IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, BANGALORE

Before Shri Chandra Poojari, Accountant Member

ITA No.2139/Bang/2019 : Asst.Year 2010-2011

Sri.Saleh Mohd. Salim Flat No.74, 14 Rest House Apartments, Bangalore – 560 001. **PAN : ADLPS1984M.**	Vs.	The Income Tax Officer Ward 1(2)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Sreehari Kutsa, CA
Respondent by : Sri.Ganesh R.Ghale, Standing Council for DR

Date of Hearing : 23.01.2020		**Date of Pronouncement : 30.01.2020**

O R D E R

This appeal filed by the assessee is directed against the order of the CIT(A), dated 19.09.2019. The relevant assessment year is 2010-2011.

2. The assessee has raised the following grounds:-

> *"1. The order of the learned Commissioner of Income-tax (Appeals) passed under section 250 of the Act in so far as it is against the Appellant is opposed to law, equity, weight of evidence, probabilities and the facts and circumstances in the Appellant's case.*
>
> *2. The learned CIT(A) failed to appreciate that the addition made under section 50C of the Act of Rs.10,72,000 is unsustainable in law and on the facts and circumstances of the case.*
>
> *3. The learned CIT(A) is not justified in upholding the view of the Assessing Officer that the reference to valuation officer is left to the discretion of the Assessing Officer even after the Appellant objects to the valuation proposed to be adopted by the AO during*

the assessment proceedings and on the facts and circumstances of the case.

4. The learned CIT(A) is not justified in passing the appellate order without addressing the submissions in the written submissions and the catena of precedents on the subject matter on the facts and circumstances of the case.

5. The Appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

6. In view of the above and other grounds that may be urged at the time of hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity."

3. The facts of the case are that the assessee field his return of income declaring total income at Rs.5,63,240. The Assessing Officer completed the assessment u/s 143(3) by assessing the total income at Rs.22,20,730, thereby raising a demand of Rs.3,74,380. Notices dated 04.07.2019 and 22.08.2019 were issued to the assessee fixing the case for hearing on 17.07.2019 and 29.08.2019 respectively. The assessee filed an adjournment letter for the first notice on 18.07.2019, but no request was made for hearing fixed on 29.08.2019 nor appeared. Again, a notice dated 29.08.2019 was sent to the assessee enclosing the remand report received from the Assessing Officer, fixing the hearing on 12.09.2019. The Assessing Officer, inter alia, made an addition of Rs.10,72,000 as capital gain being difference in guidance value price and sale price under the provisions of section 50C of the I.T.Act. On appeal, the CIT(A) confirmed the addition made by the Assessing Officer.

4. Against this, the assessee is in appeal before the Tribunal. Before me, the learned AR submitted that the guidance value fixed for registration by the State Government authorities is much more than the market value of the impugned immovable property and according to him, the assessee sold the property situated at Madurai for a consideration of Rs.50,00,000 only and the guidance value of the said property was Rs.60,72,000. The learned AR submitted that vide letter dated 19.10.2012 the assessee explained the extenuating circumstances which led to the property fetching lesser price than normal. The Assessing Officer also furnished a certificate from Government Approved Valuer wherein the circumstances surrounding the property were recorded and property was valued at Rs.45 lakh, though its guidance value was higher than that. The learned AR submitted that the assessee explained that in the wake of the low value being quoted for the property, when the new buyer proposed Rs.50 lakh for the property, the same was readily accepted and property was sold. Though the assessee objected the application of section 50C of the Act, the assessment was completed treating the sale consideration of Rs.60,72,000 and brought to tax the additional amount of Rs.10,72,000 under capital gain. The learned AR submitted that all the details were filed before the CIT(A) and consequently, a remand report was sent to the A.O. The A.O. noted that the power to refer the matter to the DVO is discretionary and the application of section 50C in bringing to tax the differential amount is justified. The learned AR further submitted that the assessee objected the same by filing a rejoinder before the CIT(A). Thus,

the A.O. is not justified in holding that the power to refer the matter to DVO is discretionary, and the CIT(A) is grossly erred in upholding the action of the Assessing Officer. He, thus, pleaded for deleting the addition made by the Revenue.

5. The learned Departmental Representative, on the other hand, submitted that there is no mandatory condition u/s 50C(2) to refer the matter to the DVO to ascertain the fair market value of the property. According to him, the A.O. may refer the valuation of the capital asset to a DVO and the word used is “may” and not “shall”, which makes the intention of the legislature amply clear. The lawmakers obviously did not want every such case to be referred to the Valuation Officer which would result in waste of time and precious resources. The legislature has directly put the onus on the Assessing Officer to determine whether a case is fit to be referred to the Valuation Officer based on the merits and circumstances of each case. Therefore, the argument of the assessee that, the AO should refer the matter to the Valuation Officer when the assessee conveys to the AO of his disagreement with the Stamp Valuation Authority’s value vis-à-vis the sale consideration does not hold water. The learned DR further submitted that it is important to examine the reasons cited by the assessee to lower sale consideration of the impugned property and the reasons why the A.O. did not deem it fit to refer the matter to the Valuation Officer. As per assessee’s letter dated 19.10.2012 filed before the A.O., during the assessment proceedings and a copy of which was produced during the appellate proceedings,

the assessee has cited a number of reasons for lower sale value of the property. The first reason given was that the plot was not considered good as per `Vastu'. This obviously cannot form a reason for making a reference to the Valuation Officer. In subsequent reasons, the assessee stated that there was a Law College opposite to the impugned property which creates nuisance and there is a large wedding hall and cars are parked in the road outside it which causes inconvenience. The fact that there is a Law college and a large wedding hall next to the impugned property will only help to enhance the market value of the property and not to reduce it as claimed by the assessee before the A.O. during assessment proceedings and before the CIT(A). The learned DR, therefore, submitted that the A.O. is justified in not referring the matter to the DVO, and the CIT(A) is rightly upheld the decision of the A.O.

6. I have heard the rival submissions and perused the material on record. In this case the value adopted for registration before the Sub-Registrar was at Rs.60,72,000, however, the value received by the assessee for sale of the impugned property at Rs.50,00,000. Thus, there was a difference of Rs.10.72 lakh. The A.O. brought the same as unexplained investment and treated as capital gain u/s 50C of the Act. The assessee got this amount only on account of the difference between the value adopted by the registration purposes and the value shown in the sale deed executed by the authorities concerned. However, there was no sufficient material on record to influence that the said additional consideration was passed between the parties concerned, i.e.,

the purchaser and seller, so as to bring the same as income of the assessee under the head capital gain. The burden is on the Revenue to prove that the assessee has really received the extra sale consideration. In my opinion, there is no rule of law to the effect that the value determined for the purposes of stamp duty is the actual consideration passed between the parties to the sale. In the present case, the A.O. has applied the provisions of section 50C for the computation of additional capital gain on the basis of the value adopted for registration of the said property. Apart from the stamp duty valuation, there is nothing on record to suggest that the assessee has received extra sale consideration over and above the sale consideration reflected in the sale deed. It was held by the Hon'ble Allahabad High Court in the case of Dinesh Kumar Mittal v. ITO [(1992) 193 ITR 770 (All.)] that there is no law to the effect that the value determined for the purposes of stamp duty is the actual consideration passed between the parties to the sale and it is the burden of the Department to show that the assessee received extra consideration passed between the parties concerned. I also place reliance on the following judgments / orders:-

(i) Kamal Kisjore Chandak v. ITO [103 TTJ 843 (Jodh).

(ii) ACIT v. Swami Constructions Pvt. Ltd. [111 TTJ 531 (Jaipur)]

(iii) Jai Marwar & Co. Pvt. Ltd. v. ACIT [79 TTJ 178 (Jodh.)]

(iv) ITO v. Satyanarayan Agarwal [112 TTJ 717 (Jodh.)]

(v) Dinesh Jain v. CIT [34 SOT 444 (Delhi)]

(vi) ACIT v. Excellent Land Developers Pvt. Ltd [1 ITR (Trib.) 563 (Delhi)]

6.1 Further in the case of Anand Banwarilal Adhukia v. Deputy Commissioner of Income-tax [148 DTR 262 (Guj.)] wherein held that where the Assessing Officer has no cogent material available not to satisfy himself about the requirement of section 69 of the I.T.Act, and therefore, in the absence of it the reference could not have been made u/s 142A of the Act. In fact no purpose would be served to make such reference especially when the contingent reflected hereinabove are not satisfied on the background of the present facts. The Hon'ble Gujarat High Court held as under:-

> *10. The other relevant statutory provision which is required to be considered is Section 69 of the Act. Section 69 of the Act pertains to unexplained investment, whereas Section 69A pertains to unexplained money etc. and likewise, Section 69B pertains to amount of investment 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, jewellery etc. and the same are not properly recorded in the books of account. This Court in a decision in case of Me and Mummy Hospital (Supra), while referring to these statutory provisions read with Section 142A of the Act, has held that unless there is prima facie application of Section 69 of the Act, reference to the valuer under 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 can call for the 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 of the Act cannot be resorted to. Relevant paragraphs of the said decision which have analyzed entire scheme of Section 142A of the Act are required to be reproduced hereinafter:

> *"10. Power of the Assessing Officer for making a reference to the Valuation Officer seeking the estimate flows from sub-section (1) of section 142A. It provides that for the purposes of making assessment or reassessment under the Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B or fair market value of any property referred to in sub-section (2) of section 56 is required to be made, such reference to make an estimate of such value can be made to the Valuation Officer.*
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> *16. The Valuer's report under section 142A of the Act is for the purpose of estimating value of such investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B of the Act. Unless, therefore, there is prima facie application of sections 69, 69A and 69B of the Act, reference to the valuer 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 sections 69, 69A and 69B as the case may be, that he can, to estimate the value of such unexplained investment or expenditure in bullion, jewellery etc., call for the report of the Valuer. Initial starting point for triggering a reference to the Valuer, therefore, has to be invocation of sections 69,69A or 69B of the Act. It is only when any of*

these provisions come into play that the Assessing Officer can resort to section 142A for estimating the value of such investment or xpenditure. Sequence cannot be put in the reverse. In other words, the Assessing Officer would have no authority to call for the report of the Valuer under section 142A to judge whether there has been any unexplained investment or expenditure as referred to in sections 69, 69A and 69B of the Act. It would only amount to fishing inquiry and not investigation under section 142A of the Act. In our opinion. the scheme of the provisions when read harmoniously would lead to a situation where in case the Assessing Officer, during the pendency of assessment or reassessment, is of the opinion that sections 69, 69A and 69B of the Act can be invoked; in order to estimate such unexplained investment or expenditure in acquisition of bullion, jewellery or valuable article, he can resort to valuation by the Valuation Officer in terms of sub-section (1) of section 142A of the Act. In the present case, no such material emerges from the record. To the contrary, neither from the order of reference nor from any other material, the respondent could point out that the Assessing Officer had invoked the provisions of sections 69,69A or 69B of the Act and in the process desired to obtain the estimate of unexplained investment or expenditure and for which purpose DVO's report was called. He simply gave no reasons in the order. No independent reasons, either flowing from the file or even in the form of an affidavit assuming the same would be permissible, are brought to our notice. Thus quite apart from the petitioner's grievance that the Assessing Officer merely acted under the directives of the superior and did not., on his own application of mind, desire to call for the report, in absence of any valid reasons for making a reference, in our opinion, the order must fail."

> *11. Considering the aforesaid proposition of law laid down by this Court, it appears that here also, the Assessing Officer had no cogent material available nor to satisfy himself about the requirement of Section 69 of the Act and therefore, in the absence of it, the reference could not have been made under Section 142A of the Act. Simply because prior to 2 days the reference order came to be made, it cannot be said that the action of making reference during the period of assessment is justified. In fact, no purpose would be served to make such reference especially when the contingencies reflected hereinabove are not satisfied on the background of present facts. Therefore, considering this set of circumstance, we are of the opinion that the action of making reference is not tenable."*

6.2 In that case, referring the provisions of section 142A of the Act, has held that unless there is prima facie application u/s 69 of the Act, reference to the Valuation Officer u/s 142A 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 can call for the report of the valuer and therefore, the 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 of the Act cannot be resorted to. Further it was held that the A.O. had no cogent material available nor to satisfy himself about the requirement of Section 69 of the Act and therefore, in the absence of it, the

reference could not have been made under Section 142A of the Act. In fact, no purpose would be served to make such reference especially when the contingencies reflected hereinabove are not satisfied on the background of present facts. Therefore, considering this set of circumstance, the Court was of the opinion that the action of making reference is not tenable. Applying those ratio, in my opinion, in the present case, there is no need to refer the matter to the DVO for valuation, as there is no material in the hands of the Assessing Officer to consider the additional consideration passed between the parties, as such the addition cannot be made in this case. Accordingly, I delete the addition.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced on this 30th day of January, 2020.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Bangalore ; Dated : 30th January, 2020.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT(A)-2, Bengaluru.
4. The Pr.CIT-1, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore