INCOME TAX: Amendment brought in section 55A(a) by Finance Act, 2012, has to be read prospectively; such amendment shall apply to transactions which are effected during period started on or after 1-7-2012

INCOME TAX: Where variation between sale consideration adopted by assessee and value determined by stamp valuation authority was only 1.49 per cent, value so declared by assessee should be adopted

[2019] 111 taxmann.com 151 (Jaipur - Trib.)

IN THE ITAT JAIPUR BENCH 'A'

Income Tax Officer, Ward 6(3), Jaipur

v.

Bajaj Udyog*

VIJAY PAL RAO, JUDICIAL MEMBER
AND VIKRAM SINGH YADAV, ACCOUNTANT MEMBER
IT APPEAL NO. 273 (JP) OF 2017
C.O. NO. 10 (JP) OF 2017
[ASSESSMENT YEAR 2011-12]
AUGUST 9, 2019

Section 55A of the Income-tax Act, 1961 - Capital gains - Reference to valuation officer (Clause (a)) - Assessment year 2011-12 - Whether amendment brought in section 55A(a) by Finance Act, 2012, has to be read prospectively and not retrospectively and, thus, such amendment shall apply to transactions which are effected during period started on or after 1-7-2012 - Held, yes [Paras 52, 54 and 56] [In favour of assessee]

Section 50C of the Income-tax Act, 1961 - Capital gains - Special provision for computation of full value of consideration (Applicability of) - Assessment year 2011-12 - Whether in order to compute capital gain on basis of value determined by stamp duty authority under section 50C, Assessing Officer should consider variance between two values i.e. value determined by stamp duty authority and value as per sale deed - Held, yes - Whether where in assessee's case, variation between sale consideration adopted by assessee and value determined by stamp valuation authority was only 1.49 per cent, value so declared by assessee should be adopted as full value of consideration and addition made on basis of valuation made by stamp valuation authority was to be deleted - Held, yes [Paras 12 and 13] [In favour of assessee]

FACTS

- The assessee was a partnership firm. During relevant year, the assessee sold an immovable property for a consideration of Rs. 18.63 crores. On the basis of registered valuer's report, the FMV for determining indexed cost of acquisition was taken as Rs. 2.72 crores. Accordingly, indexed cost of acquisition was arrived at Rs. 19.40 crores.
- On basis of aforesaid computation, the assessee declared capital loss of Rs. 1.79 crores on sale of immovable property.

- During the course of assessment proceedings, the Assessing Officer opined that the value determined by the stamp duty authority had to be adopted as full value of consideration as per the provisions of section 50C of the Act. He accordingly adopted the full value of consideration of Rs. 18.99 crores as against stated sale consideration of Rs. 18.63 crores for the purpose of determining the capital gains in the hands of the assessee. Further, regarding the indexed cost of acquisition, the Assessing Officer referred the matter to DVO during the course of assessment proceedings under section 55A and on basis of the DVO's report, adopted the FMV as on 1-4-1981 at Rs. 34.57 lakhs.
- Accordingly, the Assessing Officer determined the long term capital gains of Rs. 16.53 crores as against long term capital loss of Rs. 1.79 crores claimed by the assessee in its return of income.
- The Commissioner (Appeals) sustained the action of the Assessing Officer where he had taken the full value of consideration at Rs. 18.99 crores. However, as far as the indexed cost of acquisition was concerned, he held that the reference made by the Assessing Officer under section 55A to the DVO for estimating the fair market value of the property as on 1-4-1981 was not valid. Hence, the addition made by the Assessing Officer by adopting indexed cost of acquisition on the basis of DVO's report was deleted.
- On cross appeals:

HELD

- During the course of assessment proceedings, the Assessing Officer observed that the value determined by the stamp duty authority is higher than what has been stated in the sale deed and the assessee has not disputed the value so adopted by the stamp duty authority and accordingly, he has adopted the full value of consideration of Rs. 18,99,70,208 as against stated sale consideration of Rs. 18,63,71,000 for the purpose of determining the capital gains in the hands of the assessee as per the provisions of section 50C of the Act. In terms of section 50C(2), where the assessee objects to such valuation and states that the same exceeds the FMV of the property, the Assessing Officer is required to refer the matter to the valuation officer. [Para 10]
- Therefore, where the Assessing Officer gives a finding that the assessee has not objected to the adoption of stamp duty value during the course of assessment proceedings, the Assessing Officer is not required to refer the matter to the valuation officer and he is required to adopt the value so determined by stamp duty authority as specified in section 50C(1). [Para 11]
- At the same time, before adopting the value so determined by the stamp duty authority, under section 50C, the Assessing Officer should consider the variance between the two values *i.e.* the value determined by the stamp duty authority and the value as per the sale deed as held by the coordinate bench in case of *Smt. Sita Bai Khetan* v. *ITO* [2017] 88 taxmann.com 377 (Jaipur - Trib.) where it was held that where the variance is 2.11 per cent *i.e.*, less than 10 per cent, such difference should be ignored and the value so declared by the assessee should be accepted. The reasoning behind acceptance of variation within the tolerable limits is that DLC rates are indicative rates of a particular locality and not of a particular property and depending upon various factors, the value of two properties in the same locality may vary. Therefore, the concept of determining a tolerable range has to be appreciated

more so in the context of deeming fiction where the liability is fastened on the assessee based on such stamp duty valuation and a fact which has lately been recognized by the legislature whereby tolerance range of 5 per cent has been specified by way of third proviso to section 50C(1) as inserted by the Finance Act, 2018, with effect from 1-4-2019. [Para 12]

- In the instant case, the variation is only Rs. 35,99,208, which is 1.49 per cent of the value determined by the Stamp Valuation Authority which should thus be ignored and the value so declared by the assessee should be accepted. In the result, the value so declared by the assessee should be adopted as full value of consideration and the addition of Rs. 35,99,208 is hereby directed to be deleted. The ground of appeal taken by the assessee is thus decided in favour of the assessee and against the revenue. [Para 13]
- Now, coming to the main ground raised by the revenue wherein the revenue has challenged the action of the Commissioner (Appeals) wherein he has held that reference to the DVO by the Assessing Officer was invalid and, hence, the valuation so determined by the DVO cannot be adopted for determining the FMV as on 1-4-1981 and the addition made by the Assessing Officer by adopting indexed cost of acquisition on the basis of DVO's report was deleted. [Para 23]
- In this regard, the issue under consideration is whether the amendment to section 55A(*a*) made by the Finance Act, 2012 with effect from 1-7-2012 can apply to the proceedings relevant to the impugned assessment year 2011-12 and whether reference so made by the Assessing Officer to DVO as per the amended provisions is sustainable or not. [Para 39]
- The provisions of section 55A are as amended by the Finance Act, 2012 with effect from 1-7-2012 wherein in clause (*a*), for 'is less than its fair market value' was substituted for 'at variance with its fair value'. As per the revenue, the amended provisions of section 55A(*a*) are applicable for the impugned assessment year 2011-12 and the Assessing Officer was well within his jurisdiction to refer the matter to the valuation officer. The assessee's contention is that unamended provisions of section 55A(*a*) are relevant for the impugned assessment year 2011-12 and the Assessing Officer was not having the jurisdiction to refer the matter to the valuation officer. [Para 41]
- In order to resolve the controversy, it is necessary to examine the provisions of section 55A(*a*). First and foremost, it provides that 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. In the instant case, for the purposes of this chapter means for the purposes of determining the liability towards the capital gains tax on the sale of the land. There is no dispute that the liability towards the capital gains has arisen during the year as the transfer of the property has happened during the year. The second condition is that where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer. In the instant case, there is no dispute that cost of acquisition as substituted by the assessee with the fair market value as on 1-4-1981 is based on and in accordance with the estimate made by the registered valuer. The third condition is that the Assessing Officer should form an opinion that the value so claimed by the assessee is less than its fair market value (as per unamended provisions) or is at variance with its fair market value (as per the amended provisions). The formation of

the opinion by the Assessing Officer therefore has to be seen and examined in the context of determining the liability towards the capital gains and the liability towards the capital gains can be examined during the course of assessment proceedings. Therefore, the formation of the opinion by the Assessing Officer has to be during the course of assessment proceedings and not prior or subsequent to the completion of the assessment proceedings. As per the unamended provisions, the Assessing Officer has to form an opinion that the value so claimed by the assessee is less than its fair market value. Therefore, only in a scenario, the value so claimed by the assessee of the capital asset is less than its fair market value in the opinion of the Assessing Officer, the matter can be referred to the valuation officer. In a scenario, where the value so claimed by the assessee is more than its fair market value, the matter could not be referred to the valuation officer. However, the amended provisions take care of both the scenario and has provided that where the value so claimed by the assessee is at variance with its fair market value, the matter can be referred to the valuation officer. In the instant case, the Assessing Officer has invoked the amended provisions and has held that the value so claimed by the assessee is at variance with its fair market value. The contention of the assessee is that the amended provisions have only been brought on the statute books with effect from 1-7-2012 and the same cannot be invoked in the instant case and therefore, the Assessing Officer lacks the necessary jurisdiction to refer the matter to the valuation officer. [Para 42]

- The question is how one should read the amendment in section 55A(*a*) which has been brought on the statute books with effect from 1-7-2012. Whether one should read the amendment in the context of transactions which have happened on or after 1-7-2012 and which are liable for capital gains tax and therefore, satisfying the initial condition of reference 'for the purposes of this chapter' to the valuation officer. Alternatively, irrespective of period to which the transaction pertains, where the assessment proceedings are initiated by the Assessing Officer or pending before the Assessing Officer on or after 1-7-2012, given that the Assessing Officer has to form an opinion during the course of assessment proceedings, the amended provisions will apply. [Para 43]
- Therefore, the intent and purpose behind the amendment is to enable the Assessing Officer to make a reference to the Valuation officer where he is of the opinion that the value adopted by the assessee as on 1-4-1981 is higher than the fair market value of the asset as on that date and in order to check whether the adoption of a higher value for the cost of the asset as the fair market value as on 1-4-1981, has led to a lower amount of capital gains being offered to tax. It is therefore an empowering provision wherein the Assessing Officer has been given requisite power and authority with effect from 1-7-2012 to refer the matter relating to valuation of a capital asset to the Valuation Officer. The question however remains in respect of which transactions, the Assessing Officer is empowered to make a reference to the valuation officer with effect from 1-7-2012. [Para 44]
- The Bombay High Court in case of *CIT* v. *Puja Prints* [2014] 43 taxmann.com 247/224 Taxman 22/360 ITR 697 has held that the Parliament has not given retrospective effect to the amendment and the law to be applied is as existing during the period relevant to the Assessment year 2006-07. Similarly, the Gujarat High Court in case of *CIT* v. *Gauranginiben S. Shodhan Indl.* [2014] 45 taxmann.com 356/224 Taxman 367 ITR 238 has held that section 55A as it stood at the relevant time, has to be seen and emphasis was laid on the period of the transaction and where

the transaction was for the period prior to 1-7-2012, amended provisions were held not applicable. Similarly, in case of *DCIT* v. *Shantaben P. Patel* [IT Appeal No. 1204 of 2018 dated 8-10-2018] the Gujarat High Court has reiterated the legal position that for the transaction falling in financial year 2010-11 relevant to the Assessment year 2011-12, the matter is covered by the earlier decision in case of *Gauranginiben S. Shodhan Indl*. (*supra*). Therefore there is convergance of views as evident from these decisions of the Bombay and Gujarat High Court that the amendment brought in by the Finance Act, 2012 in section 55A(*a*) has to be read prospectively and not retrospectively. Secondly, such amendment shall apply to transactions (subject matter of determination of capital gains) which are effected during the period starting on or after 1-7-2012. [Para 52]

- In light of above discussions, in the facts of the present case, the transaction of sale of property took place during the financial year 2010-11 relevant to the assessment year 2011-12, amended provisions of section 55A(*a*) would not be applicable assessee's case shall be guided by the erstwhile provisions of section 55A(*a*) of the Act and therefore, the Assessing Officer was not correct in holding that the amended provisions are applicable in the instant case and therefore, reference to the valuation officer under the amended provisions of section 55A(*a*) cannot be sustained in the eyes of law. [Para 54]
- A related question that arises for consideration is given that the reference has been made under section 55A of the Act, can the same be sustained in terms of unamended provisions of section 55A of the Act as there is no dispute that the unamended provisions are applicable in the instant case. [Para 55]
- In order to refer the matter to the valuation officer as per erstwhile provisions of section 55A(*a*), in the instant case, there is no dispute that the liability towards the capital gains has arisen during the year as the transfer of the property has happened during the year. There is also no dispute that cost of acquisition as substituted by the assessee with fair market value as on 1-4-1981 is based on and in accordance with the estimate made by a registered valuer. The third condition which is required to be fulfilled is that the Assessing Officer should form an opinion that the value so claimed by the assessee is less than its fair market value. Therefore, only in a scenario, the value so claimed by the assessee is less than its fair market value in the opinion of the Assessing Officer, the matter can be referred to the valuation officer. In a scenario, where the value so claimed by the assessee is more than its fair market value, the matter could not be referred to the valuation officer. In the instant case, the value of the property shown by the assessee as on 1-4-1981 based on the registered valuer report is considered, it would reveal that the same was in fact even higher than the value subsequently determined by the valuation officer and therefore, the Assessing Officer was not empowered to refer the matter to the valuation officer even as per erstwhile provisions of section 55A(*a*) prior to amendment by the Finance Act, 2012. [Para 56]
- It is an undisputed fact that the assessee firm has determined the FMV basis the valuation report issued by a Registered Valuer. Further, from perusal of the letter dated 8-1-2014 issued by the Assessing Officer addressed to the District Valuation Officer which is available on record, it is found that the Assessing Officer has referred the matter to the DVO under section 55A(*a*) of the Act. Therefore, where the valuation so adopted by the assessee firm is based on a registered valuer report and the Assessing Officer has formed an opinion that the value estimated by the

registered valuer is at variance with the fair market value of the asset having regard to the nature of the asset and its use at relevant time, the Assessing Officer has invoked the provisions of section 55A(*a*) of the Act. In fact, discussed above, the main argument of the revenue is regarding the amendment brought in by the Finance Act, 2012 in section 55A(*a*) and which has been claimed as applicable for the impugned assessment year. Further, the High Courts have also held that where the issue is covered by section 55A(*a*), resort cannot be had to the residuary clause provided in section 55A(*b*)(*ii*) of the Act. Therefore, the contention so advanced by the revenue cannot be accepted. [Para 60]

- Coming to cross objection raised by the assessee wherein the assessee has challenged the DVO's report on the basis of incorrect assumption of facts and against the established norms of the valuation and without following standard practice and procedures of the revenue department for determination FMV. [Para 80]
- As noted above, though the reference to the Valuation Officer by the Assessing Officer under section 55A is not valid, at the same time, the valuation report so obtained by the Assessing Officer can be used as reliable piece of evidence where the same is found to be relevant. Therefore, it needs to be examined whether in the facts and circumstances of the present case, the valuation report takes into consideration the various factors affecting the FMV of the property under consideration or not and can be used by the Assessing Officer. Firstly, it is found that the Valuation Officer has considered the status of the land as on 1-4-1981 as residential as there was no commercial working from the premises on this date. Therefore, the Valuation Officer is referring to the date when he has carried out the inspection. However, what needs to be examined is whether there was any commercial activity carried out as on the valuation date *i.e.* 1-4-1981. In this regard, there is registration certificate issued by the office of the Joint Director District Industry Centre, dated 21-10-1980 which provides the provisional registration number allotted to the assessee's firm factory situated for carrying out the manufacturing activities relating to ferrous, non-ferrous wire, and wire products etc. Thereafter, there is a registration certificate issued by the appropriate authority under the Central Sales Tax Act, 1956 wherein the assessee has been registered as a dealer under section 7(1)/7(2) of CST Act, 1956 in respect of manufacturing, trading and commission agency in the line of copper wire products etc. and this certificate is effective from 16-3-1981. Therefore, the relevant point in time *i.e.*, on 1-4-1981, the assessee was carrying out commercial activities from the premises which is subject matter of present proceedings. Therefore, the findings of the Valuation Officer that there were no commercial activities in the premises is not borne out from the records and therefore, cannot be accepted. These are documents brought on record by the assessee and which are issued by the appropriate Government Authorities and cannot be self created by the assessee firm. Therefore, basis this very fundamental difference where the DVO has taken the status of the property as residential whereas the facts on record suggest that the assessee was carrying out commercial activities by itself put a big question mark on the value finally determined by the Valuation Officer. [Para 95]
- Further, the assessee has pointed out various discrepancies in terms of non-consideration of the frontage, locality surroundings and FAR of the property which again put a question mark on the value so determined by the Valuation Officer. Further, the assessee has drawn reference to another valuation carried out at the same time in case of another property wherein different yard sticks have been applied by

the Valuation Officer in terms of the adjustment towards the size of the plot and commercial potential. We therefore find that the valuation report so issued by the Valuation Officer suffer from serious deficiencies and the same cannot be held as reliable piece of evidences which can be applied by the Assessing Officer. Therefore, in the facts and circumstances, of the present case, we are of the considered view that the adjustment made by the Assessing Officer basis the valuation report so submitted by the DVO cannot be accepted as the same suffer from serious infirmity. In the result, the cross objection taken by the assessee is allowed. [Para 95]

- In the result, appeal of the revenue is dismissed and cross-objection of the assessee is partly allowed. [Para 97]

CASES REFERRED TO

Smt. Sita bai Khetan v. *ITO* [2017] 88 taxmann.com 377 (Jaipur - Trib.) (para 7), *John Fowler (India) (P.) Ltd*. v. *Dy. CIT* [IT Appeal No. 7545 (Mum.) of 2014, dated 25-01-2017] (para 7), *Gopee Nath Paul* v. *Dy. CIT* [2005] 147 Taxman 629/278 ITR 240 (Cal.) (para 20), *S.M. Wahi* v. *DIT* [2010] 324 ITR 269 (Delhi) (para 20), *CIT* v. *Smt. Shakuntala Kantilal* [1991] 58 Taxman 106/190 ITR 56 (Bom.) (para 20), *CIT* v. *Bradford Trading Co. (P.) Ltd.* [2002] 125 Taxman 632/ [2003] 261 ITR 222 (Mad) (para 20), *Vivek Bose* v. *ITO* [2014] 42 taxmann.com 35/ [2015] 152 ITD 745 (Kol. - Trib.) (para 20), *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC) (para 34), *CIT* v. *Puja Prints* [2014] 43 taxmann.com 247/224 Taxman 22/360 ITR 697 (Bom.) (para 36), *CIT* v. *Gauranginiben S. Shodhan Indl.* [2014] 45 taxmann.com 356/224 Taxman 253/367 ITR 238 (Guj.) (para 36), *DCIT* v. *Shantaben P Patel* [IT Appeal No. 1204 of 2018 dated 8-10-2018] (para 36), *ITO* v. *Rabinder H. Chhabra* [IT Appeal No. 5511 (Mum.) of 2012 dated, 20-5-2014] (para 37), *Seema Chadha* v. *Asstt. CIT* [IT Appeal No. 67 (RPR) of 2013, dated 21-9-2016] (para 37), *Sunita Jain* v. *ITO* [IT Appeal No. 847 (JP) of 2012 dated 30-5-2016] (para 37), *Mrs. Deepali Bhargava* v. *ITO* [IT appeal No. 158 (JP) of 2016, dated 30-5-2017] (para 37), *Kunal Kishore Borawke* v. *ITO* [IT Appeal No. 723 (PN) of 2016 dated 14-10-2016] (para 37), *Rajaram S. Wayole* v. *ITO* [IT Appeal Nos. 4233 - 4244 (Mum.) of 2015 dated 9-1-2017] (para 37), *Ujjaval Mahesbhai Pandaya* v. *ITO* [IT Appeal No. 113 (Ahd.) of 2016 dated 23-1-2017] (para 37), *Gordhandas S. Garodia* v. *Dy. CIT* [IT Appeal Nos. 5097 & 5113 (Mum.) of 2015 dated 1-11-2017] (para 37), *Asstt. CIT* v. *Bhima Dada Kharate* [IT Appeal No. 1582 (Pun.) of 2015 dated 31-10-2017] (para 37), *ITO* v. *Kum. Allobai Bezonji Jalanawala* [IT Appeal No. 895 (Pun.) of 2015 dated 23-11-2017] (para 37), *Maruti G Thopte* v. *ITO* [IT Appeal No. 863 (Pune) of 2017 dated 5-1-2018] (para 37), *ITO* v. *Bhatia Industrial Co.* [IT Appeal No. 5385 (Mum.) of 2016, dated 25-4-2018] (para 37), *Smt. Dhiraj Ben Pravin Bhai Patel* v. *ITO* [IT Appeal No. 902 (Ahd.) of 2017 (para 37), *Smt. Bhudevi Kishan Rao Gurantyal* v. *ITO* [IT Appeal No. 1036 (Pun.) of 2015 dated 12-3-2019] (para 37), *Shantaben P. Patel* v. *ITO* [IT Appeal Nos. 781, 784 & 785 (Ahd.) of 2011 dated 2-4-2018] (para 47), *Mahadevbhai Mohanbhai Naik* v. *ITO* [IT Appeal No. 820 (Ahd.) of 2016, dated 11-7-2018 (para 50), *Sonali Roy* v. *Pr. CIT* [IT Appeal No. 1329 (Kol.) of 2017, dated 28-2-2018] (para 51), *Smt. Krishnabai Tingre* v. *ITO* [2006] 101 ITD 317 (Pune) (para 58), *Smt. Amiya Bala Paul* v. *CIT* [2003] 130 Taxman 511/262 ITR 407 (SC) (para 63), *Pooran Mal ETC* v. *Director of Income Tax* (Investigation) AIR 1974 SC 348 (para 64), *DCIT* v. *Chaturbhuj Vallabhdas (HUF)* [IT Appeal No. 3439 (Mum.) of 2007 dated 20-12-2010 (para 67), *Vijay P. karnik* v. *ITO* [2013] 37 taxmann.com 48/60 SOT 155 (Mum. - Trib.) (para 67), *Pradeep G. Vora* v. *ITO* [2015] 58 taxmann.com 110/154 ITD 118 (Mum. - Trib.) (para 67), *Amrit Banaspati Co. Ltd*. v. *CWT* [Civil Appeal No. 9380 of 2003, dated 30-6-2004] (para 75), *CIT* v. *Hotel Joshi* [2002] 108 Taxman 119/242 ITR 478 (Raj.) (para 75), *Ravikant* v. *ITO* [2007] 110 TTJ 297 (Delhi) (para 92) and *Suresh C. Mehta* v. *ITO* [2013] 35 taxmann.com 230/144 ITD 427 (Mum - Trib.) (para 93).

Virinder Mehta, (CIT) *for the Appellant.* **Vinod Gupta**, (CA) *for the Respondent.*

ORDER

Vikram Singh Yadav, Accountant Member. - This is an appeal filed by the Revenue directed against the order of the ld. CIT(A), Ajmer dated 17/01/2017 for A.Y 2014-15 and the cross objection filed by the assessee wherein respective grounds of appeal are as under:—

Grounds of Revenue's appeal:

"1. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is justified in deleting the addition of Rs. 16,53,86,672/- made by the AO on account of Long Term Capital Gain without considering the facts of the case in right perspective.

2. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is justified in deleting the disallowance of Rs. 1,00,00,000/- made by the AO on account of deduction claimed by the assessee u/s 48 as payment made by it as Contractual obligation while computing LTCG which is not maintainable as per Income Tax Act, 1961."

Grounds of Assessee's cross-objections:

"1. Under the facts and circumstances of the case, the Ld. CIT(A) has erred by confirming the action of Ld. AO of adopting the value so adopted by the stamp authority i.e. 18,99,76,208 instead of transaction value of Rs. 18,63,71,000 as full value of the consideration and confirming the addition of Rs. 35,99,208.

2. Under the facts and circumstances of the case and in law, Ld. CIT(A) has erred in not deciding ground of Appeal no. 2 before him while Ld. AO has erred in:-

(*i*) not considering the valuation report of a registered valuer, submitted during the course of assessment proceedings in right prospective.

(*ii*) Referring the case to DVO u/s 55A for determining the fair market value of property.

(*iii*) Drawing inferences for referring the case to DVO which were based on incorrect assumption of facts and without providing opportunity of being heard, hence, against the principle of natural justice.

(*iv*) not considering the submission made during the course of assessment proceedings in right prospective.

(*v*) not considering in logical manner, the legal and factual objections raised during the assessment proceedings on the DVO report.

3. Under the facts and circumstances of the case and in law, Ld.CIT(A) has erred in not deciding ground of Appeal no. 3 before him while Ld. DVO has erred in:-

(*i*) determining fair market value of the property as on 01.04.1981.

(*ii*) drawing inferences based on incorrect assumption of facts

(*iii*) drawing inferences based on un-authenticated material

(*iv*) drawing inferences based on comparison, same is guided by assumption of incorrect facts and against the established norms of the valuation.

(*v*) not appreciating the principle of the determining the fair market value, which amongst others envisages that it should be determined having due regard to its existing condition, with all its existing advantages and its potential

possibilities when laid out in its most advantageous manner.

(*vi*) not appreciating the factors of adjustment such as situation of property in commercial zone, on road location, roads size, significance of the road, shapes, size, FAR etc.

(*vii*) not following the standard practice and procedures of the department itself for determining the fair market value.

(*viii*) not allowing opportunity of being heard while determining the fair market value and thus, violating the principal of natural justice.

4. Under the facts and circumstances of the case, Ld. CIT(A) has erred in not deciding ground of Appeal no. 4 before him while the Ld. AO has erred by applying the fair market value determined by DVO not calculating the long term capital gain based on said report.

5. Under the facts and circumstances of the case, Ld. CIT(A) has erred in not deciding ground of Appeal no. 9 before him while the Ld. Additional Commissioner of Income Tax, Range -6, Jaipur has erred in facts and in law, by directing Ld. AO to complete assessment on the basis of report submitted by DVO vide his order passed u/s 144A dated 24.03.2014."

2. The facts of the case are that the assessee is a partnership firm which was carrying on the business of manufacturing of copper wire. However, for the last few years, the factory was closed, and during the year under consideration, no business activity was being carried on by the assessee firm. During the year under consideration, the assessee firm sold a property measuring 3290 sq.yds situated at old Khasra No. 286/1 & 282/2 (new khasra No. 463), Rampura Roopa (presently Main Tonk Road, Near Glass Factory, Jaipur) for a consideration of Rs. 18,63,71,000/- to M/s Triveni Kripa Enterprises. In its return of income, the assessee firm has shown the capital gains on sale of the property as under:—

Date of sale	06/12/2010
Sale consideration	Rs. 17,61,42,188/-
Purchase Date	1/4/1981
Purchase Cost	Rs. 2,72,94,000/-
Indexed cost of acquisition	Rs 19,40,60,340/-
Loss	Rs. 1,79,18,152/-

3. As per sale deed, the land was initially allotted to Vasudev Nagarmal on 02.12.1943 by the then Maharaja of the Jaipur State. Subsequently, the land was sold to M/s Jaipur Glass and Potteries and thereafter, to Sh. Sri Narayan Bajaj on 13.11.1964. In the year 1980, the assessee firm M/s Bajaj Bros came into existence with Shri Sri Narayan Bajaj as one of its partners and the said land became the asset of the assessee firm. Further, it is also apparent from records that the Sub-Registrar has determined the value of this property at Rs. 18,99,70,208/- for the purpose of levying the stamp duty as against stated sale consideration of Rs. 18,63,71,000/-.

4. In the aforesaid factual background, during the course of assessment proceedings, the Assessing Officer observed that the value determined by the stamp duty authority has to be adopted as full value of consideration as per the provisions of section 50C of the Act. He accordingly adopted the full value of consideration of Rs. 18,99,70,208/- as against stated sale consideration of Rs. 18,63,71,000/- for the purpose of determining the capital gains in the hands of the assessee. Further, regarding the indexed cost of acquisition, as against the FMV as on 01.04.1981 determined at Rs. 2,72,94,000/-by the assessee based on the registered valuer's report, the Assessing Officer referred the matter to DVO during the course of assessment proceedings u/s 55A of the Act and basis the DVO's report has adopted the FMV as on 01.04.1981 at Rs. 34,57,600/-. Accordingly, the AO determined the long term capital gains of Rs. 16,53,86,672/- wherein the sale consideration has been taken at Rs. 18,99,70,208/- and indexed cost of acquisition at Rs. 2,45,83,536/- as against long term capital loss of Rs 1,79,18,152 claimed by the

assessee in its return of income.

5. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A). The ld. CIT(A) has sustained the action of the Assessing officer where he has taken the full value of consideration at Rs. 18,99,70,208/-. However, as far as the indexed cost of acquisition was concerned, the ld. CIT(A) held that the reference made by the AO u/s 55A to the DVO for estimating the fair market value of the property as on 01.04.1981 was not valid. Hence, the addition made by the AO by adopting indexed cost of acquisition on the basis of DVO's report was deleted. Further, the ld. CIT(A) allowed in expenditure amounting to Rs. 1 cr as incurred wholly and exclusively in connection with such transfer u/s 48 of the Act.

6. Against the aforesaid findings of the ld. CIT(A), both the Revenue and the assessee firm are in appeal before us. In its appeal, the Revenue has challenged the deletion of addition of Rs. 16,53,86,672/- made by the Assessing Officer on account of long term capital gains. Given that the ld. CIT(A) has sustained the adoption of full value of consideration as per the valuation done by the Stamp Duty Authority, the ground so raised by the Revenue effectively relates to determination of indexed cost of acquisition where the adoption of the FMV as on 1.4.1981 basis the DVO's report was deleted by the ld CIT(A) holding that the reference to DVO itself is not valid and hence, the valuation so determined by the DVO cannot be adopted. Further, the Revenue has challenged the action of the ld. CIT(A) in allowing at Rs. 1 cr u/s 48 while computing the long term capital gains. In its cross appeal, the assessee firm has challenged the adoption of the full value of consideration as per the valuation done by the Stamp Duty Authority as against the transaction value recorded in the sale deed. Further, the assessee firm has challenged the action of the ld. CIT(A) in non-adjudication of grounds of appeal on merits relating to determination of FMV as on 01.04.1981 by the Assessing Officer.

7. Firstly, we take up the matter relating to adoption of the Stamp Duty Valuation for the purpose of determining the full value of consideration u/s 50C of the Act. In this regard, the ld. AR submitted that the value determined by Stamp Valuation Authority is Rs. 18,99,70,208/- as against transaction value of Rs. 18,63,71,000/-, there is thus a difference of Rs. 35,99,208/-, which is 1.49% of the value determined by the Stamp Valuation Authority. It was submitted that DLC rates are indicative rates of a particular locality, not of a particular property, therefore, such insignificant difference can be there with any property. It is a fact that DLC is not a rate on with every property have to be sold. The sale value of the property depends upon various factors, hence, such insignificant difference cannot be added. In support, reliance was placed on the Co-ordinate Bench decision in case of *Smt. Sita Bai Khetan* v. *ITO* [2017] 88 taxmann.com 377(Jaipur - trib.) and in case of *John Fowler (India) (P.) Ltd*. v. *Dy. CIT* (IT Appeal No. 7545 (Mum) of 2014 dated 25.01.2017).

8. Regarding the allegation of the Assessing Officer that the assessee has not disputed the value so adopted by the Stamp Duty Authority, it was submitted that stamp duty was borne by the purchaser and it is for the purchaser to either accept or dispute the valuation so adopted by the stamp duty authority. It was accordingly submitted that no adverse inference may be drawn against the assessee so far as the said allegation made by the Assessing Officer is concerned.

9. Per contra, the ld. CIT DR relied on the finding of the Assessing Officer as well as the ld. CIT(A) and our reference was drawn the findings of the ld. CIT(A) at para 6.3 which reads as under:—

> '6.3 I have gone through the assessment order, statement of facts, grounds of appeal and the submission of the appellant carefully. Appellant challenged the adoption of valuation done by Stamp Valuation Authority. In support of the contention appellant placed reliance on judgment of jurisdictional ITAT. The relevant portion of the order dated 27.7.2016 (ITA No. 826/JP/2013) in the case of *Smt. Sita Bai Khetan* v. *ITO* 6(3), Jaipur, on which the appellant has relied upon is reproduced here under:—

"4.2 We have heard rival contentions and perused the material available on record. We find that the Hon'ble Coordinate Bench in ITA No. 1543/PN/2007 in the case of *Rahul Construction* v. *DCIT* (*supra*) has held as under:—

"We find that the Pune Bench of the Tribunal in the case of *Asstt. CIT* v. *Harpreet Hotels (P.) Ltd.* vide ITA Nos. 1156-1160/Pn/2000 and relied on by the learned counsel for the assessee had dismissed the appeal filed by the Revenue where the CIT(A) had deleted the unexplained investment in house construction on the ground that the difference between the figure shown by the assessee and the figure of the DVO is hardly 10 per cent. Similarly, we find that the Pune Bench of the Tribunal in the case of *ITO* v. *Kaaddu Jayghosh Appasaheb,* vide ITA No. 441/Pn/2004 for the asst. yr. 1992-93 and relied on by the learned counsel for the assessee following the decision of the J&K High Court in the case of *Honest Group of Hotels (P.) Ltd*. v. *CIT* (2002) 177 CTR (J&K) 232 had held that when the margin between the value as given by the assessee and the Departmental valuer was less than 10 per cent, the difference is liable to be ignored and the addition made by the AO can not be sustained.

Since in the instant case such difference is less than 10 per cent and considering the fact that valuation is always a matter of estimation where some degree of difference is bound to occur, we are of the considered opinion that the AO in the instant case is not justified in substituting the sale consideration at Rs. 20,55,000/- as against the actual sale consideration of Rs. 19,00,000 disclosed by the assessee. We, therefore, set aside the order of the CIT(A) and direct the AO to take Rs. 19,00,000/- only as the sale consideration of the property. The grounds raised by the assessee are accordingly allowed."

In the instant case, the difference between the valuation adopted by the Stamp Valuation Authority and declared by the assessee is less than 10%. Therefore, respectfully following the decision of the Hon'ble Coordinate Bench, we hereby direct the AO to adopt the value as declared by the assessee. This ground of the assessee is allowed."

It is seen that Hon'ble ITAT while passing the order has relied upon the decision of Pune Bench of ITAT in the case of *ACIT* v. *Harpreet Hotels (P) Ltd.* (ITA Nos. 1156-1160/Pn/ 2000) and *Ito* v. *Kaaddu Jayghosh Appasahed* (ITA No. 441/Pn/2004). I have gone through both the above mentioned order of ITAT Pune. The issue before the ITAT in both the cases was difference between the value given by the appellant and value estimated by the DVO. The difference between the valuation made by the State Stamp Valuation Authority and the valuation shown by the appellant was not the issue before the ITAT. Sub-section 1 of Section 50C provides that where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government (Stamp Valuation Authority) for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed shall, for the purpose of section 48 be deemed to be full value of the consideration received or accruing as a result of such transfer. Sub-section 3 further provides that where the value ascertained by the DVO on reference being made under Sub-section 2, exceeds the value adopted or assessed by the stamp valuation authority referred to in Sub-section 1, the value so adopted or assessed by the stamp valuation authority shall be taken as the full value of the consideration received or accruing as a result of the transfer. Thus, the only circumstance under which the value, less than the value adopted by the Stamp Valuation Authority can be adopted is, if the valuation has been referred by the AO under Sub-section 2 and the DVO has valued the property at the value which is less than the value adopted or assessed by the Stamp Valuation Authority. The case of the appellant is not covered under Sub-section 3 of Section 50C. Therefore, it is held that the AO has rightly adopted u/s 50C, the full value of consideration accruing to the appellant, as a result of the transfer of the asset at Rs. 18,99,70,208/- as against the

sale consideration of Rs. 18,63,71,000/- declared by the appellant. Hence, this ground of appeal is dismissed.'

10. We have heard the rival contentions and perused the material available on record. We find that during the course of assessment proceedings, the Assessing Officer observed that the value determined by the stamp duty authority is higher than what has been stated in the sale deed and the assessee has not disputed the value so adopted by the stamp duty authority and accordingly, he has adopted the full value of consideration of Rs. 18,99,70,208/- as against stated sale consideration of Rs. 18,63,71,000/- for the purpose of determining the capital gains in the hands of the assessee as per the provisions of section 50C of the Act. In terms of section 50C(2), where the assessee objects to such valuation and states that the same exceeds the FMV of the property, the AO is required to refer the matter to the valuation officer as is apparent from the plain language of section 50C(2) which reads as under:

"(2) Without prejudice to the provisions of sub-section (1), where—

(*a*) the assessee claims before any Assessing Officer that the value adopted or assessed 37[or assessable] by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

(*b*) the value so adopted or assessed 37[or assessable] by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court, the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer"

11. Therefore, where the Assessing officer gives a finding that the assessee has not objected to the adoption of stamp duty value during the course of assessment proceedings, the AO is not required to refer the matter to the valuation officer and he is required to adopt the value so determined by stamp duty authority as specified in section 50C(1) of the Act which reads as under:

"50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed 34[or assessable] by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed 35[or assessable] shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer."

12. At the same time, before adopting the value so determined by the stamp duty authority, the Assessing officer should consider the variance between the two values - the value determined by the stamp duty authority and the value as per the sale deed as held by the Coordinate Bench in case of *Smt. Sita Bai Khetan* (*supra*) where it was held that where the varinace is 2.11% *i.e.*, less than 10%, such difference should be ignored and the value so declared by the assessee should be accepted. We find that the reasoning behind acceptance of variation within the tolerable limits is that DLC rates are indicative rates of a particular locality and not of a particular property and depending upon various factors, the value of two properties in the same locality may vary. Therefore, we find that the concept of determining a tolerable range has to be appreciated more so in the context of deeming fiction where the liability is fastened on the assessee based on such stamp duty valuation and a fact which has lately been recognized by the legislature whereby tolerance range of 5% has been specified by way of third proviso to section 50C(1) has been inserted by the Finance Act, 2018, w.e.f. 1-4-2019 which reads as under:

"**Provided also** that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as

a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration."

13. In the instant case, the variation is only Rs. 35,99,208/-, which is 1.49% of the value determined by the Stamp Valuation Authority which should thus be ignored and the value so declared by the assessee should be accepted. In the result, the value so declared by the assessee should be adopted as full value of consideration and the addition of Rs. 35,99,208 is hereby directed to be deleted. The ground of appeal taken by the assessee is thus decided in favour of the assessee and against the Revenue.

14. Now, coming to the matter relating to deduction of Rs. 1 Cr which has been claimed by the assessee firm and allowed by the ld CIT(A) and is under challenge by the Revenue before us.

15. In this regard, the ld. DR submitted that this issue was not examined by the Assessing Officer at first place and therefore, where the ld. CIT(A) decided to examine the issue, he should have allowed an opportunity to the Assessing Officer and should have called for his remand report which has not happened in the instant case. Further, on merits, he submitted that the said expenditure cannot be held as expenditure incurred wholly and exclusively in connection with the transfer.

16. In his submissions, the ld. AR submitted that the property was sold for a consideration of Rs. 18,63,71,000/- and the same was assessed by the Sub-Registrar for levying Stamp Duty at Rs. 18,99,70,208/-. While filing the return of income, the appellant took the sale consideration at Rs. 17,61,42,188/-(Rs. 18,63,71,000/- actual sale consideration and reduced there from expenditure incurred in connection with such transfer amounting to Rs. 1,02,28,812/-). Out of said Rs. 1,02,28,812/-, Rs. 1,00,00,000/- was paid to Shri Ramchandra Agarwal towards withdrawing his rights and allowing the transfer to the other party of the same Property for a higher consideration.

17. It was submitted that the appellant prior to entering into the impugned Sale Deed dated 6.12.2010 had already entered into another agreement to sell with Shri Ram Chandra Agarwal to sell the Property for a consideration of Rs. 17,27,25,000/-. Subsequently, the Property was sold to Triveni Kripa Enterprises Private Limited vide the above referred Sale Deed dated 6.12.2010 for a consideration of Rs. 18,63,71,000/-. Thus before entering the fresh Sale Deed, a relinquishment from the earlier Purchaser i.e. Shri Ram Chandra Agarwal of his right with respect to the said Property was necessary. The Appellant and Shri Ram Chandra Agarwal agreed vide a MOU dated 18.11.2010 that since the Appellant would be getting higher sales consideration, in lieu of assignment of his rights, the appellant would give a sum of Rs. 1,00,00,000/- to Shri Ram Chandra Agarwal and which was paid through account payee cheque.

18. It was submitted that Section 48 of the Act deals with the mode of computation of capital gain and contains that from the value of sale consideration, under clause (i) of section 48, expenditure incurred wholly and exclusively in connection with such transfer shall be reduced. It is also important to note that clause (i) of section 48 allows deduction of the expenditure incurred in connection with transfer and it is not restricting the expenditure for transfer only. Hence, the said expenditure ought to be reduced while making the final computation of Long Term Capital Gain, since without paying said amount, the sale under consideration could not be affected. Therefore, the said expenditure is very well incurred wholly and exclusively in connection with such transfer and rightly claimed and deductable.

19. It was submitted that the Ld. A.O. did not decline the said claim but simultaneously, did not reduce the same also while making the final computation of the Long Term Capital Gain and it may be an inadvertent mistake on his part and which in any case, has been duly examined by the ld CIT(A). He accordingly supported the findings of the ld. CIT(A) which are contained at para No. 7.3 of his order which reads as under:—

'7.3 I have gone through the assessment order, statement of facts, grounds of appeal and the submission of the Appellant carefully.

It is seen that appellant paid Rs. 1,00,00,000/- to Shri Ramchandra Agarwal towards withdrawing his rights and allowing the sale property, under consideration, to other party for higher consideration, as evident from Para 4 on Page 7, the MOU dated 18.11.2010, which reads as under:—

image

Also from para 2 on Page 6 of the MOU, it is noticed payment is made through proper banking channel, which reads as under:—

image

image

In view of the above, I am of the considered view that without paying aforesaid amount, the sale could not be affected, therefore, it is held that said expenditure is incurred wholly and exclusively in connection with such transfer. Accordingly, Rs. 1,00,00,000/- is allowed as deduction u/s 48. This ground is allowed.'

20. Further, reliance was placed on the following case laws, wherein, it was held that the word "in connection with transfer" is much wider than "for the transfer". Therefore, any expenditure without incurring which the transfer could not be affected as envisaged in the Transfer Deed shall be termed as incurred wholly and exclusively in connection with transfer:—

Gopee Nath Paul v. *Dy. CIT* [2005] 147 Taxman 629/278 ITR 240 (Cal)

S. M. Wahi v. *DIT* [2010] 324 ITR 269

CIT v. *Smt. Shakuntala Kantilal* [1991] 58 Taxman 106/190 ITR 56 (Bom)

CIT v. *Bradford Trading Co. (P.) Ltd.* [2002] 125 Taxman 632/[2003] 261 ITR 222 (Mad.)

Vivek Boss v. *ITO* [2014] 42 taxmann.com 35/[2015] 152 ITD 745 (Kol. - Trib.)

21. It was accordingly submitted that in view of the above, Ld. CIT(A) has rightly allowed deduction of Rs. 1,00,00,000/- under clause (i) to Section 48 of the Act in the computation of the Long Term Capital Gain and the order of the ld CIT(A) should be confirmed and the ground so taken by the Revenue should be dismissed.

22. We have heard the rival contentions and perused the material available on record. In terms of MOU dated 18.11.2010 signed between the assessee firm and Mr Ram Chandra Agarwal, it has been stated that the assessee has agreed to sell the property to Mr. Ram Chandra Agarwal in terms of agreement to sell dated 27.09.2009 which was subsequently amended vide agreement dated 27.12.2009 and thereafter on 13.09.2010 and as on the date of signing of MOU, Mr Ram Chandra Agarwal has already paid a sum of Rs. 4,11,01,111/- to the assessee firm. It has been further stated in the MOU that Mr. Ram Chandra Agarwal has agreed to assign his rights in the property in favour of M/s Triveni Kripa Enterprises Pvt. Ltd and has also agreed with M/s Triveni Kripa Enterprises Pvt. Ltd for higher sale consideration of Rs. 18,63,71,000/- to be paid to the assessee firm as against the earlier sale consideration of Rs. 17,27,25,000/- agreed upon between the assessee firm and Mr. Ram Chandra Agarwal. And in consideration thereof, the assessee firm shall pay a sum of Rs. 1 cr to Shri Ram Chandra Agarwal and the amount of Rs. 4,11,01,111/- already paid by Shri Ram Chandra Agarwal shall be considered towards

payment of part consideration by M/s Triveni Kripa Enterprises Pvt. Ltd. Basis the said understanding between the parties, the assessee firm has paid a sum of Rs. 50,000,00/- on 26.10.2010 and another Rs. 50,000,00/- on 27.10.2010 through two separate cheques issued from its bank account maintained with HDFC Bank. Subsequently, the sale deed was executed between M/s Bajaj Udyog and M/s Triveni Kripa Enterprises Pvt. Ltd on 06.12.2010 wherein the payment of Rs. 4,11,01,111/- has been duly disclosed as part of the total payment received by the assessee firm from M/s Triveni Kripa Enterprises Pvt. Ltd. We therefore find that there is a direct and close linkage between the signing of the MOU dated 18.11.2010 and the sale deed executed on 06.12.2010 and the payment of Rs. 1 Cr is connected with the transfer of the impugned property in favour of M/s Triveni Kripa Enterprises Pvt. Ltd and the assessee should therefore be eligible to claim the same while computing the capital gains. We therefore, affirm the findings of the ld. CIT(A). The matter is thus decided in favour of the assessee and against the Revenue.

23. Now, coming to the main ground raised by the Revenue wherein the Revenue has challenged the action of the ld. CIT(A) wherein he has held that reference to the DVO by the Assessing Officer was invalid and hence, the valuation so determined by the DVO cannot be adopted for determining the FMV as on 1.04.1981 and the addition made by the AO by adopting indexed cost of acquisition on the basis of DVO's report was deleted.

24. In this regard, the ld. CIT DR took us through the findings of the Assessing Officer and submitted that the assessee has adopted the fair market value land as on 01.04.1981 on the basis of report of a registered valuer and after going through the report of the registered valuer, the Assessing Officer was of the opinion that it is necessary to have the report of another technical expert, i.e. DVO to whom a reference is thereafter made u/s 55A of the Act on 08.01.2014. It was submitted that pursuant to the DVO's report dated 07.03.2014, the Assessing Officer has adopted FMV of the property as on 01.04.1981 at Rs. 34,57,660/-. It was further submitted that the assessee was provided a copy of the report of the DVO on 13.03.2013 and subsequently, the assessee vide letter dated 07.03.2014 has raised the certain objections with regard to the reference made u/s 55A to the DVO on the plea that the reference made was invalid as amendment in section 55A is effective from 01.07.2012. Further, it was submitted that the assessee vide letter dated 18.03.2014 also filed an application u/s 144A to the Addl. CIT, Range-6, Jaipur for seeking necessary direction to the Assessing Officer. In this regard, our reference was drawn to the direction issued by the Addl. CIT, Range-6, Jaipur u/s 144A wherein the relevant findings are as under:—

> '4. I have considered the submissions made by the assessee in its application u/s 144A dated 18/3/2014, report of the Assessing Officer and the submissions made by the assessee during the course of hearing on 21/3/2014. After due consideration, the position emerged is discussed as under:-
>
> (*a*) On perusal of the case records, I find that the assessee filed the copy of the valuation report of the registered valuer, Shri G.S. Bapna in support of the fair market value of the asset as on 1/4/1981. It is on the basis of the value of Rs.2,72,94,000/- that the assessee has claimed the benefit of indexed cost of acquisition. The Assessing Officer referred the matter to the DVO u/s 55 A of the IT Act, 1961 on 8/1/2014 after considering the following factors for forming an opinion in the matter :—
>
> "The assessee has filed copy of valuation report of Shri G.S. Bapna, registered valuer in support of the fair market value of the land as on 1/4/1981. It is on the basis of this value that the assessee has claimed indexed cost of acquisition. On perusal of the registered valuer's report, the following facts have been noticed :—
>
> (5) The registered valuer had estimated the value of the property at Rs. 90,98,000/- by taking the

rate of Rs.1093/-as on 1/4/1981 and making adjustments on account of corner plot, location etc. and arrived at the value by taking rate of Rs.3306/- . In the same valuation report, he hastaken the value at Rs.2,72,94,000/- taking the rate at Rs. 9918/- if the party uses it as commercial. There is huge variation in the value estimated by the registered valuer at Rs. 9098000/- and Rs. 27294000/-.

(6) In S. No. 6, the registered valuer has himself given the nature of the property as "residential land". Therefore, the nature of the asset and its use the at relevant time is not clear from the registered valuer's report;

(7) Further, there was no basis or evidence for the adjustments made by the registered valuer;

(8) Having regard to the nature of the asset and its use at the relevant time, I am of the opinion that for computation of the long term capital gain, it is necessary to have the report of another technical expert, i.e. DVO to whom a reference is made u/s 55A of the IT Act, 1961"

It is, thus, seen that the reference was not made in a routine manner, but after considering the relevant factors and after forming an opinion on the issue. Therefore, there is appears to be no infirmity in the action of the AO in referring the matter to the DVO.

(*b*) Now regarding the applicability of amendment made in Sec. 55A by the Finance Act, 2012, through which the words "is at variance with its fair market value" has been substituted in place of " is less than its fair market value" w.e.f. 01/07/2012, it is noticed in the memorandum explaining the provisions of Finance Bill, 2012, the Legislature has clearly specified the assessment year from which the amendments made in Section 47 and Sec. 2 (19AA)(iv), Section 49(1), Section 50 D, Section 54 B, Section 54 GB and Section 112(1) will be effective whereas in respect of amendment made to Section 55A, the date from which the amendment will be applicable has been clearly specified as "w.e.f. 01/07/2012". This shows that the amendment in Sec. 55 A is not applicable from a particular assessment year, but it is effective from the date 01/07/2012 on all pending proceedings. Prior to 1/7/2012, Assessing Officer was not empowered to make a reference in a case in which the fair market value as on 1/4/1981 was shown at a higher value as the word used in the section was "where in the opinion of the Assessing Officer value of asset as claimed by the assessee is less than its market value". If the fair market value of the asset is taken at a higher figure, then the capital gain being offered for tax would be lower. It is with an intention to cure this lacuna or mischief that the amendment has been brought in with effect from 01/07/2012, enabling the AO to refer the case w.e.f. 1/7/2012 if he is of the opinion that the value of the property as on 01/04/1981 estimated by the Registered Valuer is at variance with the fair market value of the asset as on 01/04/1981. This is a curative and procedural amendment made effective from the date 01/07/2012 as specifically mentioned in the memorandum explaining the provisions of Finance Bill. If the intention of the Legislature was to make the amendment with effect from a particular assessment year, then the assessment year from which amendment is effective should have been mentioned by it. As mentioned above, the Legislature has clearly specified that the amendment will be effective from the date 01/07/2012, from which date the Assessing Officer has been enabled to make the reference to DVO where he is of the opinion that the value of asset claimed by the assessee on the basis of report of the registered valuer is at variance with the fair market value of the asset. In this case, the reference has been made by the AO on 08/01/2014 after forming an opinion before making the reference. Taking into account the facts of the case in its entirety, the submission made by the assessee is not found to be acceptable.

(*c*) The decisions in the case of *Mrs. Rubab M Kazerani* v. *JCIT* [2004] 91 ITD 429 (Mumbai Tribunal)*Mrs Rosy Dimello* v. *ACIT*, Circle-2. Thane 2014 (2) TMI 424 ITAT Mumbai cited by the assessee are not applicable to the facts of the present case as in those cases the issue of amendment brought in by Finance Act, 2012 was not involved.

(*d*) The matter of valuation was referred u/s 55A of the IT Act, 1961 and the report of the DVO was also received u/s 55A of the IT Act, 1961. In col. No. 1.7 of the reference, the section was mentioned as 55A(a). In this regard, it may be stated that with the amendment of Sec. 55 A w.e.f. 01-072012, the AO is empowered to invoke clause (a) as he was of the opinion, after considering the relevant factors, that the value shown by the assessee on the basis of report of the registered valuer was at variance with the fair market value as on 1/4/1981. Both the clauses (b) of Sec. 55A is governed by the overriding expression " in any other case", which expression, as held by the Hon'ble Gujarat High Court in the case of *Hira Ben Jayantilal Shah* v. *CIT*, refers to a case where the value declared by the assessee is not in accordance with the estimate made by the registered valuer. Also there are judicial decisions to the effect that even in a case there is registered valuer's report, there is no bar for making reference under clause (b) (ii) of Sec. 55A. However, the enabling section for referring the matter of valuation for computation of capital gain is section 55A of the IT Act, 1961. In the instant case the AO has clearly mentioned in the reference itself that "During the course of assessment proceedings, the assessee has filed a copy of the valuation report of the register valuer, Shri G.S. Bapna (copy enclosed for ready reference), in which the value of the land as on 1/4/81 has been taken at Rs. 90,98,000/-if it is considered as residential and Rs.27294000/- if it is taken as commercial. For the purpose of computation of long term capital gain, it is necessary to arrive at the value of the land as on 1/4/1981. I am of the opinion that the value estimated by the register valuer is at variance with the fair market value of the asset having regard to the nature of the asset and its use at the relevant time. Therefore, I consider it necessary to refer the below-mentioned case for determination of the fair market value of the case on the relevant date as indicated below. "This is also in consonance with Sec. 55A(b)(ii) as the AO found that it was necessary to refer the matter having regard to the nature of the asset and other relevant factors.'

25. It was accordingly submitted by the ld. CIT DR that the reference to the DVO was made by the Assessing officer after the amendment with effect from 01.07.2012 and the same being curative and procedural amendment, the amendment applies to all pending proceedings on or after dated 01.07.2012. It was further submitted that the first notice u/s 143(2) was issued by the AO on 03.08.2012 and thereafter the reference was made to the DVO on 08.01.2014 after the amendment has been brought on the statue w.e.f 1.07.2012. Therefore, the Assessing Officer was duly empowered to make the reference u/s 55A to DVO in respect of determination of the FMV of the property as on 01.04.1981. He accordingly supported the findings of the Assessing Officer.

26. Per contra, the ld. AR submitted that at the outset, perusal of the Departmental ground shows that CIT(A) has erred by not considering the facts of the case in right perspective. The grievance is limited to the facts and its consideration, whereas, perusal of the order of the CIT(A) shows that relief has been granted on the basis of interpretation of law and whether an amendment under consideration is applicable to particular year or not. Under the facts and circumstances, the order of the CIT(A) is based upon the law, not on facts, therefore, ground under consideration is not maintainable.

27. It was submitted that during the year under consideration, the Property was sold and the resultant long term capital gain/loss was calculated by substituting the FMV worked out by the Registered Valuer as cost of acquisition, as provided in Section 55(2) of the Act. The Ld. A.O. formed an opinion that the value ascertained by the Registered Valuer is higher; hence, he made a reference to the DVO. It is pertinent to note that the action of the Ld. A.O. to make reference was challenged during the assessment proceedings itself on the ground that he could only make the reference if he was of the opinion that the FMV ascertained by the Registered Valuer was less.

28. It was submitted that to appreciate under what circumstances, the A.O. can make a reference, the relevant section i.e. 55A of the Act as applicable for the assessment year under consideration may be considered and which reads as under:

"Reference to Valuation Officer:- 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,"

29. It was submitted that a perusal of the above referred legal provision makes it abundantly clear that a reference to the DVO for the relevant period can be made, where the A.O. is of the opinion that the value so claimed is less than the FMV whereas, in the instant case, the A.O. is of the opinion that the value so claimed was more than the FMV. Thus, it is very much clear that the reference was made without having any jurisdiction to make such reference. Hence, the same is illegal and, therefore, consequently the subsequent DVO report is also illegal.

30. It was submitted that during the assessment proceedings, the aforesaid objection was raised before the AO and substantiated with plethora of judgments on the issue whether in such a circumstance, the reference can be made or not. The same has been dealt by the Ld. A.O. in his assessment order at Page nos. 9 to 12. On perusal of the assessment order, it is clear that the sole basis of justifying his action by the AO is the amendment made by the Finance Bill, 2012 in the section 55A(a) w.e.f. 01.07.2012 according to which the words "at variance with its fair market value" have been substituted in place of "less than its fair market value." It was submitted that perusal of the the assessment order, shows that the Ld. A.O. distinguished all the relied upon judgments referred by the appellant during the assessment proceedings by holding that the Reference has been made only by applying the amended provision of section 55A of the Act. The relevant part of the order (Page 12 of the assessment order) clarifying the said position adopted by the AO is reproduced as follows:—

"The decisions cited by the assessee are not applicable to the facts of the present case as the reference made in assessee's case is according to the amended provisions of Sec. 55A whereas the decisions referred to above (*Mrs. Rubab M Kazerani* v. *JCIT* [2004] 91 ITD 429 (Mumbai Tribunal) and *Mrs. Rosy Dimello* v. *ACIT* Circle-2. Thane 2014(2) TMI 424 ITAT Mumbai) relate to the old provisions which stood before the amendment made by the Finance Act, 2012."

31. It further emerges from the assessment order that according to the Ld. A.O., prior to 1.7.2012, no such reference could be made as per the relevant part of the order (Page 10 of the assessment order) which is reproduced below:—

"From the above, it is noted that prior to 1.7.2012, the Assessing Officer had no option to refer a case to the Valuation Officer in which the fair market value as on 1st April, 1981 was shown at a higher value as the word used in the Section was where in the opinion of the Assessing Officer value of asset as claimed by the assessee is less than its market value".

32. While throwing light on the said amendment, the Ld. A.O. has also reproduced the memorandum explaining the provision of the Finance Bill, 2012 related to the said amendment at Page 10 of his order. According to which also, reference cannot be made before the amendment where the FMV is higher in

the opinion of the Assessing Officer. From the forgoing discussions, it is clear that Ld. A.O. agrees that before the amendment, no such reference could be made under such circumstance but due to an amendment with effect from 1.7.2012, such reference can be made. Under the circumstances, without repeating the judgments relied upon during the assessment proceedings, the surviving issue emerges as under:—

> "Whether the said amendment to section 55A(a) made by the Finance Act, 2012, wherein, it is specifically mentioned that it is applicable w.e.f. 1.7.2012 can apply to the proceedings relevant to the assessment year 2011-12 ?"

33. It was submitted that the Ld. A.O. at Page 10-11 of his assessment order has held that the intention to bring the amendment is to remove lacunae and it is a curative amendment. On perusal of the memorandum explaining the provision of the Finance Bill, 2012, nowhere, it is written that the amendment is to remove any lacunae. It is only written that in a particular situation, reference cannot be made and that can lead to lower amount of capital gain which does not mean that it is to remove lacunae. It was submitted that it is only expanding the circumstances, wherein power of reference by the A.O. can be exercised. Such expansion of power is with respect to a new particular circumstance; hence, it is very much clear that the amendment under consideration cannot be said to be curative in nature, since it expands the scope to cover new circumstances, for which there is no existing provision for reference and curative action is only possible to an existing provision. Further, if it is for a circumstance for which power has already been given then any such amendment can be made by way of clarification, since it is not by way of clarification which means that it is to cover a new circumstance, for which, no such power exists.

34. It was further submitted that the Hon'ble Supreme Court in the case of *CIT* v. *Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 in Para 32 held that "Legislations which modify accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. It further held in Para 39(c) that "if the concerned provision of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against there the revenue, has to be preferred." In the instant case, the amendment modify a right of the assessee according to which estimate made by the Registered Valuer have to accepted under certain circumstances. By expanding such circumstances, such right has been diluted.

35. It was further submitted that it is an admitted fact that the amendment is w.e.f. 1.7.2012, means it has come into force from 1.7.2012. It is pertinent to note that income tax proceeding of each assessment year is separate from the other assessment year. It has to be assessed according to the provisions applicable to that particular assessment year. Even on various occasions in the past as well, whenever the legislature intended to apply a provision retrospectively, it was specifically mentioned that it would be applicable retrospectively which has not been done for the amendment under consideration. The Ld. A.O. has grossly erred by assuming the power which is in force from 1.7.2012, for the period from 1.4.2010 to 31.3.2011. Error of assuming such power lead to retrospective effect which is not the intent of the legislature. It is further submitted that such error of assuming power is a result of not recognizing the principle of independence of each assessment year for applicability of provisions of the Act.

36. It was accordingly submitted that basis the forgoing discussions, it clearly shows that the amendment is applicable only for the transactions which are entered on or after 1.7.2012. The view is further supported by the following judicial pronouncements in this regard:

(*a*) Hon'ble Bombay High Court in the case of *CIT* v. *Puja Prints* [2014] 43 taxmann.com 247/224 Taxman 22/360 ITR 697 (Bom) while deciding the

case on the issue of reference under section 55A(a) of the Act, observed that:—

"8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less than the fair market value" is substituted by the words "is at variance with its fair market value" is clarificatory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July, 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value."

The above referred case is for the A.Y. 2006-07. The Hon'ble High Court while making the observations over the amendment made with effect from 1.7.2012, has categorically clarified that the law existing during the period relevant to the A.Y. 2006-07 would be applicable which means neither the amendment under consideration nor of the period when the assessment was completed by the Assessing Officer would be applicable. In the instant case, the law existing during the period relevant to the A.Y. 2011-12 should have been applied according to the said judgment and not of the period when the assessment order is made and accordingly, it is very much clear that Assessing Officer made the reference without having power to do so. Thus such reference is illegal and consequent report of the DVO is also not relevant for the assessment purpose.

(*b*) In the case of *CIT* v. *Gauranginiben S Shodhan Indl* [2014] 45 taxmann.com 356/224 Taxman 253/367 ITR 238 Hon'ble Gujarat High Court vide its order dated has observed:-

"15. Coming to the question of reference to DVO for ascertaining the fair market value as on 1.4.1981 also, we find that such reference was not competent, we have noticed that prior to the amendment in section 55A with effect from 1.7.2012 in a case, the value of the asset claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer was of the opinion that the value so claimed was less than its fair market value as on 1.4.1981. It would not be the case of the Assessing Officer that the value of the asset shown as on 1.4.1981 was less than the fair market value. Such clause, therefore, as it stood at the relevant time, had no application to the valuation as on 1.4.1981. We are conscious that with effect from 1.7.2012, the expression now used in clause (a) of section 55A is "is at variance with its fair market value". The situation may, therefore, be different after 1.7.2012. We are, however, concerned with the period prior thereto. Clause (b) of section 55A is in two parts and permits a reference to DVO if the Assessing Officer is of the opinion that (i) the fair market value of the asset exceeds the value of the asset so claimed by the assessee by more than such percentage of the value of the asset 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. Sub-clause (i) of clause (b) also for the same reasons

recorded above; would have no bearing on the fair market value as on 1.4.1981. The Assessing Officer had not resorted to sub-clause (ii) of clause (b). In any case, clause (b) would apply where clause (a) does not apply since it starts with the expression "in any other case". In other words if the assessee has relied upon a Registered Valuer's Report, the Assessing Officer can proceed only under clause (a) and clause (b) would not be applicable."

On perusal of the order, it is clear that the clause as it stood at the relevant time shall be applicable. The relevant time here means the assessment year under consideration and it is further stated that the amendment shall be applied only after 1.7.2012. The date 1.7.2012 does not fall under the relevant time in the instant case as well. Hence, it is clear that according to this judgment also, the said amendment is not operative for the period under consideration.

(*c*) Hon'ble Gujarat High Court in IT Appeal No. 1204 of 2018 in the case of *DCIT* v. *Shantaben P Patel* dated 8.10.2018 decided the question under consideration by following the judgment given in the case of *Gauranginiben S Shodhan* (*supra*)

37. Further, ld. AR submitted that the Co-ordinate Benches have been consistently taking the same view as per the aforesaid legal proposition laid down by the Hon'ble High Courts in the following cases:

ITO v. *Rabinder H. Chhabra, (HUF)* (IT Appeal No. 5511 (Mum.) of 2012 dated 20.5.2014).

Seema Chhadha v. *Asstt. CIT* (IT Appeal No. 67 (RPR.) of 2013 dated 21.9.2016).

Sunita Jain v. *ITO* (IT Appeal No. 847 (JP) of 2012 dated 30.5.2016)

Mrs. Deepali Bhargava v. *ITO* (IT Appeal No. 158 (JP.) of 2016 dated 30.5.2017)

Kunal Kishore Borawke v. *ITO* (IT Appeal No. 723 (PN.) of 2016 dated 14.10.2016)

Rajaram S. Wayale v. *ITO* (IT Appeal No. 4233-4244 (Mum.) of 2015 dated 09.01.2017)

Ujjaval Maheshbhai Pandaya v. *ITO* (IT Appeal No. 113 (Ahd.) of 2016 dated 23.01.2017)

Gordhandas S. Garodia v. *Dy. CIT*, (IT Appeal No. 5097 & 5113 (Mum) of 2015 dated 01.11.2017)

Bhima Dada Kharate v. *Asstt. CIT* (IT Appeal No. 1582 (Pun.) of 2015 dated 31.10.2017)

Kum. Allobai Bezonji Jalnawala v. *ITO* (IT Appeal No. 895 (Pun.) of 2015 dated 23.11.2017)

Maruti G.Thopte v. *ITO* (IT Appeal No. 863 (Pune) 2017 dated 5.1.2018)

ITO v. *Bhatia Industrial Co*. (IT Appeal No. 5385 (Mum.) of 2016 dated 25.04.2018)

Dhiraj Ben Pravin Bhai Patel v. *ITO* (IT Appeal No. 902 (Ahd.) of 2017)

Smt. Bhudevi Kishan Rao Gurantyal v. *ITO* (IT Appeal No. 1036 (PUN.) of

2015)

38. It was accordingly submitted that in light of above judicial pronouncement directly dealing with the issue under consideration, it is very much clear that the amendment is not applicable to the year under consideration and ld. CIT(A) has rightly reversed the action of the Assessing Officer and our reference was drawn to the findings of the ld. CIT(A) at para No. 4.3 of his order which reads as under:—

> 'I have gone through the assessment order, direction given by Addl. CIT u/s 144A, statement of facts, grounds of appeal and the submission of the appellant carefully. Appellant challenged the reference made u/s 55A to DVO by the AO for determination for fair market value. In support of the contention appellant placed reliance on various case laws. I have also gone through the various judicial pronouncements relied upon by the Appellant.
>
> The abstract from judgment of Hon'ble Bombay High Court in the case of *CIT* v. *Puja Prints* 360 ITR 697, is "This submission is in face of the fact that the 2012 amendment was made effective only from 1 July, 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value."
>
> *Commissioner of Income Tax* v. *Gauranginiben S Shobhan Indl.,* Hon'ble Gujarat High Court held that "Coming to the question of reference to DVO for ascertaining the fair market value as on 1.4.1981 also, we find that such reference was not competent, we have noticed that prior to the amendment in section 55A with effect from 1.7.2012 in a case, the value of the asset claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer was of the opinion that the value so claimed was less than its fair market value as on 1.4.1981. It would not be the case of the Assessing Officer that the value of the asset shown as on 1.4.1981 was less than the fair market value. Such clause, therefore, as it stood at the relevant time, had no application to the valuation as on 1.4.1981. We are conscious that with effect from 1.7.2012, the expression now used in clause (a) of section 55A is "is at variance with its fair market value". The situation may, therefore, be different after 1.7.2012.
>
> Appellant also placed reliance on various judgments of ITAT. Copy of the recently passed order dated 9.1.2017 of ITAT, Mumbai in the case of *Shri Rajaram S. Wayale* v. *ITO* (ITA No. 4233-4244/Mum/2015) has also been filed by the Appellant. The ITAT, relying on the order of Hon'ble Bombay High Court in the case of *Puja Prints* (*supra*) has held as under:-
>
> "7. We had also carefully gone through the order of the Bombay High Court in case of *Puja Prints* (*supra*), wherein the facts are exactly similar and reference so made by the AO was held to be invalid for assessment year falling prior to the amendment so brought in by Finance Act,2012. Undisputedly, relevant assessment year under consideration is assessment year 2004-05, which is prior to the amendment brought in Section 55A(a) by Finance Act,2012 w.e.f. 1.7.2012.
>
> 8. Facts and circumstances in all the appeals before us are same, respectfully following the decision of Bombay High Court, we do not find any merit for the reference so made by the AO to the DVO, when the value offered by assessee was more than the value determined by the AO in respect of assessment year falling prior to introduction of amendment brought in Section 55A(a) by Finance Act,2012 w.e.f. 1.7.2012.
>
> 9. In the result, all the appeals of the assessee are allowed in terms indicated hereinabove."
>
> Respectfully following the above judgments, I am of the considered view that the 2012 amendment

was made effective only from 1 July, 2012. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2011-12. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the Appellant is in the opinion of AO less than its fair market value.

(*ii*) AO observed that appellant is otherwise covered by the provision of section 55A(b). However, appellant submitted that even u/s 55A(b) reference can not be made. In support of the contention appellant placed reliance on various case laws. I have gone through the judicial pronouncement relied upon by the appellant carefully.

The abstract from judgment of Hon'ble Bombay High Court in the case of *CIT* v. *Puja Prints* 360 ITR 697, is "In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort can not be held to the residuary clause provided in Section 55A(b)(ii) of the Act."

Hon'ble Gujarat High Court in the case of *Commissioner of Income Tax* v. *Gauranginiben S Shodhan Indl.* held that "Clause (b) of section 55A is in two parts and permits a reference to DVO if the Assessing Officer is of the opinion that (i) the fair market value of the asset exceeds the value of the asset so claimed by the assessee by more than such percentage of the value of the asset 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. Sub-clause (i) of clause (b) also for the same reasons recorded above; would have no bearing on the fair market value as on 1.4.1981. The Assessing Officer had not resorted to sub-clause (ii) of clause (b). In any case, clause (b) would apply where clause (a) does not apply since it starts with the expression "in any other case". In other words if the assessee has relied upon a Registered Valuer's Report, the Assessing Officer can proceed only under clause (a) and clause (b) would not be applicable."

Respectfully following the above judgments, I am of the considered view that if the appellant has relied upon a Registered Valuer's Report, the AO can proceed only under clause (a) of Section 55A and clause (b) would not be applicable.

(*iii*) In view of the above discussed judgments of the High Court & ITAT, the reference made by the AO u/s 55A(a) of the DVO for estimating the fair market value as on 1.4.1981 of the property should by the Appellant is held to be invalid. Hence, the addition made by the AO by adopting indexed cost of acquisition at Rs. 2,45,83,536/- on the basis of DVO's report, as against the indexed cost of acquisition of Rs. 19,40,60,340/- adopted by the Appellant, is hereby deleted. Accordingly, this ground of appeal is decided in favour of appellant.

This ground is allowed.'

39. We have heard the rival contentions and perused the material available on record. The issue under consideration is whether the amendment to section 55A(a) made by the Finance Act, 2012 w.e.f. 1.7.2012 can apply to the proceedings relevant to the impugned assessment year 2011-12 and whether reference so made by the Assessing officer to DVO as per the amended provisions is sustainable or not.

40. The relevant provisions contained in 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 at variance with 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)."

41. The aforesaid provisions are as amended by the Finance Act, 2012 with effect from 1.07.2012 wherein in clause (a), for "is less than its fair market value" was substituted for "at variance with its fair value". As per the Revenue, the amended provisions of section 55A(a) are applicable for the impugned assessment year 2011-12 and the Assessing officer was well within his jurisdiction to refer the matter to the valuation officer. The assessee's contention is that unamended provisions of section 55A(a) are relevant for the impugned assessment year 2011-12 and the Assessing officer was not having the jurisdiction to refer the matter to the valuation officer.

42. In order to resolve the controversy, let's examine the provisions of section 55A(a). First and foremost, it provides that 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. In the instant case, for the purposes of this chapter means for the purposes of determining the liability towards the capital gains tax on the sale of the land. There is no dispute that the liability towards the capital gains has arisen during the year as the transfer of the property has happened during the year. The second condition is that where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer. In the instant case, there is no dispute that cost of acquisition as substituted by the assessee with the fair market value as on 1.4.1981 is based on and in accordance with the estimate made by the registered valuer. The third condition is that the Assessing Officer should form an opinion that the value so claimed by the assessee is less than its fair market value (as per unamended provisions) or is at variance with its fair market value (as per the amended provisions). The formation of the opinion by the Assessing officer therefore has to be seen and examined in the context of determining the liability towards the capital gains and the liability towards the capital gains can be examined during the course of assessment proceedings. Therefore, the formation of the opinion by the Assessing officer has to be during the course of assessment proceedings and not prior or subsequent to the completion of the assessment proceedings. As per the unamended provisions, the Assessing officer has to form an opinion that the value so claimed by the assessee is less than its fair market value. Therefore, only in a scenario, the value so claimed by the assessee of the capital asset is less than its fair market value in the opinion of the Assessing officer, the matter can be referred to the valuation officer. In a scenario, where the value so claimed by the assessee is more than its fair market value, the matter couldn't be referred to the valuation officer. However, the amended provisions takes care of both the scenarios and has provided that where the value so claimed by the assessee is at variance with its fair market value, the matter can be referred to the valuation officer. In the instant case, the Assessing officer has invoked the amended provisions and has held that the value so claimed by the assessee is at variance with its fair market value. The contention of the assessee is that the amended

provisions have only been brought on the statue books w.e.f 1.07.2012 and the same cannot be invoked in the instant case and therefore, the AO lacks the necessary jurisdiction to refer the matter to the valuation officer.

43. The question is how one should read the amendment in section 55A(a) which has been brought on the statue books w.e.f 1.07.2012. Whether we should read the amendment in the context of transactions which have happened on or after 1.07.2012 and which are liable for capital gains tax and therefore, satisfying the initial condition of reference "for the purposes of this chapter" to the valuation officer. Alternatively, irrespective of period to which the transaction pertains, where the assessment proceedings are initiated by the Assessing officer or pending before the Assessing officer on or after 1.07.2012, given that the Assessing officer has to form an opinion during the course of assessment proceedings, the amended provisions will apply. In this regard, it would be useful to refer to the Memorandum explaining the Finance Bill, 2012 which reads as under:

> "Under the provisions of section 55A, where in the opinion of the Assessing Officer value of asset as claimed by the assessee is less than its market value, he may refer the valuation of a capital asset to a Valuation Officer. Under section 55 in a case where the capital asset became the property of the assessee before 1st April, 1981, the assessee has the option of substituting the fair market value of the asset as on 1st April, 1981 as the cost of the asset. In such a case the adoption of a higher value for the cost of the asset as the fair market value as on 1st April, 1981, would lead to a lower amount of capital gains being offered for tax.
>
> Accordingly, it is proposed to amend the provisions of section 55A of the Income-tax Act to enable the Assessing Officer to make a reference to the Valuation Officer where in his opinion the value declared by the assessee is at variance from the fair market value. Therefore, in case where the Assessing Officer is of the opinion that the value taken by the assessee as on 1-4-1981 is higher than the fair market value of the asset as on that date, the Assessing Officer would be enabled to make a reference to the Valuation Officer for determining the fair market value of the property. This amendment will take effect from 1st day of July, 2012."

44. Therefore, the intent and purpose behind the amendment is to enable the Assessing officer to make a reference to the Valuation officer where he is of the opinion that the value adopted by the assessee as on 1-4-1981 is higher than the fair market value of the asset as on that date and in order to check whether the adoption of a higher value for the cost of the asset as the fair market value as on 1st April, 1981, has lead to a lower amount of capital gains being offered for tax. It is therefore an empowering provision wherein the Assessing officer has been given requisite power and authority w.e.f 1.07.2012 to refer the matter relating to valuation of a capital asset to the valuation officer. The question however remains in respect of which all transanctions, the Assessing officer is empowered to make a reference to the valuation officer with effect from 1.07.2012.

45. In this regard, we refer to the decision of the Hon'ble Bombay High Court in case of *Puja Prints* (*supra*) wherein it was held that the Parliament has not given retrospective effect to the amendment and the law to be applied is as existing during the period relevant to the Assessment Year 2006-07. The findings of the Hon'ble High Court are as under:—

> "6. We have considered the rival submissions. We find that the impugned order dated 18 February, 2011 allowing the respondent-assessee's appeal holding that no reference to the Departmental Valuation Officer can be made under Section 55A of the Act, only follows the decision of this Court in the matter of *Daulal Mohta HUF* (*supra*). The revenue has not been able to point out how the aforesaid decision is inapplicable to the present facts nor has the revenue pointed out that the decision in *Daulal Mohta HUF* (*supra*) has not been accepted by the revenue. On the aforesaid ground alone, this appeal need not be entertained. However, as submissions were made on merits,

we have independently examined the same.

7. We find that Section 55A(a) of the Act very clearly at the relevant time provided that a reference could be made to the Departmental Valuation Officer only when the value adopted by the assessee was less then the fair market value. In the present case, it is an undisputed position that the value adopted by the respondent-assessee of the property at Rs. 35.99 lakhs was much more than the fair market value of Rs.6.68 lakhs even as determined by the Departmental Valuation Officer. In fact, the Assessing Officer referred the issue of valuation to the Departmental Valuation Officer only because in his view the valuation of the property as on 1981 as made by the respondent-assessee was higher then the fair market value. In the aforesaid circumstances, the invocation of Section 55A(a) of the Act is not justified.

8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less then the fair market value" is substituted by the words ""is at variance with its fair market value" is clarifactory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value.

9. The contention of the revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of Section 55A(a) (ii) of the Act is not acceptable. This is for the reason that Section 55A(b)of the Act very clearly states that it would apply in any other case i.e. a case not covered by Section 55A(a) of the Act. In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort cannot be had to the residuary clause provided in Section 55A(b)(ii) of the Act. In view of the above, the CBDT Circular dated 25 November 1972 can have no application in the face of the clear position in law. This is so as the understanding of the statutory provisions by the revenue as found in Circular issued by the CBDT is not binding upon the assessee and it is open to an assessee to contend to the contrary.

10. The contention of the revenue that the Assessing Officer is entitled to refer the issue of valuation of the property to the Departmental Valuation Officer in exercise of its power under Sections 131, 133(6) and 142(2) of the Act is entirely based upon the decision of the Guwahati High Court in *Smt. Amiya Bala Paul* (*supra*). However, the Apex Court in *Smt. Amiya Bala Paul* (*supra*) has reversed the decision of the Guwahati High Court and held that if the power to refer any dispute with regard to the valuation of the property was already available under Sections 131(1), 136(6) and 142(2) of the Act, there was no need to specifically empower the Assessing Officer to do so in circumstances specified under Section 55A of the Act. It further held that when a specific provision under which the reference can be made to the Departmental Valuation Officer is available, there is no occasion for the Assessing Officer to invoke the general powers of enquiry.

In view of the above and particularly in view of clear provisions of law as existing during the period relevant to Assessment Year 2006-07, we are of the view that questions (a) and (b) do not raise any substantial question of law."

46. We now refer to the Hon'ble Gujarat High Court decision in case of *Gauranginiben S. Shodhan Indl*. (*supra*) wherein it was held section 55A as it stood at the relevant time, has to be seen and emphasis was laid on the period of the transaction and where the transaction was for the period prior to 1.7.2012, amended provisions were held not applicable. The findings of the Hon'ble High Court are as under:

'15. Coming to the question of reference to DVO for ascertaining the fair market value as on 1.4.1981 also, we find that such reference was not competent. We have noticed that prior to the amendment in section 55A with effect from 1.7.2012 in a case, the value of the asset claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer was of the opinion that the value so claimed was less than its fair market value as on 1.4.1981. It would not be the case of the Assessing Officer that the value of the asset shown as on 1.4.1981 was less than the fair market value. Such clause, therefore, as it stood at the relevant time, had no application to the valuation as on 1.4.1981. We are conscious that with effect from 1.7.2012, the expression now used in clause (a) of section 55A is "is at variance with its fair market value". The situation may, therefore, be different after 1.7.2012. We are, however, concerned with the period prior thereto. Clause (b) of section 55A is in two parts and permits a reference to DVO if the Assessing Officer is of the opinion that (i) the fair market value of the asset exceeds the value of the asset so claimed by the assessee by more than such percentage of the value of the asset 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. Sub-clause (i) of clause (b) also for the same reasons recorded above, would have no bearing on the fair market value as on 1.4.1981. The Assessing Officer had not resorted to sub-clause (ii) of clause (b). In any case, clause (b) would apply where clause(a) does not apply since it starts with the expression "in any other case". In other words if assessee has relied upon a Registered Valuer's Report, Assessing Officer can proceed only under clause (a) and clause (b) would not be applicable.

16. In the present case, admittedly the assessee had relied on the estimate made by the Registered Valuer for the purpose of supporting its value of the asset. Any such situation would be governed by clause (a) of section 55A of the Act and the Assessing Officer could not have resorted to clause (b) thereof as held by the Division Bench of this Court in the case of *Hiaben Jayantilal Shah* v. *ITO* [2009] 310 ITR 31/181 Taxman 191 (Guj.). In the said decision, it was held and observed as under:—

"10. Under clause (a) of sec. 55A of the Act under the Assessing Officer is entitled to make the reference to the Valuation Officer in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer is of the opinion that the value so claimed is less than the fair market value. In any other case, as provided under clause(b) of Sec. 55A of the Act, the Assessing Officer has to record an opinion that (i) the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed; or (ii) having regard to the nature of the asset and other relevant circumstances, it is necessary to make such a reference."'

47. We now refer to the Co-ordinate Bench decision in case of *Shantaben P Patel* v. *ITO* in (IT Appeal No. 781, 784 & 785 (Ahd.) of 2011 dated 2.04.2018) wherein, following the aforesaid decision of Hon'ble Gujarat High Court in case of *Gauranginiben S. Shodhan* (*supra*), it was held as under:—

"8. In light of the above, if facts of the present appeals are examined then it would reveal value shown by the appellants of the property as on 01.04.1981 is considered then it was not less than fair market value and reference cannot be made. As far as the amendment carried out in section 55A is concerned, it is with effect from 01.07.2012 i.e. by finance Act 2012 the transaction taken place in FY 2010-11 relevant to assessment year 2011-12 and the amended provision would not be applicable on this transaction."

48. It is noted that the aforesaid decision of the Coordinate Bench rendered in the context of transaction taken place in FY 2010-11 relevant to assessment year 2011-12 has since been affirmed by the Hon'ble Gujarat High Court in *Shantaben P Patel* (*supra*)

49. Our reference was also drawn to the Co-ordinate Bench decision in case of *Shri Bhima Dada Kharate* (*supra*) wherein, following the decision of the Hon'ble Bombay High Court in case of *Puja Prints* (*supra*), it was held as under:—

> "9. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the determination of cost of acquisition of plot of land as on 01.04.1981. The assessee during the year under consideration had sold piece of land and the issue which arose in the present appeal was the cost of acquisition to be adopted as on 01.04.1981 in order to compute the income from long term capital gains on sale of said land, in the hands of assessee. The assessee in this regard furnished the valuation report as on 01.04.1981 and claimed the cost of plot as on 01.04.1981 at Rs.68,71,658/- and declared the indexed cost of acquisition at Rs.1,60,59,301/-. The Assessing Officer on the other hand, was of the view that the cost of acquisition declared by the assessee as on 01.04.1981 was higher and Assessing Officer made reference to the Stamp Valuation Authority in this regard and relying on the report of the Stamp Valuation Authority, adopted the cost of acquisition as on 01.04.1981 at Rs.64,675/- and worked out the indexed cost of acquisition at Rs.3,76,409/-. The CIT(A) on the other hand, has relied on the ratio laid down by the Hon'ble Bombay High Court in *CIT* v. *Puja Prints* (*supra*). The dictate of the Hon'ble Bombay High Court is that reference could be made to the Departmental Valuation Officer only when the value adopted by the assessee was less than the fair market value. In case the value adopted by the assessee of any property was more than the fair market value as determined by the DVO, then such invocation of provisions of section 55A(a) of the Act was held to be not justified. Reference was also made to the amendment to section 55A(a) of the Act in 2012, wherein for the words "is less than the fair market value" was substituted by the words "is at variance with its fair market value", was held to be clarificatory and it was categorically held that where the amendment was made effective only from 01.07.2012; the Parliament has not given retrospective effect to the amendment. The Hon'ble High Court thus, held that the law to be applied in the facts of the present case was the section as existing during the period' relevant to assessment year 2006-07.
>
> 10. Now, coming to the facts of the present case, the year under reference is assessment year 2009-10 and since the amendment was made effective from 01.07.2012 and the Hon'ble High Court has held that law which is to be applied in such cases is as existing during assessment year 2009-10, then the pre-amended provisions of section 55A(a) of the Act are to be applied. In such scenario, there is no merit in the order of Assessing Officer in adopting the cost of acquisition as on 01.04.1981 at the value less than the value shown by the assessee, which in turn, is based on the report of the approved valuer. Accordingly, we uphold the order of CIT(A) and dismiss the grounds of appeal raised by the Revenue."

50. We also refer to the decision of the Co-ordinate Bench in case of *Mahdevbhai Mohanbhai Naik* v. *ITO* (IT Appeal No. 820 (Ahd.) of 2016 dated 11.07.2018) wherein it was held that the amendment is substantive in nature which is relevant to assessment year commencing after the date of amendment i.e. FY 2012-13 relevant to AY 2013-14 and the relevant findings are as under:—

> "12. Thus, the contention of the Learned Departmental Representative that reference was made after 01.07.2012 is not tenable in law as the amendment made in section is substantive in nature which is relevant to assessment year commencing after the date of amendment i.e. FY 2012-13 relevant to AY 2013-14, hence, it is not applicable for the assessment year 2010-11, as the assessment involved is prior to period of 01.07.2012. In view of these facts and circumstances, we are of the considered opinion that the law has been settled by the decision of Hon'ble Bombay High Court, Hon'ble Gujarat High Court, Mumbai tribunal and Pune Tribunal. Therefore, the AO was not justified in referring to DVO or adopting valuation based on valuation report. The amendment in section 55A was qua prior period to 01.07.2012 and not qua proceeding prior to 01.07.2012. Hence, respectfully

the following the ratio laid down in above judgements of Hon'ble High Courts and Tribunal as referred above, hence, Ground No. 1(1) to (5) of the appeal are allowed."

51. We also refer to decision of the Co-ordinate Bench in case of *Sonali Roy* v. *Pr. CIT* (IT Appeal No. 1329 (Kol.) of 2017 dated 28.02.2018) wherein it was held as under:—

'5. We have heard the rival contentions of both the parties and also gone through the orders of the lower authorities and the case laws relied upon by the assessee. In the instant case, assessee has declared the value for the cost of acquisition for the property at a higher value than the value determined by the DVO. The first technical issue arose before us is whether the reference made by the AO to the DVO for the valuation of the property is valid for the year under consideration. In this regard we note there was an amendment u/s 55A of the Act which was effective from 01.07.2012. Prior to the amendment u/s 55A of the Act, the provision of said section reads as under:—

"[Reference to Valuation Officer.

55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the [60][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 [60][Assessing] Officer is of opinion that the value so claimed is less than its fair market value"

From the above provision we note that the Assessing Officer can refer the valuation of capital asset to a Valuation Officer in a case where the value claimed by the assessee based on the registered valuation report is less than its fair market value. However in the case before us there is no ambiguity that the fair market value as declared by assessee is not less than the value determined by the DVO. Thus, the valuation determined by the DVO cannot be accepted as it is against the provision of Section 55A of the Act as applicable prior to the amendment.

However, there was amendment u/s 55A of the Act with effect from 01.07.2012 which reads as under:—

[Reference to Valuation Officer.

55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter[12], the [8°][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 [80][Assessing]

Officer is of opinion that the value so claimedat variance with its fair market value];

There is no doubt that the amendment in section 55A of the Act was effective from 01.07.2012. Now, the issue arises whether amendment u/s 55A of the Act is applicable from the Assessment Year 2012-13 i.e. the year under consideration. It is well settled law that if the amendments are applicable from the first day of assessment year then it would be applicable from the relevant assessment year.

For example if the amendment under the statute is brought 1.4.2009 then it would be applicable from the AY 2009-10.

Similarly if the amendments are brought on any date other than the 1st day of April then it would be applicable to the subsequent assessment year.

For example if the amendment under the statute is brought 30.9.2009 then it would be applicable from the AY 2010-11.

In holding so, we find support & guidance from the judgment of Hon'ble Supreme Court in the case of *Karimtharuvi Tea Estate Ltd.* v. *State of Kerela reported* in 60 ITR 262 where it was held as under:

"10. Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year. Any amendments in the Act which come into, force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force."

From the above proposition of law, it is clear that the amendments which are being applicable from any date other than first April of assessment year would be applied from the next Assessment Year. For example, in the instant case, the amendment was brought with effect from 01.07.2012. Thus, the amendment would be applicable from the Assessment Year beginning from first April, 2013 i.e. Assessment Year 2013-14. Thus, it is clear that the amendment brought under the statutory provisions of Section 55A of the Act is not applicable in the year under consideration. As the value adopted by assessee is more than the fair market value then no reference to Valuation Officer would have been made as per the provision of Section 55A(a) of the Act as it is administered at the relevant time. Once, we have reached to the conclusion no reference can be made to the DVO for the year under consideration in the given facts and circumstances. Thus on the same basis, the assessment order cannot be held as erroneous in so far as prejudicial to the interest of revenue. Keeping in view all these discussion, as also bearing in mind entirety of the case, we deem it fit and proper to uphold the grievance of the assessee and quash the impugned revision order as devoid of jurisdiction. The assessee gets the relief accordingly.'

52. As we have noted above, the Hon'ble Bombay High Court in case of *Puja Prints* (*supra*) has held that the Parliament has not given retrospective effect to the amendment and the law to be applied is as existing during the period relevant to the Assessment Year 2006-07. Similarly, the Hon'ble Gujarat High Court in case of *Gauranginiben S. Shodhan Indl.* (*supra*) has held that section 55A as it stood at the relevant time, has to be seen and emphasis was laid on the period of the transaction and where the transaction was for the period prior to 1.7.2012, amended provisions were held not applicable. Similarly, in case of *Shantaben P Patel* (*supra*), the Hon'ble Gujarat High Court has reiterated the legal position that for the transaction falling in financial year 2010-11 relevant to AY 2011-12, the matter is covered by the earlier decision in case of *Gauranginiben S. Shodhan Indl.* (*supra*). We therefore find that there is convergence of views as evident from these decisions of Hon'ble Bombay and Hon'ble Gujarat High Court that the amendment brought in by the Finance Act, 2012 in section 55A(a) has to be read prospectively and not retrospectively. Secondly, such amendment shall apply to transactions (subject matter of determination of capital gains) which are effected during the period starting on or after 1.07.2012. No contrary jurisdictional or any other High Court decision has been cited before us and therefore, in absence of any jurisdictional High Court decision, these decisions of Hon'ble Bombay and Gujarat High Courts are binding on us.

53. Further, we find that the Coordinate Benches are also of the consistent view and having been following the legal proposition so laid down by the Hon'ble Bombay and Gujarat High Court. The Coordinate Bench in case of *Sonali Roy* (*supra*) drawing support from the decision of the Hon'ble Supreme Court in case of *Karimtharuvi Tea Estate* (*supra*) has further clarified that the amendments which are being applicable from any date other than first April of assessment year would be applied from the next Assessment Year. The amendment brought with effect from 01.07.2012 in section 55A would be applicable from the Assessment Year beginning from first April, 2013 i.e. Assessment Year

2013-14 and not applicable to Assessment Year 2012-13.

54. In light of above discussions, in the facts of the present case, the transaction of sale of property has taken place during the financial year 2010-11 relevant to Assessment year 2011-12, therefore, the amended provisions of section 55A(a) would not be applicable and one shall be guided by the erstwhile provisions of section 55A(a) of the Act and therefore, the Assessing officer was not correct in holding that the amended provisions are applicable in the instant case and therefore, reference to the valuation officer under the amended provisions of section 55A(a) cannot be sustained in the eyes of law.

55. A related question that arises for consideration is given that the reference has been made under section 55A of the Act, can the same be sustained in terms of un-amended provisions of section 55A of the Act as there is no dispute that the un-amended provisions are applicable in the instant case.

56. In order to refer the matter to the valuation officer as per erstwhile provisions of section 55A(a), in the instant case, there is no dispute that the liability towards the capital gains has arisen during the year as the transfer of the property has happened during the year. There is also no dispute that cost of acquisition as substituted by the assessee with fair market value as on 1.4.1981 is based on and in accordance with the estimate made by a registered valuer. The third condition which is required to be fulfilled is that the Assessing Officer should form an opinion that the value so claimed by the assessee is less than its fair market value. Therefore, only in a scenario, the value so claimed by the assessee is less than its fair market value in the opinion of the Assessing officer, the matter can be referred to the valuation officer. In a scenario, where the value so claimed by the assessee is more than its fair market value, the matter couldn't be referred to the valuation officer. In the instant case, the value of the property shown by the assessee as on 1.4.1981 based on the registered valuer report is considered, it would reveal that the same was in fact even higher than the value subsequently determined by the valuation officer and therefore, the Assessing Officer was not empowered to refer the matter to the valuation officer even as per erstwhile provisions of section 55A(a) prior to amendment by the Finance Act, 2012.

57. Now coming to another related issue which is contended by the ld. CIT DR that even where there is registered valuer report, there is no bar in making reference under clause (b)(ii) of section 55A of the Act and in that sense, the argument of the ld AR regarding amendment in clause (a) to section 55A becomes irrelevant and the report of the DVO can thus be relied upon by the AO. In this regard, our reference was drawn to the findings and directions of the Addl. CIT u/s 144A which reads as under:

> "(*d*) The matter of valuation was referred u/s 55A of the IT Act, 1961 and the report of the DVO was also received u/s 55A of the IT Act, 1961. In col. No. 1.7 of the reference, the section was mentioned as 55A(a). In this regard, it may be stated that with the amendment of Sec. 55 A w.e.f. 01-072012, the AO is empowered to invoke clause (a) as he was of the opinion, after considering the relevant factors, that the value shown by the assessee on the basis of report of the registered valuer was at variance with the fair market value as on 1/4/1981. Both the clauses (b) of Sec. 55A is governed by the overriding expression " in any other case", which expression, as held by the Hon'ble Gujarat High Court in the case of *Hira Ben Jayantilal Shah* v. *CIT*, refers to a case where the value declared by the assessee is not in accordance with the estimate made by the registered valuer. Also there are judicial decisions to the effect that even in a case there is registered valuer's report, there is no bar for making reference under clause (b) (ii) of Sec. 55A.
>
> However, the enabling section for referring the matter of valuation for computation of capital gain is section 55A of the IT Act, 1961. In the instant case the AO has clearly mentioned in the reference itself that "During the course of assessment proceedings, the assessee has filed a copy of the valuation report of the register valuer, Shri G.S. Bapna (copy enclosed for ready reference), in which the value of the land as on 1/4/81 has been taken at Rs. 90,98,000/- if it is considered as

residential and Rs.27294000/- if it is taken as commercial. For the purpose of computation of long term capital gain, it is necessary to arrive at the value of the land as on 1/4/1981. I am of the opinion that the value estimated by the register valuer is at variance with the fair market value of the asset having regard to the nature of the asset and its use at the relevant time. Therefore, I consider it necessary to refer the below-mentioned case for determination of the fair market value of the case on the relevant date as indicated below." This is also in consonance with Sec. 55A(b)(ii) as the AO found that it was necessary to refer the matter having regard to the nature of the asset and other relevant factors."

58. In this regard, ld. AR submitted that even under clause (b) of section 55A, the reference to DVO cannot be made since it is an admitted fact that in the instant case, the FMV has been adopted based on the Registered Valuer Report and all the case laws, even relied upon by the A.O. and by the Ld. Additional CIT, support the contention that when the FMV has been adopted based on registered Valuer Report, no reference can be made under clause (b). In support, reliance was placed on the following decisions for the proposition that only when FMV has been adopted without the Registered Valuer report, a reference can be made under clause (b) which is not the case of the Appellant:—

(*a*) Hon'ble Bombay High Court in case of *Puja Prints* (*supra*) where in Para 9 of the order, it was held as under:

"9. The contention of the revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of Section 55A(b) of the Act very clearly states that it would apply in any other case i.e. a case not covered by Section 55A(a) of the Act. In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort cannot be held to the residuary clause provided in Section 55A(b)(ii) of the Act. In view of the above, the CBDT Circular dated 25 November, 1972 can have no application in the face of the clear position in law. This is so as the understanding of the statutory provisions by the revenue as found in Circular issued by the CBDT is not binding upon the assessee and it is open to an assessee to contend to the contrary."

(*b*) In the case of *Gauranginiben S. Shodhan Indl*. (*supra*), the Hon'ble Gujarat HighCourt has observed:—

"16. In the present case, admittedly the assessee had relied on the estimate made by the Registered Valuer for the purpose of supporting its value of the asset. Any such situation would be governed by clause (a) of section 55A of the Act and the Assessing Officer could not have resorted to clause (b) thereof as held by the Division Bench of this Court in the case of *Hiraben Jayantilal Shah* v. *Income-tax Officer* and another reported in [2009] 310 ITR 31 (Guj). In the said decision, it was held and observed as under:—

"10. Under clause (a) of sec. 55A of the Act under the Assessing Officer is entitled to make the reference to the Valuation Officer in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer is of the opinion that the value so claimed is less than the fair market value. In any other case, as provided under clause (b) of Sec. 55A of the Act, the Assessing Officer has to record an opinion that (i) the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed; or (ii) having regard to the nature of the asset and other relevant

circumstances, it is necessary to make such a reference."

(*c*) In the case of *Smt. Krishnabai Tingre* v. *ITO* [2006] 101 ITD 317 (Pune), it was held as under:

"The applicability of section 55A in such cases where the value claimed by the assessee is higher than the fair market value had been dealt with in detail by the Third Member decision in the case of *Ms. Rubab M. Kazerani* v. *Joint CIT* [2004] 91 ITD 429 (Mum.) (TM) wherein it was held that the Commissioner or the Assessing Officer assumes power under section 55A(a) only when in his opinion the fair market value disclosed by the assessee is less. There was one more argument of revenue that the reference to the DVO can be made by the Assessing Officer in any other case as prescribed under section 55A(b). On careful perusal of the aforesaid Third Member decision, neither the Assessing Officer nor the Commissioner (Appeals) can assume power to give such a direction where the value of the property disclosed by the assessee is based upon the approved valuer's report. The wordings of clause (b) are such that 'in any other case' if the Assessing Officer is of the opinion that having regard to the nature of the asset, it is necessary so to do. So, in the cases other than the case where there is no valuer's report given by the assessee, the Assessing Officer is empowered to make reference under section 55A(b) and not otherwise. Thus, the issue was directly covered by the decision of *Ms. Rubab M. Kazerani's* case (*supra*). [Para 6]".

59. It was further submitted that the AO himself was well aware of this legal position and in his report to the Addl. CIT u/s 144A, reproduced at page 12 of assessment order, he has admitted that S. 55A(b) is not applicable. Quite strangely, the Addl. CIT in para (d) of his order (page 17 of the assessment order) held that S. 55A(b)(ii) is also applicable. However, all the above cited decisions clearly rule out applicability of 55A(b). In the present, case only and only sub-section 55A(a) was applicable. Thus, it is clear that when the assessee adopted the FMV based on a report of the Registered Valuer, reference cannot be made under clause (b) of section 55A of the Act although, in the instant case, the reference has been made expressly under section 55A(a).

60. In the instant case, we find that it is an undisputed fact that the assessee firm has determined the FMV basis the valuation report issued by a Registered Valuer. Further, from perusal of the letter dated 8.01.2014 issued by the Assessing officer addressed to the District Valuation officer which is available on record, we find that the Assessing officer has referred the matter to the DVO u/s 55A(a) of the Act. Therefore, where the valuation so adopted by the assessee firm is based on a registered valuer report and the Assessing officer has formed an opinion that the value estimated by the registered valuer is at variance with the fair market value of the asset having regard to the nature of the asset and its use at relevant time, the Assessing officer has invoked the provisions of section 55A(a) of the Act. In fact, as we have discussed above, the main argument of the Revenue is regarding the amendment brought in by the Finance Act 2012 in section 55A(a) and which has been claimed as applicable for the impugned assessment year. Further, the Hon'ble High Courts referred *supra* have also held that where the issue is covered by Section 55A(a) of the Act, resort cannot be had to the residuary clause provided in Section 55A(b)(ii) of the Act. Therefore, the contention so advanced by the ld CIT DR cannot be accepted.

61. The next question that arises for consideration is where the reference made to DVO is held as invalid, can the Assessing Officer still rely on the valuation report issued by the DVO as a reliable and admissible piece of evidence.

62. In this regard, ld. CIT DR referred to the findings of the Assessing Officer and which have been

confirmed by the ld. Addl. CIT while passing directions u/s 144A wherein he has held that:

> "the valuation report of the DVO is a relevant and admissible evidence irrespective of the legality or otherwise of the reference as held in the case of *Chaturbhuj Vallabh Das HUF* v. *DCIT*(130 ITD 230) Mumbai wherein the decision of Hon'ble Supreme Court in case of *Pooran Mal* v. *Director of Income Tax (Inv.)* has been relied upon."

63. Per contra, the ld. AR submitted that the amendment which has been brought in section 55A(a) of the Act is to unable the Assessing Officer to make reference to the DVO and if the view of the Assessing Officer is accepted, then there was no need for such amendment wherein legislature recognized the legal position that such reference was not possible in the earlier regime and accordingly, the amendment has been made. It was further submitted that there are number of subsequent judgments and more particularly judgment of the Hon'ble Bombay High Court in case of *Puja Prints* (*supra*) on the similar issue and therefore, in view of the subsequent High Court decision, the decision of the Mumbai Tribunal should not be relied upon. It was further submitted that the said decision of the Mumbai Tribunal has been rendered without considering the Hon'ble Supreme Court decision in case of *Smt. Amiya Bala Paul* v. *CIT* [2003] 130 Taxman 511/262 ITR 407 wherein it was held that the report of the Valuation Officer obtained without proper reference cannot be used by the AO under any section for computing the income in the hands of the assessee. It was submitted that subsequent to the decision of the Hon'ble Supreme Court, section 142(A) was inserted and similar amendments were made in section 55A. It was accordingly submitted that neither power of the reference to DVO exist in any form with the AO nor such valuation report can be used when specific provisions for reference are not available at first place. It was accordingly submitted that the order of the Mumbai Tribunal relied upon by the Assessing Officer is *per inquirum* as the decision of the Supreme Court has not been considered therein.

64. Regarding the decision of the Hon'ble Supreme Court in case of *Pooran Mal ETC* v. *Director of Income Tax (Investigation)* AIR 1974 SC 348 relied upon by the Assessing officer, it was submitted that in that case, the issue was whether evidences seized during the illegal search can be used, whereas, the issue under consideration in the instant case, is related to the reference to the DVO and use of the report given, in response to such reference. The DVO is a Technical Expert and there is another report of the Registered Valuer who is also a Technical Expert. It is pertinent to note that a report of Technical Expert, the DVO, has legal value only because of the provision contained in section 55A of the Act for the proceedings under consideration. Without such provision, the report of the DVO does not have any legal relevance. Whereas, the evidence seized during the search does not require or has no such provision to create their legal relevance, meaning thereby, the report of the DVO has evidentiary value only because of the specific legal provision, whereas, the evidence seized during the search have their own evidentiary value independently. Therefore, under these circumstances when admittedly the Reference is illegal and whereas, the legality of the Reference is back bone of the report of the DVO to make it legally relevant and in absence of such legal relevance, the report of the DVO cannot find any place under the scheme of section 55A of the Act as in the case of evidence seized during a search.

65. It was further submitted that on perusal of the judgment of the Hon'ble Supreme Court in Page 18 of said judgment, it is specifically observed that document illegally seized can be used and that judgment is limited to said question. However, in the instant case, there was no such seizure rather a report was issued by the DVO which is illegal. Further, while pronouncing the said judgment, Hon'ble Supreme Court observed that provision of search and seizure is overriding the fundamental right given by the Constitution to ensure the social justice. The instant case is not related to the search and seizure and provision related is not having overriding effect to the Constitution and, therefore, have to operate within the established judicial and administrative procedure. Hence, the judgment in the case of *Pooran Mal* (*supra*) is not applicable to the facts of the case under consideration.

66. It was further submitted that in the instant case, immediately after reference was made to the DVO, it was brought to the notice of the A.O. that such reference could not be made. If the A.O. is permitted to act on the belief that even if any report is obtained illegally, it can hold good, such kind of situation can only lead to an absurd legal and administrative mechanism where the provisions and procedures contained in the Act would become irrelevant. It is not the desired situation and apparently indicates that the aforesaid decisions relied upon are not relevant to the matter under consideration.

67. We have heard rival contentions and also carefully gone through the decisions relied upon by both the parties. We find that it is a consistent view of the Coordinate Benches right from *Chaturbhuj Vallabhdas (HUF)* [IT Appeal 3439/Mum/2007 dated 20.12.2010] to subsequent decisions in case of *Vijay P. Karnik* v.*ITO* [2013] 37 taxmann.com 48/60 SOT 155 (Mum. - Trib.) and thereafter, in case of *Pradeep G. Vora* v. *ITO* [2015] 58 taxmann.com 110/154 ITD 118 (Mum. - Trib.) that the report of a valuation officer under section 55A may be considered as a piece of evidence where the same is found relevant by the Assessing officer even where the reference made by the AO is not as per the provisions of section 55A of the Act. In this regard, we refer to the relevant findings of the Coordinate Benches as under:

68. In case of *Dy. CIT* v. *Chaturbhuj Vallabhdas (HUF)* (*supra*) it was held as under:

> "11. Even otherwise, for the sake of argument, if it is presumed that the reference made by the Assessing Officer is not as per the provisions of section 55A, the valuation report of the DVO will not loose/reduce its relevancy being a good piece of evidence on the issue of FMV of the capital assets as on 1-4-1981. The admissibility of evidence is depends upon its relevance to the matter in issue and not in the manner how it has obtained. If there is any irregularity in obtaining the evidence the same will not render evidence as it is not admissible. In the case in hand, there is no doubt that the Assessing Officer is having the jurisdiction over the subject-matter, i.e., the valuation of the capital assets and the valuation officer is also having authority and jurisdiction to value the property and submit the valuation report. Thus, the valuation report of the DVO is a relevant and admissible evidence irrespective of a question whether the reference was valid or not. The Hon'ble Supreme Court in the case of *Pooran Mal.* v. *Director of Inspection (Inv.)* [1974] 93 ITR 505 has observed that even if the search is held as illegal search nothing in the Article 19 of the Constitution which bars the use of evidence obtained as a result of illegal search. At pages 525, 526, 527 and 528, the Apex Court has observed as under :
>
> Now, if the Evidence Act, 1871 which is a law 'Consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution permits relevancy as the only test of admissibility of evidence (See section 5 of the Act) and, secondly, that Act or any other similar law in force does not exclude relevant evidence, on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence. Nor is it open to us to strain the language of the Constitution, because some American Judges of the American Supreme Court have spelt out certain constitutional protections from the provisions of the American Constitution.
>
> …….A Power of search……..
>
> …….It, therefore, follows that neither by invoking the spirit of our Constitution nor by a strained construction of any of the fundamental rights can we spell out the exclusion of evidence obtained on an illegal search. So far as India is concerned its law of evidence is modeled on the rules of evidence, which prevailed in English law, and courts in India and in England have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. In *Barindra Kumar Ghose and others* v. *Emperor* (1) the learned Chief Justice Sir Lawrence Jenkins says at page, 500 :

Mr. Das……..

In *Emperor* v. *Allahabad Khan*……..

In *Kuruma* v. *The Queen* (2) where the Privy Council had to consider the English Law of Evidence in its application to Eastern Africa, Their Lordships propounded the rule thus :

'The test to be applied, both in civil and in criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.'

Some....

Certain...

In Kuruma's case, Kuruma was searched by two Police Officers who were not authorised under the law to carry out a search and, in the search, some ammunition was found in the unlawful possession of Kuruma. The question was whether the evidence with regard to the finding of the ammunition on the person of Kuruma could be shut out on the ground that the evidence had been obtained by an unlawful search. It was held it could not be so shut out because the finding of ammunition was a relevant piece of evidence on a charge for unlawful possession. In a later case before the *Privy Council in Herman King* v. *The Queen (3)* which came on appeal from a Court of Appeal of Jamaica, the law as laid down in Kuruma's case was applied although the Jamaican Constitution guaranteed the constitutional right against (1) 35 Allahabad, 358.

(2) [1955] A.C. 197. (3) [1969] (1) A.C. 304. search and seizure in the following provision of the Jamaica (Constitution) Order in Council 1962, Sch. 2, section 19 :

"(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required for the purpose of preventing or detecting crime. ..."

In other words, search and seizure for the purposes of preventing or detecting crime reasonably enforced was not inconsistent with the constitutional guarantee against search and seizure. It was held in that case that the search of the appellant by a Police Officer was not justified by the warrant nor was it open to the Officer to search the person of the appellant without taking him before a Justice of the Peace. Nevertheless it was held that the Court had a discretion to admit the evidence obtained as a result of the illegal search and the constitutional protection against search of person or property without consent did not take away the discretion of the court. *Following Kuruma* v. *The Queen* the court held that it was open to the court not to admit the evidence against the accused if the court was of the view that the evidence had been obtained by conduct of which the prosecution ought not to take advantage. But that was not a rule of evidence but a rule of prudence and fair play. It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law evidence obtained as a result of illegal search or seizure is not liable to be shut out. In that view, even assuming, as was done by the High Court, that the search and seizure were in contravention of the provisions of section 132 of the Income-tax Act, still the material seized was liable to be used subject to law before the Income-tax authorities against the person from whose custody it was seized and, therefore, no Writ of Prohibition in restraint of such use could be granted. It must be therefore, held that the High Court was right in dismissing the two Writ Petitions. The appeals must

also fail and are dismissed with costs".

12. Thus, in view of the decision of the Hon'ble Supreme Court in the case of *Pooran Mal* (*supra*), the valuation report of the DVO is a relevant and admissible evidence on the matter in issue irrespective of illegality of reference made by the Assessing Officer. Thus, the issue of validity or illegality of reference made by the Assessing Officer under section 55A has become purely academic in nature."

69. In case of *Vijay P. Karnik* (*supra*) it was held as under:

"7. We may also point out here that even if the reference made by the AO to the DVO was not in accordance with law or illegal the valuation report obtained in pursuance of such a reference will be relevant and admissible evidence which can be used by the revenue authorities in the income tax proceedings. This view is supported by the decision of Hon'ble Supreme Court in case of *Pooran Mal* v. *Director of Inspection* [1974] 93 ITR 505 in which it was held that even though the search and seizure had been conducted in contravention of the provisions of section 132 of the IT Act material obtained can be used by the Income Tax authorities. Thus even if the reference made by AO is considered not valid the valuation report can always be used in the income tax proceedings for the purposes of the Act. The same view has been taken by the decision of Tribunal in case of *Chaturbhuj Vallabhdas HUF* (*supra*) in which the Tribunal held that the valuation report having already been obtained by AO and used in the assessment proceedings, the issue of validity or illegality of the reference had become purely academic in view of the judgment of Hon'ble Supreme Court in case of *Pooran Mal* (*supra*)."

70. In case of *Pradeep G. Vora* (*supra*) it was held as under:

"4.2 We would like to mention the broad principles emerging out of various judicial decisions of the Hon'ble Courts with regard to reference to be made by the AO to the DVO u/s.55A of the Act:

(*i*) The power of the AO in the course of making an assessment under the Act is wide and, for obtaining full information, he may make such enquiry as he considers necessary. In the course of such enquiry, the AO may take the assistance of any person having expertise. But, the AO is not entitled to make a reference to the VO u/s.55A of the Act. A reference made to a VO u/s.55A has a definite connotation and a definite statutory effect and, therefore, unless the conditions precedent for making such reference are satisfied, in exercise of his general power of enquiry, the AO cannot make a reference under the said provision.

(*ii*) Reference to VO u/s. 55A can be made only to ascertain FVM of capital asset for determining capital gains. Valuation obtained in a case not involving capital gains has no statutory effect.

(*iii*) The AO loses his power in the matter of valuation only where the VO makes a report. If the VO does not submit his report, the power of valuation has to revert to the AO. Unless the VO sends his report, there is no bar on the AO 's completing the assessments taking the value of the asset referred for valuation in the best possible method in the limiting circumstances of the situation. So, if, till the expiry of limitation, no report of valuation comes from the DVO, the original power of the AO to value the asset himself revives.

(*iv*) Reference under clause (b)(ii) of section 55A can be made, if the AO is of the opinion that having regard to the nature of the asset and other relevant circumstances, it was necessary so to do.

In the case of Anant Mills Ltd. a reference under clause (b)(ii) of section 55A of the Act was made by the AO and the asset in question was a piece of land. Deciding the writ petition filed by the assessee, Hon'ble Gujarat High Court held that reference could have been made, if the AO was of the opinion that having regard to the nature of the asset and other relevant circumstances, it was necessary so to do, that there was nothing special about the nature of the asset which would have justified the AO to make a reference to the VO. No other relevant circumstances could be pointed out, that no attempt was made to justify the action of the AO under any other provision of section 55A. Finally, it was held by the Hon'ble Court that the reference to the DVO was not in accordance with law and it had to be quashed. *MV. Shah, Official Liquidator, Anant Mills Ltd.* v. *U.J. Matain* [1994] 209 ITR 568 (Guj.)

(*v*) The purpose of section 55A of the Act is not to enable the AO to make a roving and fishing inquiry for finding out materials for reopening or revising a completed assessment. Pendency of an assessment including reassessment is a sine qua non for giving jurisdiction to the AO to make a reference under the said section of the Act. It has no relevance and cannot be applied after the assessment is completed and before the reassessment has commenced, that is, to consider the question whether the completed assessment is based on undervaluation.

(*vi*) A valuation report is only an opinion of a valuer. The same does not amount to information within the meaning of section 147 nor can it form a ground for reason to believe that the assessee had failed to disclose his income fully and truly within the meaning of section 147 of the Act. The reason to believe of an AO cannot be substituted by an opinion of a valuer. In other words, the valuation report could, at best, be considered as a mere reason, but could not be a reason to be believed by the assessing authority

(*vii*) The scope of section 55A of the Act is confined to ascertaining the fair market value of a capital asset which is the subject matter of transfer. Though the expression under this Chapter is referred to in section 55A, the section has application only to transactions involving capital gains.

(*viii*) FAA is not required statutorily to give notice under section 246 or section 250 or 251 of the Act to the Valuation Officer. Sub-section (3A) of section 23 and the proviso to sub-section (5) of section 24 of the Wealth-tax Act, 1957, dealing with appeals before the FAA and the Tribunal, specifically provide for opportunity of hearing to be granted to the Valuation Officer. There are no corresponding provisions in sections 250 and 254 of the Act. Mutatis mutandis application of certain provisions of sections 16A, 23 and 24 of the Wealth-tax Act vis-a-vis section 55A could not change the position.

(*ix*) The power of the AO under sections 131(1) and 133(6) is distinct from and does not include the power to refer a matter the under u/s. 55A of the Act. A report of the VO under section 55A may be considered by the AO, as a piece of evidence if it is relevant. However, the power of inquiry granted to an AO under sections 133(6) and 142(2) does not include the power to refer the matter to the VO for an enquiry by the latter. We are of the opinion that if the power to refer any dispute to a VO was already available in sections 131(1),

133(6) and 142(2) of the Act, there was no need to specifically empower the AO to do so in certain circumstances u/s. 55A. But, order issuing commission to VO under section 131(1)(d) of the Act with regard to cost of construction is permissible and in that situation it would not be a reference u/s. 55A of the Act.

(*x*) For invoking the provisions of section 55A of the Act formation of opinion of the AO that the value claimed by the assessee is less than its FMV is a sine qua non. Recording reasons after the order of reference, for valuation of the registered valuer, is not a substitute for predecisional formation of opinion. *CIT* v. *Umedbhai International (P.) Ltd.* [2011] 330 ITR 506/[2014] 223 Taxman 152 (Mag.)/45 taxmann.com 306 (Cal.).

(*xi*) A reference can be made to VO, under section 55A, clause (b) sub-clause (ii),only if AO records existence of 'such other relevant circumstances' on the basis of which he forms such opinion. In other words, a reference can be made if certain pre-conditions exit.

In the matter of Hotel Joshi, Hon'ble Rajasthan High Court has held that for invoking sub-clause (ii) of clause (b) of section 55A of the Act, AO is required to form an opinion on the basis of the material on record that reference to the DVO for ascertaining the FMV of an asset, is necessary having regard to the nature of the asset and other relevant circumstances *CIT* v. *Hotel Joshi* [2000] 242 ITR 478/108 Taxman 199 (Raj.).

Hon'ble Gujarat High Court in the case of *Hiaben Jayantilal Shah* (*supra*) has held that as per the clause(b) of section 55A of the Act, the AO has to record an opinion that (i) the FMV of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed ;or (ii) having regard to the nature of the asset and other relevant circumstances, it is necessary to make such a reference. Clause (b) of section 55A of the Act can be invoked only when the value of the asset claimed by the assessee is not supported by the valuation report of a registered valuer.

(*xii*) The assessee 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 u/s. 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 AO, may be acted upon by him and if he does so, the validity of that action can be questioned by the assessee. Section 55A does not create any bar on the DVO to value the property on the basis of a valid reference made by the AO."

71. Further, we find that similar view has been taken earlier by the Hon'ble Supreme Court in case of *Smt. Amiya Bala Paul* (*supra*) wherein it was held as under:

"9. The common feature of sections 133(6) and 142(2) is that the Assessing Officer is the fact-finding authority. It is his opinion on the basis of the facts as found on an enquiry conducted by himself which results in the assessment order. A report by the Valuation Officer under section 55A is on the other hand the outcome of an inquiry held by the Valuation Officer himself and reflects his

opinion on the evidence before him. Such a report would not be the result of an inquiry by the Assessing Officer under the provisions of section 133(6) or section 142(2). It is true that the Assessing Officer is not bound by strict rules of evidence and a report of a Valuation Officer under section 55A may be considered by the Assessing Officer as a piece of evidence if it is relevant. (See *CIT* v. *East Coast Commercial Co. Ltd.* [1967] 63 ITR 449, 457 (SC). However, the power of inquiry granted to an Assessing Officer under sections 133(6) and 142(2) does not include the power to refer the matter to the Valuation Officer for an enquiry by him."

72. In light of above discussions, we find that even where the reference to DVO has been held as invalid in the eyes of law, the valuation report so submitted by the DVO can be considered by the Assessing officer as a reliable piece of evidence as the Assessing officer is not bound by strict rules of evidence and where the report is found to be relevant, the same can be considered by the Assessing officer. However, whether the valuation report issued by the DVO is found to be relevant in the facts and circumstances of the present case, we shall be dealing with the same in the subsequent paragraphs.

73. Now coming to the cross objection (No. 2) filed by the assessee wherein the assessee has challenged the reference of the matter to DVO u/s 55A on the basis of incorrect assumption of facts and without providing appropriate opportunity to the assessee before the matter was referred to the DVO. In this regard, our reference was drawn to Para 4.2 of the assessment order wherein the AO has observed as under:—

'On perusal of the registered valuer's report, the following facts have been noticed:-

(*i*) The registered valuer had estimated the value of the property at Rs. 90,98,000/- by taking the rate of Rs. 1,093/- as on 1.4.1981 and making adjustments on account of corner plot, location etc. and arrived at the value by taking rate of Rs. 3,306/-. In the same valuation report, he has taken the value at Rs. 2,72,94,000/- taking the rate at Rs. 9,918/-if the party uses it as commercial. There is huge variation in the value estimated by the registered valuer at Rs. 90,98,000/- and Rs. 2,72,94,000/-;

(*ii*) In S. No. 6, the registered valuer has himself given the nature of the property as "residential land". Therefore, the nature of the asset and its use at the relevant time is not clear from the registered valuer's report;

(*iii*) Further, there was no basis or evidence for the adjustments made by the registered valuer;

(*iv*) Having regard to the nature of the asset and its use at the relevant time, I am of the opinion that for computation of the long term capital gain, it is necessary to have the report of another technical expert i.e. DVO to whom a reference is made u/s 55A of the IT Act, 1961.

Therefore, a reference in the prescribed performa was sent to the DVO on 8.1.2014; vide his office letter No. 1646.'

74. In this regard, the ld. AR submitted that a perusal of the reasons given by the Ld. A.O. in Para 4.2 as reproduced hereinabove, to arrive at an opinion that the valuation claimed on the basis of the Registered Valuer's report requires reference to the DVO shows that the said reasons are (a) without any substantive material; (b) mainly because of not considering the report of the Registered Valuer in right perspective; and (c) due to incorrect assumptions of the fact, which could otherwise be avoided by providing opportunity before making Reference. Coming specific on each of the observations of the AO, the ld AR further submitted that:—

(*a*) In the first point, it was observed by the AO that there is a huge difference between the valuation arrived at by the Registered Valuer of the property as residential at Rs. 90,98,000/- and as commercial at Rs. 2,72,94,000/-. It was submitted that Registered Valuer has simply tripled the value of residential property to arrive value of commercial property. It is an established practice and also has been adopted for Stamp Duty purposes by Stamp Duty Authorities. Secondly, he himself has reported in Para 9 of his report about the locality, wherein, it is mentioned that Property is situated in mixed area, therefore, by applying the principle that for the purpose of ascertaining the FMV, one has to take the value which is most advantageous and accordingly, he adopted the value as commercial property. Therefore, in this regard, the approach of the Registered Valuer was supported with the substantiating material and guidelines for determining FMV. On the other hand, the presumption of the Ld. A.O. is arbitrary and based on mere suspicion, hence, should not hold good.

(*b*) In the Point No. 2, it was mentioned by the AO that in S. No. 6, Registered Valuer has himself given the nature of property as residential land, therefore, it is concluded that at relevant time, the land use is not clear from the Registered Valuer's report. In this regard, it was submitted that we have to read the report of the Registered Valuer in totality and comments to specific point in specific manner. Accordingly, S. No. 6 as pointed out, is only about the description of the property and comments should be read restricted to the description of the property not with respect to ascertain potential use in most advantageous manner, particularly when, there is another point at S. No. 9 of the report which specifically asked, whether property is situated in res./commercial/ mixed area/industrial area and it has been commented that property is in mixed area. Therefore, it is very much clear that potential use is commercial since the property is situated in mixed area; hence, from the fact discussed, the Registered Valuer's report is very much clear about the potential use. Conclusion arrived at by the Ld. A.O. is only due to not considering the Registered Valuer's report in right perspective, rather, conclusion has been drawn based on comments given in S. No. 6 which is not related to the potential use and limited to the description of the Property.

(*c*) In the third point, it was pointed out by the AO that for factor of adjustment, there is no basis nor any evidence has been provided by the Registered Valuer. It was submitted that this is incorrect observation as the Registered Valuer has given the basis for adjustment in brief. However, the same could be called in detail if any clarification was required and based upon such clarification, a judicious opinion could be formed, which has not been done in the instant case. It is pertinent to note and rather surprising to see that the DVO in his report while making the factor of adjustment has given the basis or evidence in similar fashion as of the Registered Valuer, which has been accepted whole heartedly by the A.O. The said act of the Ld. A.O. is contradictory and shows that he has used different yardstick of justification according to his own convenience.

(*d*) In the fourth point, a general statement has been made by the AO without any basis and material, which cannot be the basis to form such an opinion.

75. It was submitted by the ld AR that a perusal of the Section 55A(a) shows that there must be a

situation, wherein, the A.O. should form an opinion. The word "opinion" has been used in the section to restrict the use of such reference in a discretionary manner, otherwise, a blanket power could be given to the A.O. and which is not the intent of the legislature. Therefore, they have used the word "opinion" which demands an application of mind in objective manner on the facts and circumstances of any given case. Hence, for invoking the provisions of section 55A of the Act formation of opinion of the AO that the value claimed by the assessee is less than its FMV is a *sine qua non*. In support, reliance was placed on following decisions:

(*a*) It has been observed by the Supreme Court in *Amrit Banaspati Co Ltd.* v. *CWT* Civil Appeal No. 938 of 2003 dated 30.6.2004 that "It is true that the invocation of Rule 8(a) cannot be based on *ipsi dipsi* of the AO. The discretion vested in the AO to discard the value determined as per Rules 3 has to be judicially exercised. It must be reasonable, based on subjective satisfaction; the power must be shown to be objectively exercised and is open to judicial scrutiny."

(*b*) In the matter of *CIT* v. *Hotel Joshi* [2000] 108 Taxman 199/(242 ITR 478), Hon'ble Rajasthan High Court has held that for invoking sub-clause (ii) of clause (b) of section 55A of the Act, AO is required to form an opinion on the basis of the material on record that reference to the DVO for ascertaining the FMV of an asset, is necessary having regard to the nature of the asset and other relevant circumstances.

76. It was further submitted that without prejudice, even if for sake of argument, it is presumed that for the period under consideration Section 55A(a) applies in a case where the Assessing Officer is of opinion that the value so claimed is at variance with its fair market value. Thus, forming the requisite opinion, in a judicious manner requires the conclusion of "at variance", is the basic condition for making reference to the DVO. The AO has not formed any such opinion as is clear from his note reproduced at page 3 of the assessment order and without fulfilling this basic legal requirement, the reference cannot be made. Fact is that after pointing out some imaginary short comings in the report of the registered valuer as explained hereinbefore, the AO proceeded to record that "I am of the opinion that for computation of the long term capital gain, it is necessary to have the report of another technical expert i.e. DVO...". There is no reference, whatsoever, of the value determined by the registered valuer being at variance with the FMV. In fact, he could not have formed any such opinion as he had no other fact/data to show the variance. The term 'at variance' means difference or discrepancy between the two statements/documents/facts etc. To claim variance, at least two data are required. In the present case, the AO had only one figure given by the registered valuer and he has not made any attempt to collect some more relevant data regarding the FMV to show the variance. It is obvious that the term 'at variance' is used only for comparison between the two or more items. Finding some faults in the methodology adopted by the registered valuer does not give rise to any such 'opinion'. For example, one exit poll comes out with a figure in favour of a political party. If one point out that sample size was small or samples not drawn uniformly etc, then there can be just a doubt about the authenticity of this poll. But, when one says that other exit polls have given various other figures, only then one can say 'at variance'. The AO has failed to form an opinion as required by the law hence, subsequent actions deserves to be deleted.

77. It was accordingly submitted that in the instant case, on the basis of discussion made about the reason for arriving at such an opinion, it is clear that before making the Reference, neither mind was applied objectively nor the requirement of the law has met and nor a proper opportunity was provided to the assessee to represent his version on those reasons. However, in this regard, it can be said that there is no express provision in the Act for providing an opportunity to the assessee before arriving such an

opinion, even though, it is a settled principle of natural justice considering the nature of work and duty to be performed, there can be implied practices to secure justice. In the instant case, calling the assessee's view on the reasons for framing the opinion could not have affected the work of the Ld. A.O. in any way, rather could only assist him to form an opinion based upon the correct facts and the circumstances. In the instant case, looking to the reasons and explanations brought on record hereinbefore, it is a case where by providing such opportunity, the possibility of miscarriage of justice could have been avoided.

78. Per contra, the ld CIT DR submitted that the Assessing officer has not made the reference to DVO in a routine manner but after considering the report of the registered valuer and other relevant factors and after forming an opinion that the matter required to be examined by another technical expert. It was accordingly submitted that there is no merit in the contention so advanced by the ld AR and the same should be dismissed.

79. We have already decided earlier that the reference to DVO is invalid in the eyes of law, therefore, we don't deem it necessary to examine deeper into the issue around formation of opinion by the Assessing officer and what should be the ingredients or the basis/tangible material in possession of the Assessing officer before he refers the matter to the DVO though the ld AR has raised some relevant issues in this regard. Hence, in view of the same, the cross objection so raised is not adjudicated upon.

80. Now coming to another cross objection (No. 3) raised by the assessee wherein the assessee has challenged the DVO's report on the basis of incorrect assumption of facts and against the established norms of the valuation and without following standard practice and procedures of the Revenue department for determination FMV.

81. In this regard, it was submitted by the ld. AR that the Department has come out with valuation guidelines wherein prescribed procedures, practices and valuation methodology have been laid down to guide the DVO to complete his work in judicious manner. However, the same has not been followed by the DVO in the instant case and therefore, the valuation so determined by the DVO suffers from various infirmities and the valuation report issued by the DVO cannot be relied upon.

82. It was submitted by the ld AR that the DVO in his report has stated that the inspection the property was carried out by him along with the Junior Engineer on 10.07.2004 in the presence of the assessee's partner Mr Bajaj whereas the fact of the matter is that no such inspection was carried out in the presence of Mr Bajaj. Further, in reply to the RTI application, it has been stated by the Department that inspection register which is required to be maintained as per guidelines has not been maintained and even the inspection note has not been maintained. It was further submitted that on the alleged date of inspection, the property was under the possession of the buyer and it was closed, therefore, the DVO was required to take permission and keys from the buyer however, no such permission or keys were given by the buyer and therefore, claim of the DVO towards inspection is wrong. It was further submitted that the notice for inspection was served only in the month of January 2014 wherein there was no specific date of inspection and thereafter in the DVO's report, it has been claimed that the inspection was carried out on 7.3.2014 which means that there must have been a separate notice for inspection and which the assessee denies to have received any such notice either in writing or verbally. It was further submitted that the assessee has filed his objection to the proposed DVO's report. However, the same has not been considered by the DVO which effectively means that assessee has not heard and his objections to the draft valuation report has not been considered which is a gross valuation principle of natural justice.

83. It was further submitted that the DVO in his report (Para 4.6) has concluded that the land under reference was a residential use only as on 01.04.1981. However, he has not disclosed any basis on which he concluded that the land under reference was a residential use only at the relevant point of time. It was submitted that the property was situated on 128 Feet wide Road, one of the biggest wide roads of the

city not only in the year 1981 but also at present as well. The property was on a National Highway, itself shows that road under consideration was a prominent road of the city in that year as well and was also having flow of traffic.

84. It was further submitted that it is a fact that the Property was owned by a Partnership Firm which was registered with the DIC and also was carrying on trading activity from the same place. It is important to note here that the DVO has claimed that industrial land will have less DLCs in comparison to the residential but issue is that in the year 1981, various industries were running in the residential and commercial areas, whereas, at present, one cannot run the industrial activities in residential and commercial areas because of strict enforcement of the laws. Therefore, the trend of the rate prevailing in the industrial area cannot be compared with the industry running in the residential and commercial locality. Further, the approved Valuer in his report in Para 9 has reported the locality as mixed area which has not been denied by the DVO as well, therefore, such justification is only to justify his predetermined act, since he himself is of the view that property is of residential use and thus it has desired to show that the land in 1981 was not in an industrial belt.

85. It was further submitted that the finding of the DVO that there was no commercial working from the premises as on 1.04.1981 is contrary to the facts. It is an undisputed fact that the Property was used for factory as well as for trading activity as is evident from the provisional registration certificate of the Rajasthan Sales Tax Department and Central Sales Tax effective from 16.03.1981 to 16.09.1981. Now it is necessary to appreciate the meaning of word "Commercial Activity" prevailing in the year 1981 rather than today's era. In the year 1981, commercial activities were considered to be the activities of manufacturing and trading and a location which was near to the residential area. Such plots which could be used for such activities were having the highest value since in that time, people were not having much of transports, therefore, proximity to the residential area were considered to be the best commercial location. Further, the activity of manufacturing and trading is very well included in the term commercial activity. Therefore, while concluding that there was no commercial working, the DVO acted unfairly, unreasonably and prejudice on evidence and for this reason alone, the order is against the principle of natural justice, since the natural justice demands fair play, reasonableness and without prejudice on evidence, which is absent in the instant case.

86. It was further submitted that a perusal of the report of the DVO shows that while deriving the FMV of the Property, he only took the value of the land, whereas, there was a structure of building which did not find place in the final valuation. On raising the objection on the issue subsequent to the valuation, it was clarified by the DVO that the registered Valuer also did not take the said value in consideration. Now the question arises whether he is bound with the fact noted by the registered Valuer or not and the answer is certainly not. Further, in the process of valuation, it is expected by the law and established practices that the DVO must visit the site and by applying his expertise the age of the construction can be determined. Further, in this case, it is very well noted on the page 6 of the Sale Deed executed on 6.12.2010 and registered on 7.12.2010 that there is a RCC construction of 344 Sq. Ft., Patti Roofing construction of 380.63 Sq. Feet and Tin Shade of 290.75 Sq. Feet, which is 30 years old which means that it was very well there on 1.4.1981. The said Sale Deed was with the DVO, therefore, it is clear that he has not visited the site and the report has been prepared without going through all the facts noted on the documents available before him. It means that he has not given the thoughtful consideration to his work. Hence, the report of the DVO is not reflecting the correct FMV, primarily, on account of such grossly negligent approach to the work and secondly, the value of said structure could not find place in the final value determined by him.

87. It was further submitted that FMV is the estimated price which any asset in the opinion of the Valuation Officer would fetch, if sold in the open market on the valuation date and in the instant case, following factors should be considered:

The front of the Property is situated on 128 Feet wide N.H. Road;

The Property is situated approx 200 Meters from Tonk Road Flyover which was there even before 1981;

The said flyover was the first flyover of the Jaipur which shows that there was adequate traffic at that time also on the said road;

Since the Property is a corner property and left side of the plot is on average 85 Feet wide road and that road connects to Gandhi Nagar Railway Station which is only 500 Feet away from the Property;

The open front is 120 Feet and open left side is 240 Feet which provides the flexibility to use it either as a single plot or sub divide into the smaller plots for use in the most advantageous manner;

The Property was used for business purposes. However, the land use permitted in the surrounding areas was not restricted to the industrial use only which means according to the local laws, there was no restriction as far as the use was concerned. Hence, it could and can be used according to the potential possibilities in its most advantageous manner; The land in the locality wherein the Property is situated was in mixed use in 1981 and which has not been denied by the DVO

88. It was further submitted that the factor wise analysis for which adjustment should be taken according to the GVIP, 2009 and the valuation report of the DVO is as under:-

Factors to be taken according to the GVIP, 2009	*Facts of the Sale Instance*	*Of the instant case*	*Adjustment taken by DVO*
Size	372.5 Sq. Mtrs. 82'X50'	2750.77 Sq. Mtrs. 120'X246'9"	(-) 20%

Comments:- The comparable is of very small size in comparison to the size of the case under consideration. The GVIP, 2009 has provided three different situations, wherein, according to the situation, adjustment should be made. (i) ± 0.5% per 100 Sq. M., in the instant case, that will come to adjustment @ (-) 11.89%, (ii) possibilities of Sub-Division must be examined and on the basis of hypothetical layout, value may be determined. The Property is having two side roads and width of the road on both sides are reasonably good, therefore, it can reasonably divided into 2 or 3 plots i.e. (120'X126'9" and 120'X120') or (120'X90' and 120'X80' and 120'X76'). Under such circumstances, the size of the each plot could not be much larger in comparison to the comparable and will not require any adjustment on this account and (iii) Considering the possibilities under bylaws, if multi story building can be constructed and size of the plot is more than 1,500 Sq. M. then the value of the bigger plot would be more than the small size plot. The Property is having 2,750 Sq. Mtrs. which is more than 1,500 Sq. Mtrs. and there is possibility of construction of multi story building.

Under such circumstances, even according to the Guidelines instead of reduction, there should be addition on account of large size plot. However, without admitting, the reduction as correct, it is important to note that the Ld. DVO has made a reduction of 20% on this account, whereas, even under worst situation, according to the said Guidelines, it could not exceed 12%, which shows that the entire exercise was arbitrary without any basis.

Shape	One side North to West is in round shape, others are straight.	Rectangular	NIL

Comments:- (*i*) The Sale Instance is having round shape on one side, whereas, the Property is Rectangular, therefore, having advantageous position in comparison to the Sale Instance for better building layout and general architectural planning, (*ii*) In case of Sale Instance, after leaving the set back; there would be a little space available for construction, (*iii*) Further, due to odd width, the Sale Instance cannot be further sub divided, hence, reduces the flexibility for any alternative use.

The Ld. DVO failed to take into note the advantageous position of the Property while working out the factor

for adjustment and had not taken any additional % for the same. Whereas, the advantage considering the shape is factually evident.

Frontage	82'	120'	NIL

Comments:- (*i*) Both the properties are corner property, however, it is pertinent to note that Property is situated on main National Highway Road having good frontage that will definitely have higher value even compared to a property having same frontage but situated in inner colony lane. (*ii*) It is further important that in both the cases, two sides can be used as frontage and while comparing the road width of these two sides with corresponding frontage, it is clear that Property is having much more effective frontage on both side independently, hence, having advantage over the Sale Instance.

The Ld. DVO has failed to take into account the factor of adjustment on this account.

Locality and Surroundings	Residential and Graveyard	On main Tonk Road Shops, Petrol Pump and in close proximity to Gandhi Nagar Railway Station and Residences in the inner lanes of the locality.	35%

Comments:- (*i*) The Sale Instance is situated in the inner lane of the residential area, whereas, the Property is on the main National Highway and almost adjacent to the Railway Station. Further, surrounded by shops, Petrol Pump etc., whereas, the Sale Instance is in pure residential area. Therefore, at the outset, the advantage of the locality and surroundings of the Property has not been considered in complete, needs furthermore upward addition in the adjustment factor. (*ii*) It is pertinent to note that the Sale Instance is situated opposite to the graveyard which is considered as more disadvantageous factor in the society. It is clear from the report that the Ld. DVO failed to give effect to this fact either due to over sight or might have not conducted the physical verification of the Sale Instance. Since, it is not evident that the DVO conducted physical verification of the Sale Instance and in absence of such physical inspection; nobody can work out the advantageous and disadvantageous position of a property considering the locality and surroundings over the other property. Therefore, on account of disadvantage associated with the Sale Instance, the adjustment of the factor needs to be revised upward.

Amenities and Facilities	Shops and local transports are far away.	Commercial Shops, Petrol Pump, connected to local transport.	NIL

Comments:- (*i*) The Property is situated in the area where all day to day requirement can be fulfilled easily because of availability of amenities and facilities in the locality itself, whereas, the Sale Instance situated in an area where no shops are available, no local transport is available and more preciously except residence, there is no other amenities and facilities which are otherwise required in day to day life either as resident or occupier of commercial property.

(*ii*) The Ld. DVO has failed to consider the said factors for adjustment.

FAR or FSI	Height upto 63 feet	Height upto 192 feet	NIL

Comments:- (*i*) The sale deed of the Sale Instance shows that it is a constructed property having ground and first floor. Perusal further shows that the map was already approved and the construction made even till first floor was found excess and regularized by paying compounding fees which shows that limited FAR was available with the Sale Instance, whereas, the Property is situated on National Highway and on 128 Feet wide road on one side and average 85 Feet wide road on the other side since the FAR are broadly governed by the width of the road, hence, the Property was having much more FAR. Further, the FAR of the Sale Instance was exhausted till the construction of first floor only because the availability of FAR was very less due to narrow width of the road.

(*ii*) The Ld. DVO has failed to consider the said factors for adjustment.

Connectivity	Property is situated approx 1025' far from Bhawani Singh Road through indirect approach road. From main Railway Station approx 3 Kms. and from Airport 14-15 Kms.	On N.H. 12, Railway Station is only 270' far from site and on the way to Airport approx 7 Kms.	NIL

Comments:- The connectivity of the Property is far better than the connectivity of the Sale Instance as narrated above, however, the Ld. DVO has failed to consider the said factor for adjustment.

Road Width	Front 31 Feet Wide Road,	Front 128 Feet Wide Road,	NIL

	Side 41 Feet Wide Road	side average 85 Feet Wide Road.	

Comments:-

(*i*) Road width facilitated the use of the property and having very crucial role to work out the value of the property. A perusal of the fact shows that the road width available to the Property is far better than the Sale Instance.

(*ii*) Section 48 of the by-laws of Municipal Council, Jaipur known as Building by-laws, 1970 (PBP No. 149-163) governs the height of the building as relevant time i.e. 1981 and for ready reference, we reproduce the same as follows:-

"48. Height of building:- The height of the building in a scheme area shall not exceed 1½ times the width of the road. In the case of building facing more than one road height of the building will be governed by the width of the major road."

Applying the prevailing rule, the height of the Property can be upto 192 Feet as against 63 Feet in the case of the Sale Instance, meaning thereby, the Property can have 3 times construction in comparison to the Sale Instance. It is a very important factor, which governs the price of the Property and which has not been taken care by the DVO at all.

(*iii*) That very important factor has not been considered by Ld. DVO while working out the factors for adjustment.

Land Tenure	Leasehold	Freehold	NIL
(5.2.1.3) (h)	Land	Land	

Comments:- The tenure of the Sale Instance and of the Property is totally different. However, the Ld. DVO failed to take into consideration the said fact while determining the factor of adjustment, resultantly, took no adjustment on account of said difference in tenure.

89. It was further submitted that as discussed hereinbefore, the base rate of the Property has been taken by the Ld. DVO at Rs. 1,093/- Sq. Mtr. It is claimed in the Annexure 'A' attached to the DVO's report dated 7.3.2014 that "rate of the land per Sq. Mtr. as per the sale reference submitted by the Assessee". A perusal of the Sale instance shows that there was a constructed property and land was 372.50 Sq. Mtrs. and the total consideration was Rs. 5,50,000/-. The Ld. DVO has not provided the bifurcation of the sale consideration between the constructed area and of the land either in his valuation report or during the valuation proceedings to the assessee. Therefore, the working of base rate itself requires a proper examination and opportunity to the assessee to submit his own view on the bifurcation of the sale consideration.

90. It was further submitted that the registered Valuer while making his report considered the factor of adjustment of the locality and surrounding (Corner Plot, location near Gandhi Nagar Railway Station and good location on N.H. Tonk Road) and remaining factors have been considered on lump sum basis while doubling the base rate from Rs. 1,093/- to Rs. 2,186/- and, therefore, have not been addressed separately. The same is available in Part II of his Valuation Report. Further, he has considered the use of the Property as commercial is also correct since he has reported the area as mixed area and considering the concept of the FMV as discussed hereinbefore, one has to take the most advantageous use to ascertain the FMV and therefore it has been correctly taken commercial. Further, after assuming the potential use of the land as commercial the rate arrived after giving the effect of adjustment for factor has been multiplied by three. The said multiplication is very well supported by the practice adopted by the Stamp Authorities for working out the Stamp Duties. In view of the same, the FMV ascertained by the registered Valuer must be accepted and the FMV derived by the DVO must be rejected for the reasons/infirmities brought on record hereinbefore in length.

91. It was further submitted that the same Ld. DVO has ascertained the FMV vide his report dated 12.3.2014 in the case of another property situated at A-2, Prithviraj Road, 'C' Scheme, Jaipur of M/s Maharaja Shree Ummaid Mills Limited. The said report is very much relevant since in both cases (i) the same issue i.e. ascertainment of the FMV 1.4.1981, (ii) the same period as our report has been made on 7.3.2014 and this report has been made on 12.3.2014 and (iii) the common comparable i.e. S-6, Bhawani

Singh Road is involved. In this regard, it was submitted that:

(*i*) In that case, it was proposed in the DVO's proposed valuation report dated 28.2.2014 to take the average of 15 comparables as the base rate i.e. Rs. 362/- per Sq. Mtr. Then after considering the objections of the assessee, he adopted the sale instance i.e. S-6, Bhawani Singh Road, 'C' Scheme, Jaipur and consequently adopted the base rate of Rs. 1,093/- per Sq. Mtr. It is important to note that in the para 10 of the final report dated 12.3.2014 (PBP No. 168), it is specifically mentioned by the DVO that the objection made by the assessee in person or vide written submission dated 11.3.2014 are not relevant. When the objections are not relevant even then the base rate has been changed in that case.

(*ii*) In the said report, adjustment for large size plot has been made at (-) 25% as against (-)20% in the case of the appellant. As pointed out earlier, the GVIP, 2009 says that on account of size, there should be ± 0.5% per 100 Sq. Mtr. adjustments. By taking the Ummaid Mills case as a base in our case, the adjustment on this account should be (+) 57% instead of (-) 20% {19,134.81 Sq. Mtrs. Ummaid Mills area - 2,750.77 Sq. Mtrs. in our case = (16,384.04 Sq.Mtrs./100)*0.5= (81.92%-25%) = approx 57%}. Perusal of the same shows that in this case, the Ld. DVO did not take the judicious view or might has not considered the facts correctly. Even according to this report which is identical, the appellant deserves to have adjustment factor of +57% instead of (-) 20% on this account alone if compared to the Ummaid Mills case.

(*iii*) The Ld. DVO in that case has taken (+)70% as factor of adjustment on account of commercial potential as against in the case of Appellant, he has not even considered the concept of commercial potential and ascertained the FMV based on the land used reported by him. Furthermore, while making the comments in Para 7.3 of the report, the Ld. DVO mentioned the details of surroundings which are in the nature of institutional activity rather than commercial, whereas, in the case of the appellant, commercial activities in the surroundings areas were going on. This fact shows that in the case of the appellant, while determining the FMV, the concept of probable use in the most advantageous manner has not been considered and also the activities in surroundings have not been taken care.

(*iv*) The said property is situated on a road having width of 90 Feet as against the same the appellant's Property is on 128 Feet wide road. It is important to note that while assigning the factor on account of location, the width of the road has been considered in the case of Ummaid Mills and + 35% adjustment was made, whereas, in the case of Appellant, on account of width, which is much more, no adjustment has been made but only on account of main road an adjustment has been made that too is +35%.

(*v*) The plot of the Ummaid Mills is not a corner plot. The appellant demanded an adjustment on account of corner plot. It has been turned down by saying that the Sale Instance is also a corner plot but no adjustment has been made in the case of Ummaid Mills on this account in comparison to the Sale Instance. It is clear that over all potentiality to use the plot has been considered. Accordingly, the Property having enough wide roads on two sides has better potentiality of use. Therefore, applying the same analogy as explained, the

appellant deserves for adjustment on this account as well.

(*vi*) Looking to the above facts, it is clear that while ascertaining the FMV, the Ld. DVO did either not act judiciously or made the report in haste without considering the facts properly. It is further evident from the forgoing discussions that he was not consistent in his approach while ascertaining the FMV of two different properties at the same time and more importantly, applying the same Sale Instance. Therefore, the report of the DVO deserves to be rejected and the report of a Registered Valuer should be accepted.

92. It was accordingly submitted that the report of the DVO should not be taken as the basis for calculating the cost of acquisition and resultant capital gain. In support, the reliance was also placed on the decision in case of *Ravikant* v. *ITO* [2007] 110 TTJ 297 Delhi wherein it was observed as under:—

"9. On a perusal of valuation report, however, we find that even the valuation by the DVO has placed too much of emphasis on the assessment or valuation by the stamp valuation authority. This is neither desirable nor permissible. The reason is this. The valuation by the stamp valuation authority is based on the circle rates. These circle rates adopt uniform rate of land for an entire locality, which inherently disregards peculiar features of a particular property. Even in a particular area, on account of location features and possibilities of commercial use, there can be wide variations in the prices of land. However, circle rates disregard all these factors and adopt a uniform rate for all properties in that particular area. If the circle rate fixed by the stamp valuation authorities was to be adopted in all situations, there was no need of reference to the DVO under Section 50C(2). The sweeping generalizations inherent in the circle rates can not hold good in all situations. It is, therefore, not uncommon that while fixing the circle rates, authorities do err on the side of excessive caution by adopting higher rates of the land in a particular area as the circle rate. In such circumstances, the DVO's blind reliance on circle rates is unjustified. The DVO has simply adopted the average circle rate of residential and commercial area, on the ground that interior area of the locality, where the assessee's property is situated, is mixed developed area i.e. shops and offices on the ground floor and residence on the upper floors. When DVO's valuation required to compare the same with the valuation by the stamp valuation authority, it is futile to base such a report on the circle report itself. Such an approach will render exercise under Section 50C(2) a meaningless ritual and an empty formality. In our considered view, in such a case, the DVO's report should be based on consideration stated in the registration documents for comparable transactions, as also factors such as inputs from other sources about the market rates. For the reasons set out above and with these observations, we remit the matter to the file of the AO. The DVO will value the property de novo, in the light of our above observations and in the case the valuation so arrived at by the DVO is less than Rs. 11,42,100/-, the AO shall adopt the fresh valuation so done by the DVO for the purpose of computing capital gains under Section 48 of the Act. We direct so."

93. Further, reliance was also placed on the decision in case of *Suresh C. Mehta* v. *ITO* [2013] 35 taxmann.com 230/144 ITD 427 (Mum. - Trib.) wherein it was held as under:—

"7. … Provisions of section 23A gives scope of first appeal and the subject matter which can be appealed before the learned Commissioner (Appeals) including that of any order of the V.O. and the powers of the learned Commissioner (Appeals) in relation to such valuation. Section 24 deals with the appeal to the appellate Tribunal and section 34AA deals with the appearance of the assessee through registered valuers before the learned Commissioner (Appeals) and the Tribunal and section 35 deals with rectification of mistakes. A combined reading of these sections provide that insofar as the Assessing Officer is concerned, he is bound by the valuation adopted by the V.O. whereas the learned Commissioner (Appeals) and the Tribunal can entertain objections relating to such valuation and V.O's valuation is not binding upon them. Sub-section (3) of section 50C

provides that if the value ascertained by the V.O. exceeds the value adopted or assessed by the stamp valuation authority then such valuation adopted or assessed by the stamp valuation authority shall be taken, that is, if the V.O's value exceeds the value adopted by the stamp valuation authority, the same should be ignored by the Assessing Officer. From the conjoined reading of sub-section (1), (2) and (3) of section 50C along with the relevant provisions of Wealth Tax Act as have been referred to in sub-section (2), it is evident that though the Assessing Officer is bound by the V.O's report in case it is lower than the value assessed by the stamp valuation authority, however, the same is not binding upon the learned Commissioner (Appeals) or the Tribunal wherein the assessee can further raise objection to such valuation."

94. Per contra, the ld CIT DR has submitted that the contentions so raised by the ld AR has no merit as all the objections raised by the assessee firm has been duly considered and disposed off by the DVO. In this regard, our reference was drawn to the assessment order where the findings of the DVO disposing off the assessee's objections have been clearly stated and taken note of by the Add. CIT as well before issuing directions u/s 144A of the Act and the same reads as under:

'Now regarding the objections raised against the valuation report of the DVO by the assessee, I find that the same have duly been dealt with by the DVO, vide his letter No. 218 dated 19/03/2014, which is placed on the assessment record. In this letter, the DVO has disposed of the objections of the assessee as under:—

"This is with reference to your objections dated 13/3/2014 submitted in the matter. In this regard, it is to intimate that your statement objections dated 07/03/2014 was first received by the DVO on 10/3/2014 is totally false and baseless. This is due to the fact that copy of the same letter was first personally handed over by your AR to DVO on 07/03/2014 at 11.00 AM itself and based on that submission only the final orders were passed by the DVO on the same day, i.e. on 07/03/2014. Further, it is also surprising that the draft report was issued to you long back, your good-self in your objections dated 07/03/2014 have never raised detailed reservations regarding various factors in percentage adopted by the DVO. However, the para-wise reply to your objections submitted vide letter dated 13/3/2014 is as given below:—

(1) The sale reference submitted by you is also a corner land. So when we are deriving rates of your land in reference to a particular sale reference, adjustment of only those factors are required to be done which do not exist in the sale reference plot. That is why, no further addition for corner plot is done. In this regard, please also refer to the details given under para 4.6 of the valuation report ;

(2) what you are describing now and what the DVO has seen during inspection is the status of construction as on date of inspection i.e. on 7/2/2014. But probably you have forgotten that DVO has been asked to report fair market value of the property as on 01/04/1981. You have not submitted any documentary evidence to DVO regarding actual status and quantum of construction existing on 01/04/1981. Rather as per your own submission of regd. Pvt. Valuer's report, S.No. 24 P-3, there is no structure existing as on 01/04/1981. So the FMV of construction has been rightly taken as ZERO on the relevant date.

(3) The adjustment factor of 35% has already been taken on account of situation and location. No documentary evidence regarding commercially approved status of plot as on 01/04/1981 has been submitted at your end. So separate factor for commercial usage as on 1/4/1981 cannot be adopted. Why factor for corner plot taken, please refer to reply given as per para 1 above.

(4) Your plot under reference is sale reference plot around 3.5 times the area of the plot No. S-6 (sale reference). So the factor of -20% has been judiciously adopted against large plot area.

(5) The evidence submitted by you is for industrial use and not commercial use. The similar certificate dated 06/07/1981 was also submitted earlier by your good-self which is for industrial usage only and not commercial use. In this regard, refer to the observations of DVO under para 7.3 of the valuation report. It is to reiterat again that the industrial DLC rates are always much lesser than residential DLC rates of a particular area at any given time. Still adopting a more conservative approach in favour of the assessee, DVO has not adopted any factor for lowering the FMV further below the residential rates. There cannot be a more judicious approach than this.

(6) You are actually stating the status of the property at the point of sale and not as on 1/4/1981. So your submission cannot be accepted considering the status of the land existing on 1/4/1981;

(7) Reply same as above .

(8) The adjustment factor of 35% taken on account of situation and location is appropriate considering the sale reference adopted for calculations. 35% factor adopted is for the relatively better situation and location over that of the sale reference plot which itself has got a very good location just few feets away from the main Bhawani Singh Road. As per the details given above, hope your good-self will now agree that the orders have been passed by DVO considering all the relevant facts and in a judicious manner.".

From the above, it is seen that all the objections raised by the assessee against the valuation made by the DVO have duly been considered and disposed of by the DVO in detail as mentioned above. It is quite pertinent to note that the registered valuer, Shri G.S. Bapna himself has taken the nature of the land as "residential" vide S.No. 6 of his valuation report. Further, the registered valuer himself has mentioned "no structure available" vide S.No. 24 of the valuation report. The rate of land for industrial usage is even lesser than the rate of land for residential land as stated by the DVO. Still adopting a conservative approach, the DVO has not adopted any factor for lowering the FMV as on 01/04/1981. Further, the DVO has given the basis for adjustments made by him as against the adjustments made by the registered valuer, which was on a very higher side.'

95. We have heard the rival contentions and pursued the material available on record. As we have held above, though the reference to the Valuation Officer by the Assessing Officer u/s 55A is not valid, at the same time, the valuation report so obtained by the Assessing Officer can be used as reliable piece of evidence where the same is found to be relevant. Therefore, it needs to be examined whether in the facts and circumstances of the present case, the valuation report takes into consideration the various factors effecting the FMV of the property under consideration or not and can be used by the Assessing officer. Firstly, we find that the Valuation Officer has considered the status of the land as on 01.04.1981 as residential as there was no commercial working from the premises on this date. Therefore, we find that the Valuation Officer is referring to the date when he has carried out the inspection. However, what needs to be examined is whether there was any commercial activitiy carried out as on the valuation date i.e. 01.04.1981. In this regard, we find that there is registration certificate issued by the office of the Joint Director District Industry Centre, Jaipur dated 21.10.1980 which provides the provisional registration number allotted to the assessee's firm factory situated at Tonk Road, Jaipur for carrying out the manufacturing activities relating to ferrous, non ferrous wire, and wire products etc. Thereafter, there is a registration certificate issued by the appropriate authority under the Central Sales Tax Act, 1956 wherein the assessee has been registered as a dealer u/s 7(1)/7(2) of CST Act, 1956 in respect of manufacturing, trading and commission agency in the line of copper wire products etc and this certificate is effective from 16.03.1981. We therefore, find at the relevant point in time i.e. on 01.04.1981, the assessee was carrying out commercial activities from the premises located at Tonk Road, Jaipur which is subject matter of present proceedings. Therefore, the findings of the Valuation Officer that there were no commercial activities in the premises is not borne out from the records and

therefore, cannot be accepted. We find that these are documents brought on record by the assessee and which are issued by the appropriate Government Authorities and cannot be self created by the assessee firm. Therefore, basis this very fundamental difference where the DVO has taken the status of the property as residential whereas the facts on record suggest that the assessee was carrying out commercial activities by itself put a big question mark on the value finally determined by the Valuation Officer. Further, on persual of the sale deed, we find that it talks about the RCC construction which apparently has not been considered by the Valuation Officer. Further, we find that the sale instance taken by the Valuation Officer is a property of size of 372.5 sq.mts as against 2750.77 sq. m in the instant case and given the size of the plot and the potential and possibilities of construction, we find that the adjustment factors of (-) 20% applied by the DVO is also borne out from the record even as per the stated guidelines of the department. Further, the ld. AR has pointed out various discrepancies in terms of non-consideration of the frontage, locality surroundings and FAR of the property which again put a question mark on the value so determined by the Valuation Officer. Further, the ld. AR has drawn our reference to another valuation carried out at the same time in case of another property wherein different yard sticks have been applied by the Valuation Officer in terms of the adjustment towards the size of the plot and commercial potential. We therefore find that the valuation report so issued by the Valuation Officer suffer from serious deficiencies and the same cannot be held as reliable piece of evidences which can be applied by the Assessing Officer. Therefore, in the facts and circumstances of the present case, we are of the considered view that the adjustment made by the Assessing Officer basis the valuation report so submitted by the DVO cannot be accepted as the same suffer from serious infirmity. In the result, the cross objection taken by the assessee is allowed.

96. Cross Objection No. 4 raised by the assessee is general in nature and doesn't require any separate adjudication.

97. In Cross Objection No. 5 raised by the assessee, it has challenged the action of the Ld. Additional Commissioner of Income Tax, Range - 6, Jaipur in directing the AO to complete assessment on the basis of report submitted by DVO vide his order passed U/s 144A dated 24.03.2014. We find that the present proceedings are against the findings of the Assessing officer while passing the order u/s 143(3) where following the directions of the Add. CIT u/s 144A, he has completed the assessment proceedings. The Add. CIT u/s 144A has directed the AO to complete the assessment on the basis of the valuation report of the DVO on the issue of fair market value as on 1.4.1981 of the property discussed above which is in consonance with the provisions of Section 16A of the wealth tax Act which equally applies in the context of section 55A of the Act. Further, in respect of other issues dealt with by the Add. CIT, the same have already been dealt with and examined by us and doesn't require any separate adjudication.

In the result, appeal of the Revenue is dismissed and cross-objection of the assessee is partly allowed in light of aforesaid directions.

sunil

---

*In favour of assessee.