

THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

**Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 2252/Ahd/2017
Assessment Year 2012-13**

Jitendra K. Sewani, 27, Urvashi Bungalow, Naroda Patia, Saijpur Bogha, Ahmedabad PAN: AJAPS4239G (Appellant)	Vs	ITO, Ward-7(2)(2), Natureview Building Off Ashram Road, Ahmedabad (Respondent)
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**Assessee by: Shri S.N. Divatia, A.R.
Revenue by: Ms. Pooja Parekh, Sr. D.R.**

Date of hearing : 26-07-2022
Date of pronouncement : 19-10-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-7, Ahmedabad in Appeal no. CIT(A)-735/16-17 vide order dated 17/06/2017 passed for the assessment year 2013-14.

2. The assessee has taken the phone grounds of appeal:-

“1.1 The order passed u/s.250 on 17.06.2017 for A.Y.2013-14 by CIT(A)-7, Abad upholding partly the addition made towards the valuation as per DVO^J's report u/s 50C to the extent of RS. 15,49,375/- and disallowance of interest expenses of RS. 18,655/- is wholly illegal, unlawful and against the principles of natural justice.

1.2 The Ld. CIT(A) has grievously erred in law and or on facts in not considering fully and properly the submissions made and evidence produced by the appellant with regard to the impugned additions.

2.1 The Ld.CIT(A) has grievously erred in law and on facts in confirming valuation made by DVO u/s 50C dis regarding the objections raised by the appellant and thereby confirming the addition to the extent of valuation by DVO, though the discrepancy between DVQ's valuation and declared value as per sale deed were less than 15 % and facts of the case did not justify the said valuation.

2.2 That in the facts and circumstances of the case as well as in law, the Ld.CIT(A) ought not to have upheld the valuation made by DVO u/s 50C disregarding the objections raised by the appellant and thereby confirming the addition to the extent of valuation by DVO of RS. 15,49,375/-.

2.3 The Ld. CIT(A) has grievously erred in law and on facts in not considering the claim of cost of improvements, stamp duty etc. of Rs. 15,03,323/-.

3.1 The Ld. CIT(A) has erred in upholding the disallowance of interest expenses of RS. 18,655/-.

It is, therefore, prayed that the additions upheld by the CIT(A) may kindly be deleted.”

3. Grounds 1.1 and 1.2 of assessee's appeal are general and are covered as part of the succeeding grounds. Accordingly, the same are not being separately adjudicated upon since they are forming part of the succeeding grounds of appeal.

Ground 2.1:

4. In this ground, the assessee has challenged the Revenue in confirming the valuation of properties done by DVO under section 50C of the Act, disregarding the objections raised by the assessee and also ignoring the submission of the assessee to the effect that when the discrepancy between the sale value adopted by the DVO and the value of sale of properties as per the assessee is less than 15%, then in such facts the value adopted by the assessee has to be accepted.

5. The brief facts in relation to this ground of appeal are that during the course of assessment proceedings, the AO observed that the assessee has sold three properties and declared short-term capital gains of ₹ 9,23,550/-. On the request of the assessee, the AO referred the matter to the DVO but since the assessment was getting time-barred and the report of the DVO was not received till date of completion of the assessment, the AO passed order under section 143(3) of the Act by working out the capital gains on the basis of value of properties as per the stamp duty paid by the assessee at the time of sale and accordingly the AO made an addition of ₹ 46,40,047/- to the income of the assessee by invoking the provisions of section 50C of the Act.

6. In appeal, Ld. CIT(Appeals) took into consideration the report filed by the DVO and gave substantial relief to the assessee on the ground that since the value adopted by the assessee in respect of sale of three properties and the sale value assessed by the DVO were more or less similar, then the value adopted by the DVO may be considered and the value taken by the AO as per stamp duty paid is liable to be ignored. While granting relief to the assessee, the Ld. CIT(Appeals) made the following observations:

“4.2 The appellant has also made a submission dated 2.3.2017 in respect of ground of appeal No. 1 which is reproduced as under:

"Lr no made addition of Rs.46,40,047/- as per Para 4 of assessment order on account of stamp duty paid on transfer u/s.50©of IT Act 1961 subject to rectification u/s. 154 on receipt of valuation report from Govt. Authorized valuation officer, Lr Assistant V.O. prepared final order u/s.50© it Act

issued two reports dated 27/09/2016 and 27/09/2016 for three properties. Comparative chart indicating consideration assessed by LR ITO and V.O. Report is as under: -

Sr No.	Description of Property	Value taken BY ITO	Value Disclosed by assesses	Value assessed by V.O
1	Bungalow No. 31, Jai Bhole Bunglows, Bhat Gam, Gandhinagar	Rs.14,81,367/-	Rs.10,25,000/-	Rs.11,53,000/- (50 % of Rs.23,06,000/-]
2	37, jay Bhole Bunglows, Bhat Gam, Gandhinagar	Rs.26,93,877/-	Rs.20,00,000/-	Rs.23,70,000/-
3	6, Haridwar Soc., Saijhpur Bogha	Rs.47,71,428/-	Rs.22,00,000/-	Rs.23,23,000/-

The V.O. has valued approx near to declare value in return filed by appellat assesses. So many circumstances are working for property purchase and sale like location, construction, neighbor and other

facilities payment condition etc, which effect price consideration of property appellant assesses have taken loan paying interest rent realization of property was very low in compare to interest expenses hence appellant assesses was intending to reduce his liabilities at that time it was buyer market as recession was on pick considering the above fact Difference between Value disclosed by assesses and Value assesses by V.O. Rs.639000/- (Rs.5864000/- less Rs.5225000/-) which is about 10.9% appellant assesses request to accept genuine consideration received and declared by assesses in IT Return in support appellant assesses quote judgment pronounced by honorable IT AT Jaipur Bench in the case of Sitabai Khetan V/s. CAT copy of judgment is attached here with your honor ready reference. "

4.2.1 I have considered the assessment order, facts of the case and the submissions made by the appellant. I have also gone through the valuation report furnished by the DVO. It is seen from the same that the valuation of the said properties as per the DVO's report are more or less similar to the declared value taken by the appellant. It is also seen that the appellant was given an opportunity by the DVO to raised objections, if any and opportunity was given to put forth his submissions before the DVO. In view of these facts, I am of the considered opinion that the valuation taken by the DVO should be adopted as the value of the property. The AO is therefore directed to recomputed the capital gains accordingly. Ground of appeal No. 1 is partly allowed, subject to re-computation by the AO."

7. The assessee is in appeal before us against the order passed by Ld. CIT(Appeals) on this issue on the ground that that Ld. CIT(Appeals) has erred in facts and law in not considering the following grounds/issues raised by the assessee: firstly, CIT erred in confirming the valuation made by the DVO and disregarding the objections made by the assessee in respect of the valuation done by the DVO and secondly since the discrepancy between the sale value adopted by the DVO and the declared sale value of the three properties by the assessee was less than 15%, the instant facts of the case did not justify placing reliance on the valuation than by the DVO. Before us, the counsel for the assessee pointed out that the difference between the value assessed by the DVO and value declared by the assessee is less than 15% and accordingly, the value adopted by the DVO for the purpose of computing the sale value may be ignored. Besides the above the counsel for the assessee also pointed out that there are certain discrepancies appearing in the report prepared by the DVO. He drew our attention to page 22 of the paper book and submitted that the DVO for the purpose of computing the sale value of property, has taken the average rate of other societies and has ignored the prevailing rate in the same/adjacent societies. The counsel for the assessee submitted that the rate prevailing in respect of the same society is ₹ 5384.6 per square metres, whereas the DVO has adopted the land rate at ₹ 6574 per square metres, which is far higher than the prevailing market rate in the same society. The counsel for the assessee further drew our attention to pages 30 and 32 of the paper book and submitted that the DVO has also erred in taking an incorrect average, thereby leading to a higher sale value in respect of the other two properties. Accordingly, the counsel for the assessee submitted that in the instant set of facts the value adopted by the

DVO may be ignored for the reasons cited above and the sale value adopted by the assessee may be considered.

8. In response, the DR submitted that the value adopted by the DVO has to be relied upon since the assessee has never challenged/filed any objection against the report prepared by the DVO before Ld. CIT(Appeals) in appellate proceedings. Since the assessee has not challenged the report prepared by the DVO before Ld. CIT(Appeals), therefore the rate adopted by the DVO are to be relied upon. Then the Ld. DR placed reliance upon the observations made by Ld. CIT(Appeals) in his appeal order.

9. We have heard the rival contentions and perused the material on record. We observe that in various decisions, the courts have held that if the difference between the value adopted by the DVO and the sale value adopted by the assessee is less than 15%, then in such situations, the sale value adopted by the assessee may be taken into consideration. In the case of **C.B. Gautam vs. Union of India 199 ITR 53 (SC)**, the Hon'ble High Court Supreme Court has allowed to consider the actual sale consideration if the valuation report of the DVO is within the tolerance limit of 15%.

9.1 The Ahmedabad ITAT in the case of **Shri AshokkumarGovindbhai in ITA No. 863/Ahd/2017** held that there is a minor variation between the value adopted by this assessee and DVO order, to the extent of 15%, then in that case, the value adopted by the assessee may be taken into consideration. In the aforesaid case, the Ahmedabad ITAT made the following observations

while holding that the value adopted by the assessee may be considered in case of a minor variation:

Further, we have noticed that on the similar facts Pune Bench of ITAT in the case of CIT vs. Harpreet Hotels Pvt. Ltd. vide ITA 1156 to 1160/Pn/2000 held that the difference between the figure shown by the assessee and the figure of the DVO is hardly 10% therefore addition was deleted. The ITAT Pune in the case of ITO vs. Kaaddu vide ITA No. 441/Pn/2004 following the decision of Hon'ble J & K High Court in the case of Honest Group of Hotel Pvt. Ltd. vs. CIT (2002) 177 CTR (J& K) 232 had held that when the margin between the value as given by the assessee and the department valuer was less than 10% the difference is liable to be ignored and the addition made by the Assessing Officer cannot be sustained. We have also noticed that ITAT Jaipur in the case SitebiaKhetan Vs. ITO vide ITA 826/JP/2013 held that valuation is a matter of estimation and some degree of difference is bound to I.T.A No. 863/Ahd/2017 A.Y. 2012-13 Page No 19 Ashokkumar Govindbhai Patel vs. ITO be there. If the difference between the stamp duty valuation and the declared sale consideration is less than 10% then addition u/s. 50C should not be made. The ITAT Pune in the case of Rahul Construction vs. DCIT in ITA 1543/Pn/2007 (2010) 38 DTR Pune Tribunal has held that since difference is less than 10% and considering the fact that valuation is always a matter of estimation where some degree of difference is bound to occur therefore the Assessing Officer is not justified in substituting the sale consideration at Rs. 20.50 lacs as against actual

*sale consideration of Rs. 19 lacs disclosed by the assessee. All the aforesaid judicial findings justify that small variation is bound to occur considering the fact that valuation is always a matter of estimation. In the case of the assessee apart of small variation of 12.73% between the sale consideration as per sale deed and the value as per DVO report, there was also encroachment on the impugned land till the time of sale and assessee was not having the possession of the land. In this regard, we have gone through the report of the DVO placed in the paper at page no. 169 to 175 and it is noticed that nowhere in his report the DVO has discussed the encroachment of the land which compelled assessee to sell the land at the price which was only less by about 12% from the value determined by the DVO in his report. The Assessing Officer has considered the material facts of the existence of encroachment on the land and the finding of the Hon'ble Supreme Court since the variation in the value shown in the sale deed and the value reported in the DVO report was only 12.73% which was within the tolerable limit of 15% variation as recognized by the Hon'ble Supreme Court in the case of C.B. Gautam vs. Union of India 199 ITR 530. **We consider that judicial findings as discussed in this order articulate the fact that small variation within the tolerable limit of 15%** as I.T.A No. 863/Ahd/2017 A.Y. 2012-13 Page No 20 Ashokkumar Govindbhai Patel vs. ITO held by Hon'ble Supreme Court as elaborated supra **between the value shown by the assessee and the value of the DVO is liable to be ignored because of element of estimation involved in valuation of immovable property.** In this light of the above findings and considering the specific*

enquiries made by the Assessing Officer before framing assessment order and subsistence of encroachment which compelled the assessee to sell the land without possession, we consider that order passed under section 263 of the act is not sustainable, therefore, order passed u/s. 263 is quashed. Accordingly, the appeal of the assessee is allowed.

9.2 In the case of **Geetika Sachdev in ITA Number 6638/Del/2018**, the Delhi ITAT held that no addition can be made if margin between value given by assessee & Departmental Valuer was less than 10%.

9.3 In the case of **Ahmed Shareef [2021] 128 taxmann.com 202 (Bangalore - Trib.)**, the ITAT held that where AO made addition on account of difference in value of land owned by assessee as shown by it in its books of account and report of Valuation Officer, since such difference was less than 15 per cent, impugned addition made by AO only on basis of report of Valuation Officer was to be deleted.

9.4 In the case of **Smt. Charu Aggarwal [2022] 140 taxmann.com 588 (Chandigarh - Trib.)**, ITAT held that where difference between valuation shown by assessee and estimated by Departmental Valuation Officer was less than 10 per cent, Assessing Officer was not justified in substantiating valuation determined by Departmental Valuation Officer for cost shown by assessee and therefore, addition made by Assessing Officer on account of difference in valuation as determined by DVO and as shown by assessee in its regular books of account was to be deleted.

9.5 The Punjab and Haryana High Court in the case of **Unitech Industries (P.) Ltd. [1998] 98 Taxman 343 (Punjab & Haryana)** held that there being no cogent evidence that difference between fair market value and apparent consideration was more than 15 per cent, initiation as well as acquisition proceedings u/s 269UD of the Act had rightly been held to be bad in law.

9.6 In the case of **Bimla Singh v. CIT [2009] 308 ITR 71 (Patna)**, the High Court held that where difference between cost of construction shown by assessee and that estimated by valuer was less than 15 per cent and further construction of house was spread over period of 7 years, difference was so meagre that one could assume it to be bona fide difference, fit to be ignored.

9.7 We further observe that In the case of **DCIT v. Unitech Industries (P.) Ltd [1998] 98 Taxman 343 (Punjab & Haryana)**, the Hon'ble Punjab and Haryana High Court held that fair market value has to be based on factors such as sale of properties situated in same locality, and since land which was treated as a comparable sale instance was not located in same village, the High Court held that reliance by DVO on that sale instance could not be treated as fair basis for determining fair market value. Further, in the case of **Suresh C. Mehta, [2013] 35 taxmann.com 230 (Mumbai)**, the ITAT held that where assessee had made various objections to such valuation report before Commissioner (Appeals), Commissioner (Appeals) was bound to look into these objections so as to arrive at proper fair market value.

9.8 In view of the above judicial precedents, we are of the considered view that if the difference between the value adopted by the DVO for estimating the sale price of the properties under consideration and the sale value declared by the assessee in its return of income is less than 15%, then the value adopted by the assessee may be taken into consideration. Accordingly, the matter is being restored to the file of the assessing officer to determine whether in the instant facts, the difference between the sale value adopted by the DVO and that by the assessee in respect of properties under consideration is less than 15% as submitted by the assessee. In the event, if such difference is less than 15%, then the sale value adopted by the assessee in its return of income may be taken into consideration, for the purpose of determining the capital gains tax.

10. Accordingly, this ground numbers 2.1 and 2.2 of the assessee's appeal are allowed with the above directions.

Ground number 2.3 of the assessee's appeal relates to Ld. CIT(Appeals) not considering the ground of cost of improvement, stamp duty etc. of ₹ 15,03,323/-

11. The assessee's contention in respect of this ground of appeal is that the Ld. CIT(Appeals) has erred in facts and law in not considering the cost of improvement while passing the order. The assessee contended before us that during the course of appellate proceedings, the ground relating to deduction towards cost of improvement viz. stamp duty etc. was raised which was not disposed of by DCIT. In response, DR submitted that no

details of cost of improvements were submitted and nor any details were filed before AO/Ld. CIT(Appeals) and accordingly this ground needs to be dismissed.

12. We have heard the rival contentions and perused the material on record. We observe that vide order sheet entry dated 8th October 2020, the ITAT observed that assessee had not filed Form number 35, and accordingly it is not possible to decide whether this ground of appeal was raised before Ld. CIT(Appeals). We now observe that a perusal of Form 35 shows that the assessee has not raised any ground of appeal in connection with claim of cost of improvement before Ld. CIT(Appeals). Further, we have also perused the various written submissions filed by the assessee before Ld. CIT(Appeals) and from the same also it is apparent that the assessee has not filed any written submissions in respect of the claim of cost of improvement before Ld. CIT(Appeals) for his consideration. Though, apparently at page 3 of the order of the Ld. CIT(Appeals), wherein the CIT has re-produced the relevant extracts of remand report received from the AO, there an indirect mention that “in absence of evidence to the effect, cost of improvement could not be verified”, however, besides the above, neither this ground is coming as per the grounds of appeal before Ld. CIT(Appeals), nor is it anywhere coming in written submissions filed before Ld. CIT(Appeals) during the course of appellate proceedings. Accordingly, in our considered, view ground number 2.3 of the assessee’s appeal is infructious since this issue was never raised before Ld. CIT(Appeals) for his consideration.

13. Accordingly, Ground number 2.3 of the assessee's appeal is dismissed.

Ground number 3.1 relates to Ld. CIT(Appeals) having erred in upholding the disallowance of interest expenses of ₹ 18,655/-

14. In this regard, Ld. CIT(Appeals) in its order has specifically observed that the assessee has simply mentioned that interest has been paid on loans taken for its property business. However, no documentary evidences have been furnished by the assessee and no nexus between the loans taken and the property purchased has been shown. Accordingly in absence of any supporting documents filed by the assessee during the appellate proceedings, Ld. CIT(Appeals) dismissed this ground of appeal of the assessee.

14.1 In view of the above facts, we find no infirmity in the order of Ld. CIT(Appeals) who, on appreciation of facts/supporting documents placed before him, dismissed assessee's appeal on this ground.

15. In the result ground number 3.1 of the assessee's appeal is dismissed.

16. In the combined result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 19-10-2022

Sd/-
(P.M. JAGTAP)
VICE PRESIDENT

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER

Ahmedabad : Dated 19 /10/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद