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SMT. AMIYHA BALA PAUL

v.

COMMISSIONER OF INCOME TAX, SHILLONG

JULY 7, 2003

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[RUMA PAL AND B.N. SRIKRISHNA, JJ.]

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Income Tax Act, 1961; Sections 55A, 116, 120, 131(1), 133(6) and 142(2): Assessee filed return disclosing certain investment on construction of a house in two consecutive assessment years—Assessing Officer referring the matter of valuation of construction cost to Valuation Officer—Assessment of previous years reopened—Additions made therein towards undisclosed investment—Challenge to—Dismissed by the Appellate Authority—Tribunal allowed the appeal holding that the Assessing Officer could not refer such matter to the Valuation Officer—On Reference High Court held that the authority possess ample power under the provisions of the Act to refer such a matter to the Valuation Officer—On appeal, held, Power of inquiry granted under provisions other than Section 55A of the Act does not include the power to refer the matter for inquiry—Consequences of referring the matter to Valuation Officer under Section 55A of the Act and issuing of commission under Section 75 r/w O.XXVI R.9 are different—Assessing Officer could not invoke the general power of inquiry under the Act to refer such matter to the Valuation Officer in the circumstances and purposes different from the expressed provisions of law—Reference to a Valuation Officer could be made if permissible under the Act—However, since the Valuation Officer is appointed under the Wealth Tax Act, he could discharge functions within the statutory limits—Code of Civil Procedure, 1908—Order 26—Sections 75 to 78—Wealth Tax Act, 1957; Ss. 8, 12A, 16(A), 23, 35, 37(1) and 38.

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In the return filed by the assessee for the assessment year 1982-83, she had shown certain amount as investment towards the construction cost of a house. In the subsequent assessment year, she further disclosed investment of a further amount for the construction of the house. The return was not accepted by the Assessing Officer, who referred the question of determination/valuation of construction cost of the house to the Valuation Officer under Section 55A of the Income Tax Act. On the basis of the valuation report, the assessment for the assessment year 1982-83 was reopened and the Assessing Officer made certain additions towards

undisclosed investment in the assessment years 1982-83 and 1983-84. Aggrieved, assessee filed appeals which were dismissed by the Appellate Authority. On appeal, Tribunal held that the Assessing Officer could not have referred the question to the Valuation Officer. Thus a Reference was made to the High Court as to whether the Tribunal erred in law in holding that the Assessing Officer could not have referred the matter to the Valuation Officer for estimation of the cost of construction of a house/property. Answering the question in the affirmative, the Division Bench of the High Court held that the Assessing Officer could not have referred the said question under Section 55A of the Act but could have referred it under other provisions of the Act. Hence the present appeals.

It was contended for the assessee that a reference to the Valuation Officer could be made strictly in terms and in the circumstances mentioned under Section 55A of the Act; that when power to refer to determine the cost of construction was available under other provisions of the Act, it was not appropriate to invoke Section 55A of the Act; and that since the Valuation Officer was appointed under the Wealth Tax Act, he could exercise power in the manner as prescribed under that Act.

On behalf of the Revenue, it was submitted that the Assessing Officer was empowered under provisions other than Section 55A of the Act to refer the matter of evaluation of the construction cost to the Valuation Officer; and that in the absence of the provisions in the Wealth Tax Act precluding/restricting the Valuation Officer to submit report in respect of the matter not covered by that Act, Assessing Officer's reference to the Valuation Officer was not without jurisdiction.

Allowing the appeals, the Court

HELD: 1.1. Section 55A of the Income Tax Act deals with capital gains. For the purpose of assessing the fair market value of a capital asset in connection with the computation of capital gains it incorporates several provisions relating to a Valuation Officer in the Wealth Tax Act. Clearly Section 55A of the Act can have no application to the assessee's case.

[395-C, D; 396-C]

1.2. 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 of the Act may be considered by the Assessing Officer as a piece of evidence if it is relevant. However, the power of inquiry granted to an Assessing Officer

A under Sections 133(6) and 142(2) of the Act does not include the power to refer the matter to the Valuation Officer for an enquiry by him.

[396-G, H; 397-A]

CIT v. East Commercial Co. Ltd., (1967) LXIII 449, 457, relied on.

B 1.3. In the instant case, the Assessing Officer had made a reference under Section 55A of the Act. This action cannot be supported by reference to Section 131(1) of the Act read with Order XXVI Rule 9 C.P.C. since the consequences of reference to a Valuation Officer under Section 55A of the Act and of a commission issued under Section 75 read with order XXVI Rule 9 of the Code are different. It is not a case of correction of an error in mentioning the Section by the Assessing Officer, an error which could be ignored by referring the action to the appropriate source of power. Besides Section 55A having expressly set out the circumstances under and the purposes for which a reference could be made to a Valuation Officer, there is no question of the Assessing Officer invoking the general powers of enquiry to make a reference in different circumstances and for other purposes. Section 55A was introduced in the Act by the Taxation Laws (Amendment) Act, 1972 when Sections 131(1), 133(6) and 142(2) were already on the statute book. Though the power to refer any dispute to a Valuation Officer were already available in Sections 131(1), 133(6) and 142(2) of the Act, still there was a need to specifically empower the Assessing Officer to do so in certain circumstances under Section 55A of the Act. [398-E, F, G, H; 399-A]

Padam Sen v. State of U.P., AIR (1961) SC 218 para 8 and *Arjun Singh, v. Mohindra Kumar*, AIR (1964) SC 993 para 19, relied on.

F 1.4. Whenever reference to a Valuation Officer appointed under the Wealth Tax Act is permissible under the Income Tax Act, it has been statutorily so provided. A Valuation Officer is appointed under the Wealth Tax Act and can discharge functions within the statutory limits under which he is appointed. It is not open to a Valuation Officer to act in his capacity as Valuation Officer otherwise than in discharge of his statutory functions. He cannot be called upon nor would he have the jurisdiction to give a report to the Assessing Officer under the Income Tax Act except when a reference is made under and in terms of Section 55A or to a competent authority except under Section 269L. The Tribunal had rightly held that the Assessing Officer cannot refer the matter to the Valuation Officer for estimating the cost of construction of the house property.

H [399-G, H; 400-A, B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4657 of 2000. A

From the Judgment and Order dated 25.8.1999 of the Gauhati High Court in I.T.R. 6/96.

Vijay Hansaria, Ms. Inkle Barooah and Sushil Kumar Jain for the Appellants. B

TLV Iyer, Ms. Lakshmi Iyengar and BVB Das for the Respondent.

The Judgment of the Court was delivered by

RUMA PAL, J. The assessee built a house in a suburb of Kolkata C between the years 1981 to 1983. She filed a return in respect of the assessment year 1982 - 1983 in which she disclosed that she had invested an amount of Rs.1,75,000 in the construction of the house. The return was accepted by the Income Tax Officer (now known as the Assessing Officer). In respect of the subsequent assessment year, namely 1983-84, the assessee disclosed that she had invested a further amount of Rs 1,70,000 in the construction of the house. This was not accepted by the Assessing Officer, who referred the question of the construction cost of the house to the Valuation Officer under Section 55(A) of the Income Tax Act, 1961 (hereinafter referred to as the Act). The Valuation Officer submitted a report to the Assessing Officer. On the basis of the report, the Assessing Officer re-opened the assessment in respect of the assessment year 1982-83. The Income Tax Officer then made an addition of Rs 2,79,000 in respect of the assessment year 1982 - 83 and Rs 1,77,000 in respect of the assessment year 1983- 84 as undisclosed investment in the construction of the house. The assessee's appeals from the assessment orders were turned down by the Commissioner of Income Tax (Appeals) Guahati. The Income Tax Appellate Tribunal, however, following an earlier decision, allowed the assessee's appeal and held that the Assessing Officer could not have referred the question of the cost of construction of the assessee's house to the Valuation Officer. In this background the following question was referred to the High Court under Section 256 (2) of the Act. D E F

“Whether on the facts and in the circumstances of the case, the Tribunal G erred in law by holding that the Assessing Officer cannot refer the matter to the Valuation Cell(sic) for estimating the cost of construction of the house property”.

The Division Bench of the High Court held that although the Assessing H

- A Officer could not have referred the question of the cost of construction of the assessee's house to the Valuation Officer under Section 55 A of the Act, he had ample power under Sections 131 (1), 133 (6) and 142 (2) of the Act to ask for a Valuation Report from the Valuation Officer. It was held that each of these sections were "enabling machinery provisions which invested ample powers in the Assessing Authority", and that any wrong mention of the provision on the requisition memo would not be material. Accordingly the question referred was answered in the affirmative and against the assessee.
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- C In the appeal before us, it was contended on behalf of the assessee that a reference to a Valuation Officer could only be made strictly in terms of section 55 A of the Act and that if the circumstances justifying the reference under that Section were not prevailing, the Assessing Officer did not have the jurisdiction to otherwise refer the matter to the Valuation Officer. It was further pointed out that Section 55 A of the Act only allows for reference to the Valuation Officer for the purposes of computing the market value of property in connection with the computation of capital gains. It was also submitted that reference to the Valuation Officer had been specifically provided for under Section 55A and that this implied that a reference to the Valuation Officer could not be made under any of the other provisions which generally empowered the Assessing Officer to ascertain the income of the assessee. The submission of the appellant was that if the power to refer the determination of the cost of construction to the Valuation Officer was otherwise available to the Assessing Officer under the other provisions of the Act, it was not necessary to specifically empower the Assessing Officer under Section 55A. Finally, it is submitted that the Valuation Officer is appointed under the Wealth Tax Act and that he could exercise the power only in the manner prescribed by that Act or by any other statutory provision like Section 55 A
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- F of the Act, and that he could not be called upon to discharge functions not statutorily prescribed, in his capacity as a Valuation Officer.

- G Learned counsel appearing on behalf of the Revenue Authorities has submitted that under Section 131 (1), the Assessing Officer has all the powers of the Civil Court including issuing of commissions under Section 131(1)(d). Further, under Section 142 (2), an assessing officer for the purpose of obtaining full information in respect of the income or loss of any person, may make "such inquiry as he considers necessary". While conceding that Section 55-A would not in terms apply to the assessee's case, the respondents' contention was that the Assessing Officer was otherwise empowered under the other provisions of the Act to refer the matter to the Valuation Officer. According
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to the respondents the powers of enquiry invested in the Assessing Officer under Secs. 131(1), 133(6) and 142(2) were wide and that this Court should not read in any limitation to this power. It was further submitted that there was nothing in the Wealth Tax Act, 1957 which precluded the Valuation Officer from giving a valuation report in respect of any matter not covered by the provisions of that Act. Therefore, it was submitted, the Assessing Officer's reference to a Valuation Officer was correct and could not be held to be without jurisdiction.

The Valuation Officer to whom a requisition was sent by the Assessing Officer in this case, is an officer appointed under the Wealth Tax Act 1957. Section 2 sub-section (r) of the Wealth Tax Act, 1957, defines "Valuation Officer" as meaning a person appointed as a Valuation Officer under Section 12 A of the Wealth Tax Act and includes a Regional Valuation Officer, a District Valuation Officer and an Assistant Valuation Officer. Under section 8 of the Wealth Tax Act, it has been provided that the Income Tax Authorities specified in Section 116 of the Income Tax Act shall be the Wealth Tax Authorities for the purposes of the Wealth Tax Act, and "every such authority shall exercise the powers and perform the functions of Wealth Tax Authorities under this Act in respect of any individual, Hindu undivided family or company and for this purpose his jurisdiction under this Act shall be the same as he has under the Income Tax Act by virtue of orders or directions issued under Section 120 of that Act or under any other provision of that Act". A brief look at the powers and functions of a Valuation Officer under the Wealth Tax Act would be apposite at this stage. Under section 16 A of the Wealth Tax Act for the purpose of making an assessment under the Wealth Tax Act and in specified circumstances, the Assessing Officer may refer the valuation of any asset to a Valuation Officer when, broadly speaking, the Assessing Officer is of the opinion that the value of the asset had not been correctly disclosed by the assessee. Sub section (2) of Section 16 A of the Wealth Tax Act provides for the Valuation Officer to give a notice to the assessee for production of various accounts, records or other documents as the Valuation Officer may require. If the Valuation Officer is of the opinion that the value of the asset had been correctly declared in the return made by the assessee, he shall, under sub-section (3) of section 16 A, pass an order in writing to that effect and send a copy of his order to the Assessing Officer and to the assessee. When, however, the Valuation Officer is of the opinion that the value of the asset is higher than the value declared in the return made by the assessee, and in certain other specified circumstances, the Valuation Officer is required under sub-section (4) of section 16 A to serve notice on the

A assessee intimating the value at which he proposes to estimate the asset giving the assessee an opportunity to state his objections either in person or in writing before the Valuation Officer and to produce or cause to be produced, such evidence as the assessee may rely in support of his objections. Under sub-section (5), the Valuation Officer may pass an order in writing estimating the value of the asset after hearing such evidence as the assessee may produce and after considering such evidence as the Valuation Officer may require and after taking into account all relevant material which he has gathered, the Assessing Officer is required to complete the assessment in conformity with the estimate of the Valuation Officer as far as the valuation of the particular asset in question is concerned in terms of sub-section (6) of section 16 A.

C The decision of the Valuation Officer is amendable by him under section 35 (aaa) of the Wealth Tax Act. The decision may also be the subject matter of appeal under Section 23 (ha) in which event the Appellate Authority is required, under section 23 (3A), to give the Valuation Officer an opportunity of being heard or if necessary direct the Valuation Officer to hold a fresh inquiry. There is a similar provision in respect of appeals before the Commissioner (Appeals). It is thus seen that the Assessing Officer, under Section 16 A does not retain the power of enquiry. There is a similar provision in respect of the particular asset in respect of which the requisition is made to the Valuation Officer. The entire process of inquiry is solely conducted by the Valuation Officer alone whose responsibility it is to arrive at a correct valuation of the asset.

F The inquiry by the Valuation Officer is distinct from the power of the Assessing Officer who is otherwise invested with the power to enquire into the actual wealth of an assessee under the Wealth Tax Act. For this purpose, under section 37(1) of the Wealth Tax Act, the Assessing Officer is given, the powers of a Court under the Code of Civil Procedure, 1908 when trying a suit in respect of:

- (a) discovery and inspection
- (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;
- (c) compelling the production of books of account and other documents; and
- (d) issuing commissions.

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Under section 38 of the Wealth Tax Act, the Wealth Tax Authority is also given the power to obtain any statement or information from any individual, company, (including a banking company) firm, Hindu undivided family or other person and to “serve a notice requiring such individual, company, firm, Hindu undivided family or other person, on or before a date to be therein specified, to furnish such statement or information on the points specified in the notice, and the individual or the principal officer concerned or the manager of the Hindu undivided family, as the case may be, shall, notwithstanding anything in any law to the contrary, be bound to furnish such statement or information to such wealth-tax authority”. Thus it is apparent that the Assessing Officer’s power to enquire under sections 37(1) and 38 of the Wealth Tax Act is distinct from his power to refer to the Valuation Officer under Section 16A. There is no overlapping.

Section 55 A of the Income Tax Act occurs in Chapter IV, Part E which deals with capital gains. For the purpose of assessing the fair market value of a capital asset in connection with the computation of capital gains it incorporates several provisions relating to a Valuation Officer in the Wealth Tax Act and reads as follows

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

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

and where any such reference is made, the provisions of sub-section (2), (3), (4), 5) and (6) of section 16A, clauses (ha) and (i) of sub-

- A 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.

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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).

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"Clearly this section in terms can have no application to the assessee's case. But can the Assessing Officer otherwise take a reference to a Valuation Officer for generally computing the assessee's taxable income? The respondents say he can, and have referred us to Sections 131(1) and 133(6) of the Act. Section 131 (1) of the Act is in pari materia with Section 37(1) of Wealth Tax Act and Section 133 (6) of the Act is substantially similar to section 38 of the Wealth Tax Act. On a parity of our earlier reasoning, the power of the Assessing Officer under the Sections 131 (1) and 133 (6) of the Income Tax Act is distinct from and does not include the power to refer a matter to the Valuation Officer under Section 55A. Nor does the third section viz., S.142(2) on which reliance has been placed by the respondents allow him to do so. Section 142 (2) of the Act provides:

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"For the purpose of obtaining full information in respect of the income or loss of any person, the Assessing Officer may make such inquiry as he considers necessary".

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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 55 A 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 Commercial Co. Ltd.*, (1967) LXIII ITR 449, 457) However, the power of inquiry granted to an Assessing Officer

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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.

Learned counsel for the respondents has however particularly drawn our attention to clause (d) of sub section (1) of section 131 which provides inter alia that the assessing officer shall, “for the purposes of this Act, have the same powers as are vested in a court under a Code of Civil Procedure, 1908, (referred to as ‘the Code’) when trying a suit in respect of the following matters, namely: —

“(d) issuing commissions.”

The Court’s power to issue commissions is contained in sections 75 to 78 of the body of the Code and Order XXVI of the Schedule to the Code. Sections 76 to 78 are not relevant for our purposes. Section 75 which delineates the power of Court to issue commissions says:

“Power of court to issue commissions. Subject to such conditions and limitations as may be prescribed, the court may issue a commission-

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition;
- (e) to hold a scientific, technical, or expert investigation;
- (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the court pending the determination of the suit;
- (g) to perform any ministerial act.”

Order XXVI provides for the procedure for issuing commissions in respect of each of the purposes mentioned in sections 75. Thus Rules 1 to 8 are in respect of commissions to examine witnesses, Rules 9 to 10 C are in respect of commissions for local investigations; Rules 11 and 12 relate to commissions to examine accounts and Rules 13 and 14 pertain to commissions to make partitions. If at all the Assessing Officer could have issued a commission to a Valuation Officer it could only be under Rule 9 which lays down that:

“*Commissions to make local investigations.* - In any suit in which the

A Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

B Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

C Assuming that the Valuation Officer was appointed in terms of Order XXVI Rule 9, it is not clear whether the report submitted by the Valuation Officer was in keeping with Rule 10 sub-section 1 which requires the Commissioner not only to hold “such local inspection as he deems necessary” but also to reduce in writing the evidence taken by him and to return such evidence together with his report in writing signed by him to the court. If this were done then the report of the Commissioner and the evidence taken by him “shall be evidence in the suit and shall form part of the record”. However the Court and any of the parties to the suit, with the permission of the Court, may examine the Commissioner personally “touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation”.

E The Assessing Officer in this case had made a reference under section 55 A of the Act. This action cannot be supported by reference to Section 131(1) of the Act read with Order XXVI Rule 9 of the Code since the consequences of reference to a Valuation Officer under Section 55A of the Act and of a commission issued under Section 75 read with Order XXVI Rule 9 of the Code are different. It is not, therefore, a case of correction of an error in mentioning the section by the Assessing Officer, an error which could be ignored by referring the action to the appropriate source of power.

G Besides section 55 A having expressly set out the circumstances under and the purposes for which a reference could be made to a Valuation Officer, there is no question of the Assessing Officer invoking the general powers of enquiry to make a reference in different circumstances and for other purposes. [See *Padam Sen v. State of U.P.*: AIR (1961) SC 218 para 8 and *Arjun Singh v. Mohindra Kumar*, AIR (1964) SC 993 (para 19)]. It is noteworthy that Section 55 A was introduced in the Act by the Taxation Laws (Amendment) Act, 1972 when Sections 131 (1), 133 (6) and 142 (2) were already on the

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statute book. Learned counsel for the appellant has correctly submitted that if the power to refer any dispute to a Valuation Officer were already available in 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 55 A.

We may also note Section 269L of the Act which enables the competent authority appointed under Section 269B:

- (1) (a) “for the purpose of initiating proceedings for the acquisition of any immovable property under section 269C or for the purpose of making an order under section 269F in respect of any immovable property require a Valuation Officer to determine the fair market value of such property and report the same to him;
- (b) for the purpose of estimating the amount by which the compensation payable under sub-section (1) of section 269J in respect of any immovable property may be reduced or, as the case may be, increased under clause (a) or clause (b) of sub-section (2) of that section, require the Valuation Officer to make such estimate and report the same to him.

The Valuation Officer referred to has, according to the Explanation to the Section, the same meaning as in clause (r) of Section 2 of the Wealth Tax Act, 1957. Under sub-section (2) of Section 269L, the Valuation Officer to whom a reference is made under clause (a) or clause (b) of sub-section (1) is given all the powers he has under Section 38 of the Wealth Tax Act, 1957. And if in an appeal under Section 269G against the order for acquisition of any immovable property, the fair market value of such property is in dispute, the Appellate Tribunal shall, on a request being made in this behalf by the competent authority, give an opportunity of being heard to any Valuation Officer nominated for the purpose by the competent authority.

From this it is clear that whenever reference to a Valuation Officer appointed under the Wealth Tax Act is permissible under the Income Tax Act, it has been statutorily so provided.

Apart from the aforesaid, a Valuation Officer is appointed under the Wealth Tax Act and can discharge functions within the statutory limits under which he is appointed. It is not open to a Valuation Officer to act in his capacity as Valuation Officer otherwise than in discharge of his statutory

A functions. He cannot be called upon nor would he have the jurisdiction to give a report to the Assessing Officer under the Income Tax Act except when a reference is made under and in terms of Section 55 A or to a competent authority except under section 269L.

B We are therefore of the view that the High Court incorrectly answered the question referred to it in the affirmative. The Tribunal had not erred in holding that the Assessing Officer cannot refer the matter to the Valuation Officer for estimating the cost of construction of the house property. The appeal is accordingly allowed and the decision of the High Court is set aside. There will be no order as to costs.

C S.K.S.

Appeal allowed.