**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"B" BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**
**AND**
**SMT. BEENA PILLAI, JUDICIAL MEMBER**

| ITA No.1988/Bang/2016 |
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| Assessment Year: 2007-08 |

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| Sri K. Satish Kumar,<br>#4, 3rd Floor, Shirdi Sai Krupa Complex<br>Nagappa Street,<br>Seshadripuram<br>Bengaluru 560 020<br><br>**PAN NO : ACZPK8076F** | **Vs.** | The Addl. CIT<br>Range-9<br>Bengaluru |
| **APPELLANT** | | **RESPONDENT** |

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| **Appellant by** | : | Shri V. Srinivasan, A.R. |
| **Respondent by** | : | Dr. Manjunath Karkihalli, D.R. |

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| **Date of Hearing** | : | 14.06.2022 |
| **Date of Pronouncement** | : | 01.08.2022 |

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal filed by the assessee is directed against order of the CIT(A)-2, Bengaluru dated 11.8.2016 for the assessment year 2007-08. The assessee has filed the following grounds of appeal:-

*1. "The orders of the authorities below in so far as they are against the appellant, are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*

*2. The learned CIT[A] is not justified in upholding the addition of Rs. 13,88,76,800/- being the earth filling expenses incurred by the appellant for the assessment year 2006-07 Et 2007-08 under the facts and in the circumstance of the appellant's case.*

*2.1 The learned CIT[A] failed to appreciate that the aforesaid expenses incurred by the appellant were genuine and supported by vouchers as are in vogue in this line of trade and the said vouchers were also found and impounded at the time of survey and therefore, the addition made by the learned A.O. was opposed to law and facts of the appellant's case and liable to be deleted.*

*2.2 The learned CIT[A] failed to appreciate that the aforesaid disallowance sustained were purely on suspicion and surmise, assumption end presumptions and totally discarding the evidence tendered by the appellant in support of the condition of the land and necessity to incur the expenses on earth filling and therefore, the impugned disallowance made being opposed to law and facts of the appellant's case deserves to be deleted.*

*3. The learned CIT[A] failed to appreciate that the reference made by the learned A.O. to the DVO to determine the development expenses incurred by the appellant was opposed to law and therefore, no reliance could be placed on the report of the learned DVO, which in any case is unreliable and ought to have been excluded under the facts and in the circumstances of the appellant's case.*

*4. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies himself liable to be charged to interest u/s 234-B and 234-C of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.*

*5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs."*

2. The facts of the case are that the assessee, a land developer, filed his return of income for the assessment year 2007-08 on 30/10/2007, declaring the total income at Rs.2,49,87,100/-. A survey was conducted u/s 133A(1) of the Income-tax Act,1961 ['the Act' for short] in the assessee's business premises on 27/6/2008. In the assessment concluded u/s 143(3) of the Act, the total income has been determined at Rs.9,02,68,100/-. Aggrieved, the assessee had filed an appeal before Ld. CIT(A) in which only the addition of Rs.6,42,21,000/- and levy of interest u/s 234A, 234B and 234C of the Act are agitated, in addition to the addition of Rs.7,55,85,800/- made by the AO on protective basis.

2.1 The appellant's first appeal was dismissed *in Limine b*y the Ld. CIT(A) on the ground that the assessee had not paid the taxes in full in respect of the admitted income. On further appeal, the coordinate Bench of ITAT vide order in ITA.No.1176/Bang/2010 dated 13/5/2011 set aside the order of the Ld. CIT(A) and restored it for reconsideration to his file for fresh consideration.

2.2 On appeal before Ld. CIT(A), he adjudicated the assessee's appeal afresh as follows on various grounds raised before him.

DISALLOWANCE OF EXCESS EXPENDITURE:

Rs. 6,42,21,000 FOR A.Y. 2007-08 & Rs. 7,55,85,800 FOR A.Y. 2006-07 TOTAL Rs. 13,98,06,800/-:

2.3 Ld. CIT(A) stated that the AO noted in his scrutiny that the assessee was engaged in developing residential layouts on a land (said to be agricultural by the AO) at Kasavanahalli, Sarjapur Road, Bengaluru; that the assessee had entrusted the work of development of the land to M/s SSS Projects Ltd. of which the assessee is the Managing Director and in which he holds majority of the shares; that the assessee had claimed expenditure of Rs.6,46,86,000/- towards earth filling. As per the assessee, he had to make payments for filling earth with the help of tippers only in cash as the persons supplying earth were all from the un-organized sector. That the assessee expressed his helplessness to furnish the details of the place from where earth was brought and licenses issued by the State Government authorities since the issue of license was not involved as the materials from the already excavated earth at different sites were supplied. The assessee also expressed his helplessness to furnish the registration numbers of the vehicles used and the names of the drivers engaged for transport of the materials. The AO also found from the calculation made by him that the assessee should have carried out development on a land measuring 49431 sq metres and the depth of the land filled should have been 79.82 feet deep; that the assessee failed to produce any evidence for the existence of land of such a magnitude; and that the land was an agricultural land as per the documentary evidence. The AO took into consideration the aggregate estimate of expenditure relating to the land filling at Rs.9,30,000/-for the assessment years 2006-07 and 2007-08 and apportioned the expenditure in this regard at

Rs.4,27,800/- for the assessment year 2007-08 and deducted the same from the expenditure of Rs.6,46,86,000/- claimed by the assessee and arrived at the disallowable expenditure at Rs.6,42,58,200/-. In view of the foregoing, the AO concluded that the assessee's claim of having incurred expenditure to the tune of Rs.6,42,58,200/- was inflated and brought it to tax by disallowing the same.

2.4 The AO has observed that the amount of Rs.7,55,85,800/- representing the assessee's claim of expenditure relating to land filling, which had been considered as inflated expenditure and, therefore, disallowed in the assessment order for the assessment year 2006-07, is added *on protective basis* to the assessee's declared income in the assessment order for the assessment year 2007-08 following the observations of the Ld. CIT(A) in his letter dated 16/3/2009 to the AO to the effect that, if the claim of the assessee that the land had been sold in the financial year 2006-07 (AY 2007-08) was true, the expenditure could be relevant only for the assessment year 2007-08. However, it is seen that this amount has not been added to the income declared by the assessee in the computation of total income.

2.5 The assessee's authorized representative vide his submissions dated 20.8.2013 submitted a "Note on Earth Filling Expenses" in detail (common for the AYs 2006-07 & 2007-08) before the Ld. CIT(A). With regard to above submissions of Ld. A.R., The AO was called for a remand report who has in turn submitted his detailed report. The Ld. CIT(A) confirmed the additions to the tune of Rs.13,88,76,800/- including the expenditure claimed in AY 2006-07 at Rs.7,55,85,800/-.

Against this assessee is in appeal before us by way of following grounds:-

3. Ground No.1 is general in nature.

4. Ground Nos.2 to 2.2 are with regard to sustaining addition by Ld. CIT(A) at Rs.13,88,76,800/- incurred towards earth filling expenses by the assessee.

4.1 The Ld. A.R. submitted that the assessee has incurred this expenditure to make the land fit for the formation of a residential layout by removing the contours and other undulations of the land. Hence, Ld. A.R. prayed that the claim of the assessee is supported by proper evidence and the same to be allowed. It was further submitted that the expenses incurred by the assessee are supported by proper voucher. The fact that assessee was not able to furnish the name and address of the lorry owners who received the payments for transportation of earth does not mean that expenses are bogus. The assessee has not claimed any deduction on account of these expenses that were capitalized in the books of accounts as work in progress. Hence, the addition made was misconceived. The disallowance made by the AO to be deleted. The assessee filed details of work in progress, property details, profit & loss account, balance sheet along with Form No.3CB for the period ending 31.3.2007.

4.2 He submitted that the assessee furnished secondary evidence in shape of the topographical survey conducted on a portion of the property at Kasavanahalli ad-measuring and extent of 12 acres and 23 guntas of land. Ld. A.R. submitted that, although the appellant had acquired 18 acres 1 guntas of Land at Kasavanahalli Village, he

had engaged M/s Guide Line Surveyors to prepare a topographical survey in May 2004 for a portion of contiguous land of 12 acres and 23 guntas. Later, after earth filling and completion of the leveling in May 2007, the appellant once again made another topographical survey to show the present levels of the Land. It was reported by the surveyor that the extent of earth required to be filed for 12 acres and 23 guntas of the Land was approximately 731,993 cubic maters. In this manner, the appellant justified the extent of expenditure that was required to be incurred on the earth filling activity.

4.3 Ld. A.R. further submitted that the A.O. however, did not accept the said evidence which was tendered by the appellant and also supported and reiterated in an affidavit of the appellant dated 30/03/2009 filed before the A.O. The A.O. gave a copy of the Valuation Report of the DVO and called for objections to be filed in course of the hearing on 30/03/2009. On the very next day the A.O. passed the assessment order dated 31/03/2008 for the assessment year 2007-08 making a huge disallowance in respect of earth filling charges after allowing a proportionate deduction as per the DVO's report.

4.4 The Ld. A.R. also submitted that the DVO has inspected the lands perhaps in the year 2009. No details are forthcoming from the DVO's report with regard to the enquiries he made or the techniques he employed to arrive at the quantity of earth required to be filled. The DVO was not aware of the nature of the Land purchased by the appellant and he only inspected the Land after the completion of the works. Perhaps, more than two years after the completion of the works and therefore, his report cannot be relied upon and in this view of the matter also, the report of the DVO is liable to be ignored.

4.5 The Ld. A.R. submitted objections to the report of the DVO to be adopted as the basis of arriving at the extent of cost incurred by the appellant. It is also pointed out that the appellant has led in evidence in the shape of surveyors report to bring out the extent of earth required to be filled atleast on 12 acres and 23 guntas of the Land in the Kasavanahalli Project in course of the assessment proceedings for the assessment year 2007-08. The same has been ignored by the A.O. without assigning any reasons therefor. Thus, the disallowance made by the A.O. is purely on suspicion and surmise, assumptions and presumptions and in fact, contrary to the evidence on record submitted by the appellant in support of the extent of expenses required to be incurred. Hence, Ld. A.R. prayed that the same may be deleted.

4.6 He further submitted that in course of assessment before the AO, the Ld. AO had desired the assessee to explain as to how the quantity of earth was worked out by the surveyor in his report. It is ascertained that the working was done by dividing the entire Land up to 16 blocks or plots and the area was worked out for each Block by multiplying the Length, breath (read `breadth') and height of earth filling. The appellant furnished the details required with regard to the cost of purchase of Land, the agreements under which the Land was purchased, the details relating to the sale of Lands and the photographs. The appellant has also prepared a chart showing the total profit disclosed by the appellant for the assessment year 2007-08 in respect of the property transaction at Kasavanahalli Village considering the sale of the property and the cost incurred. It is clarified that the appellant has incurred the development expenses only for assessment years 2006-07 and 2007-08 which is essentially the expenditure to make the Land fit for formation of a residential Layout by removing the contours and other undulations of the Land.

4.7 Hence Ld. A.R. submitted that the claim of the expenses incurred by the appellant is supported by proper evidence and the same ought to have been allowed and prayed accordingly."

4.8 The Ld. A.R. submitted that the assessee furnished the financial statements as on 31.03.2007 relevant to A.Y. 2007-08 have shown that the assessee sold the property claimed deductions towards earth filling charges during the said year. The expenses were genuine & supported by vouchers. The addition was purely on surmise & suspicion. The assessee has explained why he could not produce persons as they come from un-organized sector and it is very difficult to locate them after completion of the works. The Assessing officer has not made as unexplained expenditure on the ground that the source for incurring the expenditure was not proved. A disallowance can be made if there is claim for allowance of expenditure against income. It is not the Assessing officer's case that the assessee had claimed deduction of earth filling chares during the year under appeal. The addition is misconceived & deserves to be deleted. The Assessing officer never furnished copy of DVO's valuation report to the assessee in the course of assessment proceedings. The report indicates that the DVO has not inspected the property for estimating the development expenses as no mention is made. The assessee has not received notice from the DVO for giving details to him. It is surprising that the DVO estimated the value of development charges at Rs.9,30,000/- only. The report is totally baseless, unjustified & credence cannot be given as the DVO has neither inspected the property nor ascertained the extent of development work carried out by the assessee.

5. On the other hand, Ld. D.R. submitted that expenses are incurred by the assessee regarding development expenditure in the form of earth filling and land levelling charges to the tune of Rs.7,66,26,200/-. These expenses were capitalized expenses are not claimed as expenditure in the P & L account by the assessee as the same were treated as capital expenses. The expenditure in the form of earth filling & land levelling charges Assessing officer has all the power to investigate and enquire into the affairs of the assessee's case and the expenditure claimed whether it is a revenue or capital expenditure. The assessee can claim expenses as revenue or capital, if these expenditure are genuine and actually incurred by him in the course of running his business. In the instant case, the assessee has not denied the fact that expenditure of Rs. 7,55,85,800/- has been incurred and capitalized as WIP. It is the duty of the assessee to produce and furnish the details of expenditure claimed by him in the books of accounts. The assessee failed to produce details to support and justify his claim. The expenses may not be claimed in the Profit & Loss account. But once it finds entry in the balance sheet as WIP, the value of assets is increased to that extent. The assessee should file all the details of justify the increase of the value of assets in the balance sheet. In the present case, the assessee also admitted some lapses regarding basic information and daily expenditure not appearing in the cash book (Q. No. 8 & 9 dated. 16.07.2008 - statement on oath). It is seen that all the payments were made in cash & below Rs. 20,000 in each case. This fact cannot be relied upon by the assessee to claim that his expenses are genuine & justified. It is observed that these payments were made to only six persons and aggregate payments were more than Rs. 50,000/-. Therefore, the assessee is liable to

deduct tax at source for all these payments u/s 194C of the Act. Once, the provisions of sec. 194C of the Act is involved, all these payments can also be disallowed u/s 40(a)(ia) of the Act. This line of action is not considered by the Assessing officer. The disallowance made by the Assessing officer is based on documents found during the survey. Therefore, the view of the assessee that disallowance was made on surmise, assumptions & presumptions is not correct and tenable. The disallowance made during this year is justified.

5.1 Further, he drew our attention to the remand report submitted by Deputy Commissioner of Income-tax dated 5.5.2014, which reads as follows:-

> *"The assessee had filed the Return of income for A.Y. 2006-07, but taxes were not paid, while filing the return of income. Similarly, the Return of Income for A.Y. 2007-08 was filed Later here also taxes were shown as payable only and there was default on the part of the assessee. There was a survey conducted in the case of the assessee on 27.6.2008.*
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> *At the time of survey, the assessee was asked to furnish the details of Development Expenditure for A.Y. 2006-07 & A.Y. 200708 the assessee has stated that he was not in a position to produce the vouchers at that time. The assessee was also asked to clarify the details of WIP & the assessee couldn't give a satisfactory reply on the day of survey. Further, the assessee was also asked that since the survey was being taken in his business premises, he should be in the possession of documents & should produce these documents immediately. However, the assessee couldn't produce them. It is also relevant to mention that the Assessing Officer has in the statement recorded on oath has clearly stated that Vouchers relating to F.Y. 2006-07 don't have full details & this shows that assessee was not having complete vouchers on the day when his statement was recorded at the time of survey. Though the assessee claimed that vouchers were complete, he could not give the details he Later submitted that the expense was in nature of earth*

*filling & that tipper was used in this process. However, was not able to give the details of the tipper owner's name & address at the time of survey. The assessee was unable to give further details of Land filling also.*

*Later, a statement u/s 131 was also recorded on 16.07.2008. The Assessing Officer discussed that the Development Expenditure for A.Y. 2006-07 was Rs. 7,66,26,200/- & for A.Y. 2007-08 the expenditure was Rs. 6,55,61,800/- & which was huge. The assessee has shown the name of certain persons to whom huge amounts were paid in cash to them on account of the alleged development expenditure. The assessee has claimed that the persons who supply the earth are from unrecognized sector & hence cash payments were made.*

*It is also pertinent to note that at the time of giving this statement also, the assessee had stated, when he was asked the name & address of suppliers to whom cash payments were made, that it is difficult to trace the supplies as there was more than two years & the particular earth supply sector keeps changing. Again, the assessee was asked that, while making the payment some basic information should have been collected by him & the assessee has stated that it was a Lapse on his part & also that site engineers present at site had Lapsed by not collecting the details & that their Lapse was also his Lapse. However, mere acceptance of a Lapse doesn't exonerate the assessee of the onus of maintaining the details of the persons to whom huge payments were made*

*I would like to further mention that the assessee has also stated that site engineers supply cash vouchers to office in bulk and one single entry is passed in the books and this covers the expenditure for a period of 30-35 days. It is also relevant to mention that the assessee was not able to explain the expenditure incurred in excess of the available cash balance & from these facts it is clear that the assessee was not having any concrete evidence to show that the expenses were genuinely made & that his claim was genuine & bonafide.*

*In this connection, it is further seen from records that for A.Y. 2007-08 also, the assessee was claiming an amount of Rs. 7,15,72,000/- for development of Land as per the Ledger, though the seLf made vouchers were only made available only to the tune of Rs. 6,55,61,800/- & they were also not clearly verifiable & it was not established that these huge payments were actually made.*

*An assessment order has been passed u/s 143(3) dated 31.12.2008 in the case of Sri Satish Kumar for A.Y. 2006-07. As discussed already the assessee has shown an amount of Rs.7,55,85,800/- for earth supplies for filling 12 acres & 9 guntas land at Kasavanahalli project. The relevant portion of the assessment order is reproduced:*

*During the course of survey, it is noticed that the assessee has debited a sum of Rs. 7,55,85,800/- towards amount paid to earth suppliers for filling 12 acres & 9 guntas of Land at Kasavanahalli project. The assessee has also incurred an expenditure through self- made vouchers on Land Levelling.*

1. *A.Y.2006-07*

   *i) Expenditure towards earth suppliers*

| *Sl.No.* | *Name of the payee* | *Amount paid* | |
|---|---|---|---|
| *1.* | *Santosh* | *1,66,95,400/-* | |
| *2.* | *Kumar* | *98,02,800/-* | |
| *3.* | *Mohan* | *1,25,66,400/-* | |
| *4.* | *Nagaraja* | *1,68,17,800/-* | |
| *5.* | *Ramaiah* | *72,05,600/-* | |
| *6.* | *Rajesh* | *1,24,97,800/-* | |
| | | *7,55,85,800/-* | *b/f 7,55,85,800/-* |

   *ii) Expenditure towards levelling of land*

| *Sl.No.* | *Name of the payee* | *Amount paid* | |
|---|---|---|---|
| *1.* | *Rajanna* | *2,17,750/-* | |
| *2.* | *Madan* | *5,77,850/-* | |
| *3.* | *Anand* | *2,44,800/-* | |
| | | *10,40,400/-* | *10,40,400/-* |

*Thus the total expenditure claimed to have incurred tiLL31.03.2006 is Rs. 7,66,26,200. As per the Ledger account the expenditure was Rs. 7,69,53,250. The assessee was not in a position to explain the difference of Rs. 3,27,050.*

*Subsequent to survey operation a sworn statement of the assessee was recorded on 9.07.2008, wherein it was brought to the notice of the assessee about the entire expenditure had been incurred by cash only & each item of expenditure is Less than Rs. 20,000 & for A.Y. 2006-07 a sum of Rs. 7,55,84,800 was spent on earth filling & Rs. 10,40,400 towards JCB charges for Land Levelling. The assessee had stated that the people who supply earth are all from unorganised sector & as such*

*he had to make payments only in cash. The entire Land is said to be filled with earth with the help of tippers. Each tipper has a capacity of 10 to 12 cubic meters of earth. The assessee was asked to give details of the place from which the earth is brought & the Licenses issued by the state mining department for carrying out of such activity. The assessee _replied that this does not come under the mining Licenses & the suppliers supply the earth from the sites where huge constructions are being carried out & the earth has been removed for creating the basements, which is transported by the suppliers to the Land developed. The assessee was asked to furnish the registration numbers of the vehicles by means of which the earth has been supplied as none of the vouchers contains information Like he number of trips the earth has been transported, Like registration Numbers, name of the driver etc. The assessee replied that it is very difficult to trace such information, as the supplies were from unorganised sector.*

*The assessee was also questioned about the quantity of earth a tipper can carry. The assessee himself stated that each tipper can carry 10 to 12 cubic metres of earth. The cost of each load is said to be at Rs. 1400.Since the expenditure for earth filled is at Rs. 7,55,85,800 during the A.Y. 2006-07 & Rs.6,46,86,000 during the A.Y. 2007-08. There should have been 100194 trips carried out by the tippers. Since the capacity of each tipper is 10 to 12 cubic metres, the total volume of the earth filled is at 100194 x 12 = 1202328 cubic metres of earth. Since the entire land is of 12 acres & 9 guntas, when converted into yards it comes to 59169 yards. Further, on conversion into metres it comes to 49431 sq. Meters. As per the assessee's version from the depth the earth is filled which is at 1202328/49431 = 24.32 metres, which comes to 79.82 feet deep. he land said to be filled & developed is situated at about three metres from Sarjapur cross on outer ring road. The assessee not able to produce any evidence with reference to existence of such a land at that place. Further, as seen from the sale agreement the description of the land is only agricultural land.*

*In view of the above facts, the expenditure claimed to have been incurred is superfluous & the purpose of it is only to inflate the development expenditure so as to conceal the real profit as & when the lands are sold. Incidentally, the lands are sold to his own company, M/s. SSS Projects Limited, where is the Managing Director. Hence, the land levelling charges to the extent of Rs. 10,40,400 are allowed & the earth filling charges of Rs. 7,55,85,800 is added back to the income returned."*

*I would like to further mention that the assessee couldn't give any specific details about the persons to whom such exorbitant amount of money was paid, at the time of survey, at the subsequent recording of statement or till the completion of assessment. The Assessing officer has also made a reference to the District Valuation Officer & the report was not received by the Assessing officer till the time of completion of assessment. The Ld. CIT (Appeals)-V heard the matter & passed an order dtd. 09.04.2009. The relevant portion is reproduced:*

*"The assessee was asked to furnish the registration number of the vehicles as vouchers did not indicate numbers, name of the drivers etc. The assessee replied that it is very difficult to trace such information as the suppliers were from un-organised sector. The assessee was asked about the quantity of earth a tipper can carry. He stated that it can carry 10 to 12 cubic meters of earth & the cost is Rs. 1,400. The earth filling expenses for the A.Y. 2006-07 was Rs. 7,55,85,80 and Rs. 6,46,86,000 for the A.Y. 2007-08. The land said to be developed is situated at 3 Km from Sarjapur on outer ring road & the sale agreement described the land as agricultural land. The Assessing officer concluded that the expenditure claimed is superfluous & the purpose is to inflate development expenditure to reduce the profit from the sale of lands. These lands are sold to his own company M/s. SSS Projects Ltd, where he is the M.D. The expenses on land levelling of Rs. 10,40,400 was allowed & earth filing of Rs. 7,55,85,800 added back to total income. The difference of Rs. 3,27,050 between the amounts as per vouchers & the books of account as discussed earlier is added back.*

*The appellant submitted that additions made are unjustified & purely on suspicion & surmise, assumptions & presumptions. The expenses incurred are supported by vouchers that are in vogue in this line of trade. The fact that the appellant was not able to furnish the name & address of lorry owners who received payments for transportation of earth does not mean that the expenses incurred were bogus. The appellant has not claimed any deduction on account of these expenses that were capitalized in the books of accounts as WIP and the addition made was misconceived. The disallowances made by the Assessing Officer are liable to be deleted. The appellant also filed the WIP details, property profits & audited accounts in Form No.3CB for the period ending 31.3.2007."*

**Findings on merits:--**

5.2 In the present case, the issue is with regard to addition of Rs.13,88,76,800/- which is said to be incurred by the assessee towards earth filling expenses and land levelling expenses which has been capitalized in his books of accounts as work in progress. The AO disallowed this expenditure as bogus expenditure on the basis of DVO report obtained by AO u/s 142A of the Act.

5.2.1 This issue was originally came for consideration in the assessment year 2006-07 before this Tribunal in ITA No.444/Bang/2009 vide order dated 17.7.2009 made an observation as follows:-

*"2. The first grievance of the appellant is against the addition of Rs.7,55,85,800/- being the earth filling expenses incurred by the appellant. Another grievance raised and which is relevant to the above referred addition is that the Assessing Officer could not have added the amount because the assessee has not claimed the deduction of that expenditure.*

*2.1 The appellant is a land developer. In the return of income, the assessee showed a sum of Rs.9,69,85,015/- as work-"in-progress in respect of various projects, which were undertaken by the assessee. The AO required the assessee to show proper evidences for which development expenses debited in the accounts. Survey u/s 133A was also conducted during the course of survey, it was noticed thot the assessee has debited a sum of Rs.7,55,85,800/- towards amount paid to earth suppliers for filling 12 acres and 9 guntas of land at Kasavanahalli project. The assessee was having self-made vouchers in respect of land leveling. The AO required the assessee to furnish the. registration number of the vehicles by means of which the earth has been supplied as none of the vouchers contains information like the number of trips for bringing the earth for filling. The assessee showed his inability to furnish such information. The assessee has shown an expenditure on earth filling at Rs.7,55,85,800/- during the asst. year 2006-07 ana Rs.6,46,86,000/- during the asst. year 2007-08. The Assessing Officer noticed that a tipper can carry 10 cubic meters of earth and for this, the assessee has to incur an expenditure of Rs.1400. Looking to the quantum of expenditure debited and the cost incurred for each trip, the AO calculated that there should have been 100194 trips carried out by the tippers. The quantity o earth carried by these tippers will be 1202328 cubic meters of the land is 59169 yards. Looking to the quantity of is used for*

*filling and considering the area of land, the AO calculated that the depth for which the earth has been filled will come to 24.32 meters. The assessee was not able to produce any evidence with reference to existence of such a land, which was required to be filled up 24.32 meters. The sale agreement showed that the description of the land was agricultural land,The AO therefore inferred that the expenditure which has been claimed to have been incurred is superfluous and has been debited to conceal the real profit. The AO therefore disallowed the sum of Rs.7,55,85,800/-*

*2 3 Before the learned CIT(A), the AO vide letter dated 31st March, 2009 mentioned that the DVO vide letter dated 27th February, 2009 has estimated the expenditure for earth filling at Rs.9,30,000/- for the asst. year 2006-07 and 2007-08. Before the learned CIT(A), it was argued by the assessee that the report of the DVO was not made available to the assessee. The AO has not inspected the property for estimating the development expenses. The* learned CIT(A) confirmed the addition after observing as under:-

> *"I have carefully/ considered the facts of the case. It is seen that expenses are incurred by the appellant regarding development 7xpeno'iture in the form of earth filling and land leveling charges to the tune of Rs.7,66,26,200. These expenses were capitalized and shown a WIP in the balance sheet by the appellant. These expenses are not claimed as expenditure in the P&L. A/c by the appellant as the same were treated as capital expenses. The AO has all the power to investigate and enquire into the affairs of the appellant's case and the expenditure claimed whether it is a revenue or capital expenditure. The appellant can claim expenses as revenue or capital if these expenditure are genuine and actually incurred by him in the course of running his business. In the instant case, the appellant has not denied the fact that expenditure of Ps.7,55,85,800 has been incurred and capitalized as WIP It is the duty of the appellant to produce and furnish the details of expenditure claimed by him in the books of accounts. The appellant failed to produce details to support and justify his claim. The expenses may not be claimed in the P&L. account. But once it finds entry in the balance sheet as WIP, the value of assets is increased to that extent. The appellant should file all the details to justify the increase of the value of assets in the balance sheet. In the present case, the appellant also admitted some lapses regarding basic information and daily expenditure not appearing in the cash book (Q. No.8 & 9 dt.16.7.08 - statement on oath). It is seen that all the payments were made in cash and below Rs.20,000 in each case. This fact cannot be relied upon by the appellant to claim that his expenses are genuine ani justified. It is observed that these*

*payments were made to only six persons and aggregate payments were more than Rs.50,000. Therefore, the appellant is liable to deduct tax at source for all these payments u/s 194C. Once the provisions of sec.194C is involved, all these payments can also be disallowed u/s 40(a)(ia) of the Act. This line of action is not considered by the AO. The disallowance made by the AO is based on documents found during the survey. Therefore, the view of the appellant that disallowances were made on surmise, assumption and presumptions is not correct and tenable. The disallowance made during this year of Rs.7,55,85,800/- is justified. The appellant has not adduced any evidence to disapprove the addition of Rs.3,27,050/-. I do not see any infirmity in the order of the AO. As no interference is called for, the addition is hereby confirmed".*

*2.4 During the course of proceedings before us, the learned AR submitted that earth-filling expenses has been incurred for the asst. years 2006-07 and 2007-08. For the asst. year 2006-07, the expenditure has not been claimed in the P&L account but was shown as work in progress. Even if the expenditure is held to be inflated, then no addition can be made as no deduction has been claimed. The finding of the revenue is that the expenditure is not genuine. If the expenditure is not genuine then the closing work in progress will stand reduced and therefore, the opening work in progress for the subsequent year will stand reduced and will affect the income of The subsequent year. .It was further submitted that the AO has mode addition of the sum in the asst. year 2007-08 on protective basis. It was further submitted that during the course of assessment proceedings for the asst. year 2007-08, the assessee has produced some more evidences in support of his claim that earth filling expenses are genuine. Though the contention of the assessee has not been accepted but the appeal of the assessee against assessment for the asst. year 2007-08 is pending before the learned CIT(A).*

*2.5. On the other hand, the learned DR stated that the finding of the AO that expenditure is not genuine should be upheld so that the*

*addition if it is required to be made for the asst. year 2007-08 can be taken note of by the lower authorities.*

*2.6 We have heard both the parties. It is not disputed that the expenditure on earth filling has not been claimed in the asst. year under consideration and therefore, the addition could not have been made in the asst. year under reference. It is true that the AO could not record a finding in respect of the genuineness of the expenditure. If the expenditure is not genuine, then the closing work in progress for the asst. year will stand reduced. Since the assessee has also incurred earth filling expenses in the subsequent year and the appeal of the assessee for the subsequent year is pending before the learned CIT(A), the learned CIT(A) will have to record a finding in respect of genuineness of the expenses in respect of earth filling. The addition which has been made in this year has also been made on protective basis in the subsequent year and therefore, the learned CIT(A) will have to decide the quantum of addition for that year. We therefore feel that the issue should be restored back on the file of the learned CIT(A). The learned CIT(A) will afford opportunity to the AO for placing the material on record to support the case that the expenses are not genuine. Since the expenditure is being claimed as a deduction in the asst. year 2007-08, therefore, the learned CIT(A) will be free to give a finding on the genuineness of the expenditure debited in asst. year 2006-07 and credited in work in progress. With these observations, the addition of Rs.7,55,85,800/- is restored back on the file of the learned CIT(A)."*

5.3 On set aside assessment by Tribunal, the Ld. CIT(A) directed the AO to disallow not only expenditure incurred in assessment year 2007-08 but also expenditure incurred in AY 2006-07 totalling of Rs.13,88,76,800/-. According to the Ld. CIT(A), the claim of earth filling and levelling expenses is only paper entry with sole purpose of being to inflate the cost of and reduce the profit and avoid payment of tax. Out of total expenditure of claim of assessee a deduction of Rs.9,30,000/- has been granted and an amount of Rs.13,88,76,800/- has been sustained. Before us, Ld. A.R. submitted that the assessee has maintained the regular books of accounts. All these expenditures were duly accounted in books of accounts and the books of accounts were audited by the qualified Chartered Accountant in terms of section 44AB of the Act and there was no adverse findings by the tax auditors. The income declared by the assessee from this business transaction is not below the accepted rate of net profit in similar line of business. Further, assessee produced self-made vouchers and each payment is made by cash below Rs.20,000/- and these vouchers are found during the course of survey u/s 133A of the Act. The A.O. doubted incurring of this expenditure. According to the lower authorities, it is only paper entries so as to inflate the expenditure. The assessee was asked to produce the parties to whom the payment has been made. The assessee's plea is that the assessee engaged the service of the persons who are belonging to unorganized sector and it was not possible to produce them after lapse of long time as the work was completed before 31.3.2007 and the assessee was asked to produce them in the month of March, 2009 and those persons keep moving from place to place in search of work. These are people with no fixed address or permanent place of residence in Bangalore. The AO disbelieved it and he made addition towards impugned expenditure. The assessee during the

course of assessment also produced the certificate to support the incurring of expenditure from M/s. Guideline Surveys placed at page 62 of the paper book, which reads as follows:-

Annexure - E

GUIDELINE SURVEYS

TOPOMAPPING & SURVEYING CONSULTANTS

Regd. Office : (No. 272) "Guideline House", 14th Cross, Domlur Layout, Bengaluru – 560 071.
Tel. : 25353877, 25357205, Fax : 080 – 41258799, E-mail : guideline@airtelmail.in

**TO WHOM SO EVER IT MAY CONCERN**

This is to **Certify that the Quantity** calculation for the site filling taken place at the project site at **Sy. No 61/2, 62 & 62/2(P), of Kasavanahalli Village, Varthur Hobli, Bangalore.**

The quantity has been carried out with reference to the original ground level or Levels before formation (OGL OR BF) **surveyed on May 2004 , Drawing No. 773/2004** & the present ground level (Level after formation) surveyed **( Drawing No. 225/2007) on May 2007.**

The total filling quantity has been calculated to **731993 cubic meter.**

The above quantity has been calculated by applying the Prismordial method using related software

Thanking you,

Yours faithfully,

For GUIDELINE SURVEYS

25/3/2009

(LA. ARRI)
Managing Partner

*********

5.4 Further, assessee also supported the claim of expenditure by way of his affidavit, which is placed in paper book at page Nos.63 & 64 which reads as follows:-

(d)

(63)

Annexure - F

~~60~~

**INDIA NON JUDICIAL**

**Government of Karnataka**

**e-Stamp**

सत्यमेव जयते

| | | |
|---|---|---|
| Certificate No. | : | IN-KA02647183643042H |
| Certificate Issued Date | : | 26-Mar-2009 01:59 PM |
| Account Reference | : | SHCIL (FI)/ ka-shcil/ MALLESHWARAM/ KA-BA |
| Unique Doc. Reference | : | SUBIN-KAKA-SHCIL02760128111041H |
| Purchased by | : | K SATISH KUMAR |
| Description of Document | : | Article 12 Bond |
| Description | : | AGREEMENT |
| Consideration Price (Rs.) | : | 0 (Zero) |
| First Party | : | K SATISH KUMAR |
| Second Party | : | NA |
| Stamp Duty Paid By | : | K SATISH KUMAR |
| Stamp Duty Amount(Rs.) | : | 50 (Fifty only) |

For Stock Holding ... on of India ...

Authorised Signatory

Please write or type below this line

**AFFIDAVIT**

I, **K. SATISH KUMAR**, son of late Sri Krishnappa, aged about 54 years, residing at **#164, I Block, II Stage, RMV BANGALORE - 560092**, do hereby solemnly affirm and state on oath as follows :

Statutory Alert:

1

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1. That I had purchased the property at **Survey No.8, 61/2, 62 and 63/2[P], Kasavanahalli Village, Varathur Hobli, Bangalore South Taluk**, in the year 2004.

2. That the aforesaid property purchased by me was much below the ground level in the neighbouring areas and there were deep ravines and valleys in the property.

3. That I engaged the services of M/s. Guideline Surveys, Topomapping & Surveying Consultants, #272, "Guideline House", 14th Cross, Domlur Layout, BANGALORE - 560 071, to make a survey of the property and the Survey report given by them in May, 2004 shows the different contours on the property.

4. That I undertook the task of leveling the land and raising the ground level to bring it at par with the neighbouring areas and carried out earth filling, leveling and compaction works on the above property from 6.12.2005 to 23.10.2006.

5. That I have incurred a sum of Rs. 7,69,53,250/- during the financial year 2005-06 and a sum of Rs. 7,15,72,000/- during the financial year 2006-07 towards earth filling charges.

6. That the aforesaid expenditure was incurred by me to purchase earth from various construction sites, etc., where excavation work is done and transport the same by lorries to the property for dumping therein.

7. That the earth was purchased from several persons viz., Sri. Rajesh, Sri. Ramaiah, Sri. Nagaraj, Sri. Mohan, Sri. Santosh and Sri. Kumar who used to bring the earth by engaging lorries and payments were made to them after receipt of material by my staff.

8. That after completion of the earth filling, leveling and compaction works, I once again engaged M/s. Guideline Surveys to do a survey of the property and marked the present ground level.

9. That the expenditure incurred by me in earth filling on the property is genuine and supported by vouchers as are in vogue in this line of the trade and it has not been possible for me to locate the recipients of the payments as their present whereabouts are not known.

**WHATEVER STATED ABOVE IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.**
**DATED THIS THE 30th DAY OF MARCH, 2009 AT BANGALORE.**

NOTARY
L.S.SUBRAMANYAMY
BANGALORE
KARNATAKA
Reg.No. 2152
GOVT. OF INDIA

DEPONENT
SWORN TO BEFORE ME

L. S. SUBRAMANYAMY
B.Sc., B.E., [illegible] LL.B.,
NOTARY, GOVT. OF INDIA
[illegible] Bangalore

2

5.5 The A.O. was not ready to accept these documents. He referred the matter to DVO and the AO obtained the report from him on 27.2.2009 after lapse of 2 years of incurring this expenditure and he has given a certificate that assessee has incurred an expenditure of Rs.9.30 lakhs only towards earth filling and levelling. The A.O. went on making an addition on the basis of DVOs report. However, on going through the order of the AO, we found that the books of accounts of the assessee are not rejected. In our opinion, without rejecting the books of accounts by AO, disallowance of expenditure in the eyes of law is not sustainable especially when assessee has maintained regular books of accounts with supporting evidence and duly audited by the tax auditor. During the course of assessment, AO proceeded to verify the veracity of the bills with the service provider who are not available and the assessee failed to produce as they left Bangalore after completion of this work and they do not have the permanent address or residence in Bangalore. We note that the assessee has maintained books of accounts and duly audited u/s 44AB of the Act. The assessee has produced the regular books of accounts and supporting vouchers and bills before the AO, therefore, the finding of the AO that there was no evidence to support the claim of expenditure is erroneous and we find that all the evidences were filed before AO including M/s. Guideline Survey's report and affidavit from assessee which were not examined by the AO in accordance with law. It is the duty of the AO to examine the deponent in the affidavit and also the valuer who has given the report, with regard to the incurring expenditure by assessee. The AO failed to examine the person who has given those documents. We find that all the evidences were filed before AO along with books of accounts were never been rejected and if the AO have any doubt in respect of the expenditure mentioned by M/s. Guideline Surveys dated 25.3.1999, he ought to have examined them on

oath. The entries made in the books of accounts of the assessee has not been challenged by the authorities and in the absence of such challenge, the authorities cannot take adverse inference against the assessee. In such scenario, in our opinion, without rejecting the books of accounts, and not challenging the entries made in the books of accounts, the disallowance made by AO is not sustainable in the eyes of law. In other words, if any specific expenditure is unverifiable or is unvouched, then such specific expenditure is disallowable. In the present case, no specific item has been identified by AO to make such disallowances, therefore, we are of the view that the disallowance as confirmed by Ld. CIT(A) is arbitrary exercise of power and therefore, unsustainable in the eyes of law. Further, in similar circumstances, Hon'ble High Court in the case of Sri Ganesh Shipping Agency in ITA No.366/2015 vide order dated 6.2.2021 deleting the additions made towards payment of speed money by shipping agency held as under:-

> *"5. We have considered the submissions made on both sides and have perused the record. From perusal of the order passed by the authorities, it is evident that the authorities have accepted the books of accounts produced by the assessee. The Assessing Officer, in its order, has admitted that the payment of speed money is a trade practice which is followed by the assessee and similar business concerns functioning for speedy completion of their work. However, the disallowance of 20% of the expenses is made solely on the ground that the assessee had produced the self-made cash vouchers which showed that the payment was made by cash to each gang leader and the identity of the gang leader is not verifiable and the recipients are not assesse's employees. The aforesaid finding has been affirmed by the Commissioner of Income Tax (Appeals) as well as by the Tribunal. However, it is pertinent to note that the books of accounts have not been touted by any of the authorities under the Act. A Bench of this Court vide judgment dated 24.03.2015 passed in ITA No.22/2015, has held that admittedly the normal practice in the line of business of the assessee is to pay*

*certain extra amounts to port labourers as speed money for promptly and speedily carrying out the labour work of handling cargo beyond working hours and has placed reliance on .the decision rendered by this Court in* ***KONKAN MARINE AGENCIES,*** *supra. It is pertinent to note that in* ***CLIFFORD D'SOZA,*** *supra, payment was made to the sub-contractors in cash as well as by Cheques In the absence of any challenge to the entries made in the books of accounts by the authorities, in our opinion, the finding recorded by the Assessing Officer as well as the Tribunal that it denied the claim of the assessee for expenditure to the extent of 10% on account of payment of speed money, is perverse as the same is duly supported by the documentary evidence. Insofar as the submission made by the learned counsel for the revenue that in paragraph 4 of the order of the Commissioner the assessee himself had restricted the payment of speed money to 10°/0 is concerned, it is pertinent to note that the restriction was made by the assessee in respect of Assessment Year 200405 and from the grounds of memorandum of appeal before the Tribunal, we find that the assessee had challenged the aforesaid finding which is evident from paragraphs 1 and 2, therefore, the aforesaid submission is of no assistance to the revenue."*

5.6 Similarly, in the present case, the revenue authorities have accepted the books of accounts produced by the assessee and not challenged the entries therein and also the entries are supported by vouchers/bills, the disallowance of expenditure incurred towards earth filling and land levelling cannot be made. More so, when the net profit declared by the assessee is at par with the net profit earned by the similar line of business and there is no finding by authorities that the net profit declared by the assessee is below the acceptable rate of net profit in the similar line of business. In view of this, the addition made by the AO on earth filling and land levelling is deleted.

5.7 The Ld. A.R. also argued that the AO cannot rely on the material collected under survey u/s 133A of the Act in view of

the judgement of Hon'ble Supreme Court in the case of Khader Khan cited Vs. CIT 352 ITR 480, wherein they confirmed the judgement of Hon'ble Madras High Court reported in 300 ITR 157, wherein held that "Section 133A does not empower any authority to examine any person on oath, hence any such statement has no evidential value and any admission made during such statement cannot, by itself cannot be made the basis of addition."

5.8 We have heard the rival submissions on this issue. Admittedly, in this case, there was survey and thereafter statement was recorded u/s 131 of the Act on 16.7.2008. The material collected on survey was the provocation to doubt the expenditure incurred on earth filling and land levelling. A reference to the DVO to decide the quantum of amount spent on earth filling and land levelling. In our opinion as held by Hon'ble Supreme Court in the case of Khader Khan sons cited (supra) the material collected during the course of survey u/s 133A of the Act cannot be used for the purpose of assessment which have no evidential value and any admission mad during the statement recorded on that count itself cannot be basis for addition. On this count also, addition cannot be sustained. Accordingly, ground Nos.2 to 2.2 are allowed.

6. Next Ground No.3 of the assessee is with regard to reference to the Valuation Officer made by the Assessing officer is in order or not. The claim of the assessee is that in terms of sec. 142A of the Act, as it stood at the relevant point of time, a reference could be made to the Valuation Officer for making an estimate of the value of

investment referee to in section 69 of the Act, or for the valuation of any bullion, jewellery or other valuable article referred to in section 69 & 69B of the Act. The provisions as it stood at relevant point of time is reproduced for the sake of facility:

> *"Section 142A - For the purposes o making an assessment or reassessment under this 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 valuable article referred to in section 69A and 69B is required to be made, the Assessing officer may require the Valuation Officer to make an estimate of such value and report the same to him."*

6.1 As can be seen from the above, a reference to the Valuation Officer u/s 142A of the Act can be made only for estimating the value of investments referred to in section 69 and 69B of the Act. Further, reference could also be made for estimating the value of any article referred to in section 69A and 69B of the Act. However, there is no power containing u/s 142A of the Act to make a reference to the Valuation Officer to estimate the expenditure incurred by the appellant, as provisions of section 69C of the Act, are not included in section 142A of the Act, as it stood at the relevant point of time. In fact, the aforesaid objection was taken before the Learned A.O. and the same has been adverted to at para (11 & 12) of the impugned assessment order for the assessment year 2007-08. The Learned A.O. has justified the reference in terms of section 142A(2) of the Act, dealing with the powers of the Valuation Officer. It is submitted that the reference to the Valuation Officer can only be made in terms of subsection (1) of section 142A of the Act and the same cannot be justified by virtue of the powers of the Valuation Officer under sub-section (2) of section 142A of the Act. The Hon'ble Supreme Court in the case of AMIYA BALA PAUL reported in 262 ITR 407 (SC) has considered the powers of the Valuation Officer to estimate the cost of

construction before the insertion of section 142A of the Act. The Hon'ble Supreme Court has observed at page (416) as follows:

> *"The Valuation Officer referred to has, according to he Explanation to the section, the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957.Under sub-section (2) of section 269L, the Valuation Officer to whom a reference is made under clause (a) or clause (b) of sub-section (1) is given all the powers he has under section 38 of the Wealth-tax Act, 1957. And if, in an appeal under section 269G against the order for acquisition of any immovable property, the fair market value of such property is in dispute, the Appellate Tribunal shall, on a request being made in this behalf by the competent authority, give an opportunity of being heard to any Valuation Officer nominated for the purpose by the competent authority."*
>
> *From this it is clear that whenever reference. to a Valuation Officer appointed under the Wealth-tax Act is permissible under the Income-tax Act, it has been statutorily so provided.*
>
> *Apart from the aforesaid, the Valuation Officer is appointed under the Wealth-tax Act and can discharge functions within the statutorily Limits under which he is appointed. It is not open to a Valuation Officer to act in his capacity as Valuation Officer otherwise than in discharge of his statutory functions. He cannot be called upon nor would he have the jurisdiction to give a report to the Assessing officer under the Income-tax Act except when a reference is made under and in terms of section SSA or to a competent authority under section 269L*
>
> *We are, therefore, of the view that the High Court incorrectly answered the question referred to it in the affirmative. The Tribunal had not erred in holding that the Assessing officer cannot refer the matter to the Valuation Officer for estimating the cost of construction of the house property. The appeal is accordingly allowed and the decision of the High Court set aside. There will be no order as to costs."*
>
> **underlining for emphasis"*

6.2 Having regard to the parity of reasoning of the aforesaid decision of the Hon'ble Supreme Court in the case of AMIYA BALA PAUL (Supra), it is noted that a Valuation Officer can only have

jurisdiction to give a report under the Income-tax Act in terms of the statutory provisions of the Act, which in the instant case is the provisions of sec. 142A of the Act. The reference to the Valuation officer cannot be justified having regard to the powers vested in the Valuation Officer, as has been done by the Learned A.O. Since the Assessing Officer is not empowered to make a reference to the Valuation Officer to estimate the extent of expenditure incurred and claimed by the appellant on Earth Filling Expenses in terms of the provisions of section 142A of the Act, as it stood at the material point of time, the reference made is illegal and a nullity. It is submitted that no credence can be placed on the report of the Valuation Officer when the reference itself was without jurisdiction and the same requires to be ignored. It is prayed accordingly.

6.3 Ld. D.R. submitted that Ld. CIT(A) observed that the reference to the valuation officer was made during the course of assessment for the AY 2007-08. The assessee has relied on the decision of the Hon'ble Supreme Court in the case of Amiya Bala Paul reported in 262 ITR 407 (SC) for arguing that the reference to the Valuation Officer u/s 142A of the Act was not valid. The said decision of the Hon'ble Supreme Court has been rendered prior to insertion of section 142A of the Act i.e., prior to the said provision being introduced in the Income tax Act, 1961 and at such time when the reference to Valuation Officer was provided only in the Wealth tax Act and not under Income tax Act. However, with the insertion of section 142A of the Act in the Finance No. 2 of the Act 2004 with retrospective effect from 15.11.1972, the said section 142A of the Act has been inserted in the Income tax Act,

1961 providing for reference to Valuation Officer for estimating the value of immovable property.

6.4 As regards the issue whether reference to Valuation Officer u/s 142A of the Act can be made in the case of the assessee where the said immovable property was actually shown as stock-in-trade and not an investment is examined. In the case of Namitha Singh, New Delhi Vs. IT department before the coordinate Bench of Delhi in ITA No. 2256 (Del) of 2008 (vide order. dated 30.8.2011) for the asst. year 2004-05, the assessee (in that case) argued that the valuation made by Valuation Officer was not binding on the Assessing officer as there was nothing to indicate any unaccounted investment in the purchase of properties and the assessee relied on the decision of the Hon'ble Supreme Court in the case of Smt. Amiya Bala Paul vs. CIT (supra) stating that the reference to Valuation Officer was not valid. However, the Tribunal held that the said reference was valid vide aforesaid order.

> *"Now coming to the investment made by the assessee in three shops at N-5, NDSE-1, New Delhi. The DVO has estimated the fair market value o the assets at Rs.1,46,8,062/-.The Ld. CIT (Appeals) has deleted the addition based on he valuation report on the ground that the AO has not brought any material on record apart from DVO's report to show that there was any undisclosed investment in the property purchased by the assessee. He has also observed that for making an addition the assessee must be shown to have received or paid more than what is recorded or disclosed by him as the consideration.*
>
> *Before us the Ld. AR of the assessee submitted that provisions of section 142A of the Act are not applicable on the ground that Amendment to section 142A has been made by Finance Act, 2010 with effect from 1/7/2010. We have gone through the provisions of section 142A(1) before and after the amendment made by Finance Act, 2010.*

*Section 142A was inserted by Finance Act, 2004 w.e.f. 1.4.1972 for purposes of estimating the value of certain investments. Section 142A as applicable' for assessment year 2004-05 under consideration reads as under:*

> *"142A(1) For the purpose of making an assessment or reassessment under this 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 is required to be made, the Assessing officer may require the Valuation Officer to make an estimate of such value and report the same to him.*

*"Section 69 of Income tax Act, 1961 deals with unexplained investments not recorded in books of accounts, if any, maintained by the assessee for any source of income; section 69A is applicable in the cases where in any financial year the assessee is found to be owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of investments; and section 69B is applicable in cases where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, I.T. Appeal No. 256 (Del) of 2008 and CO No.79(Del) of 2010. and the Assessing officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income and assessee offers no explanation about nature and source of investment/acquisition or offers no explanation about such excess amount or the explanation offered by him is not, in the opinion of the Assessing officer, satisfactory provisions section 69/69A/698 will be attracted. The assessing officer in order to estimate the value of such investments in assets may refer the matter to valuation officer."*

6.5 Ld. D.R. stated that it was held even prior to the amendment in Finance Act, 2010, the provisions for valuation of immovable property existed in the Income Tax Act and,

therefore, reference to the Valuation Officer in such cases was in order.

6.6 In the case of Shagun Buildwell Ltd. the coordinate bench of ITAT Delhi in ITA No.3514/Del/2008 dated 18.12.2009, has, under similar circumstances held that reference to Valuation Officer could be made for valuation of immovable property held as stock-in-trade, wherein it was held as under:

> *"Under sec. 142A(1) for the purpose of making an assessment or reassessment under the Income-tax Act, 1961, where an estimate of value of any investment referred to in sec. 698 or value of any bullion, jewellery or other valuable articles referred to in sec. 69A or 698 is required to be made, the Assessing officer may require the Valuation Officer to make an estimate of such value and report the same to him. From the Language of sec. 142A(1), it is clear that reference under this section can be made by the Assessing officer for the purpose of estimation of investment u/s 69 or sec. 69A or 698. In the instant case, the purchase price has not been fully disclosed in the books of the assessee and, therefore, assessee's case will be covered by provisions of sec. 698 of the Act. Section 698 deals with the cases where assessee has made investments and also the cases where assessee is found to be owner of any bullion, jewellery or other valuable articles and where the Assessing officer finds that amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in the books of account maintained by the assessee for any source of income and assessee does not offer explanation, the excess amount shall be deemed to be the income of the assessee. The section does not specifically exclude that the "stock-in-trade" would not all in definition of valuable article. Therefore, the amount expended on acquisition of building whether it is stock-in-trade or as investment, it would be covered by the provisions of sec. 69 and 698 of the Act. Since the value of property has not been disclosed fully by assessee in the books of account, it is covered by the provisions of sec. 698 and consequently, the Assessing Officer was justified in making reference u/s 142A of the Act. Accordingly,*

*we do not find any infirmity in the order of Ld. CIT (A) confirming the action of Assessing officer for making reference u/s 142A of the Act."*

6.7 Thus, Ld. D.R. submitted that as held in the above cases, with the introduction of section 142A of the Act, a reference to the Valuation Officer can be made 'in effect' to determine the undisclosed income of the assessee under such circumstances as held by the Courts as discussed above. Even otherwise, it is seen that reference to an expert is a part of enquiry carried out by the Assessing officer and the Hon'ble Supreme Court of India in the case of CIT, Delhi vs. Bharati Cellular Limited dated 12.8.2010 in Civil appeal No.6696/2010, 6697/2010, 6698/2010 and Nos. 13027/2009 has held that the department should take opinion from technical experts to enable to appellate forum to decide legal issues based on the factual foundation. Under such circumstances, as have emerged in the present case showing glaring gaps in the claim of the assessee with circumstantial evidence brought on record by the AO and the opinion of expert and where the transaction is so as to benefit the assessee himself and under such legal interpretation given by the Courts as stated above, the reference to Valuation Officer by the Assessing Officer was justified and as per law.

6.8 Ld. D.R. stated that under such facts as brought out above, the claim of the assessee that Rs. 13,98,06,800 has been spent towards improvement or development of the property shown as WIP during the year cannot be accepted. Ld. CIT(A) agreed with the finding of the AO in the remand report that the expenditure

claimed is superfluous and hold that this is on 'paper only' with the sole purpose being to inflate the cost of land and reduce profits and avoid payment of the taxes. At best, the expenditure on cost of earth supplies can be allowed to the extent of Rs. 9,30,000 as determined by the DVO in his detailed and speaking report which has been confronted to the assessee during the course of assessment and hence, the appeal and the rejoinder of the assessee has been considered. The AO has made an addition of Rs.13,98,06,800/- for the AY 2006-07 and AY 2007-08. After giving further relief of Rs.9,30,000/-, the addition was upheld to the extent of Rs.13,88,76,800/- for the AY 2007-08.

6.9 These facts and findings in respect of the payments made during the AY 2006-07 apply to the entire expense of Rs.13,98,06,800 (being Rs.7,55,85,800/- paid during AY 2006-07 and Rs.6,4,686,000) for AY 2007-08. which were claimed as expenses in asst. year 2007-08 as held by the coordinate bench of this Tribunal in its order in ITA No.1176/Bang/2010 dated 13.5.2011 that the disallowance (if any) has to be made in the year the expenses have been claimed. Hence, Ld. CIT(A) held that the addition of Rs. 13,88,76,800 was upheld on substantive basis.

**Findings:-**

7. In this case, there was survey u/s 133A of the Act. During the course of survey in the business premises of the assessee on 27.6.2018, the revenue authorities noticed that the assessee has incurred substantial expenditure on earth filling and levelling of land purchased by assessee at Kasavanahalli measuring 12 acres and 9 guntas. The revenue authorities

found the vouchers maintained by the assessee in respect of aforesaid expenditure incurred on earth filling charges for the lands at Kasavanahalli and same were impounded. During the course of survey u/s 133A of the Act, assessee was subject to intensive enquiries. According to the AO, the payments made for earth filling & earth levelling were made by self-made vouchers and each payment is less than Rs.20,000/- and entire expenditure incurred by cash. The assessee was asked to give details of the place from which the earth is brought and the license issued by the State Mining Department for carrying out such activity. Assessee failed to give satisfactory answer to AO. Even the assessee failed to give the details of trucks used for transporting the earth filling materials. Consequent to this AO referred the matter to DVO to ascertain the true and actual cost of development expenses incurred on the above property u/s 142A of the Act. Now the contention of the Ld. A.R. is that the reference made to DVO u/s 142A of the Act is bad in law as there is no power u/s 142A of the Act to make reference to the valuation officer to determine the cost of development works incurred by assessee. Consequently, reference made is illegal so addition based on such DVO report is void-ab-initio. Let us examine the section 142A of the Act and its historical background.

7.1 Section 142A of the Income-tax Act, 1961 inserted by the Finance Act, 2004, with effect from November 15, 1972 enables the Assessing Officers to make a reference to Valuation Officer for the purpose of making assessment or reassessment under the Act. For quite sometime, the legal basis of a reference to Valuation Officer of

the Department to determine cost of construction of buildings was the subject-matter of controversy before various Courts, some courts deciding in favour and some against the revenue, till the issue was decided by the Apex Court in the case of Smt. Amiya Bala Paul v. CIT [2003] 262 ITR 407 (SC). The legal basis of such references under sections 55A, 142(1), 131 and 133(6) was held as infirm in the said judgment. However, the law has been amended by the Finance Act No. 2, 2004 inserting section 142A with effect from November 15, 1972 enabling the Assessing Officers to make reference to Valuation Officer for the purposes of making an assessment or reassessment under the Act.

7.2 Sec.142A inserted by the Finance (No. 2) Act, 2004, w.e.f. **15-11-1972** and as amended by the Finance Act, 2010, w.e.f. 1-7-2010, read as under :

> *'142A. Estimate by Valuation Officer in certain cases.—(1) For the purposes of making an assessment or reassessment under this 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, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.*
>
> *(2) The Valuation Officer to whom a reference is made under sub-section (1) shall, for the purposes of dealing with such reference, have all the powers that he has under section 38A of the Wealth-tax Act, 1957 (27 of 1957).*
>
> *(3) On receipt of the report from the Valuation Officer, the Assessing Officer may, after giving the assessee an opportunity of being heard, take into account such report in making such assessment or reassessment:*
>
> ***Provided** that nothing contained in this section shall apply in respect of an assessment made on or before the 30th day of September,*

*2004, and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A.*

*Explanation.—In this section, "Valuation Officer" has the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957)."*

7.3 In Circular No.5 of 2005 dated 15.7.2005 issued by the CBDT, the insertion of the aforesaid section has been explained thus:

***"Clarificatory amendments regarding estimates by Valuation Officer in certain cases***

*The existing provisions of section 131 provide that the Assessing Officer shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, when trying a suit. One such power which has been provided in clause (d) of sub-section (1) of section 131, is the power to issue commissions. Section 75 of CPC and order XXVI of the Schedule thereto lays down the power of "issuing commission", which inter alia, empowers the Court to make a local investigation and also "to hold a scientific, technical and expert investigation". Using this power, the Assessing Officer has been making a reference to the Valuation Officer for estimating the cost of construction of properties.*

*The scope of power vested in an Assessing Officer under section 131 to make a reference to the Valuation Officer for estimating the cost of construction of properties has been a subject-matter of litigation.*

*A new section 142A has been inserted by the Finance (No. 2) Act, 2004 to specifically provide that an Assessing Officer has the power to make a reference to the Valuation Officer for estimating the value of investment, expenditure, etc. This section has been inserted with retrospective effect from 15th November, 1972 to save the cases where such references have been made in the past and are still pending in litigation at one stage or the other.*

7.4 Sub-section (1) of the new section provides that 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 is required to be made for the purposes of making any assessment or re-assessment, the Assessing Officer may require the Valuation Officer to make an estimate of the same and report to the Assessing Officer.

> *Sub-section (2) of the new section provides that the Valuation Officer to whom such a reference is made under sub-section (1) shall, for the purpose of dealing with such reference, have all the powers that he has under section 38A of the Wealth-tax Act, 1957.*
>
> *Sub-section (3) of the new section provides that on receipt of the report from the Valuation Officer, the Assessing Officer may after giving the assessee an opportunity of being heard, take into account such report in making such assessment or re-assessment.*
>
> *It has been provided in the proviso to the new section that the provisions of the same shall not apply in respect of an assessment made on or before the 30th day of September, 2004 and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A.*
>
> *This amendment takes effect retrospectively from 15th November, 1972."*

7.5 The Finance Act, 2010 inserted the words "or fair market value of any property referred to in sub-section (2) of section 56 is required to be made". This amendment is insignificant as far as the present appeal is concerned.

7.6 It has been held by the Hon'ble Supreme Court in the case of Sargam Cinemas Vs. CIT 262 ITR 513 (SC) that rejection of books of accounts is a precondition for making a reference to DVO. Therefore in cases where this requirement was not satisfied, the addition made on account of unexplained investments in construction was being deleted. It is only with a view to remove such hurdle that Sec.142A

of the Act was substituted by inserting a new Sec.142A by the Finance (No.2) Act, 2014, which no longer requires rejection of books of accounts of an Assessee to make a reference to the DVO.

7.7 By the Finance (No.2) Act, 2014 substituted the existing Sec.142A by inserting a new Sec.142A of the Act with effect from 1.10.2014, which reads thus:

> *"Estimation of value of assets by Valuation Officer.142A.*
>
> *(1) The Assessing Officer may, for the purposes of assessment or reassessment, make a reference to a Valuation Officer to estimate the value, including fair market value, of any asset, property or investment and submit a copy of report to him.*
>
> *(2) The Assessing Officer may make a reference to the Valuation Officer under sub-section (1) whether or not he is satisfied about the correctness or completeness of the accounts of the assessee.*
>
> *(3) The Valuation Officer, on a reference made under sub-section (1), shall, for the purpose of estimating the value of the asset, property or investment, have all the powers that he has under section 38A of the Wealth-tax Act, 1957 (27 of 1957).*
>
> *(4) The Valuation Officer shall, estimate the value of the asset, property or investment after taking into account such evidence as the assessee may produce and any other evidence in his possession gathered, after giving an opportunity of being heard to the assessee.*
>
> *(5) The Valuation Officer may estimate the value of the asset, property or investment to the best of his judgment, if the assessee does not co-operate or comply with his directions.*
>
> *(6) The Valuation Officer shall send a copy of the report of the estimate made under sub-section (4) or sub-section (5), as the case may be, to the Assessing Officer and the assessee, within a period of six months from the end of the month in which a reference is made under sub-section (1).*
>
> *(7) The Assessing Officer may, on receipt of the report from the Valuation Officer, and after giving the assessee an opportunity of being heard, take into account such report in making the assessment or reassessment.*

*Explanation.—In this section, "Valuation Officer" has the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).”*

7.8 In Circular No.1 of 2015 dated 21.1.2015 issued by the CBDT, the reasons for substitution of new Sec.142A in place of the earlier Sec.142A of the Act has been explained thus:

***“43. Estimate of value of assets by Valuation Officer and time limit for completion of assessments where reference made***

***43.1*** *The provisions contained in section 142A of the Income-tax Act, before its amendment by the Act, provided that the Assessing Officer may, for the purpose of making an assessment or reassessment, require the Valuation Officer to make an estimate of the value of any investment, any bullion, jewellery or fair market value of any property. On receipt of the report of the Valuation Officer, the Assessing Officer may after giving the assessee an opportunity of being heard take into account such report for the purposes of assessment or reassessment.*

***43.2*** *Section 142A of the Income-tax Act does not envisage rejection of books of account as a pre-condition for reference to the Valuation Officer for estimation of the value of any investment or property. Further, the said section 142A does not provide for any time limit for furnishing of the report by the Valuation Officer.*

***43.3*** *Accordingly, section 142A has been substituted so as to provide that the Assessing Officer may, for the purposes of assessment or reassessment, require the assistance of a Valuation Officer to estimate the value, including fair market value, of any asset, property or investment and submit the report to him. The Assessing Officer may make a reference to the Valuation Officer whether or not he is satisfied about the correctness or completeness of the accounts of the assessee. The Valuation Officer, shall, for the purpose of estimating the value of the asset, property or investment, have all the powers of section 38A of the Wealth-tax Act, 1957. The Valuation Officer is required to estimate the value of the asset, property or investment after taking into account the evidence produced by the assessee and any other evidence in his possession or gathered, after giving an opportunity of being heard to the assessee. If the assessee does not cooperate or comply with the directions of the Valuation Officer he*

*may, estimate the value of the asset, property or investment to the best of his judgment.*

***43.4** It has also been provided that the Valuation Officer shall send a copy of his estimate to the Assessing Officer and the assessee within a period of six months from the end of the month in which the reference is made. On receipt of the report from the Valuation Officer, the Assessing Officer may, after giving the assessee an opportunity of being heard, take into account such report in making the assessment or reassessment.*

***43.5** Sections 153 and 153B of the Income-tax Act have also been amended to provide that the time period beginning with the date on which the reference is made to the Valuation Officer and ending with the date on which his report is received by the Assessing Officer shall be excluded from the time limit provided under the aforesaid section for completion of assessment or reassessment.*

***43.6 Applicability:**- These amendments take effect from 1st October, 2014."*

7.9 It can be seen from the aforesaid history of Sec.142A, that the original provisions were introduced for the purpose of enabling to specifically provide that an Assessing Officer has the power to make a reference to the Valuation Officer for estimating the value of investment, expenditure, etc. The power was given to make a reference to the Valuation Officer purpose for the purposes of making an assessment or reassessment under this Act, (i) where an estimate of the value of any investment referred to in section 69 or section 69B or (ii) the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B or (iii) fair market value of any property referred to in sub-section (2) of section 56 is required to be made. Because the law was retrospective in its operation, the legislature wanted to safeguard concluded assessments being reopened and therefore by proviso to Sec.142A(3) of the Act, it was Provided that nothing contained in section 142A shall apply in respect of an assessment made on or before the 30th day of

September, 2004, and where such assessment has become final and conclusive on or before that date.

7.10 The reference in the present case was by the AO to the DVO on 2.12.2008 and therefore the reference to the DVO was valid on this point of view and not hit by the decision rendered by the Hon'ble Supreme Court in the case of Amiya Bala Paul (supra). By virtue of the aforesaid insertion of Sec.142A, the decision in the case of Amiya Bala Paul (Supra) rendered by the Hon'ble Supreme Court no longer stood in the way of the power of the AO to make a reference to the DVO but the requirement that finding that the books of accounts maintained by the Assessee is not correct and the value estimated by the AO varies substantially from what is recorded in the books of accounts is required to be satisfied before making a reference to DVO. It has been held by the Hon'ble Supreme Court in the case of Sargam Cinemas Vs. CIT 262 ITR 513 (SC) that rejection of books of accounts is a pre-condition for making a reference to DVO. Therefore in cases where this requirement was not satisfied, the addition made on account of unexplained investments in construction was being deleted. It is only with a view to remove such hurdle that Sec.142A of the Act was substituted by inserting a new Sec.142A by the Finance (No.2) Act, 2014, which no longer requires rejection of books of accounts of an Assessee to make a reference to the DVO.

7.11 Whether the observations in the case of Sunita Mansingha 393 ITR 121 (SC) can be the basis to hold that the reference to the DVO is valid in the present case, is the next aspect on which we need to delve. In the case of CIT Vs. Sunita Mansingha 393 ITR 121 (SC), the facts were that during the search conducted at residence of the

assessee, the Assessing Officer found that the assessee had half share in a firm and a farm house-cum-swimming pool was constructed by the firm. The Assessing Officer referred the properties, namely, residential house as well as farm house to the DVO for evaluating cost of construction and in turn the cost of the properties was determined at higher figure as against the cost declared by the firm as cost of construction. Accordingly, the Assessing Officer made addition of difference as income from undisclosed sources as investment in cost of construction of the properties. The Tribunal set aside the additions made by the Assessing Officer. On further appeal by the Revenue, the Rajasthan High Court held that it is well-settled that for the purpose of finding cost of construction, for the purpose of making assessment under the Act, no reference can be made to the DVO under section 55A and no addition can be made on the basis of report submitted by the DVO on such reference as per the law propounded by the Supreme Court in Smt. Amiya Bala Paul v. CIT 262 ITR 407(SC). On further appeal by the Revenue the Hon'ble Supreme Court held that in view of the fact that Section 142A was inserted by Finance (No.2) Act, 2014 (23 of 2004) w.e.f. 15th November, 1972 and subsequently again substituted by Finance Act, 2010 (14 of 2010) w.e.f. 1st July, 2010 and Finance (No.2) (225 of 2014) w.e.f. 1st October, 2014, as the proviso to sub-section (3) of Section 142A as it existed during the relevant period, reference to the Departmental Valuation Officer can be made because assessment in the present case had not become final and conclusive because the appeal preferred by the Revenue under section 260A of the Income Tax Act, 1961 was pending before the Rajasthan High Court. It is clear from the facts of the case before the Hon'ble Supreme Court that the Hon'ble Supreme Court was

clearly referring to the provisions of Sec.142A of the Act inserted by the Finance (No.2) Act, 2004 w.e.f from 15.11.1972. In the present case the law applicable to these appeals are the provisions of Sec.142A of the Act as amended by the finance Act, 2004 and if that be so, the reference to the DVO is invalid as there was no defects in the books of accounts of the Assessee pointed out by the AO before making reference to DVO. The aforesaid observations cannot have the effect of dispensing with the requirements for making a valid reference to the DVO as held by the Hon'ble Supreme Court in the case of Sargam Cinemas Vs. CIT 262 ITR 513 (SC) wherein it was held that rejection of books of accounts is a precondition for making a reference to DVO. In the absence of any provision similar to the proviso to Sec.142A(3) in the newly substituted Sec.142A by the Finance Act, 2014, no such inference can be made. When the new Sec.142A was inserted by the Finance (No.2) Act, 2014, the proviso to Sec.142A(3) did not exist as it no longer served any purpose. The legislature was conscious of the fact that the substitution of Sec.142A by the Finance (No.2) Act, 2014 was made only for the purpose of overruling the legal position as interpreted by various High Courts and Supreme Court in the case of Sargam Cinemas 352 ITR 480 (SC). The legislature did not make the law retrospective in operation nor were pending proceedings saved as was done when Sec.142A was inserted by the Finance (No.2) Act, 2004 w.e.f. from 15.11.1972. It cannot also be said that Sec.142A as inserted by the Finance Act, 2014 has retrospective effect. Therefore, we are of the view that the reference to DVO in the present case is invalid because as held by the Hon'ble Supreme Court in the case of Sargam Cinemas Vs. CIT 262 ITR 513 (SC) rejection of books of accounts is a pre-condition for making a reference to DVO and there was admittedly no such rejection of books of accounts. On

this count also the addition of Rs.13,88,76,800/- cannot be sustained.

7.12 In view of the above discussion, we are of the opinion that reference made by AO to DVO is not justified. On this count also, addition cannot be sustained as the AO firstly required to reject the books of accounts by recording his finding and then he referred the matter to DVO. In the present case, he failed to do so. Accordingly, we hold that reference made by DVO u/s 142A of the Act is bad in law. On this count also, the issue to be decided in favour of the assessee.

8. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on 1st Aug, 2022

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(Beena Pillai)** | **(Chandra Poojari)** |
| **Judicial Member** | **Accountant Member** |

Bangalore,
Dated 1st Aug, 2022.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

**Asst. Registrar,**
**ITAT, Bangalore.**