

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 2nd May, 2012*
Date of Decision: 21st May, 2012

+ **W.P. (C) 3795/2011**

ACC LTD.

.....Petitioner

Through: Mr. A. N. Haksar, Sr. Adv. With Mr.
U.A. Rana and Ms. Mrinal
Mazumdar, Advocates.

Versus

DISTRICT VALUATION OFFICER AND ORS.Respondents

Through: Mr. Kiran Babu, Sr. Standing
Counsel for Revenue.
Ms. Shilpi Kaushik, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

R.V. EASWAR, J.:

This writ petition under Article 226 of the Constitution of India has been filed by M/s. ACC Ltd., hereinafter referred to as the 'petitioner', seeking a writ of prohibition, prohibiting the respondents from taking any action pursuant to the notices dated 07.04.2011 and 19.04.2011 and pursuant to the order of reference dated 20.12.2010 for valuation of the

property, hereinafter referred to as 'Okhla land', as on 01.04.1981. A prayer has also been made for issue of writ of certiorari for quashing the aforesaid orders and the proceedings as well as issue of writ of mandamus directing the first respondent to withdraw, revoke or cancel the impugned valuation proceedings.

2. The brief facts leading to the filing of the present petition may be noticed. The petitioner is a public limited company incorporated under the Indian Companies Act, 1913. It is engaged in the business of manufacture and sale of cement and also in the generation of power. It is regularly assessed to income tax under the Income Tax Act, 1961, hereinafter referred to as 'the Act'. Under a sale deed dated 10.04.2006, the petitioner sold the Okhla land which is situated at Mathura Road, Okhla, New Delhi. It was sold to M/s. S.S.P. Buildcon Pvt. Ltd. for a consideration of ₹1,40,20,00,000/-. The property had been taken on lease by the petitioner from Delhi Shimla Catholic Archdiocese under a lease agreement dated 24.04.1953 for a period of 99 years. By a deed of conveyance dated 12.02.1999, the residuary rights in the Okhla land were transferred in favour of the petitioner. In the income tax return filed by the petitioner in respect of the assessment year 2007-08, the petitioner declared capital gain on the sale of Okhla land. It appears that the date of acquisition of the property was taken as 12.02.1999 allegedly by mistake and, therefore, in the course of the assessment proceedings, the petitioner modified the claim by letter dated 18.11.2010. By virtue of the modification, the petitioner claimed that it had the option to take the fair market value of the Okhla land as on 01.04.1981 in the place of the original cost of acquisition. In order to support the claim of valuation of the Okhla land as on 01.04.1981,

the petitioner also filed a valuation report dated 16.11.2010 from a registered valuer, in which the Okhla land was valued at ₹21,72,95,000/- as on 01.04.1981.

3. In the course of the assessment proceedings, the Assessing Officer, who is the second respondent, passed an order purporting to refer the question of valuation of the Okhla land as on 01.04.1981 to the District Valuer Officer ('DVO'). Apparently the report of the Valuation Officer was not received by him before the completion of the assessment proceedings, and therefore in the assessment order passed on 29.12.2010 under Section 143(3) of the Act, he observed as under with reference to the assessee's claim regarding the fair market value as on 01.04.1981: -

“14.3 The assessee's submission has been considered. However, the assessee has now submitted a valuation report dated 16.11.2000 from an approved valuer who has valued the cost of property as on 01.04.1981 at ₹21,72,95,000/-. The valuer's report appears to be on a higher side, therefore, the same has been referred to the Government Valuation Cell, New Delhi on 20.12.2010 for having the valuation done as on 01.04.1981. On receipt of the valuation report, long term capital gain would be recomputed on the basis of the said valuation report. Till then, the capital gain is computed on the basis of the revised claim submitted by the assessee.”

4. On 19.04.2011, about 4 months after the completion of the assessment, the petitioner received a notice from the respondent No.1, who is the District Valuation Officer, Income Tax Department, Rohit House, No.3 Tolstoy Marg, New Delhi proposing to estimate the fair market value of the land as on 01.04.1981 at ₹71,71,352/-. This valuation report was prepared and issued under Section 55A of the Act. It was stated in this

report, which was only a proposal to value the Okhla land as on 01.04.1981 at ₹71,71,352/-, that the petitioner may file its objections to the proposed estimate and also submit any documentary evidence in support of the petitioner's valuation of the property at ₹21,72,95,000/- as on 01.04.1981.

5. It is against the aforesaid proposal issued by the first respondent to estimate the fair market value of the Okhla land at ₹71,71,352/- as on 01.04.1981 as against the value of ₹21,72,95,000/- declared by the petitioner, that the petitioner has filed the present writ petition. When notice was issued by this Court on 30.05.2011, an order was also passed that the valuation shall be completed by the District Valuation Officer, the first respondent herein but the same shall not be given effect to without leave of this Court. It appears that thereafter on 12.07.2011 the Assessing Officer had issued a notice under Section 148 of the Act, presumably on the basis of the report of the District Valuation Officer, but by order passed on 20.10.2011 the said notice was permitted to be withdrawn by this Court subject to the outcome of the writ petition.

6. The main contention urged on behalf of the petitioner is that the reference made to the District Valuation Officer is invalid once the assessment under Section 143(3) of the Act was completed on 29.12.2010 and thereafter the DVO cannot proceed with the same. In support of the contention, reliance is placed on the judgment of a Single Judge of the Calcutta High Court in *Reliance Jute & Industries Ltd. v. Income-tax Officer*, (1984) 150 ITR 643. It is consequently urged that the DVO's report, even if it has been prepared, would be invalid and cannot be permitted to be acted upon. It is further pointed out that an appeal against

the assessment order passed on 29.12.2010 is pending before the CIT (Appeals) in which the petitioner has, *inter alia*, challenged the decision of the Assessing Officer in paragraph 14.3 of the assessment order to refer the question of the fair market value of the Okhla land as on 01.04.1981 to the DVO under Section 55A.

8. In the counter affidavit it has been stated by the respondents that it was open to the Assessing Officer to refer the matter to the DVO on the basis of his opinion that the valuation as on 01.04.1981 was on the higher side, leading to a reduction in the amount of capital gains to be assessed, and since the assessment was getting barred by time on 31.12.2010, the Assessing Officer was compelled to complete the assessment without waiting for the report from the DVO. It is further stated that the reference to the DVO was made by virtue of the power conferred on the Assessing Officer under Section 55A(b)(ii), under which the Assessing Officer can refer the valuation of property to the DVO “having regard to the nature of the asset and other relevant circumstances”. The contention on behalf of the respondents is that since the value of ₹21,72,95,000/- as estimated by the registered valuer as the value of the Okhla land as on 01.04.1981 was on the higher side leading to a reduction in the amount of capital gains, it was necessary that the question as to what would be the proper fair market value to be adopted in respect of the property as on 01.04.1981 should be referred to the DVO. It is further contended that since the Assessing Officer has lawfully exercised his power under Section 55A, there is no question of quashing the proceedings for valuation or to stall them. It is submitted that even if the valuation report is received from the DVO after the completion of the assessment, it becomes part of the record and it is

open to the respondents to take any action on the basis of the report as permissible under the Act, such as reopening of the assessment under Section 147, etc.

9. In the rejoinder affidavit filed by the petitioner it is submitted that there is a clear infringement of the fundamental rights as the respondents have assumed jurisdiction without the authority of law in as much as there is no formation of any opinion for invoking Section 55A and also because proceedings for valuation are not maintainable once the assessment is framed. It is submitted that there was no material before the Assessing Officer on the basis of which he could have formed the opinion to invoke Section 55A. It is further submitted that the Assessing Officer has exercised the power in an arbitrary manner without having due regard to the legal provisions. It is further urged that there has been a mechanical presentation in the assessment order that the valuation report from the registered valuer, submitted by the petitioner before the Assessing Officer, was on the higher side. According to the petitioner, this is a subjective opinion of the Assessing Officer which is not within the contemplation of law. Reliance is placed on the judgment of the Supreme Court in *ACIT v. Dhariya Construction Co.*, (2010) 328 ITR 515 and the judgment of Division Bench of this Court in *CIT v. Smt. Suraj Devi*, (2010) 328 ITR 604.

10. Section 55A of the Act reads as under: -

“55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer –

- (a) *in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of opinion that the value so claimed is less than its fair market value;*
- (b) *in any other case, if the Assessing Officer is of opinion*
 -
 - (i) *that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf; or*
 - (ii) *that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do,*

and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clauses (ha) and (i) of sub-section (1) and sub-sections (3A) and (4) of section 23, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

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).”

11. A perusal and a plain reading of the section shows the circumstances under which the Assessing Officer may refer the valuation of the property to the DVO. The section can be invoked by the Assessing Officer for ascertaining the fair market value of a capital asset for the purpose of Chapter IV of the Act, which includes the provisions relating to capital gains. Sections 45 to 55 fall under the chapter, under the sub head “E.-

Capital Gains". Section 55 (2) (b)(i) gives the assessee the option to substitute the fair market value of the property as on 01.04.1981 in the place of the cost of acquisition thereof, if the property had been acquired by the assessee before 01.04.1981. The option given to the petitioner was exercised by the petitioner by filing the letter dated 18.11.2010 before the Assessing Officer under which the original computation of the capital gains was sought to be substituted by a revised computation in which the cost of the property was taken at the fair market value as on 01.04.1981 at ₹21,72,95,000/- on the basis of the registered valuer's report. This letter was filed about 1½ months before the date on which the assessment would have become barred by time. The Assessing Officer while examining the computation of the capital gains was of opinion that the figure of ₹21,72,95,000/- shown as the fair market value of the property as on 01.04.1981 was on the higher side and accordingly referred the matter to the DVO, Government Valuation Cell, New Delhi on 20.12.2010. In doing so, he was only exercising his power under Section 55A (b)(ii) of the Act under which he may refer the valuation to the DVO if he considers it necessary so to do, having regard to the nature of the asset and other relevant circumstances. The contention of the petitioner that the Assessing Officer had no basis to form the opinion is not acceptable. The original computation of the capital gains as per the return filed by the petitioner was ₹130.19 crores as seen from para 14.1 of the assessment order. After the revised computation/ modification of the capital gains was filed, the figure of capital gains came down drastically to ₹14,07,16,551/- there was thus a reduction of approximately ₹116 crores in the computation of the capital gains and this was significantly due to the claim that the fair market value

of the land as on 01.04.1981 was ₹21,72,95,000/-. It was on this basis that the Assessing Officer took the view that the valuer's report filed by the petitioner showed the figure on higher side and came to the conclusion that the matter should be referred to the DVO for valuation. The Assessing Officer obviously had the registered valuer's report filed by the petitioner before him. It cannot, therefore, be said that he had no basis or material to form the opinion that a reference ought to be made to the DVO. The reference was made before the assessment order was passed and during the pendency of the assessment proceedings. The contention of the petitioner to the contrary is therefore rejected.

12. The main contention based on the judgment of the Calcutta High Court (supra) that once the assessment was completed, the pending reference to the DVO became invalid and of no effect need not be examined in the present proceedings for the simple reason that the petitioner can be said to be effectively prejudiced only when action is taken by the income tax authorities on the basis of the report submitted by the DVO. Even otherwise there is no provision in the Act which deals with the situation as to what would happen to a reference made to the DVO under Section 55A which is pending completion at the time of passing the assessment order. Obviously the assessment order cannot be deferred in view of the limitation prescribed for passing the same. The report of the DVO, as and when received by the Assessing Officer, may be acted upon by the income tax authorities and if they do so, the validity of that action can be questioned by the assessee on grounds which he may be advised to take. That is not of any concern to us in the present proceedings. Section 55A does not in terms create any bar on the DVO proceeding to value the

property on the basis of a valid reference made by the Assessing Officer. We need not speculate as to what purpose the report of the DVO would serve if it is received after the completion of the assessment. As already pointed out, if any action is taken by the departmental authorities on the basis of the report of the DVO received after the completion of the assessment, such action will be open to challenge by the petitioner and it is at that point of time that the Court may be called upon to examine the validity of the action taken by the revenue authorities. That stage has not yet arisen in the present case. It is in this behalf pointed out in the counter affidavit that the reference to the DVO does not become invalid on the completion of the assessment proceedings before the receipt of the valuation report and that after the receipt of the valuation report after completion of the assessment proceedings, the report would become part of the record which may enable the income tax authorities to take action as permissible under the Act, such as Section 147, Section 263, appellate power under Section 250 or Section 251 etc. It is not necessary to examine the contention of the petitioner that once the assessment proceedings are completed, the pending proceedings under Section 55A become infructuous or invalid or get automatically terminated.

13. The petitioner placed reliance on the judgment of the Supreme Court in *ACIT v. Dhariya Construction Co.* (supra) and the judgment of Division Bench of this Court in *CIT v. Smt. Suraj Devi* (supra). In these cases, it has been held that the reopening of an assessment under Section 147 of the Act on the basis of the report of the DVO is bad in law. A deeper study of the judgment of the Supreme Court discloses that what has been held therein is that “the opinion of the DVO *per se* is not an information for the

purpose of reopening assessment under Section 147 of the Income-tax Act, 1961” and that “the Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon”. It may be possible to contend that the judgment of the Supreme Court interdict only a mechanical or robot-like reliance on the report of the DVO for the purpose of reopening the assessment under Section 147 and that if the reopening is based on an independent application of the mind of the Assessing Officer to the report obtained from the DVO and an independent formation of a belief on that basis, then the reopening would be valid. We are not to be understood as expressing any opinion on the applicability of the judgment to the action, if any, that may be taken on the basis of the report of the DVO. The judgment of the Supreme Court has been adverted to by the Division Bench of this Court in *CIT v. Smt. Suraj Devi* (supra). The question before this Court was not with regard to the validity of the reopening of the assessment on the basis of the report of the DVO. There, on the basis of a search conducted in the premises of the assessee, in which a registered purchase deed for a property was recovered, the Assessing Officer, suspecting that the market value of the property was more than the disclosed purchase price, made a reference to the DVO under Section 142A. The DVO estimated the market value of the property at an amount which was much higher than the amount shown in the document. The Assessing Officer added the difference between the two figures as undisclosed investment. It was in this background that this Court held that the report of the DVO, *per se*, is not information and cannot be relied upon without the books of account maintained by the assessee being rejected. While coming to this conclusion, the Court relied on the judgment of the

Supreme Court dated 19.10.2009 in Civil Appeal No.6973/2009, in which case the Supreme court had held that without rejecting the books of accounts, the Assessing Officer could not have referred the matter to the DVO for the purpose of making an addition for undisclosed investment. It will be noticed that the judgment of this Court in Smt. Suraj Devi's case was not concerned with the validity of a reference made to the DVO under Section 55A of the Act for the purpose of estimating the fair market value of a property as on 01.04.1981 for computing the capital gains nor was the Court concerned with the validity of a reference made to the DVO under Section 55A, which was pending when the assessment order was passed (proceedings were completed). This judgment does not touch upon the point raised by the petitioner in the present writ petition.

14. In any case we do not think we would be justified in preventing the Assessing Officer from collecting evidence which may be used by him for the purpose of bringing what in his opinion is the proper amount of capital gains on the sale of Okhla land. As to how he proposes to use the evidence against the assessee is a matter of speculation which we refrain from indulging in. The petitioner would be at liberty to strain every nerve in opposing and challenging any action sought to be taken by the Assessing Officer or any other departmental authority under the Act, if and when such an action is taken. We say nothing about the validity of any such action that may be taken under the Act. If the petitioner raises any objections to any such action that is taken under the Act, it would be the duty of the income tax authorities to examine and deal with them in accordance with law. Non-acceptance of the contentions of the petitioner in the present writ petition shall not be put against the petitioner in any proceedings that may

be taken against it pursuant to the reference made to the DVO under Section 55A.

15. With the above observations the writ petition is dismissed. All interim orders stand vacated. There shall be no order as to costs.

R.V.EASWAR, J

SANJIV KHANNA, J

MAY 21, 2012

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