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Judgement	Last Updated on: 31 Dec 2007	LexDoc Id: 342143
Category - Direct Tax		
Issuing Authority/Forum: ITAT (Delhi)		
Tej Pratap Singh vs ACIT		
Citation	116 ITD 388 307 ITR 244 2008 22 SOT 156	
Topic	Validity of: Reference to DVO	
Sub Topic	Reference prior to commencement of assessment proceedings	
Summary	AY 1999-2000. The return was filed on 29 March 2001. The reference under s.131(1)(d) was made by the AO to the DVO on 31 March 2000. The reference having been made prior to commencement of proceedings for assessment was invalid. Therefore, re-opening of the assessment on basis of such DVO's report was invalid.	
	S.131(1)(d) and s.147 of the Income Tax Act 1961	
Topic	Computation of: capital gains	
Sub Topic	DVO's report	
Summary	The capital gains were to be computed on the basis of consideration received and not on the basis of market value determined by the DVO.	
	S.48 of the Income Tax Act 1961	

ITAT, Delhi

Tej Pratap Singh vs ACIT

IT Appeal No. 4601 (Delhi) of 2004, Assessment Year 1999-2000

P.N. Parashar, Judicial Member and K.D. Ranjan, Accountant Member

31 December 2007

M.P. Rastogi for the Appellant
Devinder Singh for the Respondent

ORDER

P.N. Parashar, Judicial Member:-

1. This is an appeal filed by the assessee against the order of the learned CIT (Appeals) dated 5-8-2004 relating to assessment year 1999-2000.

2. The assessee has taken as many as 14 grounds in this appeal but at the time of hearing, the learned counsel for the assessee submitted that ground Nos. 1 to 4 involving a purely legal issue relating to assumption of jurisdiction by the Assessing Officer should be adjudicated first. The learned DR agreed for this course. Hence, we proceed to adjudicate ground Nos. 1 to 4 first.

3. Ground Nos. 1 to 4 : These grounds are as under :

"1. That the provisions of section 147/148 of the Income-tax Act, 1961 are not applicable at all.

2. That the Assessing Officer has no valid material to have any reason to believe that the income has escaped assessment under section 147 of the IT Act and the reassessment made in furtherance of such invalid assumption of jurisdiction is invalid, non est in law.

3. That there is no nexus between alleged material and the facts of the appellant's case and, therefore, the provisions of section 147 are not applicable at all.

4. That the reference by the Assessing Officer to the Valuation Cell in the year 2000 invoking the provisions of section 131(d) of the Act for valuation of agricultural land at village Mandoaoli sold is without jurisdiction and so the valuation report obtained in furtherance of such invalid jurisdiction is not admissible in law and cannot be made the basis for reopening an assessment under section 147 of the Income-tax Act.'

4. The assessee, an individual, was carrying on business of finance and investment etc. He had agricultural land in village Mandoli in Delhi as ancestral property. During the year under consideration the assessee had shown capital gain on account of sale of agricultural land at village Mandoli, sale consideration of which was disclosed at Rs. 50,000. The return was processed under section 143(1)(a) on 25-2-2002. Thereafter the DCIT (In.), Circle 12(1), New Delhi made reference of the matter relating to valuation for determining the fair market value of the agricultural land shown by the assessee. The reference was made on 17-4-2000 to the Valuation Officer. He estimated the value of land at Rs. 2,73,281.

4.1 The Assessing Officer issued notice under section 148 dated 15-3-2002 for assessment year 1999-2000. In compliance to the notice under section 148, which was served on 20-3-2002, the assessee filed return on 28-6-2002, declaring total income at Rs. 1,47,26,630.

4.2 The Assessing Officer took the capital gain at Rs. 1,25,861 in view of the estimated cost worked out by the valuation officer at Rs. 2,73,281 and completed the assessment at Rs. 1,67,93,825.

4.3 The assessee challenged the legality of the assessment order by taking following specific grounds before the learned CIT (Appeals).

"1. The learned Assessing Officer erred in law and on facts in concluding that the income had escaped without any material on record and consequently lacked jurisdiction to issue notice under section 148 of the Income-tax Act.

2. The learned Assessing Officer erred in law in making reference under section 131(1) of the Income-tax Act to the valuation cell for the valuation of agricultural land which is against the law particularly in the absence of any satisfaction of concealment or any pending proceedings under section 147 or any other provisions of Income-tax Act.'

4.4 The learned CIT (Appeals) dismissed these grounds by observing as under :

"4. Regarding the first ground of appeal, it is against issue of notice under section 148. The appellant contended that notice under section 148 should not have been issued as the original return was filed on 29-3-2001 declaring income at Rs. 1,19,65,050 which was processed under section 143(1) on 27-2-2002 on the same figure. Subsequently, the Assessing Officer has issued notice under section 148 of the Income-tax Act on 15-3-2002 simultaneously for assessment years 1994-95, 1995-96, 1996-97, 1998-99 and 1999-2000. The notice under section 148 was issued by the Assessing Officer on the ground that the fair market value of land, which was sold in these years, has been worked out by the Departmental Valuation Officer at a higher figure than that of the sale consideration received and disclosed by the assessee. Looking to the facts of the case the Assessing Officer was totally justified in issuing notice under section 148 in view of the fact that according to the report of the Departmental Valuation Officer the value of land sold was much more than that declared by the appellant. Hence this ground of appeal stands dismissed.'

5. Before us, while support ground No. 4, the learned counsel for the assessee submitted that reference made by the Assessing Officer to the Valuation Officer, in this case, is illegal because the same was made when no proceedings were pending before the Assessing Officer. In this regard he invited our attention to the valuation report available at pages 52 to 64 of the paper book. We have considered the entire relevant material. As per the report of Valuation Officer, reference was made to the valuation officer on 31-3-2000. The Assessing Officer thereafter recorded reasons for reopening the assessment on 11-3-2002. The reasons for assessment year 1999-2000 are as under :

"This is a case of individual. The assessee is being assessed in this circle and is filing the return of income regularly.

There is a complain against the assessee that he had land at village Mandoli, near Shahdara Delhi which he had sold in phased manners. Total area of land sold year-wise, sale value declared by the assessee and value as per valuation report is as under:-

A.Y.	Total area of land sold	Sale value declared and assessed	Value as per valuation report	Difference

1999-2008	2.10 Bighas	50000	273281	(-213281)
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From the above chart, it is very clear that there is a difference in each year and income to this extent had been under-assessed. This income has to be assessed to tax for which action under section 147/148 of the Income-tax Act, 1961 is required to be taken.

In these circumstances, I have reasons to believe and I am satisfied that income chargeable to tax is escaped assessment for the assessment year 1999-2000.'

5.1 Thus reasons were recorded on 11-3-2002 and thereafter notice under section 148 was issued on 15-3-2002. On perusal of the reasons, recorded as above, it is clear that the reopening has been made mainly on the basis of valuation report as per which the valuation of the property was estimated at Rs. 2,73,281 as against Rs. 50,000 shown by the assessee.

5.2 On examination of the relevant material, following facts remain undisputed :

- (1) The original return was filed by the assessee for assessment year 1999-2000 on 29-3-2001.
- (2) For the assessment year under consideration, return was processed under section 143(1)(a) on 25-2-2002.
- (3) The ITO had made reference to the Valuation Officer on 31-3-2000 i.e. before filing of the return. Thus, at the time when the reference was made, no proceedings were pending before the Assessing Officer. Even the return was filed subsequent to the report of Departmental Valuation Officer.
- (4) The notice under section 148 was issued on 15-3-2002 on the basis of report of Departmental Valuation Officer.

5.3 The contention of the learned counsel for the assessee was that since no proceedings were pending at the time when the reference was made, firstly the reference was invalid and secondly the reopening of the assessment based upon such invalid reference was illegal and thirdly the assessment order made on the basis of such report of Departmental Valuation Officer and on the basis of reasons recorded by the Assessing Officer, is totally null and void as the same is not tenable in the eye of law. In support of this argument, the learned counsel for the assessee placed reliance on the following decisions :

- (1) Dr. Arjun D. Bharad v. ITO [2002] 83 ITD 774 (Nag.);
- (2) CIT v. Nevendram Ahuja [2007] 290 ITR 453 (MP);
- (3) Smt. Rina Sen v. CIT [1999] 235 ITR 219 (Pat.).

6. The learned DR on the other hand submitted that the reference can be made under section 131 against any person even though proceedings may not be pending against him. According to him, the reference was valid and therefore the reopening based on the report of Departmental Valuation Officer is fully justified. On facts the learned DR submitted that a notice was issued under section 131 to the assessee vide letter dated 26-11-1998, in response to which the assessee submitted reply dated 3-12-1998. According to him, therefore, the proceedings against the assessee commenced from the issuance of notice dated 26-11-1998 and thus the reference being subsequent to this letter, the same cannot be treated to be invalid. The learned DR also placed reliance on the following authorities :

- (1) ITO v. Prem Hotel [2000] 109 Taxman 357 (JandK);
- (2) Peerless General Finance and Investment Co. Ltd. v. Assessing Officer [2001] 248 ITR 113 (All.);
- (3) Om Prakash Bamba v. Valuation Officer [2002] 122 Taxman 624 (JandK).
- (4) New Central Jute Mills Co. Ltd. v. Dwijendralal Brahmachari [1973] 90 ITR 467 (Cal.).

7. We have carefully considered the entire material on record and the rival submissions. We have already stated the undisputed facts. To repeat the original return in this case was filed on 29-3-2001. Thus, the assessment proceedings started after the filing of the return. The reference was made by the ITO concerned prior to the filing of the return. So far as the alleged earlier notice of the Assessing Officer dated 26-11-1998 is concerned, this appears to be in relation to some general inquiry or complaint. This notice does not even

mention the assessment year to which this notice pertained. The assessee filed reply in response to this notice in 1998. The matters appears to be dropped or concluded at that stage because no subsequent proceedings were conducted. In any case, it cannot be said that reference to Valuation Officer was made in continuation of the said letter, nor it can be said that assessment proceedings commenced when the said letter was issued. Thus, it cannot be said that the reference was made during the pendency of the proceedings.

7.1 The provisions contained under section 131 are as under :

"131. The Assessing Officer, Deputy Commissioner (Appeals), Joint Commissioner, Commissioner (Appeals) and Chief Commissioner or Commissioner shall, for the purpose of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:-

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.'

7.2 In view of the above provisions, the authorities mentioned in section 131(1), have been given the same powers which are available to the Civil Courts while trying a suit. The power includes power to issue commission. The Assessing Officer thus has been given power under section 131(1)(d) to issue commission, but such power can be exercised only when the assessment proceedings are pending before him. As in the case of Civil Courts, the power to issue commission etc. can be exercised only when civil suit/proceedings are pending before such courts. Similarly, under the Income-tax Act, the Assessing Officer can exercise such powers when the assessment proceedings are pending before him. The nature of the activities and functions for which the power is exercised, like discovery and inspection of record, summoning of witnesses or any other person or to compel production of books etc., can be exercised by a Civil Court during the trial of a suit or during the pendency of other proceedings before such Civil Court and similarly such powers are to be, exercised by the Assessing Officer for making assessment effectively. Hence the object and the purpose behind giving such power to the assessing authorities and other authorities discharging quasi-judicial functions, shows the nature of functions and the nature of proceedings in which such powers are to be exercised. Certain other authorities have been given power under section 131(1A). These authorities can exercise power even if the assessment proceedings are not pending before them. These are different authorities, which exercise different jurisdiction which pertains to the area of investigation, inquiry and search etc. This position is clear from the provision contained under section 131(1A), which is as under :

"131(1A) If the Director General or Director or Joint Director or Assistant Director or Deputy Director or the authorized officer referred to in sub-section (1) of section 132 before he takes action under clauses (i) to (v) of that sub-section, has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of making any enquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-section (1) on the income-tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other income-tax authority.'

7.3 Thus, on comparing the provisions as contained under section 131(1) and those contained under section 131(1A), it becomes obvious that whereas powers by the authorities mentioned under section 131(1) can be exercised when the proceedings are pending before such authorities, the powers mentioned under section 131(1A) can be exercised by the authorities mentioned therein, even if proceedings are not pending before such authorities.

7.4 The issue was considered by the Hon'ble Patna High Court in the case of Smt. Rina Sen (supra). In that case the Hon'ble High Court has held that the existence of a pending proceedings is a condition precedent and sine qua non for the exercise of power under section 131(1) of the Income-tax Act. The observations of the Hon'ble High Court are as under :

"The existence of a pending proceedings is a condition precedent and sine qua non for the exercise of power under section 131(1) of the Income-tax Act, 1961. The words "notwithstanding that no proceedings with respect to such person or class of persons are pending' occurring in sub-section (1A) of section 131 leave no room for doubt that while the authorities specified under section 131(1A) of the Act are empowered to take action if there is "reason to suspect' that any income has been concealed or is likely to be concealed by any person or class of persons even though no proceeding with respect to such person or class of persons is pending before him or any other income-tax authority, the authorities specified in section 131(1) of the Act can do so only if a proceeding is pending before them. The proceeding with the meaning of section 131(1) of the

Act must, therefore, be an independent proceeding pending from before and it is only in connection with that proceeding that commission can be issued.'

7.5 In the case of Dr. Arjun D. Bharad (supra), the Nagpur Bench of the ITAT has considered the issue in detail. After following the decision in the case of Bhola Nath Majumdar v. ITO [1996] 221 ITR 608 (Gau.) and several other authorities, the Bench has observed as under :

"In the light of legal position emanating from the various judicial pronouncements, the basic conditions precedent for issue of commission under section 131(1)(d) are that there must be a proceeding pending before the Assessing Officer and that the Assessing Officer must form a judicial opinion having regard to the relevant material/evidence produced by the assessee in support of the construction cost disclosed, in the books of account that the cost of construction disclosed by the assessee is under stated. If these conditions are not satisfied, the commission issued by the Assessing Officer without satisfying the said conditions cannot be considered as valid.

In the instant case, when a reference was made by the Assessing Officer to the Valuation Officer under section 131(1)(d) on 12-9-1997, neither the proceedings were pending before him nor did he derive any satisfaction applying his judicial mind that such a commission was requisite or proper having regard to the books of account and other evidence maintained by the assessee in support of the construction cost. As a matter of fact he had not even given an opportunity to the assessee to support and substantiate the cost of construction shown in the returns filed by him for the years under consideration before making a reference to the Departmental Valuation Officer. Thus, the conditions precedent for making such a reference were not satisfied and that being the position, the Assessing Officer had no jurisdiction to make a reference to the Departmental Valuation Officer under section 131(1)(d).'

7.6 The issue was also considered by the Hon'ble Madhya Pradesh High Court in the case of Nevendram Ahuja (supra). In that case also, the Hon'ble High Court after making reference to the decision of Patna High Court in the case of Rina Sen (supra), has observed as under :

"Under section 131(1), the Assessing Officer can issue a commission only if a proceeding is pending before him and not otherwise. The existence of a pending proceeding is a condition precedent and sine qua non for the exercise of such power.

Where the Assessing Officer had issued a commission to the Departmental Valuation Officer under section 131(1)(d) to value the construction of the building owned by the assessee and his brother on 29-11-1989, long prior to the commencement of assessment proceedings relating to the assessment year 1990-91 :

Held, that as no proceeding in regard to the assessment year 1990-91 was pending before the Assessing Officer on 29-11-1989, he could not have issued the commission under section 131(1)(d). Thus, the issue of a commission by the Assessing Officer on 29-11-1989, prior to the initiation of the assessment proceedings relating to the assessment year 1990-91 was not valid and consequently the valuation report of the Departmental Valuation Officer received in pursuance of the invalid commission could not be made use of.'

7.7 In view of the above authorities, it is clear that if the reference is made to the Departmental Valuation Officer by the Assessing Officer prior to the commencement of proceedings then the reference cannot be treated to have been made during the pendency of the proceedings and as such the validity of the reference cannot be legally justified. Consequently, the reopening of the assessment made on the basis of such reference can also not be justified.

7.8 The learned DR has made reference to certain authorities. In our considered opinion, in view of direct authorities to which have made reference as above, these authorities are either not applicable or are distinguishable.

7.9 In the case of Prem Hotel (supra), the Assessing Officer wanted to determine the fair market value of the capital asset for the purpose of Chapter IV. Therefore, he made reference to the Departmental Valuation Officer. The assessee challenged the reference on various grounds. It was found that the assessee was informed that a commission was being issued. The Commission under section 131(1)(d) of the Act was issued in that case during assessment proceedings. The main issue involved in that case was as to whether a show-cause notice should be issued to the assessee before making a reference and as to whether before making reference the assessee should be heard or not. It was held that Assessing Officer can seek the assistance of Valuation Officer and it is not necessary for the Assessing Officer to issue a show-cause notice to assessee but such requirement would come into existence when evaluation is made by the Assessing Officer. Thus, it is not a case where the reference to Valuation Officer was made before the commencement of assessment proceedings as has been done in the instant case. Thus, this case does not help the revenue.

7.10 In the case of Peerless General Finance and Investment Co. Ltd. (supra), the Hon'ble Allahabad High Court has held that section 131 of the Income-tax Act, 1961, is a machinery provision and must be interpreted in a manner which makes the machinery workable and practicable. The Hon'ble High Court has considered

the ambit and scope of section 131. In a writ of certiorari to question the reference order etc., the Hon'ble High Court has also observed as under :

"As regards the submission of Dr. Debi Prosad Pal that no proceedings are pending before respondent No. 1, we are of the opinion that since, admittedly, the assessment proceedings are pending at Calcutta it is not a case where no proceedings are pending at all. Section 131 does not expressly lay down that some proceedings must be pending before the same Income-tax authority who exercises the power under section 131. No doubt some High Courts have taken a view that some proceeding must be pending before the same authority, but we do not think this can be made an absolute principle. Section 131 is a machinery provision and must be interpreted in a manner which makes the machinery workable and practicable."

7.11 From the above observation it is also clear that assessment proceedings were pending before the commission was issued. It is to be pointed out that in the instant case the revenue has not brought out any fact to show that assessment proceedings or other proceedings were pending before any authority at any place at the time when he issued commission/reference to the Departmental Valuation Officer. Hence, on facts this case is distinguishable.

7.12 Here, it may be observed that there may be some decisions in favour of the department and even if the authorities cited on behalf of the department may support the case of the department, however, it is a settled legal position that if there are two possible views then the one favourable to the assessee should be followed, unless there is any direct authority of the Jurisdictional High Court, as held by the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd. [1973] 88 ITR 192. In that case the Hon'ble Apex Court has made following observations :

"If the court finds that the language of a taxing provision is ambiguous or capable of more meanings than one, then the court has to adopt that interpretation which favours the assessee, more particularly so where the provision relates to the imposition of penalty."

7.12-1 In the case of Virtual Soft Systems Ltd. v. CIT [2007] 289 ITR 83, the Hon'ble Supreme Court has observed that where the predominant majority of the High Courts have taken a certain view of the interpretation of a certain provision, the Supreme Court would lean in favour of the predominant view.

7.13 It is to be pointed out that neither of the parties has brought to our notice any direct decision of Hon'ble Delhi High Court on the issue before us. In view of the above, we consider it proper to place reliance on the ratio of decision of the Hon'ble Madhya Pradesh High Court in the case of Nevendram Ahuja (supra), which is the latest authority and other authorities cited on behalf of the assessee, which are directly in favour of the assessee, reference to which has been made in above paragraphs. In view of the above, we hold that the reference made by the Assessing Officer to the Valuation Officer was invalid and consequently the reopening of the assessment by using the valuation report sought through such reference is illegal. Further, the assessment made by placing reliance on such report of Departmental Valuation Officer is also bad in the eye of law and the same is liable to be quashed as being null and void. In view of above, ground No. 4 stands allowed.

8. The learned counsel for the assessee also submitted that provisions of section 147/148 have been wrongly invoked in this case by the Assessing Officer because he had no valid material to have any reason to believe that the income of the assessee has escaped assessment. According to him, reassessment made in furtherance of such invalid assumption of jurisdiction is invalid. He further pointed out that there is no nexus between the alleged material and the grounds for reopening and therefore the provisions of section 147 are not applicable at all. These submissions were made by the learned counsel with respect to ground Nos. 1 to 3, taken in the appeal.

8.1 The learned DR, on the other hand, justified the action of the Assessing Officer and supported the order of the learned CIT (Appeals).

8.2 We have carefully considered the entire material on record and the rival submissions. The Assessing Officer has reopened the assessment after recording reasons. A perusal of the reasons so recorded indicates that the belief of the Assessing Officer regarding escapement of the income of the assessee is based only on the opinion of the Valuation Officer. It is also found that before making reference, no material was examined by him. The reasons recorded also showed that for reopening the assessment he did not see any other material except the valuation report. Thus, it is clear that the Assessing Officer has not made any judicial application of mind for reopening the assessment. He made no enquiry from the assessee or from any other source nor examined the books of account of the assessee before doing so. On these facts, the making of reference to Departmental Valuation Officer by the Assessing Officer was without any basis as there was no material before him to justify the action taken by him.

8.3 In view of the above facts, the reference made to the Valuation Officer was itself illegal and consequently non est. When the reference itself is illegal and non est in law, the report submitted in such reference, consequently, cannot be relied upon to initiate reassessment proceedings. It was so held by the Hon'ble

Rajasthan High Court in the case of Brig. B. Lall v. ITO [1981] 127 ITR 308. In the case of Bhagwandas Jain v. Dy. CIT [2000] 246 ITR 632, the Hon'ble M.P. High Court, after following the decision of Hon'ble Rajasthan High Court in the case of Brig. B. Lall (supra), held that reopening of the assessment on the basis of valuation report is not valid. In that case notice dated 19-2-1988 was issued under section 17 of the Wealth-tax Act for reopening the assessment on the basis of valuation report, which report related to the period from December 1981 to 1984. The assessee challenged the notice as illegal and without jurisdiction. The Hon'ble High Court of Madhya Pradesh held that the report of the Valuation Officer was not called for during the pendency of the assessment and it could not have relevance to the previous year relevant to the assessment years 1979-80 to 1981-82, for which assessment were made. It was held that the valuation report could not form any basis for reopening the assessment for assessment years 1979-80 to 1981-82. The Hon'ble High Court quashed the notice on this ground.

8.4 In view of the above, the contention of the learned counsel for the assessee that there was no valid basis for reopening the assessment, deserves to be accepted.

8.5 The learned counsel for the assessee nextly contended that the capital gain is to be computed and taxed on the basis of provisions contained under section 48 of the Income-tax Act and it could not be computed on the basis of fair market value as determined by the Valuation Officer. According to him, the reopening made on the basis of such estimate is not legally justified. In support of his submission, he placed reliance on the ratio of decision in the case of Britannia Industries Ltd. v. Dy. CIT [1999] 238 ITR 57 (Cal.).

8.6 We have carefully considered the entire material. As observed earlier, the reopening of assessment has been made in this case by recording reasons which showed that in relation to escapement of income the Assessing Officer has taken into account the difference which was worked out on the basis of estimated market value of the land. He has not taken into account the full value of the land, which could have been worked out on the basis of consideration received by the assessee.

8.7 The provisions contained under section 48 of the Income-tax Act are as under :-

"Mode of computation - The income chargeable under the head 'Capital gains' shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :-

- (i) Expenditure incurred wholly and exclusively in connection with such transfer;
- (ii) The cost of acquisition of the asset and the cost of any improvement thereto.'

8.8 On examination of the above provision, it is clear that the capital gain is to be computed by deducting from the 'full value' of the consideration received or accruing as a result of the transfer of the capital asset i.e., the cost of acquisition and expenditure incurred in connection with the transfer are to be deducted from the full market value of the asset. The expression 'full value of the consideration' does not mean 'market value' or 'fair market value' of the asset transferred. Hence, capital gain tax cannot be computed and levied with reference to the market value determined on the basis of valuation report.

8.9 In the case of CIT v. George Henderson and Co. Ltd. [1967] 66 ITR 622 (SC), the Hon'ble Supreme Court of India, while considering a similar provision contained in section 12B(2) of the Income-tax Act, 1922, has observed as under :-

"The expression 'full value of the consideration for which the sale, exchange or transfer of the capital asset is made', appearing in section 12B(2) of the Indian Income-tax Act, 1922, does not mean the market value of the asset transferred, but the price bargained for by the parties to the sale, etc. The consideration for the transfer of a capital asset is what the transferor receives in lieu of the asset he parts with, viz., money or money's worth, and therefore the very asset transferred or parted with cannot be the consideration for the transfer. The expression 'full consideration' in the main part of section 12B(2) cannot be construed as having a reference to the market value of the asset transferred but the expression only means the full value of the thing received by the transferor in exchange for the capital asset transferred by him. The main part of section 12B(2) provides that the amount of capital gain shall be computed after making certain deductions from the 'full value of the consideration for which the sale, exchange or transfer of the capital asset is made'. In the case of a sale, the full value of the consideration is the full sale price actually paid. The Legislature had to use the words 'full value of the consideration' because it was dealing not merely with sale but with other types of transfers, such as exchange, where the consideration would be other than money. The expression 'full value' means the whole price without any deduction whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor has it any necessary reference to the market value of the capital asset which is the subject-matter of the transfer.'

8.10 Hence, from this angle also the basis for reopening of the assessment for taxing capital gain in the hands of the assessee, being market value as estimated by the Departmental Valuation Officer cannot be a proper basis under the relevant provisions of law contained under section 48 of the Income-tax Act for the reopening

of the assessment.

8.11 The Delhi Bench of the ITAT in the case of Ashok Soni v. ITO [2006] 10 SOT 39 (URO), after following the decisions of Hon'ble Supreme Court in the case of K.P. Verghese v. ITO [1981] 131 ITR 597; and George Henderson and Co. Ltd.'s case (supra) and various other authorities, has observed as under :-

"In the absence of any material with the Assessing Officer to show that the assessee has received more amount than the consideration shown in the concerned document, the action of the Assessing Officer in substituting the full value of consideration by the fair market value as stated by the Departmental Valuation Officer in his report for computation of capital gains was not valid."

8.12 There is another aspect of the matter. The valuation report is an expert opinion at the most. In relation to the transaction of transfer such report cannot be treated to be proof of the fact that there is some under hand dealing and consideration has passed more than what is disclosed.

8.13 In the case of Britannia Industries Ltd. (supra), the Hon'ble Calcutta High Court has held that in case of transfer of asset, no capital gain tax can be taxed over and above the capital gain shown and disclosed by the assessee unless there is evidence that there has under statement by the assessee and more consideration has passed than disclosed. The Hon'ble Court has also held that on the basis of valuation report, the Assessing Officer cannot assume jurisdiction under section 148. The observations of the Hon'ble Court are reproduced as under :-

"Although section 52(2) of the Income-tax Act, 1961 has been omitted from the statute the fact remains that in case of transfer of assets no capital gain tax can be taxed over and above the capital gain shown and disclosed by the assessee unless there is evidence that there has been an understatement by the assessee and more consideration has passed than disclosed. A valuation report is only an opinion, but that does not show or prove that there is some underhand dealing and consideration has passed more than what is disclosed by the assessee or the petitioner. When no tax or any addition can be made on the basis of the valuation report, the Assessing Officer cannot assume jurisdiction under section 148 of the Income-tax Act, 1961, to issue notice for escaped capital gain as no addition can be made on the basis of the fair market value of the property in case of capital gain tax."

8.14 Since in the present case the reasons recorded for reopening and the facts taken into account for formation of belief by the Assessing Officer that income of the assessee has escaped assessment is based on the report of DVO, in view of the above authorities, the assumption of jurisdiction under section 148 by the Assessing Officer on this basis is not legally justified. The contention of the assessee that the 'reason to believe' should be considered with reference to the relevant provisions of the Act under which the income is chargeable to tax also carries force. In the instant case, therefore, the Assessing Officer was required to base his reasons for reopening of the assessment with reference to the provisions of section 48.

He has not done so. On the other hand, he has gone on totally irrelevant consideration which is estimated value of the land, which aspect is not relevant so far as section 48 is concerned. The issuance of notice under section 148 by assuming jurisdiction on the basis of such irrelevant material, is not justified in law.

8.15 In the case of NRK Ramkumar Raja v. ITO [1999] 106 Taxman 81, the Hon'ble Madras High Court has considered this aspect and has observed as under :-

"The words 'the Assessing Officer should have reason to believe', should be read with reference to the other provisions of the Act under which the income is chargeable to tax. It is in this regard that the authorities should satisfy themselves whether such income is chargeable to tax, before holding that the Assessing Officer has reason to believe that any income of the petitioner chargeable to tax has escaped assessment for any assessment year.

Therefore, in the instant case, the Assessing Officer, before issuing a notice under section 148 should have tested the ground for issuing such notice in the light of section 182(3) whether the income of the petitioner from the firms was chargeable to tax, and then should have reason to believe that such income chargeable to tax had escaped assessment for the assessment year 1989-90."

8.16 Since notice issued under section 148 in the instant case has not been issued after testing the grounds of issuing such notice in the light of section 48, the jurisdiction of the Assessing Officer in issuing such a notice on the basis of such material, as has been taken by the Assessing Officer in this case, is not justified.

8.17 In view of the above discussion, ground Nos. 1, 2 and 3 as taken in this appeal are allowed.

9. In view of our finding on ground Nos. 1 to 4, the assessment order is quashed and on these grounds the appeal of the assessee is allowed.

10. As we have quashed the assessment order, we are not required to adjudicate other grounds raised in this appeal and go into the merits of the case.

11. Assessee's appeal stands allowed accordingly.

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