

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"C" BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER  
AND  
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**आयकर अपील सं./ IT(SS)A No.65/Ahd/2009**

**With**

**CO No.236/Ahd/2009**

**निर्धारण वर्ष/Asstt. Year: 2004-2005**

ACIT, Cent.Cir.4 Surat.	Vs	Shri Jayantilal T. Jariwala Survey No.91, Opp: Navin Florine Udhana Navsari Road, Surat.  PAN : AAWPJ 4444 K
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Revenue by :	Smt.Vibha Bhalla, CIT-DR
Assessee by :	Shri Sanjay Kapadia with Shri Ankur D. Shah

सुनवाई की तारीख/Date of Hearing : 25/08/2015

घोषणा की तारीख/Date of Pronouncement: 28/10/2015

**आदेश/ORDER**

**PER BENCH:**

Revenue is in appeal before us against the order of the Id.CIT(A)-II dated 17.6.2009 for the Asstt.Year 2004-05.

2. On receipt of notice in the Revenue's appeal, the assessee has filed cross-objections bearing no.CO No.236/Ahd/2009. The Revenue has taken twelve grounds of appeal, but the grievance revolves around a single issue whereby it has pleaded that the Id.First Appellate Authority has erred in deleting the addition of Rs.6,31,300/- made by

the AO on account of unexplained investment made by the assessee in construction of residential building.

3. The brief facts of the case are that a search operation under section 132 of the Income Tax Act was carried out at the premises of Colourtex Group of Surat on 26.7.2006. The assessee is a member of this group and his premises were also searched on 26.7.2006. A notice under section 153A was issued upon the assessee. To this notice, the assessee has filed his return of income on 31.3.2007 declaring total income at Rs.63,45,634/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Income Tax Act dated 3.3.2008 was issued and served upon the assessee. The Id.AO has rejected the books result of the assessee. He found that the assessee had constructed a residential house, B-3, Mamta Flats, Surat and plot No.158/21 GIDC, Pandesara, Surat. The AO was not satisfied with the cost of construction shown in the books of accounts. He formed an opinion that there was an under-invoicing of bills, and therefore, the Id.AO made reference to the valuation officer, who has determined the value of the property vide letter no.5/2/VOB/2008-09/193 dated 22.12.2008, No.5/2/VOB/2008-09/181 dated 22.12.2008. The Id.AO has reproduced the part of the report indicating name of the investors, property description, valuation period, declared cost, estimated cost and the difference. These details are as under:

Sr. No.	Name of the assessee	Property Description	Valuation period F.Y.	Declared Cost	Estimated Cost	Difference
1.	Shri Jayantilal Thakordas Jarriwala	Resdl. House: D-3, Mamta Flats, Surat.	2002-03	300000	572800	272800
2.	Shri Jayantilal Thakordas Jarriwala	Residential House: B-3, Mamt Flats, Surat	2003-04	500000	581800	81800
3.	Shri Jayantilal Thakordas Jarriwala	Plot No.158/21, GIDC,	2003-04	1600000	2149500	549500

		Pandesara, Surat				
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4. On the strength of these details, the Id.AO has made addition.
5. On appeal, the Id.CIT(A) has deleted the addition by observing as under:

*"6. I have considered the facts and submissions of the appellant. I agree with the appellant's view. The property are residential flats and plots of land which were purchased by the appellant and on which no further expenses for addition or improvement was carried out by the appellant. No incrementing documents and evidences were found during the search. The property under consideration is registered with stamp authorities and is recorded in the books of accounts of the appellant and Assessing Officer not having found out any other defect or discrepancies, merely on the basis of valuation report of the VO/DVO, the investment in the property cannot be considered as unexplained and unaccounted. Further the valuation officer has valued the property on the basis of other properties purchased which are not comparable with this property.*

*The Hon'ble Tribunal Ahmedabad in the case of Smt. Ilaben Bharat Shah (ITA No. 839/A/2007) dtd. 17-8-2007 for A.Y. 2004-05 deleted the addition made on account of difference in valuation report alone.*

*Further, there is no evidence on record that the assessee made unaccounted investment. As a result, deeming provision of the section 69/69B of the Act in regard to unexplained investment, is not applicable. This view is also supported by the decision of Gujarat High Court in the case of Ushakant N. Patel v. CIT (282 ITR 553).*

*There is no deeming provision in Income Tax Act to tax the alleged difference in valuation for the purpose of section 69/69B as contained in section 50C for the purpose of taxing capital gain by enhancing consideration as envisaged in section 48 of the Act. The reliance is placed on decision of Rajasthan High Court in the case of Krishna Kumar Rawat & Ors. V. Union of India & Ors. 210 CTR 553 (Raj) wherein it is categorically held that section 50C has application for purposes of section 48 only and has no application in case of pre-emptive purchases under chapter XX-C. Now, when Government was the purchaser (under chapter XX-C), in that case, it was made clear that provision of section 50C was*

*not applicable. Thus, applying the same logic section 50C cannot be applied when the assessee is a purchaser.*

*In view of the above facts and the ratio of the various decisions cited above it is held that Assessing officer was not justified in making the addition. Therefore, the addition made by the assessing officer is deleted."*

6. Before us, at the very outset, the Id.counsel or the assessee contended that various Hon'ble High Courts are unanimous on the point that if during the course of search, no incriminating material was found, exhibiting unexplained investment by an assessee, then merely on the basis of DVO's report, the addition cannot be made. He relied upon the following judgments:

- i) Hon'ble Gujarat High Court in the case of CIT Vs. Jayendra N. Shah, (2014) 52 taxmann.com 54 (Gujarat).
- ii) The Hon'ble High Court in the case of CIV Vs. Vasudev Construction (2014) 44 taxmann.com 30 (Kar.)
- iii) CIT Vs. Berry Plastics P. Ltd., (2013) 35 taxmann.com 296 (Guj)
- iv) CIT Vs. Sadhna Gupta (IT Appeal No.434 of 2012) (Delhi HC);
- v) CIT Vs. Lahsa Construction P. Ltd., (2014) 42 taxmann.com 549 (Delhi);
- vi) Gookluck Automobils P. Ltd. Vs. ACIT (2012) 26 taxmann.com 254 (Guj)

The Id.counsel for the assessee placed on record, the copies of the above decisions.

7. On the other hand, the Id.DR relied upon the order of the AO.

8. We have duly considered rival contentions and gone through the record carefully. Before we embark upon an inquiry on the facts of the present case, we would like to take note of the finding recorded by the

Delhi High Court in the case of CIT Vs. Sadhna Gupta (supra) on the issue whether merely on the basis of the DVO's report, an addition can be made or not. The following finding is worth to note:

*"4. The only point to be considered is whether the valuation rendered by the DVO is to be taken into account or not. It has been argued by the learned counsel for the revenue that the assessing officer was justified in referring the matter to the DVO for an opinion with regard to the fair market value of the property and once that opinion has been rendered, the same has to be taken into account and if that were to be so, the addition of Rs. 2,81,83,0007- would be fully justified. Consequently, it was submitted by the learned counsel for the revenue that the Tribunal had erred in deleting the addition. On the other hand the learned counsel for the respondent referred to a Division Bench decision of this Court in the case of CIT v. Puneet Sabharwal [2011] 338 ITR 485. In that decision a specific question had been raised as to whether the Income Tax Appellate Tribunal was right in holding that notwithstanding the report of the DVO the revenue had to prove that the assessee had received extra consideration over and above the declared value of the same. That question was answered by this Court in favour of the assessee and against the revenue. The Division Bench in the case of Puneet Sabharwal (supra) had also placed reliance on the decision of Supreme Court in K. P. Varghese (supra) as also on another decision of a Division Bench of this Court in CITv. Smt. Suraj Devi [2010] 328 ITR 604 wherein this Court held that the primary burden of proof with regard to concealment of income was on the revenue and it was only when the said burden was discharged that reliance could be placed on the valuation report of the DVO. There are several other decisions of this Court in the same vein. One such case being the case of CIT v. Vinod Singhal (IT Appeal No.482/2010 decided on 05.05.2010) where, again, reliance was placed on the very same decision of the Supreme Court in K.P. Varghese (supra) and also on a decision of this Court in CIT v. Smt. Shakuntala Devi [2009] 316 ITR 46. It was observed that there must be a finding that the assessee had received an amount over and above the consideration stated in the sale deed and for this the primary burden was cast on the revenue. It is only when this burden is discharged by the revenue that it would be permissible to rely upon the value as given in the valuation report of the DVO.*

*5. The law seems to be well settled that unless and until there is some other evidence to indicate that extra consideration had flowed in the transaction of purchase of property, the report of the DVO cannot form the basis of any addition on the part of the*

*revenue. In the present case there is no evidence other than the report of the DVO and, therefore, the same cannot be relied upon for making an addition. In these circumstances, the question which has been framed is decided in favour of the assessee and against the revenue. The appeal is dismissed."*

9. Similarly, it is pertinent to note the observations of the Hon'ble Gujarat High Court in the case of CIT Vs. Jayendra N. Shah (supra). The observations in para-8 and 9 are worth to note. They read as under:

*"8. We have no reason to interfere with the concurrent reasonings of the two authorities below. Firstly, taking the issue of cost of construction, it clearly emerges from the record that between the DVO's estimation of cost of construction without furniture and fixture and that of the assessee's valuer, there is a minor difference of Rs. 1.22 lakhs. When we are considering the total figure in the vicinity of Rs. 1.36 crores, this difference is insignificant. Even if, therefore, the Assessing Officer had accepted the DVO's report in its entirety, the total addition under the head could not have exceeded Rs. 1.22 lakhs. He instead made an addition of Rs. 27.69 lakhs, for which we see no basis whatsoever. Learned counsel, Shri K. M. Parikh, strenuously urged that the construction was carried out in three separate previous years relevant to different assessment years. The Assessing Officer had, therefore, divided the undisclosed investment in the cost of construction in these three years. Even if this be so, we fail to see how the total of these three years of expenditure could exceed Rs. 1.22 lakhs which was the difference between the DVO's valuation and that of the valuation of die assessee's valuer, on the basis of which he filed the return.*

*9. Coming to the question of addition towards purchase of land, the Commission of Income-Tax (Appeals) as well as the Tribunal both have examined the issue on the basis of the material available on record. It is noted that the assessee had made no disclosure towards the purchase of land in his statement during the search proceedings. The addition was made merely on the basis of the DVO's report without there being any other material. Moreover, the DVO had also substantially relied on jantri rates and had made other reference's for arriving at the valuation."*

*10. Both the issues are based primarily on factual aspects. No question of law, therefore, these appeals are dismissed."*

10. Similarly, in the case of CIT Vs. Berry Plastics P. Ltd., (2013) 35 taxmann.com 296 (Guj), the Hon'ble Gujarat High Court has made following observations:

*“9. We are of the opinion that CIT( Appeals) as well as the Tribunal committed no error in deleting the additions made by the Assessing Officer. It is undisputed that the sole basis for making the addition was the DVO's report. DVO's report may be a useful tool in the hands of the Assessing Officer, Nevertheless it is an estimation and without there being anything more, cannot form basis for additions under Section 69B of the Act. In absence of any other material on record, addition was correctly deleted. Tax Appeal is, therefore, dismissed.”*

11. A perusal of the above judgments would indicate that mere valuation report is not sufficient to conclude that the assessee has made unexplained investment. From perusal of the assessment, nowhere it reveals that inspite of search, Revenue was in a position to lay its hands on any material exhibiting the unexplained investment made by the assessee, over and above one stated in the books of accounts. Further, we find that the Id.First Appellate Authority has deleted the addition by following the order of the ITAT in the case of Smt.Ilaben Bharat Shah in ITA No.839/Ahd/2007 dtd. 17-8-2007 for the Asstt.Year 2004-05. The Id.First Appellate Authority is of the opinion that the addition cannot be made merely on the basis of DVO's report, and there should be some other incriminating material to support the case of the Revenue. The issue is also covered by the various decisions of the Hon'ble High Courts cited supra, and therefore, we do not find any reason to interfere in the order of the CIT(A), which is confirmed and the ground of appeal of the Revenue is dismissed.

12. As far as CO filed by the assessee is concerned, we are of the view that sub-section 4 of section 253 authorises the respondent to file cross-objection on receipt of notice in appeal. The CO is required to be filed within 30 days of receipt of notice and it is to be verified in the manner akin to an appeal, but, the CO is to be filed against any part of

the order impugned in the appeal. In the CO filed by the assessee, he has nowhere demonstrated his grievances against any part of the order of the CIT(A), as such, the CO is not maintainable in the present form.

13. In the result, appeal of the Revenue as well as cross objection of the assessee, both are dismissed.

Order pronounced in the Court on 29<sup>th</sup> October, 2015 at Ahmedabad.

Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER

Sd/-  
(RAJPAL YADAV)  
JUDICIAL MEMBER