

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

| Sl. No. | ITA No.       | Name of Appellant  | Name of Respondent          | Asst. Year |
|---------|---------------|--|-----------------------------|------------|
| 1       | 2301/PUN/2014 | Sidharth Ratanlal Bafna,<br>96, Nayantara,<br>Subhash Chowk,<br>Jalgaon-425001.<br>PAN: ALGPB5972R       | DCIT, Circle-1,<br>Jalgaon. | 2009-10    |
| 2       | 2302/PUN/2014 | Rajkumar Ratanlal Bafna,<br>96, Nayantara,<br>Subhash Chowk,<br>Jalgaon-425001.<br>PAN: AINPB8779J       | DCIT, Circle-1,<br>Jalgaon. | 2009-10    |
| 3       | 2303/PUN/2014 | Sushilkumar Kasturchand Bafna,<br>96, Nayantara,<br>Subhash Chowk,<br>Jalgaon-425001.<br>PAN: AAMPB3941R | DCIT, Circle-1,<br>Jalgaon. | 2009-10    |

Assessee by : Shri Sunil Ganoo  
Revenue by : Shri N. Ashok Babu

सुनवाई की तारीख / Date of Hearing : 05.08.2019  
घोषणा की तारीख / Date of Pronouncement : 05.09.2019

**आदेश / ORDER**

**PER D. KARUNAKARA RAO, AM:**

There are three appeals filed by the three different assessees under consideration involving the common assessment year 2009-10. All the three appeals are directed against the order of CIT(A)-II, Nashik dated 27.11.2014 for the Assessment Year 2009-10.

2. Since the facts and issues involved in all the three appeals are common, therefore, the appeal in ITA No.2301/PUN/2014 involving Sidharth Ratanlal Bafna taken as the lead case for adjudication.

**ITA No.2301/PUN/2014 (By Sidharth Ratanlal Bafna)**

3. The grounds raised by the assessee are as under :-

“1] On the facts and in the prevailing circumstances of the case and in law, the learned CIT(A) has grossly erred in upholding the validity of proceedings initiated u/s.148 of the I T Act, which was initiated on the basis of DVO’s opinion/report.

(a) **DVO’s opinion/report cannot constitute** per se information for the purposes of re-opening the assessment u/s.147 of the I T Act to arrive such belief that income chargeable to tax has escaped assessment, as held by the Hon Supreme Court in the decision of ACIT vs Dharia Construction Co (2010) 328 ITR 515, as relied by the appellant.

(b) A.O failed to record the word as “Reasons to believe” in the reasons recorded which is mandatory, as contemplated in provision of section 147 of the I T Act.

(c) The condition requires for initiation of proceedings u/s.147/148 are not fulfilled, as per ratio laid down in the decisions relied by the appellant as mentioned on page 13 of the appellate order.

In view of the above, finding of the CIT(A) may be vacated and assessment based upon such illegal notice, may please be annulled.

2] On the facts and in the prevailing circumstances of the case and in law, the learned CIT(A) has grossly erred in confirming the **addition made u/s.50 C of the I T Act**, neglecting the fact that the valuation as per Stamp duty Authority of the said impugned plots were less than sale consideration as on the date of consent cum possession Agreement as on 01-08-2007 and hence, the provision of section 50 C read with section 2(47) of the I T Act is applicable. Therefore, addition confirmed by the CIT(A) may please be deleted.

3] On the facts and in the prevailing circumstances of the case and in law, the Learned CIT(A) has grossly erred in confirming the addition of deemed income on the **basis of DVO’s report followed in the case of Rahul Bafna**, even though, A.O has accepted the Business profit shown by the appellant of the said impugned land in the revised return of income filed on 14-02-2013, as can be seen from the computation of income. Therefore, addition confirmed by the CIT(A) may please be deleted

4] On the facts and in the prevailing circumstances of the case and in law, the Learned CIT(A) has grossly erred in confirming the addition Rs.34,50,130/-, merely relied upon CIT(A)-2, Nashik’s order in the case of Shri Rahul Bafna, wherein the addition was confirmed on the basis of DVO’s report, but failed to considered the CIT(A)-2 Nashik’s order in the case of Smt. Taradevi Bafna, wherein the addition was deleted by the same CIT(A) in the same circumstance. Therefore, addition confirmed by the CIT(A) may please be deleted.

5] *On the facts and in the prevailing circumstances of the case and in law, the Learned CIT(A) has grossly erred in confirming the addition, even though it was specifically brought to his notice, that the appellant has transferred the said impugned property to the firm where in he is a partner and hence, the provision of section 45(3) of the I T Act is only attracted to the facts of the case and not the section 50C of the Act. Therefore, addition confirmed by the CIT(A) may please be deleted.*

6] *The Appellate craves the permission to add, amend, modify, alter, revise, substitute, delete any or all grounds of the appeal, if deemed necessary at the time of hearing of the appeal.”*

4. Briefly stated the relevant facts include that the assessee reported earning of capital gains and interest income in the year under consideration. The assessee filed the original return of income declaring the total income of Rs.62,04,380/- on 29.09.2009. During the year under consideration, there is a transaction of sale of lands with M/s Bafna Builders and Land Developers. The value of these plots as per the stamp duty authorities is Rs.13,37,72,550/-. This property was referred to the DVO for valuation, who determined the value of this property at Rs.6,72,51,553/-. Considering the difference in all these properties, the proportionate share consideration comes to Rs.34,50,310/-. On finding the share value offered by the assessee is only Rs.34,50,310/- and for taxing the same, the Assessing Officer issued notice u/s 148 of the Act on 16.01.2013. The assessee filed the return in response to the said notice on 14.02.2013. The assessee did not offer any additional income while revising the said return. Eventually, as per the discussion given in para 6 and 7 of the re-assessment order, the Assessing Officer taxed the said sum of Rs.34,50,310/- (Rs.34,50,130/- sic). The said para 6 or 7 of the assessment order is extracted hereunder :-

*“6. In view of the above, I am left with no other alternative but to finalise the assessment proceedings with the material available on record.*

Now coming to the facts of the case, it is seen that the assessee has shown Income on account of Capital Gains, which has been worked out on the basis of agreement entered into with M/s Bafna Builders and Land Developers, Jalgaon by adopting sale consideration at Rs.1,00,00,000/-. However, the valuation of plots, as per Stamp Duty Valuation comes to Rs.13,37,72,550/-. Accordingly, in view of this, the proportionate 1/5<sup>th</sup> share is to be adopted. However, during the course of appellate proceedings, the property was referred to Department Valuation Officer. The DVO has arrived at the valuation of Rs.6,72,51,533/-. The CIT(A) has considered the valuation at Rs.6,72,51,553/-, which was originally disclosed by the assessee at Rs.1,00,00,000/- instead of Rs.13,37,72,550/- as per Stamp Duty Valuation. Since, it has been decided that the valuation is to be considered at Rs.6,72,51,553/-, then it is bound to be considered in the hands of the co-owners at the proportionate ratio. Thus, the 1/5<sup>th</sup> share in the case of the assessee and the other co-owners is hereby considered at Rs.1,34,50,310/-. As against this, the assessee has shown and disclosed at Rs.1,00,00,000/- under the head Short Term Capital Gain. Thus, I have no hesitation to consider the assessee's proportionate share at Rs.1,34,50,310/- under the head Short Term Capital Gain, as against this, the assessee has shown Rs.1,00,00,000/-. Thus, the difference of Rs.34,50,310/- is hereby added to the total income of the assessee. Penalty proceedings u/s 274 r.w.s. 271(1)(c) is separately initiated.

7. Subject to the above remarks, the total income of the assessee is computed as under :-

|   |                    |
|---|--------------------|
| Total income as per Revised Return of Income                                    | 62,04,380/-        |
| Add: <b>Diff in Short Term Capital Gain on sale of land, as discussed above</b> | <b>34,50,130/-</b> |
| TOTAL INCOME Rs.  | <u>96,54,510/-</u> |

5. The CIT(A) confirmed the above addition. In fact, the assessee raised a legal issue before the CIT(A) asking for quashing the re-assessment proceedings on the ground of **borrowed "reasons to believe" for DVO's estimation**. The CIT(A) not only dismissed the legal ground but also confirmed the addition made by the Assessing Officer as per discussion given in para 9 to 11 of his order.

6. Aggrieved with the above order of the CIT(A), the assessee is in appeal before us. Similar grounds raised by the assessee in other two appeals also.

### **Proceedings before the Tribunal**

7. Referring to the ground no.1, ld. Counsel for the assessee submitted that the legal issue relating to the validity of the re-assessment is being raised in this ground. Referring to the Hon'ble Supreme Court judgement in the case of ACIT vs. Dharia Construction Co., 328 ITR 515, ld. Counsel for the assessee submitted that the reason for issue of notice u/s 147/148 of the Act by the Assessing Officer in this case is **an opinion of the DVO** and the same constitutes a **borrowed opinion of the DVO** and not that of the Assessing Officer. Mentioning that under the Statute, the Assessing Officer should have a "reason to believe" that there is concealment of income. In this regard, ld. Counsel brought our attention to the reasons recorded on 16.01.2013 before issue of notice u/s 148 of the Act, copy of which is placed at page 14 of the Paper Book and submitted that the escapement of income of Rs.34,50,310/-, which is linked to the DVO and not that of the Assessing Officer. He merely extracted the figures and the opinion of the DVO and, in that case, the same do not constitute a sustainable "reason for believe" of the Assessing Officer for issuance of notice u/s 148 of the Act. Without going into the merits of the figures, correctness of addition etc, ld. Counsel submitted, on similar facts, the Apex Court in the case of Dharia Construction Co. (supra), dismissed the re-assessment proceedings.

8. In reply, the ld. DR for the Revenue relied heavily on the order of the Assessing Officer and also the discussion given by the CIT(A) in para 9 to 11 of the order of CIT(A).

9. We heard both the sides on this legal issue and find relevant to adjudicate this preliminary issue before going to the correctness of the reassessed income and the addition of Rs.34,50,310/- in this case. Similar amounts were added in other two cases and similar reasons given by the revenue authorities for adding the same in other two cases of the assessee.

#### **Reasons to believe**

10. The reasons mentioned above are given at page 14 of the Paper Book and we find it relevant to extract the same herein below:-

“.....

Date 16-01-2013.

*It is seen from the records that Income on account of Capital Gain has been worked out on the basis of agreement entered in to with M/s Bafna Builders and Land Developers, Jalgaon, by adopting sale consideration at Rs. 1,00,00,000/-. As per the valuation of plots, as per stamp duty valuation it comes at Rs. 13,37,72,550/-. However, after decision of LD C.I.T-(A)-II, Nashik, in the case of Shri. Rahul Sushilkumar Bafna, Jalgaon, for A.Y. 2009-10, the LD CIT(A)-II, Nashik, has arrived at the Valuation at Rs.6,72,51,553/- after considering valuation report of **D.V.O. and again by confirming, the valuation from the office of present DVO.** Keeping this in view the proportionate share of valuation for sale consideration comes to Rs. 1,34,50,310/- as 1/5<sup>th</sup> share and as such there is a **apparent escapement of income to the extent of Rs. 34,50,310/-**. So in my opinion it is **prima facie case of under assessment, as such income escaping assessment Rs. 34,50,310/- has escaped assessment** on account of Short Term Capital Gain, which requires to be taxed.*

*Issue notice u/s 148 of the Income-tax Act.”*

11. From the above, it is evident that (i) the stamp duty authorities valued of the lands, (ii) the amount offered by the assessee as his share, (iii) assessee's share as per the DVO's report, (iv) differential sum not offer to tax in the return at Rs.34,50,310/-, are borne out of the DVO's report. Further, from the DVO's report cited above, placed at page 24 to 37 of the Paper Book, we find Rs.672.52 lakh is the figure emanating from the DVO's report (para-9 of the DVO's report relating to the final valuation of the land). Thus, the DVO's report is the genesis for the differential of the above referred figures of Rs.34,50,310/- . Further, we also examined the above cited Hon'ble Supreme Court's judgement in the case of Dharia Construction Co. (supra). In this case, the following lines are relevant for adjudication of this issue :-

*“Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the DVO. Opinion of the DVO per se is not an information for the purposes of reopening assessment under s. 147 of the IT Act, 1961. The AO has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment.”*

12. Further, we examined the compendium of decisions filed by the assessee before us. In the case of CIT vs. Vrindaban Real Estate (P.) Ltd., 31 taxmann.com 12 (Allahabad), the Hon'ble Allahabad High Court held that reopening of the assessment only on the basis of report of the DVO is invalid, illegal and *void ab-initio*.

13. Further, we examined the decision of the Pune Bench of the Tribunal in the case of Shri Shivratan Motilal Rathi vs. ITO vide ITA Nos.730 to 733/PUN/2016 dated 11.03.2019 (copy of which is placed at

page 23 to 31 of the Paper Book). The Tribunal in this case held that where the DVO report cannot be the basis for reopening of assessment. The contents of para 16 to 18 of the said order of the Tribunal (supra) are relevant and the same are extracted as under :-

*“16. The limited issue which arises before us is that where the assessment has been reopened in the hands of assessee on the basis of DVO report vis-à-vis unexplained investment into construction of apartment building and hospital building by the assessee, can the reopening be sustained. The answer to the said is ‘No’.*

*17. The Hon'ble Supreme Court in ACIT Vs. Dhariya Construction Company (2010) 328 ITR 515 (SC) has laid down the proposition that where the Department had sought reopening of assessment based on the opinion given by the DVO; the opinion of DVO perse was not information for the purpose of reopening the assessment under section 147 of the Act. The Hon'ble Apex Court further held that the Assessing Officer had to apply his mind to the information, if any, collected and must form a belief thereon. The Hon'ble Supreme Court thus, held that the Department was not entitled to reopen the assessment.*

*18. In the facts of present case before us, the issue is identical where the basis for reopening the assessment by the Assessing Officer is opinion of the DVO i.e. valuation report of the DVO estimating cost of construction of the property by the assessee in the respective years. The Assessing Officer on the basis of such report of the DVO has reopened the assessment and has proceeded to complete assessment proceedings against the assessee. Where the basis for reopening is report of the DVO, then applying the ratio laid down by the Hon'ble Apex Court in ACIT Vs. Dhariya Construction Company (supra), we hold that the Assessing Officer is not entitled to reopen the assessment on the basis of such opinion of the DVO. Accordingly, we hold that the Assessing Officer had no authority to reopen the assessment under section 147 / 148 of the Act. Consequently, the assessment order passed thereafter under section 143(3) r.w.s. 147 of the Act do not stand. The additional ground of appeal raised in all three years is allowed and assessment made by the Assessing Officer is held to be invalid and bad in law.”*

14. From the above, it is evident that the Hon'ble Supreme Court's judgement in the case of Dhariya Construction Co. (supra) was relied heavily by the Tribunal while quashing the re-assessment proceedings. Thus, from the above, it is existing judgemental law that the DVO's report cannot be the sole basis for formation of the “reason to believe” about the concealment of income thereby issuance of notice u/s 148 of

the Act. This kind of approach of the Revenue is not sustainable and the Hon'ble Supreme Court's judgement in the case of Dhariya Construction Co. (supra) is relevant in this regard. Considering such legal proposition on this issue, we are of the opinion that the issuance of notice u/s 148 of the Act is invalid and unsustainable in law. Thus, the ground no.1 raised by the assessee is **allowed**.

15. Considering the relief granted on the legal issue, we are of the opinion that the adjudication of other grounds on merits as well as the other legal issue becomes an academic exercise only and, therefore, the rest of grounds no.2 to 6 are dismissed as academic.

16. In the result, the appeal of the assessee in ITA No.2301/PUN/2014 is partly allowed.

**Rest of other two appeals – ITA Nos.2302 & 2303/PUN/2014 -  
(By Rajkumar Ratanlal Bafna & Sushilkumar Kasturchand Bafna)**

17. The ground no.1 raised by the assessee in the rest of two appeals are identical to ground no.1 raised by the assessee in his appeal in ITA No.2301/PUN/2014. This ground no.1 is already adjudicated by us in the preceding paragraphs of this order and decided the same in favour of the assessee. Therefore, our decision in ITA No.2301/PUN/2014 shall applied *mutatis mutandis* in the rest of two appeals also i.e. ITA Nos.2302 & 2303/PUN/2014. Thus, the ground no.1 raised by the assessee in the rest of two appeals is allowed in favour of the assessee.

18. Considering the legal issue raised in ground no.1 in rest of two appeals, the adjudication of other respective grounds raised by the assessee in rest of two other appeals becomes academic exercise only. Thus, the respective other grounds are raised by the assessee in rest of two appeals are dismissed as academic.

19. In the result, rest of two appeals of the assessee in ITA Nos.2302 & 2303/PUN/2014 are partly allowed.

20. To sum up, all the three appeals of the assessee are partly allowed as above.

Order pronounced on 05<sup>th</sup> day of September, 2019.

Sd/-  
(विकास अवस्थी /VIKAS AWASTHY)  
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-  
(डी. करुणाकरा राव/D. KARUNAKARA RAO)  
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 05<sup>th</sup> September, 2019.  
Sujeet

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-II, Nashik.
4. The CCIT, Nashik.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.