/ sq. mtr. by the DVO is more than Rs.10,750/- where as the amount actually spent by us is Rs.2,86,78,056/- which works at to Rs.5035/-/Sq. Mtr.
- In the case of Tile flooring, the DVO has adopted nearly Rs.100/- as the value per sq. ft. where as the cost of the vitrified tiles used is only Rs.40/-sq.ft plus Rs.8/- sq. ft as laying charges and Rs.14/- per sq. ft towards cement, sand etc. (total Rs.62/- per Sq.Ft). Even today the cost of 600mm x 600mm vitrified tiles of 1st quality is only Rs.41/-per Sq.ft.
- In the case of Internal Electrical Installations the DVO has taken the value as 12.5% of the total RCC structural cost arrived at by him, which is a highly inflated figure where as the actual amount spent was only 5.5% of structural cost. It was submitted that this was a commercial building and only open wiring for minimum points were provided and the tenants would have to rewire the room to suit their requirements.
- In the case of plumbing the DVO has taken the value as 4% of the total RCC structural cost arrived at by him, which has a cascading effect as the value of structural work is highly escalated. It was informed that the assessee had done up only 12 bathrooms for the entire area.
- In the case of Electrical HT Work, the cascading effect of the structural cost has created the same impact on the DVO's valuation.
- In the case of Over Head Tank & Fire Sump Tank, the value adopted by the DVO is highly inflated at Rs.19.76/-per Litre. The ready made tanks are available at less than Rs.3/- per litre, which justifies the actual cost incurred by the assessee.

- In the case of false ceiling work, the DVO has adopted Rs.111/- per sq.ft where as the actual rate prevailing in this locality even now is nearly Rs.35/- per Sq.ft.
- In the case of rolling shutter, the rates given by the assessee are actual which is prevalent in this area. Present rate even today is only Rs.1184/- per Sq.Mtr. whereas the DVO has taken the value Rs.2000/- per sq. ft.
- Even though the building has a plinth area of 61277 sq. ft., it is a commercial building and has only 2 toilets in alternate floors. The number of toilets are only 12 and quantity of sewage to be treated is very less. However, the DVO has arrived at an astronomical value of Rs.44 lakhs for the STP when as the actual cost paid by the assessee was only Rs.1,92,850/- Even in 2016 the value of an STP of 40 KL/day having more than 189 toilets and bathrooms and 78 kitchens is only Rs.6.56 lakhs. It is only prudent to assume that the sewage to be treated in a commercial complex with occupancy for only 8 hours a day is far less than a residential building which has occupancy all the 24 hours in a day.
- In the case of compound wall, the assessee has done only minor repairs and random plastering of the existing structure.
- The assessee had paid architectural fee only for the drawings and supervisions were conducted by supervisors of the assessee.

3.9.9 The Ld. AR submitted that it is a trite position of law, crystallized by various Courts/Tribunals, that when the Assessing Officer has no cogent material available to satisfy himself about the requirement of Section 69, no reference to the DVO can be made under Section 142A of the Act. The Ld. AR relied on the judgment of the High Court of Gujarat in Anand Banwarilal Adhukia vs. DCIT reported in [2016] 75 taxmann.com 301 wherein it was held as follows:

*"The other relevant provision which is required to be considered is section 69 of Act pertains to unexplained investment, whereas section 69A pertains*

*to unexplained money etc not fully disclosed in books of accounts and therefore, these statutory provisions are related to a case where assessee had made certain investment or expenditure or is found to be the owner of any bullion, related to a case where assessee had made certain investment or expenditure or is found to be the owner of any bullion, jewellery etc and the same are not properly recorded in the books of account. The court in a decision of ME and Mummy Hospital (supra), while referring to these statutory provisions read with section 142A of the Act is simply not permissible. It is only when there is some material before the Assessing Officer to hold that in case of an assessee falls under section 69, as the case may be, that he can, to estimate the value of such unexplained investment or expenditure in bullion, jewellery etc and call for report of the valuer and therefore, the Division Bench of this Court has observed that initial starting point for triggering a reference to the valuer, therefore, has to be invocation of section 69 of the Act and therefore, unless and until such contingencies are reflecting on the record, reference under section 142A cannot be resorted to."*

3.10 It was submitted that the above-mentioned dictum has been upheld in the following judgments:

- Chennai Special Bench in the case of ITO Vs JKK Textiles Processing Mills (1990) (35 ITD 396)
- Chennai ITAT in Dr Anburajan Vs Department of Income-tax (ITA No 2014 to 2017/Mds/2011)
- Rajasthan High Court in the case of CIT Vs Pratapsingh Amrosingh Rajendra [1992](64 Taxmann 585)
- Delhi Special Bench in the case of Sri Har Sarup Cold Storage Vs ITO (1988) 27 ITD 1
- Me & Mummy Hospital v. Asst. CIT (2014) 224 Taxman 65 (Mag.)/45 Taxmann.com 248
- Omnia Appliances Private Limited (ITA No.3775/Del/2015).

3.11 It was submitted that the Assessing Officer erred in relying on Bharathi Cement Corporation (P) Ltd vs. CIT reported in (2012) 253 CTR 98 (Andhra Pradesh) in concluding that rejection of books of accounts of the assessee is not a precondition for enquiry u/s 142A failing to appreciate that the ratio in the said case was distinguished by High Court of Gujarat in Anand Bhanwarilal Adhukia vs. DCIT reported in [2016] 75 taxmann.com 301 wherein the Court held as follows::

*"As against that, the learned counsel for the assessee has heavily relied upon the decision in case of Bharathi Cement (P) Ltd. We have gone through the said decision and found that the case of Bharathi Cement (P) Ltd. was altogether on a different set of circumstances from the present case. In that case, the Assessing Officer was of the view that despite several reminders, the assessee had not produced any material and just dragged on the time so as to see that final assessment cannot be undertaken and therefore, in the background of that particular case, the issue was dealt with of section 142A of the Act."*

3.12 It was submitted that the Assessing Officer erred in contending that the DVO has expertise in the valuation of buildings failing to appreciate that the report of the DVO being a mere estimate, cannot take precedence over the actual facts and valuation is an estimate and therefore, cannot be given precedence over real facts unless the real figures are defective. According to the Id. AR, this position was reiterated by various courts including the Supreme Court in the case of Daulatram Rawatmull (1964) 53 ITR 574 (SC). Reliance was also placed on Dr. S.V. Krishna Reddy vs. Dy. CIT (514-516/HYD/2009} and M/s. Legend Estates Pvt. Ltd. vs. Dy. CIT [I.T.A. No. 1542/Hyd/2010] in

this regard. Thus, it was prayed that the order of the CIT dated 15/03/2018 may be quashed and set aside for all the assessment years.

4. On the other hand, the Ld. DR relied on the orders of the CIT passed u/s. 263 of the Act and submitted that the Assessing Officer received the DVO report before passing the assessment order. However, the Assessing Officer failed to consider the same. Hence, the CIT invoked the provisions of sec. 263 of the I.T. Act and directed the Assessing Officer to consider the DVO report. The Ld. DR submitted that there is no error committed by the CIT in this action of invoking provisions of sec. 263 of the Act.

5. We have heard the rival submissions and perused the record. The primary issue raised by the Revenue in this case is with regard to the conclusion of the CIT that rejection of books of account is not a pre-requisite for referring the valuation of asset u/s 142A of the I.T. Act. In this connection, the contention of the assessee and the ground on which the CIT had passed the order is that the reference to Valuation Officer itself is not in accordance with the law. The reason put forward by the AO for reference to DVO for the valuation of the construction of property is that the value declared by the assessee is less. At this point of time the A.O. has not given an opportunity to the assessee to explain the reason for the difference. Further as per section 69B of the I.T. Act

when the value of investment is not recorded in the books of account or the value expended on making such investment exceeds the value recorded in the books of account in this behalf maintained by the assessee, then only the question of referring to Valuation Officer for arriving at correct value is to be followed. As rightly pointed out by the Ld. AR, the assessee had got the books of accounts audited as per the requirement of statute and also duly filed the tax audit report. The AO had not identified any mistake / omission in any of these records and the only reason put forward for reference is the difference between the value as per the report of the approved valuer, who valued as per the requirements of lending institutions and as recorded in the books of account.

5.1 Prior to 2014, in the absence of specific provision for reference to Departmental Valuation Officer (DVO), for estimating the cost of construction of a property/investment, the Assessing Officers (AO) were using the power of summons u/s 131, survey u/s 133 and power of enquiry u/s 142(1). The use of these powers by AO's for reference to DVO, were being questioned and the various judicial forums and High Courts had taken conflicting views as to the legitimacy of use of such powers. This had been put on rest based on the judgment of Supreme Court in the case of *Amiya Bala Paul v CIT* 2003 (262 ITR 407), wherein the Apex Court has categorically concluded that there no

power to Assessing Officer for making reference to DVO for valuation of investments for assessment purpose

5.2 Finance (No.2) Act, 2004 has inserted Section 142A as a new section, with retrospective effect from 19th November 1972 to neutralise the decision of the Supreme Court in *Amiya Bala Paul v CIT* (supra). As per section 142A, as introduced by Finance (No.2) Act, 2004 the Assessing Officer can refer to Valuation Officer to make an estimate of value of any investment referred to in Section 69 or Section 69B. Therefore, section 142A has given power to AO to refer to the DVO for the purpose of estimating value of any investment for making assessment subject to certain conditions.

5.3 Even after insertion of section 142A of the I.T. Act, there are number of judicial pronouncements holding that the reference to DVO under section 142A of the I.T. Act is possible only upon finding that the books of accounts maintained by the assessee is not correct and the value estimated by the Assessing Officer varies substantially from what is recorded in the books of accounts. The various judicial pronouncements confirms that the process of estimation cannot be done if the investment is properly recorded in the books of accounts and the Assessing Officer is satisfied with the correctness and completeness of such books of accounts. If the AO is not satisfied with the correctness and completeness of the books of accounts, he should record his

findings and reasoning and reject the books of accounts to proceed for estimation of the value of investments by referring to DVO. The High Court of Gujarat in the case of Goodluck Automobile (P) Ltd. v. ACIT (359 ITR 306)(Guj), while analyzing section 142A stated as follows:-

*"From the language employed in the heading of the section as well as the opening part of the said section it can be seen that the expression used by the Legislature is "estimate". Thus a resort can be made to the said provision by the Assessing Officer for the purpose of estimating the value of any investment in the circumstances referred to therein. It is common knowledge that the question of estimate arises only when the books of account of the assessee are not reliable. In other words, if the Assessing Officer is of the view that the computation of taxable income cannot be based on the books of accounts of the assessee he can reject the books of accounts and proceed to estimate the taxable income of the assessee. The question of making an estimate of the value of any investment referred to in section 69 of the Act would arise only when the Assessing Officer finds that the assessee has made investments which are not recorded in the books of accounts maintained by him. On a conjoint reading of the provisions of section 69 and section 142A of the Act, it appears that for the purpose of resorting to the provisions of the Act 142A of the Act, the Assessing Officer would first be required to record a satisfaction that the assessee had made investments which are not recorded in the books of accounts. As a necessary corollary, he would then reject the books of account as not reflecting the correct position and then proceed to make assessment on the basis of estimation for which purpose he can resort to the provisions of section 142A of the Act and make a reference to the Valuation Officer for estimating the value of such investments. Thus on a plain reading of section 142A of the Act, it is apparent that the question of estimating the value of any investment would arise only when the books of accounts are not reliable. Accordingly the Assessing Officer would first be required to reject the books of accounts before making a reference to the valuation officer. The rejection of books of accounts should precede the reference to the Valuation Officer".*

5.4 Section 142A of the I.T. Act was substituted vide Finance (No.2) Act, 2014 w.e.f 1.10.2014. As per the said substitution the reference to section 69, 69B etc .... had been removed and it has made as a general provision stating that Assessing Officer can refer to DVO to estimate the value of any asset, property or investment for the purpose of assessment. The sub section (2) of 142A of the I.T. Act states that the Assessing Officer may make a reference to DVO whether or not he is satisfied about correctness or completeness of the accounts of the assessee. The ITAT Delhi Bench in the case of Westland Buildtech (P) Ltd. v. ITO Ward-18 (3), New Delhi (2016) 76 Taxman.com 142 (Delhi - Trib.) had occasion to consider the amendment to section 142A of the I.T. Act by the Finance Act, 2014. The finding of the Delhi Bench of the Tribunal reads as follows:

*"It is relevant to note that sub-section (2) of section 142A as inserted by the Finance (NO.2) Act 2014, with effect from 1.10.2014 provide that the Assessing Officer may make a reference to the valuation officer under section (1) whether or not he is satisfied about the correctness or completeness of the accounts of the assessee. There was no analogous provision prior to this insertion. This shows that the position of the law laid down by the Supreme Court in Sargam Cinema v. CIT (2010) 328 ITR 513 for not making any addition on the basis of the Departmental Valuation Officers report without first rejecting the books of accounts, is valid up to the period prior to the insertion of sub-section (2).*

*As the assessment year under consideration is 2006-2007, being the year anterior to the amendment, the same will be governed by the judgement in Sargam Cinema's case (supra) and not the later amendment nullifying the pro tanto effect of this judgment".*

5.5. This finding of the Tribunal make the law very clear and unambiguous to the effect that the rejection of books of account, as decided by the Apex Court in the case of Sargam Cinema reported in 328 ITR 513 is valid for all assessment years prior to 01.10.2014, till the section is amended to neutralize the decision of the Apex Court.

5.6 The High Court of Gujarat in the case of Principal Commissioner of Income Tax v. Sanjay Hiralal Thakkar (Tax Appeal Nos.832 and 837 of 2016 - judgment dated 21.12.2016) had held that the reference to DVO without rejecting the books of account by the Assessing Officer would make the assessment void. The division bench quashed the assessment proceedings which are based on the report of DVO and clarified that AO cannot make a reference to DVO under the provisions of the Act without rejecting the books of accounts. The division bench noted that the Tribunal relied upon the decision of the Supreme Court in the case of Sargam Cinema v. CIT and held that before making a reference to DVO u/s 142A of the I.T. Act, if the Assessing Officer has not rejected the books of account the reference u/s 142A of the I.T. Act itself was bad in law and therefore DVO's report cannot be the basis of addition. The High Court, after taking notice of substitution of section 142A of the I.T. Act with effect from 1.10.2014, held that *"it is true that subsequently there is an amendment to section 142A of the Act, however considering the provisions of law prevailing at the relevant time under consideration, before making reference to DVO the Assessing Officer was*

*required to reject the books of accounts."*

5.7 The Agra Bench of the Tribunal in the case of Sanjeev Parashar Aligra v. ITO [ITA No.230/Agra/2016 – order dated 07.12.2017), after referring to the judgment of the Gujarat High Court in the case of Goodluck Automobiles (P) Ltd. v. ACIT (supra) and the judgment of the Supreme Court in the case of Sargam Cinema (supra), held that the reference made by the Assessing Officer under section 142A of the I.T. Act without rejection of books of account is invalid. It is further held by the Tribunal that *"there is no merit in the Department's content that extent of section 142A is applicable retrospectively. The section has specifically being made applicable by legislature itself w.e.f. 01.10.2014 and so it cannot be said to operate retrospectively"*.

5.8. The judgment of the Apex Court in the case of *CIT v. Sunita Mansingha [(2017) 393 ITR 121 (SC)]* will not apply to the facts of the present case. The Apex Court in the case of *Sunita Mansingha (supra)* was interpreting proviso to section 142A(3) of the I.T. Act (which was in existence from the date of insertion of section 142A of the I.T. Act till section 142A of the I.T. Act was substituted w.e.f. 01.10.2014). The newly substituted section 142A(3) of the I.T. Act w.e.f. 01.10.2014 does not have a proviso. Therefore, the principle laid down by the judgment of the Supreme Court does not have application to the newly inserted

section 142A of the I.T. Act. It is admitted that section 142A of the I.T. Act is a procedural section and applies to the pending proceedings. In other words, the law on the date of referring the case to the Valuation Officer u/s 142A of the I.T. Act has to be applied. In this case, the Assessing Officer referred for valuation u/s 142A of the I.T. Act on 06.12.2004. The law that is applicable as on 06.12.2004 is a provision prior to its insertion of section 142A with effect from 01.10.2014. Therefore, going by the judgment of the Apex Court in the case of *Sargam Cinema (supra)*, which was in force at the relevant time states that it is mandatory that the books of account need to be rejected prior to referring the case for valuation u/s 142A of the I.T. Act. Further, we rely on the decision of the ITAT, Delhi Bench in the case of Jithendra Singh Chaddha in ITA No.2732/Del/2018 dated 31/12/2018 wherein it was held that reference of matter to the DVO by the Assessing Officer for valuation of property is not mandatory. In our opinion, the provisions of section 142A of the Act provides that the Assessing Officer may refer the matter to the DVO for the purpose of estimation of the value of the asset, property or investment and get a copy of the report from the DVO. The word 'may' makes it discretionary to refer the matter to the DVO. It cannot be said by any stretch of imagination that it is mandatory. Therefore, we are of the view that CIT is not justified in exercising jurisdiction u/s. 263 of the Act. Accordingly, we quash the order passed by CIT u/s. 263 of the Act. Since we have quashed the order of CIT passed u/s. 263 of the Act, we refrain from going into other grounds of appeal of the assessee. The appeal of the assessee in ITA No. 241/Coch/2018 is allowed.

#### ITA Nos. 495 to 499 (Assessee's appeals)

6. There was a delay of 201 days in filing these appeals before the Tribunal. The Ld. AR has filed a condonation petition accompanied by an affidavit stating that originally the assessee's appeals were handled by the Chartered Accountant, Shri S. Sivaramakrishnan aged 70, S/o. S. Subramania Iyer,

residing at 'Lakshmi', XXXV/1256, Pazhayanadakkavu, Thrissur-680 001. Partner, M/s. Vasu & Sivaram, Chartered Accountants, 10<sup>th</sup> Floor, Capital City, Korapath Lane, Thrissur-680 020. Later, the assessee changed the chartered accountant by a new person. Hence, there was a delay in filing the appeals before the Tribunal. To this effect, the Chartered Accountant, Shri S. Sivaramakrishnan has filed an affidavit stating the above change which reads as follows:

"1. I. V. Parameswaran, S/o. R. Vasu Iyer, aged 69 years, residing at "Sivasakthi", Thottakkat Lane, Punkunnam P O, Thrissur - 680002.\_ being the Partner of the Applicant firm, M/s Ardra Associates, in the above case state that I know the facts of the case.

2. It is humbly submitted that this Condonation for delay application is before this Hon'ble Income Tax Appellate Tribunal in Appeal preferred against the impugned Order No. C.No. 23(84)/Tech/CIT(C) 15-16/817 dated 04.03.2016 for the Assessment Year 2008-09 passed by the Principal Commissioner of Income Tax (Central), Cochin received by the Applicant on 07.03.2016 and with an Appeal for the restoration and recall of the above-mentioned appeal.

3. It is humbly submitted that this prayer with a request for condonation of delay for an extension of time to file this petition before this Hon'ble Income Tax Appellate Tribunal at Cochin. The Applicant submits that there is a delay of approximately 201 days in preferring the above numbered Appeal.

4. The Applicant/ Petitioner submits that the cause for the delay in preferring an Appeal against the impugned order can be explained as follows. The Applicant/Petitioner submits that the Petitioner was under the bonafide belief that all matters pertaining to the Assessment Year attained finality after the Commissioner (Appeals), Kochi vide Order dated 07.05.2015 allowed the appeal preferred by the Applicant/Petitioner with reference to certain additions made by the Respondent in assessment orders issued under Section 143(3) read with Section 153A of the Act. Furthermore, the Managing Partner of the Petitioner firm had to travel

abroad owing to certain personal exigencies wherein his personal presence was required. Furthermore, as the impugned order required re-visiting voluminous valuation reports (Departmental Valuation Report), and files connected with the projects which includes numerous vouchers, bills etc executed by the Applicant/Petitioner firm and hence perusal of the reports and files resulted in the delay of filing the appeal. Furthermore, the Petitioner firm/applicant sought legal advice with reference to challenging the impugned order, and simultaneously the Petitioner firm/ Applicant also had to consult its auditors/ Chartered Accountant who had appeared before the Respondent Assessing Officer. This resulted in detailed discussions between the Applicant firm/ Petitioner with its legal advisors who had to briefed on the factual and legal matrix of issues involved.

5. The Applicant/ Petitioner firm further submits that there have been no willful delays or laches on its part for preferring an Appeal. The Applicant is of the bonafide belief that the impugned order issued by the Respondent is liable to be set aside for the grounds stated in the accompanying Memorandum of Appeal.

6. It is humbly prayed that based upon the totality of the circumstances mentioned above this Hon'ble Income Tax Appellate Tribunal, Cochin may be pleased to consider the prayer of the applicant in granting the condonation for delay Of 201 days in appearing before this Hon'ble Tribunal for justice and equity. It is a trite position of law, crystallized by the Hon'ble Supreme Court of India in Collector, land acquisition anantnag and another verus Mst. Katiji and others, reported in 1987 (28) E.L.T. 185 S.C.) that refusal to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. Furthermore the Hon'ble Supreme Court of India in *Esha Bhattacharjee v. Managing Committee of Rash unathpur Academy & Ors.* Reported in (2013) 12 SCC 649 was pleased to reiterate the principles relating to condonation of delay by a court. The Hon'ble Court was pleased to sum the principles up as follows:

“The principles for dealing with application for condonation of delay are as follows:

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for

the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) it is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) There is distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

7. It is humbly submitted that this Hon'ble Income Tax Appellate Tribunal, Cochin on scrutinizing the facts and circumstances in the accompanying application, may please construe facts and circumstances as "sufficient cause" for condoning the delay. The facts and circumstances elucidated in the accompanying application involves the question of "substantial justice", where gross delay of 201 days only, deserves to be condoned in the overall interest of justice. On the other hand if condoning the delay being denied it would seriously undermine the cause of justice, resulting into gross miscarriage of justice."

6.1 We have heard the rival submissions and perused the affidavit. Originally the assessee's appeals were handled by the Chartered Accountant, Shri S.

Sivaramakrishnan aged 70. Later, the assessee changed the chartered accountant by a new person. Hence, there was a delay of 201 days in filing the appeals before the Tribunal. We find that the reason explained by the assessee is bona fide and there is sufficient cause for filing the appeals belatedly by 201 days. Accordingly, we condone the delay and admit the appeals for adjudication.

7. The facts of the case are that the while completing the assessment for AY 2008-09, reference was made to Dist. Valuation Officer, for ascertaining the cost of construction of one of the properties of the assessee, namely Capital City. The report was received after the completion of assessment. The valuation report has not been considered. The difference in valuation for AY 2008-09 is as under:

Cost disclosed as per assessment (Rs.)	Proportion of total cost declared by the assessee (%)	Proportionate cost as per DVO (Rs.)	Difference in cost between assessee and DVO (Rs.)
1,18,72,387	19.55	1,92,64,375	73,91,988

In view of the above, the CIT was of the opinion that the order u/s. 143(3) r.w.s. 153A passed by the Assessing Officer dated 28/03/2014 is prima facie erroneous in so far as it is prejudicial to the interest of the revenue. Before the CIT, the assessee submitted that there were various anomalies on the part of the DVO in making assumptions and the rate and assumptions made by the

Assessing Officer was on very high side. The CIT observed that the DVO's report was received after the completion of the assessment and non-consideration of valuation report rendered the assessment erroneous in so far as it is prejudicial to the interest of the Revenue. Hence, the CIT by exercising power u/s. 263 of the Act, remitted the issue to the Assessing Officer to conduct necessary inquiries/verifications and passing consequential orders, after giving the assessee opportunity of being heard.

7.1 For the assessment year 2009-10, the CIT observed that while completing the assessment, reference was made to District Valuation Officer for ascertaining the cost of construction of one of the properties of the assessee which was received after the completion of assessment. The CIT observed that there was difference in valuation as under:

Cost disclosed as per assessment (Rs.)	Proportion of total cost declared by the assessee (%)	Proportionate cost as per DVO (Rs.)	Difference in cost between assessee and DVO (Rs.)
1,03,01,925	16.84	1,65,93,967	62,92,042

non-consideration of valuation report rendered the assessment erroneous in so far as it is prejudicial to the interest of the Revenue. Hence, the CIT by exercising power u/s. 263 of the Act, remitted the issue to the Assessing Officer to conduct necessary inquiries/verifications and passing consequential orders, after giving the assessee opportunity of being heard.

7.2 For the assessment year 2010-11, the CIT observed that there was difference in valuation for ascertaining the cost of construction of one of the properties of the assessee as under:

Cost disclosed as per assessment (Rs.)	Proportion of total cost declared by the assessee (%)	Proportionate cost as per DVO (Rs.)	Difference in cost between assessee and DVO (Rs.)
70,21,086	11.48	1,13,12,277	42,91,191

The CIT observed that non-consideration of valuation report rendered the assessment erroneous in so far as it is prejudicial to the interest of the Revenue. Hence, the CIT by exercising power u/s. 263 of the Act, remitted the issue to the Assessing Officer to conduct necessary inquiries/verifications and passing consequential orders, after giving the assessee opportunity of being heard.

7.3 For the assessment year 2011-12, the CIT observed that there was difference in valuation for ascertaining the cost of construction of one of the properties of the assessee as under:

Cost disclosed as per assessment (Rs.)	Proportion of total cost declared by the assessee (%)	Proportionate cost as per DVO (Rs.)	Difference in cost between assessee and DVO (Rs.)
1,23,14,140	20.13	1,98,35,901	75,21,761

The CIT observed that non-consideration of valuation report rendered the assessment erroneous in so far as it is prejudicial to the interest of the

Revenue. Hence, the CIT by exercising power u/s. 263 of the Act, remitted the issue to the Assessing Officer to conduct necessary inquiries/verifications and passing consequential orders, after giving the assessee opportunity of being heard.

7.4 For the assessment year 2012-13, the CIT observed that there was difference in valuation for ascertaining the cost of construction of one of the properties of the assessee as under:

Cost disclosed as per assessment (Rs.)	Proportion of total cost declared by the assessee (%)	Proportionate cost as per DVO (Rs.)	Difference in cost between assessee and DVO (Rs.)
1,05,39,899	17.23	1,69,78,270	64,38,371

The CIT observed that non-consideration of valuation report rendered the assessment erroneous in so far as it is prejudicial to the interest of the Revenue. Hence, the CIT by exercising power u/s. 263 of the Act, remitted the issue to the Assessing Officer to conduct necessary inquiries/verifications and passing consequential orders, after giving the assessee opportunity of being heard.

8. Against this, the assessee is in appeal before us. The Ld. AR submitted that reference to the DVO is not mandatory. It is only discretionary power of the Assessing Officer. If the Assessing Officer refers the matter to the DVO, it

does not make the assessment erroneous and prejudicial to the interests of the Revenue.

9. The Ld. DR relied on the order of the CIT.

10. We have heard both the parties and perused the record. Section 142A provides that the Assessing Officer may refer the matter to the DVO for valuation of the property. The use of the word 'may' makes it discretionary and not mandatory. In this case, the Assessing Officer though referred the matter to the DVO for valuation of the property on 15/01/2014 for the assessment year 2008-09, the report was received after the completion of the assessment for the assessment year 2008-09. She passed the assessment order on 28/03/2014 after making due enquiry with the assessee. Consequent to this, the CIT invoked the provisions of section 263 for the AY 2013-14. In these assessment years, the DVO report was received subsequent to passing of the assessment order, i.e. on 28/03/2014. Hence, the CIT exercised power u/s. 263 of the Act for these assessment years and directed the Assessing Officer to consider the valuation report. The Assessing Officer is not expected to consider the valuation report submitted by the DVO after framing the assessment. Therefore, it cannot be said that the Assessing Officer has committed any error in not considering the valuation report submitted by the DVO after the

assessment, when he has completed assessments as per books of account of the assessee. Therefore, it can be said that the Assessing Officer has taken one possible view in this case. It cannot be said that the assessment order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. More so, as discussed earlier, once the Assessing Officer has accepted the books of account, there is no question of referring the valuation of the property to the DVO. In other words, to exercise power u/s. 142A, the Assessing Officer primarily shall reject the books of account, then only she can go for valuation by the DVO. As discussed in earlier appeal in ITA No.241/Coch/2018, we quash the order passed by the CIT u/s. 263 of the Act for these assessment years. In the present case, the Assessing Officer being satisfied about the value of the construction of the property declared by the assessee in its books of account, cannot refer the matter to the DVO. Therefore, it could be said that the

Assessing Officer has taken one possible view in this case. Thus, it cannot be said that the assessment order passed was erroneous and prejudicial to the interests of the Revenue. In view of the ratio laid down by the Supreme Court in the case of CIT vs. Greenworld Corporation (314 ITR 81), we find that the Assessing Officer has passed the assessment order after application of mind and considered the value of the property declared in the books of account of the assessee as correct, therefore, the CIT was not justified in interfering with the assessment order on the basis of the valuation report received after the assessment order was framed. Accordingly, we quash the order passed by the CIT under section 263 of the Act for all the assessment years. Hence, the appeals of the assessee are allowed.

ITA Nos. 374 to 379 (Revenue's Appeals)

11. In these cases, the Assessing Officer consequent to the order passed u/s. 263 of the I.T. Act, gave effect to that order by making additions towards valuation of construction not disclosed by the assessee in the books of account by comparing it with the DVO report. On appeal, the CIT(A) observed as under:

"9. I have gone through the assessment order and submission of the appellant. I have also perused other relevant material submitted during the appellate proceedings, available on record. A search was conducted at the premises of the appellant. The appellant is engaged in the business of Civil Construction. During the course of search, it was seen that the assessee was developing many residential as well as commercial schemes

and projects. Some of these schemes were referred to District Valuation Officer (DVO). One of such project was referred to the DVO. The DVO valued it much higher than the cost declared by the appellant. The appellant submitted his objections on the flaws in the Valuation Report prepared by the DVO to the AO during original assessment proceedings. But the AO went on to make addition on the basis of DVO's Valuation Report. The matter travelled to CIT(A) and the CIT(A) deleted the addition made by the AO with the following concluding remarks:

"..... if there is no doubt that there is a distortion in the valuation made by the DVO, which is because of incorrect appreciation of facts, and prima facie, the rejection of the contentions raised by the appellant and, the same have not been given consideration to, by the Assessing Officer, during the course of assessment proceedings. Thus, it is found that there has been no basis for the higher valuation given by the DVO to be adopted by the AO. Accordingly, the addition made by the Assessing Officer is not sustainable for the Asst. Yrs. 2007-08 to 2010-11. Accordingly, the addition made by the assessing officer is deleted and appeal on this ground is allowed."

11.1 Similarly, another project named "Capital City" was also referred to the DVO for valuation. However, the Valuation Report was received by the AO after he passed the assessment order and, therefore, he could not consider the Valuation Report while framing the assessment order. The Pr. CIT found the order passed by the AO as erroneous and prejudicial to the interests of Revenue for non-consideration of Valuation Report, and set aside the assessment with a direction to consider the Valuation Report and redo the assessment after giving due opportunity of being heard to the Appellant. As a consequence, the AO gave an opportunity to the appellant and the appellant raised various objections on DVO's Valuation Report and pointed at various

mistakes in the said Valuation Report. However, the AO just brushed aside the objections raised by the appellant by simply stating that all the objections have already been dealt with by the DVO in the Valuation Report. The AO mechanically adopted the figures of Valuation Report and made additions in proportion of the work carried out in various years falling under the Block Period. Thus, from the reading of the assessment order, it is clear that the AO has not considered the objections raised by the appellant.

11.2 This is a case of search and, therefore, it cannot be said that books of accounts maintained by the assessee were not available to the Department or the DVO for verification. Admittedly, no defect or mistake was found in the books of accounts of the assessee, as the AO has not spoken-about any mistake or defect in the assessment order. The books of accounts and the book results have not been rejected by the AO. The AO has not found the books of the assessee as unreliable and, therefore, no addition on this account was made by the AO when the assessment order was framed originally. Normally, a case is referred to the DVO, only when the accounts maintained by the assessee is defective and the same cannot be relied upon for framing correct assessment order. Such circumstances are non-existent in the instant case. Valuation is an estimate only and, therefore, valuation cannot be given precedence over real figures, unless the real figures are defective or fudged .

On one hand, the AO has not pointed out any mistake in the books of accounts maintained by the assessee, and on the other, the Appellant has pointed out many mistakes and anomalies in the Valuation Report of the DVO. On the set of these facts, in my opinion, the AO was not justified in relying on the Valuation Report of the DVO and completely disregarding the books of accounts maintained by the assessee. This has been like giving precedence to fiction over facts. Additions made on such basis cannot be sustained. Addition made in all the years on the basis of the Valuation Report are hereby deleted. All the appeals are allowed."

12. Against this, the Revenue is in appeal before us.

13. The Ld. AR relied on the order of the CIT(A).

14. We have heard both the parties and perused the record. Since we have quashed the order passed by the CIT u/s. 263 of the Act itself for all these assessment years in para 10 of this order, there cannot be any consequential order to be passed by the Assessing Officer in these assessment years. Hence, the appeals of the Revenue are dismissed.

15. In the result, the appeals of the assessee are allowed and the appeals of the Revenue are dismissed.

Order pronounced in the open Court on this 30<sup>th</sup> April, 2019

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi

Dated: 30<sup>th</sup> April, 2019

GJ

Copy to:

1. M/s. Ardra Associates, Capital Towers, Thiruambady P.O., Patturaikkal, Thrissur-680 022.
- 2&3 The Deputy/Assistant Commissioner of Income-tax, Central Circle-1, Kozhikode.
4. The Commissioner of Income-tax(Appeals)-IV, Kochi.
5. The Pr. Commissioner of Income-tax, Central, Kochi.
6. D.R., I.T.A.T., Cochin Bench, Cochin.
7. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin