www.taxguru.in

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH "A" AHMEDABAD

Before **Shri N.S.SAINI, ACCOUNTANT MEMBER** and
Shri MAHAVIR SINGH, JUDICIAL MEMBER

ITA No.3172 & 3288/Ahd/2009
Assessment Year:2006-07

Date of hearing:20.5.10 Drafted:1.6.10

M/s. Rajhans Builders, B-210, Yash Plaza, Opp. Dhanamal Mill, Varachha Road, Surat **PAN No.AAFFR3094L**	**V/s.**	Dy. Commissioner of Income-tax, Central Circle-2, Ahmedabad
Asstt. Commissioner of Income-tax, Central Circle-2, Surat	**V/s.**	M/s. Rajhans Builders, B-210-211, Yash Plaza, Opp. Dhanmal Mill Compound, Varachha Road, Surat
(Appellant)	..	(Respondent)

Assessee by :-	Shri Resesh Shah, AR
Revenue by:-	Shri Jayant Jhaveri, SR-DR

O R D E R

PER Mahavir Singh Judicial Member:-

These cross-appeals, one by the Revenue and other by assessee are arising out of the order of Commissioner of Income-tax (Appeals)-II, Ahmedabad in appeal No. CIT(A)-II/CC.2/357/2007-08 dated 16-09-2009. The assessment was framed by the DCIT, Central Circle-2, Surat u/s.143(3) r.w.s. 153C of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 07-01-2008 for assessment year 2006-07.

2. The assessee has raised following ground in its appeal:-

(1) On the facts and in the circumstances of the case as well as law on the subject, the ld. CIT(A) has erred in partly confirming the addition of Rs.43,59,881/- out of Rs.2,18,26,105/- for alleged unaccounted investment.

www.taxguru.in

Whereas the Revenue has raised the following grounds in its appeal :-

i) The Ld. CIT(A) has erred in law and on facts in restricting the addition of Rs,2,18,26,105/-made on account of unexplained investment in cost of construction of building to Rs.43,59,881/-

iii] The Ld. CIT(A) has erred in law and on facts in deleting the addition on account of unexplained investment in the construction of the building on the basis of the valuation report of the DVO, on reference under section 142A of the Act?

iv] The Ld. CIT(A) has erred in law and on facts in restricting the addition made for the value of extra items not included in the plinth area of Rs.2,28,92,921/- to Rs,94,87,505/- on the ground that assessee has produced all the vouchers or extra items before the DVO, ignoring that the assessee has failed to produce the same before the DVO or the A.O. during the course of assessment proceedings and the submission before the Ld CIT(A) was an attempt to suppress the valuation of construction emanated from after thought.

v) The Ld. CIT(A) has erred in law and on facts in granting benefit of 20% in the cost of built up area on the ground that DVO himself stated that variation of 20% is possible in the cost of construction ignoring that DVO has remarked as aforesaid, subject to the verification of the construction account of the assessee and the case of assessee is quite different as the assessee was not having any proper accounts, and he has to made disclosure to cover the defects of his books of accounts.

vi) The Ld. CIT(A) has erred in law and on facts in allowing a deduction of 10% for construction under owner's own supervision, ignoring the fact that assesses could not have had that advantage of cost reduction as the assessee himself had shown architect fees and has got the work done through labour contractors and not under his own supervision.

3. At the time of hearing Ld. counsel for the assessee, Shri Rasesh Shah stated that the assessee has filed additional ground vide letter dated 17-04-2010 and the additional grounds are on legal issue. The relevant additional grounds raised are as under:-

> *"a) On the facts and in the circumstances of the case as well as law on the subject, the Ld. Assessing Officer has erred in making reference to DVO without calling information from the appellant in regard to cost of construction. The reference was made to DVO on 31.07.07 and notice u/s.143(2) was issued on 01.08.07. The detailed questionnaire was issued later on 09.08.07. The assessing officer has therefore erred in making reference to DVO u/s 142A of the Act when no proceeding for assessment was pending for the year under consideration.*
>
> *b) On the facts and in the circumstances of the case as well as law on the subject, the Ld. Assessing Officer has erred in referring the matter u/s.142A to*

www.taxguru.in

DVO for the purpose of estimating the value of construction u/s.69C of the Act."

The Ld. counsel for the assessee stated that the above stated additional grounds are purely legal, based on the existing facts on the record. He stated that the ground of appeal at Sr. No. (a) was raised before CIT(A) but due to in- advertence it was omitted to be raised before the tribunal in Form-36. He further stated that another additional ground at Sr. No.(b) is raised before the Tribunal in view of recent decision of Hon'ble Delhi High Court in the case of *CIT v. AAR Pee Apartments (P) Ltd.* (2009) 319 ITR 276 (Del). In view of these facts, the Ld. counsel requested the Bench to admit these grounds as there was a reasonable cause for not raising these grounds at the time of filing of appeal.

4. On the other hand, Ld. SR-DR, Shri Jayant Jhaveri made no serious arguments as regards to admission of additional grounds but stated that there is no reasonable cause for not raising before the Tribunal at the time of filing of appeal. He stated that the grounds should not be admitted solely on this aspect.

5. Seeing the issue being legal as raised in the additional grounds, we admit these legal grounds and adjudicate accordingly.

6. The first legal issue raised is that the cost of construction was referred to the DVO without pendency of any proceedings under the Act. The brief facts of the case are that a search and seizure action in the case of assessee was conducted on 7/3/2006. During the course of search & seizure operation certain incriminating documents belonging to different concerns/companies/individuals of the group was found on the basis of which the assessee group made a disclosure of Rs.8.25 crores. The assessee group has also furnished break up of the disclosure made by it during the course of search and seizure action and the group has disclosed unaccounted income of Rs.1,00,00,000/- in the hands of Rajhans Builders, the assessee. It was the contention of the assessee that the cost of construction was referred to DVO on 31-07-2007, whereas notice u/s.143(2) was issued on 01-08-2007 and subsequently a detailed questionnaire was also issued on 09-08-2007. The Assessing Officer referred various projects to the DVO for valuation, who valued

www.taxguru.in

at Rs.5,59,45,013/- as against value shown by the assessee at Rs.3,41,18,908/-, accordingly on the basis of DVO's report, the AO added Rs.2,18,26,105/- to the declared income of assessee. Aggrieved, the assessee went in appeal before the CIT(A). The assessee made detailed submissions before the CIT(A) which have been discussed by the CIT(A) vide para 4.2 at pages 2 to 5 of the appellate order. The CIT(A) has decided the issue vide para 4.3 to 4.5 of his order by observing as under :-

> *"4.3 I have considered the facts and the submissions. From the affidavit filed by the AO before the Hon'ble Gujarat High Court (copy of which is submitted by the appellant in his paper book), it is evident that although there was no search in the appellant's premises, but there was search at the residence of managing partner who voluntarily disclosed Rs.1 crore in the hands of M/s Rajhans Builders and on that basis, notice u/s 153C of the I.T. Act was issued for Asst. Year 2000-01 to 2005-06. The reference to DVO was made for Asst. Year 2005-06 & 2006-07 together during the pendency of proceedings u/s.153C of the IT Act for A.Y.2005-06. Thus, there was pendency of proceedings when the reference was made Further, the managing partner had already disclosed Rs 1 crore in his statement, which was sufficient ground for the Assessing Officer to conclude that unaccounted investment is made in the construction and justifying the rejection of books of accounts and making the reference to DVO for the valuation. In view of these facts, it is held that reference to DVO was valid and properly made and the appellant's grounds of appeal this regard are rejected.*
>
> *4.4 The appellant's submission that "the addition would ultimately resulted into squaring off the whole addition since on one side the addition is made and on the other side the deduction is to be allowed as a business expenditure. Thus, the whole exercise would result into NIL (Ruby Builders vs. ITO 63 TTJ 202(Ahd.), ITO vs. Jagdish Chandra Virmani (2007) 106 TTJ (Delhi) 287)", is not acceptable in view of the introduction of section 69C Proviso by Finance (No.2) Act, 1998 w.e.f. 1.4 1999. As per this proviso, unexplained expenditure which is deemed to be the income of the assessee, shall not be allowed as a deduction under any head of income. Accordingly, if assessee has made unexplained investment and expenditure in construction of building in stock in trade, the expenditure will not be allowed. Therefore, the case laws relied by the appellant, no longer hold good.*
>
> *4.5 However, on the quantum of valuation, I find that the Assessing Officer has not considered the objection of the appellant which has to be considered before arriving at the correct valuation*
>
> *a) The DVO has made the valuation as under:*
>
> *A. Cost of built up area for 9641 sq mts. Rs. 7,11,95,266/-*
> *B. Extra Items not included in plinth area Rate. Rs. 2,28,92,921/-*

www.taxguru.in

Total Rs. 9,40,88,187/-

Less:7.5% for self supervision & purchases Rs. 70,56,614/-
Add 3% consultation charges for architecture.Rs.28,22,640/-

Net Total Rs.6,98,54,219/-

Out of this, the DVO has allocated the amount for A.Y.2005-06 & 2006-07 at Rs.3,39,09,206/- & Rs.5.59,45,013/- respectively.

b) However, the DVO has himself staled that variation of 20% is possible hence, the cost of built up area after giving benefit of 20% variation conies to Rs.5,69,56,213/- (Rs.7,11,95,266 - 20% of Rs,7,11,95,266).

c) The appellant has maintained all the vouchers for extra items and on the basis of this, he is entitled for further deduction of Rs,1,34.05,416/- as evident from the chart submitted by the appellant and discussed & reproduced in para 4.2(d) above. Hence, the extra item has to be taken as Rs. 94,87,505/- in place of Rs.2,25.92,921/- taken by the DVO

d) The DVO has given benefit of 7.5% deduction for self supervision whereas it is reasonable to give deduction of 10% for self supervision.

e) Accordingly, in my view, the correct valuation comes as under:

A. Cost of built up area.	*Rs.5,69,56,213/-*
B. Extra Items not included in plinth area Rate.	*Rs. 94,87,505/-*
Total	*Rs.6,64,43,718/-*
Less: 10% for self supervision & purchases.	*Rs. 66,44.371/-*
Add. 3% consultation charges for architecture.	*Rs. 19,93,311/-*
Net Total	*Rs.6,17,92,658/-*

As against this, the appellant has shown cost of construction for A.Y.2005-06 & 2006-07 taken together at Rs. 5,47,98.948/- resulting into the difference of Rs,69,93,7l0/- for A.Y 2005-06 & 2006-07 taken together Allocating it between A.Y.05-06 & 06-07, the allocation for A.Y.06-07 cornes to Rs.43,59,881/- (Rs.69,93,710 x 3.41 crore ÷ 547 crore).

Accordingly, the addition for unaccounted investment for A.Y.2006-07 is restricted to Rs.43,59,88l/- and the appellant is allowed relief for the balance amount of Rs.1,74,66,224/-."

www.taxguru.in

7. The Ld. counsel for the assessee before us stated that the notice u/s.143(2) was issued on 01-08-2007 and detailed questionnaire was issued on 09-08-2007. He further stated that the Assessing Officer referred the cost of construction to DVO on 31-07-2007 i.e. one day earlier to the date of notice u/s.143(2), even before verifying the books of account regularly maintained and without pointing out any defects in the books. He stated that assessee has regularly maintained books of account and various records along with supporting evidences of various raw materials like cement, steel, bricks, sand, wood, labour cost, sanitary wares etc. but the AO has not found out any defect in the books/records/bills etc. and has not rejected books of account. Without causing any defects in books regularly maintained and without rejecting the books u/s.145, there is no reason to add any amount on the presumption that the cost/investment in construction is low. Thus, without rejecting the books of account regularly maintained, the addition cannot be made only on the basis of the DVO's report which is also an interim report dated 13-12-2007 was also not final. The DVO in his report has stated rates of various items viz., granite, floorings, ceramic tile, kitchen platform, acrylic bath tub, kota stone flooring etc. but did not mention any base for the rates he arrived at. The Ld. counsel further stated that the assessee has supplied the X-erox copies of bills of these items mentioning the rate to DVO and all these bills were also produced before DCIT which he has seen and verified but has no commented on the genuineness of these bills and no pointed out any material defects in these bills and hence not rejected the records maintained and produced by assessee. He further stated that the assessee had supplied the X-erox copies of bills of all the construction materials along with the working to arrive at the rate per sq.ft. to DVO and comparison chart of rates adopted by DVO arbitrarily without any basis and the actual rates of these materials supported by the bills and other records is also annexed which shows that the rates taken by DVO to estimate the cost were very high and exorbitant compared to the actual rates. The Ld. counsel further stated that the assessee has obtained the valuation report of the registered Valuer for he whole project which also supports that the cost of construction recorded in the books is the correct value and the estimate done by DVO is baseless. Therefore, addition made only on the basis of DVO's report without considering the Registered Valuer' report is unwarranted. The bills for the extra items like granite tile flooring, tile flooring stones and other items are maintained which shows that actual cost of these items is much lower than the cost

www.taxguru.in

taken by DVO. These objections were submitted before DVO as well as Assessing Officer but both have not considered and made over estimation of investment of Rs.1,34,05,416/- on this account only as per the following details:-

		Rate of items		Total Amount		
Sl. No.	Items	As per Account (per sq.mt)	As per DVO (per sq.mt)	As per Account (Rs)	As per DVO (Rs)	Difference (Rs)
1.	Granmite Tile Flooring 0.605m x 0.605m	453	1034	12,84,735	22,33,605	-9,48,870
2.	Ceramic Tiles Flooring Ceramic Dado title coloured Glazed Dado	216.41	515	15,09,127	29,30,127	-14,21.563
3.	Porcelano Tiles 0.505m x 505m	270	1480	12,30,368	60,87,033	-48,56,665
4.	Kota Stone Flooring	116	681	7 7,393	2,30,873	- 1,53,480
5.	Interlocking Pavement Tiles flooring	85.50	427	2,15,707	8,55,409	-6,39,702
6.	CC Pavement flooring	333.70	427	66,957	5,24,570	-4,57,613
7.	Black Granite Work a) In stape & sill/jamb b) Kitchen platform c) Kitchen platform sides	597	2632	5,79,228	49,86,955	-44,07,727
8.	Acrylic bath tub	3426 per pcs.	15000 per pcs.	1,70,204	6,90,000	-5,19,796
	Total			51,33,719	1,85,39,135	-1,34,05,416

Ld. Counsel for the assessee stated that DVO has mentioned in his report the cost declared by assessee at Rs.5,655/- per sq.mt. as against Rs.9,320/- per sq.mt. as estimated. Considering 20% variation unit cost of construction will work out to Rs.7,455/-. The Assessing Officer as well as the DVO failed to consider exact cost to be ascertained from checking the detailed construction account. According to him, with anticipated variation assessed cost may work out to Rs.7.19 crore and thus, the

www.taxguru.in

DVO has himself indicated hat actual cost will be much less than the estimated by him whereas the Assessing Officer has ignored this comment. The AO has failed to appreciate the fact that the assessee is a builder and engaged in the said business for years together. The addition made on the count that the assessee has shown lower amount of cost of construction, would ultimately resulted into squaring off the whole addition since on one side the addition is made and on the other side the deduction is to be allowed as a business expenditure. Thus the whole exercise would result into Nil.

8. As regards to the other additional ground that referring the matter to the DVO u/s.142A of the Act for the purposes of estimating the cost of construction u/s.69 of the Act, he stated that this is squarely covered in favour of the assessee and against the Revenue by the decision of Hon'ble Delhi High Court in the case of *ARR PEE Apartments* (supra), wherein it is stated sub-section (1) of Sec.142A of the Act enables the Assessing Officer to get the valuation done from the Valuation Officer in certain specific types of cases. These would be the cases wherein an estimate of the value of any investment referred to in Sec. 69 or 69B or the value of any bullion, jewellery or other valuable articles referred to in Sec.69A or 69B is required. There is no mention about Sec. 69C. In the present case, the Ld. counsel argued that the AO doubted about the expenditure incurred on the project and the assessee has shown the expenditure on the project as declared in the books of account. The Ld. counsel stated that for the purpose of getting himself satisfied about the purported unexplained expenditure under Sec. 69C of the Act, powers u/s. 142A cannot be invoked.

9. On the other hand, Ld. SR-DR, stated that the proceedings in the present case are pending as this is a search case and the assessment was framed u/s.153C of the Act. He stated that in earlier years also, those falling u/s.153C of the Act i.e. assessment years 2000-01 to 2005-06, the assessee's returns were called u/s.153C of the Act and the assessments were framed. Accordingly, he stated that the assessments were pending in the present case. As regards to the applicability of Sec.142A of the Act to Sec.69C of the Act, the Ld. SR-DR stated that such powers could be traced to Sec.69B of the Act which relates to amount of investment etc., not fully disclosed in the books of account and the expenditure incurred should be

www.taxguru.in

considered as coming within the expression "investment". He also submitted that having regard to the circumstances under which Sec. 142A was inserted by the Finance Act, 2004, it be deemed that the intention of legislature was to include even those unexplained expenditure stipulated in Sec. 69C of the Act.

10. We have heard the rival contentions and gone through the facts and circumstances of the case. First of all, we have to go through the provision of Sec. 142A of the Act to consider the issue in hand. The relevant provision sub-section-1 of Sec.142A reads as under:-

> ***Estimate by Valuation Officer in certain cases.***
>
> *142A (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 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.*

We find from the facts of the case that certain incriminating documents found and seized during the course of search on 07-03-2006 on the group cases, i.e. one of the partner of this assessee-firm was covered under search. Subsequently, notice u/s.153C of the Act was issued for and from assessment years 2000-01 to assessment years 2005-06 vide notice dated 01-08-2007. It is to be noted that no search was conducted in the case of the firm. The Assessing Officer in the present assessment year i.e. 2006-07 notice u/s.143(2) was issued on 01-08-2007 and the cost of construction was referred to the DVO for valuation on 31-07-2007. We find that the assessee is engaged in the business of construction projects and the group has undertaken a number of projects under the name of M/s. Rajhans Builders. Perusal of the assessment order shows that there is no reference to any material/evidence/information on the basis of which it could be said that the cost of construction was shown by assessee was understated or anything above what was disclosed by assessee in the books of account. It is a clear cut case that the assessee has produced the books of account but the Assessing Officer has not rejected or no defect was pointed out in the books of account regarding cost of construction of the project. We further find from the case records that even before verifying the books of account regularly maintained and without pointing out any defects in the books the cost of construction was referred to DVO. We are of the

www.taxguru.in

view, on the basis of evidences produced before us, that the assessee has regularly maintained books of account and various records along with supporting evidences of various raw materials like cement, steel, bricks, sand, wood, labour cost, sanitary wares etc. but the AO has not found out any defect in the books/records/bills etc. and has not rejected books of account. Without causing any defects in books regularly maintained and without rejecting the books u/s.145, of the Act there is no reason to add any amount on the presumption that the cost/investment in construction is low. Thus, without rejecting the books of account regularly maintained, the addition cannot be made only on the basis of the DVO's report. We further find that the assessee has supplied the X-erox copies of bills of these items mentioning the rate to DVO and all these bills were also produced before DCIT which he has seen and verified but has no commented on the genuineness of these bills and not pointed out any defects in these bills and hence not rejected the records maintained and produced by assessee.

11. In view of the above facts and circumstances, the provision of Sec.142A of the Act, we are of the view that no proceedings were pending at the time of reference made to the DVO regarding ascertainment of cost of construction of the project. We find from the starting words of the section that for the purpose of making an assessment or reassessment under this Act, once the process of assessment is initiated, the word 'making' should be presumed to be associated with both 'assessment' or 'reassessment', the reference u/s. 142A of the Act can be made. When there is process of assessment, which is initiated after filing of the return of income or issuance of notice u/s. 142(1) and similarly, the process of reassessment could be initiated only after issuance of notice u/s.148(1) after duly fulfilling the formalities mentioned therein, the reference u/s.142A of the Act can be made. It clearly shows that the invoking of Sec. 142A is a process after the initiation of the assessment proceedings. Further, it is mentioned in this Sec. that 'where estimate of the value of any investment referred to in Sec. 69 is required to be made. This also shows that a reference to DVO u/s. 142A can be made only when a requirement is felt by the AO for making such reference. Requirement would arise or could be felt only when here is some material with the AO to show that whatever estimate assessee has shown is not correct or not reliable. The use of word 'require' is not superfluous but signifies a definite meaning whereby some preliminary formation of

www.taxguru.in

mind by the AO is necessary which requires him to make a reference to the DVO us 1422A. It can only be during the course of pendency of assessment or reassessment that the AO frame his mind to refer the property to valuation cell of the Department. Such mind can be framed if there is a basis to think that the assessee may have understated the cost of construction or whatever is declared by him in this regard is not believable. Therefore, it is quite apparent that reference to valuation cell u/s.142A can be made during the course of assessment and reassessment and not for the purpose for initiating reassessment. This view is clearly supported by the decision of Ahmedabad Bench in the case of *Umiya Co-operative Housing Society Ld. v ITO* (2005) 94 TTJ 392 (Ahd), wherein it is held as under:-

> *"7. From the above, it is evident that s.142A empowers the AO to require the valuation officer for making the estimate of the value of any asset provided the AO, required the same for the purpose of making the assessment or reassessment. He above provision does not empower the AO to refer the matter to the DVO for gathering information for reopening of assessment. Making the reassessment and reopening of assessment are two different things.*
>
> *8. When the process of reopening of assessment ends and the assessment is validly reopened thereafter the process of making reassessment starts. Therefore even after the insertion of s.142A, the AO should have reason to believe that any income chargeable to tax has escaped assessment as provided under s. 147 and thereafter only the notice for reassessment can be issued under s. 148. Even after the insertion of s.142A, there is no amendment in the language of s. 147. Therefore, the condition prescribed under s. 147 for reopening of assessment still exits. The Hon'ble Gauhati High Court in the case of* Bhola Nath Majumdar *and the Tribunal, Jodhpur Bench, in the case of* Vijay Kumar *(supra) have taken the view that the valuation report is only an opinion of the valuer and an opinion of a third party cannot be a reason to believe of the ITO. The Hon'ble Bombay High Court in the case of* Jamnadas Madhavji & Co. *(supra) has held that the AO cannot issue summons under s. 131 for the purpose of making investigation for reopening of the assessment."*

12. This decision of the Tribunal has been confirmed by the Hon'ble jurisdictional High Court in the case of *CIT v. Umiya Co-operative Housing Society Ltd.* in Tax Appeals No.1496 to 1498 of 2005 dated 12-07-2006, wherein it is held as under:-

> *"The short controversy involved in these appeals whether the Assessing Officer can refer any matter for valuation of the property of an assessee though assessment and / or reassessment proceedings are not pending. The Tribunal is of the view that when the assessment proceedings are not pending the Assessing Officer has no jurisdiction and is not empowered to refer any*

www.taxguru.in

property for valuation to the Valuation Officer. The Tribunal has discussed this issue as under:

a-S8 When the process of reopening of assessment ends and the assessment is validly reopened thereafter, the process of making reassessment starts. Therefore, even after the insertion of section 142A, the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment as provided u/s.147 and thereafter only the notice for reassessment can be issued u/s.148. Even after the insertion of section 142A there is no amendment in the language of section 147. Therefore, the condition prescribed u/s.147 for reopening of assessment still exists. The Hon'ble Gauhati High Court in the case of Bhola Nath Majumdar and the ITAT Jodhpur Bench *in the case of* Vijay Kumar *(supra) have taken the view that the valuation report is only an opinion of the valuer and an opinion of a third party cannot be a reason to believe of the ITO. The Hon'ble Bombay High Court in the case of* Jamnadas Madhavji and Co.*(supra) have held that the Assessing Officer cannot issue summons u/s. 131 for the purpose of making investigation for reopening of the assessment.*

9. In view of the above, we are of the opinion that the issue of notices u/s.148 in all three years under consideration was not in accordance with law. We, therefore quash the notices issued u/s.148 and consequently the assessments completed in pursuance to notices u/s. 148 are also quashed. Since the assessment itself has been quashed, the grounds raised by both the parties with regard to the merits of the additions for undisclosed investments in the house property need no adjudication at this stage because once the assessment is cancelled, the addition does not survived. a~y.

Mr. Bhatt has mainly emphasized on Section 142A of the Act. He submits that the Assessing Officer at any time can make reference to the Valuation Officer for valuing the property for the purpose of assessment or reassessment, where the value of any investment referred to in Section 69 or Section 69B or Sections 69A & 69B is required to be made. Whether any income can be taxed by deeming the value of investment not disclosed, are issues where such types of questions arise while some proceedings are pending for assessment. In absence of such proceedings, the Assessing Officer cannot refer any property for valuation to Valuation Officer.

In opening part of Section 142A the words used are for the purposes of making an assessment or reassessment under the Act. The intent of the legislation is that the matter can be referred to the Valuation Officer only when the proceedings of assessment or reassessment are pending before the Assessing Officer. When no such proceedings are pending, the Assessing Officer has no jurisdiction to refer any property for assessment.

When the notice u/s.148 has been issued, and addition has been made by adopting the value estimated by the Valuation Officer, and when we fond that the Assessing Officer is not empowered to refer any property for valuation in a case where no assessment proceedings or reassessment proceedings of the

www.taxguru.in

> *assessee is pending before him, we see no justification to make any addition in such cases."*

Even the Hon'ble Apex Court has also dismissed the SLP of the Revenue in this case and affirmed the judgment of Hon'ble High Court in SLP No. CC 187 of 2007 dated 07-03-2007. As the issue in these appeals of the present assessee before us is exactly identical, what was before the Hon'ble High Court in the case of *Umiya Co-operative Housing Society Ltd.*(supra), respectfully following the same, we are of the considered opinion that the reference u/s.142A of the Act can be made only when the proceedings under this Act is pending and not otherwise. Accordingly, this legal issue, we decide in favour of the assessee and against the Revenue.

13. We further find from the case records that even if a reference u/s. 142A is made by the Assessing Officer on certain consideration such as anything fund during the course of search u/s.132 of the Act or on the basis of a tax evasion petition or a reference is required to be made during the course of other proceedings or a report of the DVO is available to the AO before making an assessment or reassessment then same can be utilized only in accordance with sub-Sec.(3) of Sec. 142A i.e., the assessee has to be given an opportunity of being heard before such a report is utilized and in accordance with Sec.145 where books of account are required to be rejected by pointing out some apparent defects. In our considered view the provisions of Sec. 142A cannot be read in isolation to Sec.145. In other words, if books of account are found to be correct and complete in all respect and no defect is pointed out therein and cost of construction of building is recorded therein, then the addition on account of difference in cost of construction could not be made even if a report is obtained within he meaning of Sec.142A from the DVO. It is because the use of the report of the DVO obtained u/s.142A is not mandatory but is discretionary as the word used is 'may' therein. Accordingly, we are of the considered view hat in the present case when AO has not rejected the books of account by pointing out any defects reference to the DVO will not be valid and, therefore, DVO's report could not be utilized for framing assessment even if such a report is considered to be obtained u/s.142A. Since reference to DVO being held as invalid, the assessment/reassessment framed thereafter would also be invalid. Even otherwise, the issue of unexplained expenditure u/s.69C of the Act is not covered under the powers of Sec.142A of the Act and this issue is squarely covered in favour of the

www.taxguru.in

assessee and against the Revenue by the decision of Hon'ble Delhi High Court in the case of *AAR PEE Apartments (P) Ltd.* (supra). The Hon'ble Delhi High Court held as under:-

> *"6. Before we advert to the interpretation to the aforesaid provision we deem it proper to reproduce the following discussions detained in the order of Tribunal on this aspect:-*
>
> "The next point to be determined is whether the AO is justified in referring to the DVO for computing cost of construction claimed as revenue expenditure. Prior to insertion of Sec. 142A by Finance (No.2) Act, 2004 with retrospective effect from 15th Nov. 1972, the reference to DVO in assessment proceedings other than as permissible under s. 55A was held to be invalid as held by Hon'ble Supreme Court in the case off Smt. Amiya Bala Paul vs. CIT (2003) 182 CTR (SC) 489 : (2003) 262 ITR 407 (SC). Sec. 142A, was inserted with retrospective effect from 15th Nov., 1972, however, even under s. 142A, a reference can be made for assessment or reassessment where an estimate of value of any investment referred to in s. 69 or s. 69B or the value of any bullion, jewellery or other valuable articles referred in s. 69A or 69B is required to be made. The AO may require the Valuation Officer to make an estimate of such value and report under s. 142A(1), for the purpose of making as assessment under Act, where an estimate of the value of any investment referred to in s. 69A or s. 69B or the value of any bullion, jewellery or other valuable article referred to in s. 69A or s.69B is required to be made, the AO may require the Valuation Officer to make an estimate of such value and report the same to him. Thus the power available under s. 142(1) is requiring the Valuation Officer to value any investment or bullion, jewellery or other valuable article referred in s.69, s 69A or s.69B of the Act,. These powers do not extend to estimate the amount of unexplained expenditure referred in s. 69C of the Act. Admittedly, in the present case the expenditure on construction are claimed and allowed as revenue expenditure and cannot be considered as an investment or bullion, jewellery etc. referred in s. 69, s. 69A or s.69B, of the Act. We accordingly hold that the reference to DVO is not in accordance with the provisions of s. 142A. Hence the decision of Hon'ble Supreme Court in the case of Smt. Amiya Bala Paul (supra) will still apply to hold that no addition can be made merely relying upon the value arrived at by DVO. In view of the above discussion, addition of Rs.19,69,881 is directed to be deleted."
>
> 7. We are in agreement with the aforesaid interpretation given by the Tribunal to Sec. 142(A) of the Act. Our discussion on this aspect proceeds as under:
>
> *8. Sec. 142(A) is to the following effect:-*
>
> "142A. For the purposes of making an assessment of reassessment under this Act, where an estimate of the value of any investment referred to in s 69 or s. 69B or the value of any bullion, jewellery or other valuable article referred to in s. 69A or s. 69B is required to be made, the AO may require the

www.taxguru.in

Valuation Officer to make an estimate of such value and report the same to him."

9. It is clear from the reading of sub-s.(1) of this provision that it enables the AO to get the valuation done from the Valuation Officer in certain specific types of cases. These would be the cases wherein an estimate of the value of any investment referred to in s. 69 or s. 69B or the value of any bullion, jewellery or other valuable articles referred to in s. 69A or 69B is required. There is no mention about s. 69C of the Act. As is clear from the above, s 69A deals with unexplained money. Sec. 69B likewise relates to the amount of investment etc. not fully disclosed in books of accounts. On the other hand, the provision relates to unexplained expenditure is in s. 69C.

10. In the present case the AO had doubts about the expenditure incurred on the project. As pointed out above the assessee had shown the expenditure on the Yusuf Saral project as Rs.39,69,440. Since AO had doubted this expenditure, he referred the matter to DVO for the purpose of determining the cost of construction of said project. However, as pointed out above, for the purpose of getting himself satisfied about the purported unexplained expenditure under s. 69C powers under s. 1142A could not be invoked.

11. Learned Counsel for Revenue submitted that such a power could be traced to s. 69B of the Act which relates to amount of investment etc. not fully disclosed in the books of accounts.

12. Her submission was that the "expenditure" incurred should be considered as coming within the expression 'investment'.

13. We cannot agree with this submission of learned counsel for Revenue. If investments could include within its fold he expenditure as well which is incurred by a businessman during the course of his business, there was no necessity of having a separate provision under s. 69C of the Act which deals width unexplained 'expenditure' and reads as under:

"69C. Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of he AO satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year."

14. The scope and ambit of ss. 69B and 69C are altogether different. The connotation to the investment appearing in s. 69B has to be in the context of investments made in some property or any other type of investment and it could not be the business expenditure. The word 'investment' contained in s. 69B deals with investment in bullion, jewellery or other valuable articles, etc. if the contention of learned counsel for Revenue is accepted and the expression

www.taxguru.in

is given wider meaning as sought to be made out, the provisions of s. 69C shall be rendered otiose.

15. The learned counsel for Revenue however took another plea to buttress her submission. She submitted that having regard to the circumstances under which s. 142A was inserted by the Finance Act, 2004, it be deemed that the intention of legislature was to include even those un-explained expenditure stipulated in s. 69C. No doubt the need behind inserting s. 142A was to empower the AO to make a reference to the Valuation Officer as there was no such specific powers and existing provision contained in s. 131 were inadequate. However, even this statement of object and reason clearly confined and limited the reference "to hold a scientific, technical and expert investigation etc." Learned counsel for the assessee has drawn our attention to CBDT circular issued by it explaining the Finance Bill, 2004 which specifically omits the word 'expenditure' as well as s. 69C. It is on this basis that the s. 142A was inserted in the form as it appears on the statute book now. If the intention was to include unexplained expenditure as contemplated in s. 69C of the Act as well this provision should have been specifically mentioned in s. 142A of the Act.

16. From the reading of sub-s.(1) of s. 142A, it is clear that the legislature referred to the provisions of ss. 69, 69A and 69B but specifically excluded 69C. The principle of casus omissus becomes applicable in a situation like this. What is not included by the legislature and rather specifically excluded, cannot be incorporated by the Court through the process of interpretation. The only remedy is to amend the provisions. It is not the function of the Court to legislate or to plug the loopholes in the law.

17. In the present case except the report of DVO on which the AO relied upon, there was nothing on record to suggest that there was any other evidence to disbelieve the expenditure shown by the assessee. In fact during the course of arguments, learned counsel for the assessee produced the assessment order which clearly demonstrates that the expenditure shown by the assessee from the time, when it was an on-going project, w4as examined and accepted by, the AO "

14. In view of the above facts and the judgment of Hon'ble Delhi High Court in the case of *AAR PEE Apartments Pvt. Ltd.* (supra) we are of the considered view that the Legislature has not included unexplained expenditure stipulated in Sec.69C of the Act for invocation of provisions of Sec.142A of the Act. We further find that even the CBDT Circular issued by it, explaining the Finance Bill, 2004, specifically omitted the word 'expenditure' as well as Sec.69 from the ambit of Sec.142A of the Act as inserted in the form as it appears on the statue book. If the intention of the Legislature to include unexplained expenditure as contemplated in Sec.69C of the

www.taxguru.in

Act, the provision of Sec.142A should have been specifically mentioning the same. Accordingly, we decide this issue in favour of the assessee and against the Revenue.

15. In view of the above decision on both the legal issues, we decide this appeal of the assessee in favour of the assessee and the issues on merits have become academic and needs no adjudication. Since we have decided the legal issue in favour of the assessee, the Revenue's appeal on merits have become academic and need no adjudication.

16. **In the result, appeal of the assessee is allowed and that of Revenue is dismissed.**

Order pronounced in Open Court on 04/ 06/2010

Sd/-	Sd/-
(N.S.Saini)	(Mahavir Singh)
Accountant Member	Judicial Member

Ahmedabad,
Dated : 04/06/2010

*Dkp
Copy of the Order forwarded to :
1. The Appellant.
2. The Respondent.
3. The CIT(Appeals)-II, Ahmedabad
4. The CIT concerns.
5. The DR, ITAT, Ahmedabad
6. Guard File.

BY ORDER,

/True copy/

Deputy/Asstt.Registrar
ITAT, Ahmedabad