

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH “SMC”: NEW DELHI****BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER****ITA No. 4903/DEL/2019**  
**[Assessment Year: 2006-07]**

M/s Toffee Agricultural Farms Pvt. Ltd. 67, Friends Colony, New Delhi-110065 PAN- AACCT3058J	<u>Vs</u>	Income-tax Officer, Ward 25(3), New Delhi
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>	<b>Sh. Anil Bhalla, CA</b>	
<b>Respondent by</b>	<b>Sh. Anil Kumar Sharma, Sr. DR</b>	
<b>Date of hearing</b>	<b>14.02.2022</b>	
<b>Date of pronouncement</b>	<b>18.04.2022</b>	

**ORDER****PER KUL BHARAT, JM:**

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals)-33, New Delhi, dated 22.02.2019, pertaining to the assessment year 2006-07. The assessee has raised following grounds of appeal:

*“1 The learned CIT(A) has erred both on facts and in law in sustaining the addition of Rs. 14,79,300 albeit under section 69B of the Act. The learned CIT(A) further erred in sustaining Section 69B of the Act for Section*

*69C of the Act applied by the Assessing officer while making the impugned addition.*

*1.1 The learned CIT(A) has erred both on facts and in law in not providing opportunity to the company when substituting section 69B of the Act for Section 69C of the Act, for sustaining the addition of Rs. 14,79,300 made by the assessing officer by applying Section 69C of the Act.*

*2 The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in not providing sufficient opportunity of being heard to the assessee company in re-characterizing the additions made by the learned Assessing Officer in his assessment order dated \_\_\_\_.*

*3 The learned Commissioner of Income Tax (Appeals) has erred both on facts and in law in confirming the addition by ignoring the fact that referring the matter to DVO by learned AO is incorrect in law and report obtained in this respect cannot form basis of addition u/s 69C of the Act.”*

2. Facts giving rise to the present appeal are that the assessee filed its return of income on 29.11.2006, declaring ‘Nil’ income. The case was selected for scrutiny and a notice u/s 143(2) of the Income-tax Act, 1961, hereinafter referred to as the “Act”, was issued. In response thereto the authorized representative of the assessee attended the proceedings. The Assessing Officer noticed that during the year under consideration the assessee had purchased two tracts of land in the same village for Rs. 22,21,000 and Rs. 15,44,000 respectively, whereas the stamp duty paid on amount of Rs. 34,58,000 and 23,69,000 respectively. Hence the assessee had purchased land below the circle rate. Thereafter, the Assessing Officer referred the issue of valuation of agricultural land in question to the Valuation Officer (DVO).

The DVO after considering the facts and circumstances estimated the value of the land less than 10% of the value adopted by the Stamp Valuation Authority. The Assessing Officer, therefore, proceeded to treat the difference of Rs. 14,79,300/- as unexplained expenditure u/s 69C of the Act. Aggrieved against this the assessee preferred appeal before the learned CIT(Appeals), who after considering the submissions dismissed the appeal. Aggrieved against this the assessee is in appeal before this Tribunal.

3. Learned counsel for the assessee submitted that the orders of the authorities below are unjust, arbitrary and against the principles of law. He submitted that in the present case the Assessing Officer had made assessment u/s 69C of the Act and he had referred the matter to DVO U/s 142A of the Act. He contended that the reference u/s 142A can be made for the purpose of ascertaining the correct value of investment referred to in section 69 or 69B. However, Section 69C is not mentioned in the proviso. He placed reliance on the judgment of Hon'ble Delhi High Court rendered in the case of CIT Vs. Aar Pee Apartments (P) Ltd. 319 ITR 276 to buttress the contention that reference is bad in law. Learned counsel further submitted that even otherwise also the Assessing Officer did not make any inquiry regarding the correct fair market value of the land. In support of the contention that if inquiry is not made by the assessing authority the assessment is vitiated, learned

counsel for the assessee has placed reliance on the judgment of the Hon'ble Delhi High Court rendered in the case of CIT Vs. Lubtech India Ltd. (2009) 311 ITR 175 (Del). Further reliance was placed on the judgment of the Hon'ble Allahabad High Court rendered in the case of Dinesh Kumar Mittal Vs. ITO (1992) 193 ITR 770 (All). He further submitted that the learned CIT(Appeals) to fill the legal lacuna, regarding assessment made u/s 69C, arbitrarily replaced Section 69B in place of Section 69C, as mentioned in the assessment order. Therefore, he submitted that the action of the learned CIT(Appeals) tantamount to assess a new source of income not forming part of the assessment order. Learned counsel for the assessee placed reliance on the judgment of the Hon'ble Delhi High Court rendered in the case of CIT Vs. Sardari Lal & Co. (2001) 251 ITR 864. Further reliance was placed on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Union Tyres (1999) 240 ITR 556 (Del). Further reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of CIT Vs. Naresh Khattar (HUF) 261 ITR 664. He further placed reliance on the decision of Hon'ble Allahabad High Court rendered in the case of Smt. Sarika Jain Vs. CIT (2017) 84 Taxmann.com 64 (All) to buttress the contention that the learned CIT(Appeals) was not justified in invoking the provisions of Section 69B when the Assessing Officer had invoked the provisions of Section 69C of the Act. Learned counsel also placed reliance on the decision of the Tribunal rendered in the case of Hari Mohan Sharma rendered

in ITA No. 2953/Del/2018 to buttress the contention that the words “enhance the assessment” are confined to the assessment reached through a particular process.

4. The learned DR opposed the submissions and supported the orders of the authorities below. He submitted that merely because there was an error in writing Section 69C by the Assessing Officer, would not vitiate the entire proceedings. The Assessing Officer was dealing in substance with the subject matter relating to the investment made by the assessee in immovable property. He submitted that by mistake the Assessing Officer has stated Section 69C, that has been correctly construed to be Section 69B by the learned CIT(Appeals). He submitted that the case laws relied by the learned counsel for the assessee, are distinguishable on facts and circumstances of the present case.

5. I have heard rival submissions, perused the material available on record and gone through the orders of authorities below. The objection of the assessee regarding erroneous reference to the DVO, it was submitted that the Assessing Officer was not empowered to refer the matter to DVO, where the assessment was being made u/s 69C of the Act. In support of this contention, learned counsel for the assessee has placed reliance on various case laws. There is no dispute with regard to the fact that the Assessing Officer in the assessment order has stated addition regarding unexplained expenditure u/s 69C of the Act. The Revenue has not brought on record that mentioning of Section 69C was on account of any

typographical error. It is also clear from the assessment order that the Assessing Officer had referred the issue of market value of the property in question u/s 142A of the Act. However, as per Section 142A such reference can be made to ascertain the value of any investment referred to in Section 69 or Section 69B or the value of any bullion, jewellery or any other valuable article referred to in section 69A or Section 69B of the Act. There is conspicuous exclusion of Section 69C. In the present case, reference u/s 142A was not made regarding ascertaining the correct market value of the investment in property. But, it was in fact for the purpose of ascertaining expenditure which the assessee made on the purchases. I find merit into the contention of the assessee that the reference to DVO u/s 142A for the purpose of Section 69C is not valid.

6. Now coming to the question regarding action of the learned CIT(Appeals) to treat the reference u/s 142 for the purpose of Section 69B, I find merit into the contention of the assessee that there is no power conferred upon the learned CIT(Appeals) to assess a particular item under different provision of the Act what the Assessing Officer had done without giving a specific notice to the assessee regarding such action. The Revenue has not brought any material to suggest that the assessee was put to notice by the learned CIT(Appeals) before taking such action. I am of the considered view that law does not permit for such change of provision of law. As per Section 250 of the Act, the learned CIT(Appeals) is

empowered to make further inquiry as he thinks fit or may direct the Assessing Officer to make further inquiry and report to the learned CIT(Appeals). As per Section 251(1)(a), in appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment, but there is no such power provided by the law that learned CIT(Appeals) could change the provision of law qua the item of which assessment was made. Therefore, in the absence of such power, learned CIT(Appeals) could not have treated the addition made u/s 69C as the addition made u/s 69B and the same is contrary to the spirit of the Act. Reliance placed by the learned counsel for the assessee on the judgment of the Hon'ble Delhi High Court, rendered in the case of CIT Vs. Aar Pee Apartments (P) Ltd. (supra), has held that from the reading of sub-section (1) of Section 142A, it is clear that legislature referred to the provisions of Section 69, 69A and 69B but specifically excluded 69C. The principle of casus omissus becomes applicable in a situation like this. What is not included by legislature and rather specifically excluded, cannot be interpreted by the Court through the process of interpretation. The only remedy is to amend the provision. It is not the function of the Court to legislate or to plug the loopholes in the law. In the light of the above binding precedent the action of the learned CIT(Appeals) in treating the addition made by the Assessing Officer u/s 69C as have been made u/s 69B is contrary to the law laid down by the Hon'ble Jurisdictional High Court. I, therefore, respectfully following the decision

of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Aar Pee Apartments (P) Ltd. (supra), the impugned order is therefore set aside. The addition made u/s 69C on the basis of the report of the DVO by the Assessing Officer deserves to be deleted. Hence, impugned addition is hereby deleted. Grounds of appeal taken by the assessee are allowed accordingly.

7. In the result, assessee's appeal is allowed.

Order pronounced in open Court on 18<sup>th</sup> April, 2022.

**Sd/-**  
**(KUL BHARAT)**  
**JUDICIAL MEMBER**

**\*MP\***

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR**  
**ITAT, NEW DELHI**