

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****TAX APPEAL No.148 of 2000****For Approval and Signature:****HONOURABLE MR. JUSTICE AKIL KURESHI  
HONOURABLE MS. JUSTICE HARSHA DEVANI**

1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

**GOODLUCK AUTOMOBILES PVT.LTD. - Appellant(s)****Versus****ASSTT. C.I.T. - Opponent(s)****Appearance:**

MR BANDISH SOPARKAR for MR SN SOPARKAR for Appellant(s): 1,  
MR MR BHATT, SR. ADVOCATE with MRS MAUNA M BHATT for Opponent(s): 1,

**CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI****and****HONOURABLE MS. JUSTICE HARSHA DEVANI****Date : 07/08/2012****ORAL JUDGMENT  
(Per : HONOURABLE MS. JUSTICE HARSHA DEVANI)**

1. By this appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), the appellant-assessee has challenged the order dated 28<sup>th</sup> February, 2000 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') in ITA No.3055/Ahd/1993.

2. The assessment year is 1989-90 and the relevant accounting period is the year ended on 31<sup>st</sup> March, 1988. During the year under consideration, the assessee had constructed a building for office, showrooms, service centre etc. on the Ahmedabad-Mehsana Highway and had declared cost of Rs.13,23,321/-. The Assessing Officer made a reference to the Departmental Valuation Cell seeking expert advice regarding cost of construction. The District Valuation Officer computed the cost of construction at Rs.19,13,100/-. Thus, there was a difference of Rs.5,89,779/- in the cost as shown by the assessee and that computed by the Valuation Officer. The Assessing Officer called upon the assessee to explain the difference in the cost. The assessee vide its letter dated 26<sup>th</sup> February, 1992 stated various grounds for the difference in valuation. The Assessing Officer did not accept the assessee's explanation and held that the difference in cost of Rs.5,89,779/- was the income of the assessee from undisclosed sources. The assessee went in appeal before the Commissioner (Appeals) who, inter alia, found that the major difference in the valuation report of the approved valuer as submitted by the assessee and the valuation report submitted by the Valuation Officer was because the approved valuer ignored various parts of the structure in his report and held that the said report could not be considered to be complete and correct. Having regard to the fact that the difference in valuation between the report of

the approved valuer and the Valuation Officer was more than 30%, the Commissioner (Appeals) turned down the plea of the assessee that no addition could have been made on the basis of such estimate by the Valuation Officer and dismissed the appeal. The assessee went in second appeal before the Tribunal, which concurred with the findings of the Commissioner (Appeals) and held that the reference made by the Assessing Officer to the Valuation Officer was not a statutory reference and was, therefore, not governed by the provisions of the statute or the rules. It was an advisory reference made by the Assessing Officer for seeking opinion of the expert regarding cost of construction. Having regard to the wide disparity in the valuation arrived at by the Valuation Officer and the approved valuer, the Tribunal held that the cost of construction of the building as reflected in the books of account was highly unreliable and the provisions of section 69 of the Act would be clearly applicable. The Tribunal ultimately held that the assessee had failed to account for the construction cost in respect of basement and various other items and upheld the addition made by the Assessing Officer as confirmed by the Commissioner (Appeals).

3. While admitting the appeal, this court had, by an order dated 25<sup>th</sup> September, 2000, formulated the following two substantial questions of law:-

*“1. Whether, in the facts and circumstances of the case, the ITAT was right in law in holding that the reference made by the respondent to the Valuation Cell for estimating the cost of construction of the building was not invalid?”*

2. *Whether, in the facts and circumstances of the case, the finding of the ITAT that the addition of Rs.5,89,779 as made by the A.O. was correct, is not vitiated by conjectures, surmises and lack of any evidence whatsoever?"*

4. Mr. Bandish Soparkar, learned advocate for the appellant invited the attention of the court to the assessment order framed under section 143(3) of the Act to point out that the Assessing Officer has categorically recorded that the accounts are duly audited and complete details are available. It was submitted that once the Assessing Officer found that the accounts are complete, there was no question of making reference to the Valuation Officer regarding the cost of construction. According to the learned counsel, the Assessing Officer could not have made the reference to the Valuation Officer for estimating the cost of construction without first rejecting the books of account. In support of his submission, the learned counsel placed reliance upon the decision of the Supreme Court in the case of **Sargam Cinema vs. Commissioner of Income-tax**, (2010) 320 ITR 513. Reliance was also placed upon the decision of the Allahabad High Court in the case of **Commissioner of Income-tax vs. Lucknow Public Educational Society**, (2011) 339 ITR 588 wherein following the decision of the Supreme court in the case of Sargam Cinema (supra), the court held that the Assessing Officer cannot refer the matter to the Departmental Valuation Officer without first rejecting the books of account. It was submitted that for the purpose of making a reference to the Valuation Officer, the Assessing Officer must first detect some

defect in the books of account. Without rejecting the books of account, the question of making a reference would not arise. It was urged that rejection of books of account has to precede the reference to the Departmental Valuation Officer and that the report of the Valuation Officer cannot form the foundation for rejecting the books of account. The Tribunal has, therefore, erred in holding that the Assessing Officer has rightly made reference to the Valuation Officer. Reliance was also placed upon the decision of this court in the case of ***Income-tax Officer v. Mahabir Builders***, (2003) 259 ITR 332.

5. Opposing the appeal, Mr. M.R. Bhatt, Senior Advocate, learned counsel for the respondent supported the impugned order. It was submitted that the Assessing Officer was justified in making the reference to the Valuation Officer and the very fact that reference had been made would be indicative of the fact that he was not satisfied with the books of account submitted by the assessee. Referring to the impugned order passed by the Tribunal, it was submitted that the Tribunal has concurrently found that there was a wide disparity in the valuation report of the approved valuer and the valuation report of the Valuation Officer. That the approved valuer had failed to take into account various structures resulting in a difference of more than 30% in the valuation carried out by the approved valuer and the Valuation Officer. Under the circumstances, the facts do not justify interference by this court. It was, accordingly, submitted that the impugned order passed by the Tribunal being just, legal and proper, does not warrant interference by this court.

6. From the facts noted hereinabove, it is apparent that

the Assessing Officer made a reference to the Valuation Officer for valuation of the cost of construction of the building constructed by the assessee. Upon receipt of the valuation report, the Assessing Officer noticed a difference of Rs.5,89,779/- between the cost of construction as shown by the assessee and that reflected in the valuation report submitted by the Valuation Officer. He, therefore, after calling upon the assessee to explain the difference, made addition of the said amount under section 69 of the Act as undisclosed investment of the assessee. It may be noted that at the relevant time when the reference was made to the Valuation Officer, there was no statutory provision which empowered the Assessing Officer to make such reference. The Supreme Court in the case of **Amiya Bala Paul v. Commissioner of Income-Tax, Shillong**, (2003) 6 SCC 342, had held that 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. It was further held that section 55A of the Act expressly sets out the circumstances under and the purposes for which the reference could be made to the Valuation Officer and as such, there was no question of the Assessing Officer invoking the general powers of enquiry to make a reference in different circumstances and for other purposes. The court upheld the contention of the assessee that if the power to refer any dispute to a Valuation Officer was already available under sections 131(1), 133(6) and 142(2), there was no need to specifically empower the Assessing Officer to do so in certain circumstances under section 55A of the Act. Subsequently, the Legislature vide Finance (No.2) Act, 2004 inserted section 142A in the Act with retrospective effect from 15<sup>th</sup> November, 1972 empowering the Assessing Officer to

estimate the value of any investment or any bullion, jewellery or other valuable article as referred to therein by requiring the Valuation Officer to make an estimate of such value. Under the circumstances, the power exercised by the Assessing Officer for referring the matter to the Valuation Officer for computing the cost of construction can be traced to the said section.

7. It would, therefore, be necessary to examine the nature of the powers of the Assessing Officer under section 142A of the Act, which reads as under:-

**142A. Estimate by Valuation Officer in certain cases.-** (1) For the purposes of making an assessment or reassessment under this Act, where an estimate of the value of any investment referred to in section 69 or section 69B or the value of any bullion, jewellery or other valuable article referred to in section 69A or section 69B or fair market value of any property referred to in sub-section (2) of section 56 is required to be made, the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him.

(2) The Valuation Officer to whom a reference is made under sub-section (1) shall, for the purposes of dealing with such reference, have all the powers that he has under section 38A of the Wealth-tax Act, 1957 (27 of 1957).

(3) On receipt of the report from the Valuation Officer, the Assessing Officer may, after giving the assessee an

*opportunity of being heard, take into account such report in making such assessment or reassessment.*

**Provided** *that nothing contained in this section shall apply in respect of an assessment made on or before the 30<sup>th</sup> day of September, 2004, and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A.*

*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).*

8. From the language employed in the heading of the section as well as the opening part of the said section, it can be seen that the expression used by the legislature is "estimate". Thus, resort can be made to the said provision by the Assessing Officer for the purpose of estimating the value of any investment, bullion, jewellery or any valuable article in the circumstances referred to therein. It is common knowledge that the question of estimate arises only when the books of account of the assessee are not reliable. In other words, if the Assessing Officer is of the view that the computation of taxable income cannot be based on the books of account of the assessee, he can reject the books of account and proceed to estimate the taxable income of the assessee. The question of making an estimate of the value of any investment referred to in section 69 of the Act would arise only when the Assessing Officer finds that the assessee has made investments which are not recorded in the books of account, if any, maintained by

him.

9. On a conjoint reading of the provisions of section 69 and section 142A of the Act, it appears that for the purpose of resorting to the provisions of section 142A of the Act, the Assessing Officer would first be required to record a satisfaction that the assessee has made investments which are not recorded in the books of account. As a necessary corollary, he would then reject the books of account as not reflecting the correct position and then proceed to make the assessment on the basis of estimation, for which purpose he can resort to the provisions of section 142A of the Act and make a reference to the Valuation Officer for estimating the value of such investment. Thus, on a plain reading of section 142A of the Act, it is apparent that the question of estimating the value of any investment would arise only when the books of account are not reliable. Accordingly, the Assessing Officer would first be required to reject the books of account before making a reference to the Valuation Officer. The rejection of books of account should precede the reference to the Valuation Officer. As rightly contended by the learned counsel for the assessee, the report of the Valuation Officer cannot form the foundation for rejection of the books of account.

10. In the context of the controversy in issue it may also be germane to notice the provisions of section 145(2) of the Act as it stood at the relevant time, which provided that where the Assessing Officer is not satisfied with the correctness or completeness of the accounts of the assessee, or where no method of accounting has been regularly employed by the assessee, the Assessing Officer may make an assessment in

the manner provided under section 144 of the Act. Therefore, when the Assessing Officer records that he is not satisfied about the correctness or completeness of the accounts of the assessee etc., the Assessing Officer can make a best judgment assessment. In other words, before proceeding to estimate the value of any investment the Assessing Officer has to record that he is not satisfied about the correctness or completeness of the accounts of the assessee.

11. At this juncture, reference may be made to the decision of the Uttarkhand High Court in **Commissioner of Income-tax v. Bhawani Shankar Vyas**, (2009) 311 ITR 8, wherein the court was dealing with the question as to whether the Income Tax Appellate Tribunal was justified in holding that without rejecting the books of account, the Assessing Officer was not justified in making reference to the Departmental Valuation Officer, ignoring the retrospective effect of the provisions of section 142A of the Income Tax Act? The court held that where the Income Tax officer while making his assessment had doubts on the correctness of the accounts submitted by the assessee, the Income Tax Officer was perfectly justified in making a reference to a departmental valuer without formally or categorically rejecting the books of account submitted by the assessee. According to the High Court, this view was further strengthened by section 142A of the Act. The court accordingly held that the Income Tax Appellate Tribunal was not justified in holding that without rejecting the books of account, the Assessing Officer was not justified in making reference to the Departmental Valuation Officer. The said decision came to be carried before the Supreme Court in the case of **Sargam Cinema v.**

**Commissioner of Income-tax** (supra) wherein the court found that the Tribunal had decided the matter rightly in favour of the assessee inasmuch as the Tribunal came to the conclusion that the assessing authority could not have referred the matter to the Departmental Valuation Officer (DVO) without the books of account being rejected. It was observed that the Tribunal had recorded a categorical finding that the books were never rejected, which aspect had not been considered by the High Court. The court, accordingly, set aside the order of the High Court and restored the order of the Tribunal.

12. The facts of the present case may be examined in the light of the statutory scheme discussed hereinabove as well as the decision of the Supreme Court in *Sargam Cinema* (supra). In this regard, a perusal of the assessment order reveals that the Assessing Officer has categorically recorded a finding to the effect that the accounts are duly audited and complete details are available. From the tenor of the order of the Assessing Officer, it is apparent that he has made the reference to the Valuation Officer merely to seek expert advice regarding the cost of construction. There is nothing in the assessment order to suggest that the Assessing Officer had any doubt regarding the cost of construction or that he was not satisfied regarding the correctness or completeness of the books of account. Before making the reference to the Valuation Officer for ascertaining the fair price of construction, the Assessing Officer does not appear to have ascertained the correctness or otherwise of the cost of construction shown by the assessee in its books of account. Thus, prior to making the reference to the Valuation Officer, the Assessing Officer has not ascertained as to what was the defect in the cost of

construction disclosed by the assessee in its returns of income. Moreover, it is apparent that the only reason for making the addition under section 69 of the Act is that there is a difference in the cost of construction as determined by the Valuation Officer and as shown by the assessee. At no stage of the assessment proceedings does the Assessing Officer appear to have mentioned that the books of account are defective or that the cost of construction as shown in the books of account is not the true cost of construction. Thus, while making the reference to the Valuation Officer, the Assessing Officer has not recorded any defect in the books of account nor has he rejected the same. Except for the difference in the estimated cost determined by the Valuation Officer and the actual cost as shown by the assessee, the Assessing Officer has not brought any material on record to establish that the assessee had made any unaccounted investment in the construction of the building in question and that the books of account do not reflect the correct cost of construction. Under the circumstances, there was no occasion for the Assessing Officer to make a reference to the Valuation Officer. As held by the Supreme Court in the case of Sargam Cinema (supra), unless the books of accounts are rejected, the Assessing Officer cannot make a reference to the Valuation Officer. The reference made to the Valuation Officer, not being in consonance with the provisions of law, was, therefore, invalid. Accordingly, the report made by the Valuation Officer pursuant to such an invalid reference could not have been made the basis for addition under section 69 of the Act.

13. In view of the above discussion, the Tribunal was not justified in holding that the reference made by the Assessing

Officer to the Valuation Officer for estimating the cost of construction was not invalid. The Tribunal was also not justified in holding that the addition made by the Assessing Officer under section 69 of the Act was correct. Both the questions, accordingly, stand answered in favour of the assessee and against the revenue. The appeal, therefore, succeeds and is, accordingly, allowed. The impugned order passed by the Tribunal is hereby quashed and set aside. No order as to costs.

( Akil Kureshi, J. )

( Harsha Devani, J. )

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