

**(2007) 01 MP CK 0018**

**Madhya Pradesh High Court (Indore Bench)**

**Case No:** None

Choudhary Builders (P) Ltd.

APPELLANT

Vs

Principal Secretary, Union of  
India (UOI) and Others

RESPONDENT

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**Date of Decision:** Jan. 4, 2007

**Acts Referred:**

- Income Tax Act, 1961 - Section 131, 260A

**Citation:** (2007) 209 CTR 133 : (2007) ILR (MP) 738 : (2007) 295 ITR 98 : (2007) 3 MPLJ 472 :  
(2007) 162 TAXMAN 13

**Hon'ble Judges:** S.K. Seth, J

**Bench:** Single Bench

**Final Decision:** Allowed

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### **Judgement**

@JUDGMENTTAG-ORDER

S.K. Seth, J.

In this petition, the only point for consideration is whether, respondents were justified in issuing the commission in exercise of powers conferred by Section 131(1)(d) of the IT Act, 1961.

Relevant facts in brief are as under. Petitioner company is builder and developer. In the course of its business, petitioner company constructed and developed a multi-storied building in Indore known as "Chetak Chambers on the R.N. Marg. Construction of said building commenced in the year 1985 and was completed by March, 1994. It is the case of the petitioner, that all expenses and receipts were shown in the returns of income as the account books of relevant accounting years from 1984-85 onwards and from time-to-time assessment orders were passed. It is an admitted position that to ascertain the cost of construction during its progress as on 31st March, 1992, the then AO had issued a commission u/s 131(1)(d) of the IT

Act, 1961. As per report of District Valuation Office (DVO) dt. 9th Feb., 1995 the valuation was Rs. 2,87,68,500. The matter was taken in appeal and the valuation report submitted by the DVO was not accepted, not only by the CIT(A) vide order dt. 31st March, 1995 but also by the Tribunal vide its order dt. 30th Aug., 2000 (Annex. P-1) and that was the end of the matter. Thus, assessments were made up to accounting year 1997-98 and no assessment proceeding or appeal were pending on 22nd May, 2001 when the Dy. CIT, Circle-I (1), Indore u/s 131(1)(d) once again issued commission to the DVO to ascertain the cost of construction of Chetak Chambers with a copy endorsed to the petitioner (Annex. P-2). Petitioner objected to issuance of the commission to the DVO and in the background of details of expenses and receipts as shown in the reply (Annex. P-3) requested to drop the proceedings. It seems that before the reply of petitioner could reach the authorities, the DVO very next day i.e. 23rd May, 2001 issued notice (Annex. P-4) to the petitioner. By a registered notice dt. 18th June, 2001 (Annex. P-5), petitioner gave a legal notice before filing present petition to challenge the order dt. 22nd May, 2001 (Annex. P-2) and consequent notice dt. 23rd May, 2001 (Annex. P-4).

Respondents have filed their counter-affidavit to justify the issuance of commission and the consequent notice basically on the ground that against the order of Tribunal dt. 30th Aug., 2000, Revenue had preferred an appeal u/s 260A of the Act before this Court on 28th Aug., 2001 and in support of this contention respondents have relied upon the notice of appeal-Annex. R-1 filed along with the reply. Thus, according to implication proceedings were pending to justify issuance of commission u/s 131(1)(d) of the Act.

After having heard rival submissions of learned Counsel for the parties, this Court is of the view that this petition deserves to be allowed on the short ground that respondents have failed to show that any assessment proceeding was pending before the AO on 22nd May, 2001, when the Dy. CIT, Circle-1, Indore issued commission u/s 131(1)(d) of the Act to the DVO. The controversy is no longer res integra in view of the recent Division Bench decision of this Court in [Commissioner of Income Tax Vs. Nevendram Ahuja](#), . Chief Justice, R.V. Raveendran, (as his Lordship then was), in the elaborate decision, after considering various authorities, held that when no proceeding relating to asst. yr. 1990-91 in that case was pending as on 29th Nov., 1989 reference by way of commission made to the DVO u/s 131(1)(d) of the Act was invalid. In that case, commission was issued long prior to the commencement of assessment proceeding relating to asst. yr. 1990-91 and in that backdrop considering the scope and ambit of Section 131(1)(d) of the Act, it was held that:

Section 131(1)(d) of the Act provides that the AO shall have the same powers as are vested in a Civil Court under the CPC, 1908, when trying a suit, in respect of the matters enumerated including issue of commission. What is significant is the use of the words "when trying a suit". A Court can issue a commission only during the

pendency of the suit. As the powers, vested in the AO are same powers as are vested in a Court, it follows that the AO can issue a commission only if a proceeding is pending before him.

(Emphasis, italicised in print, is added by us).

The above decision applies on all fours to the question posed for decision in this petition. As pointed above, to ascertain the cost of construction as on 31st March, 1992, the AO sought on commission DVO report and made certain additions in the cost of construction, which were deleted by the CIT(A) and confirmed by the Tribunal in the appeal preferred by the Revenue. Thus it is clear that no assessment proceeding was pending before the AO when Dy. CIT issued the commission. The DB decision even answers the plea taken by respondents to justify issuance of commissions on the pendency of the so-called appeal u/s 260A of the Act, though there is no material on record to show as to when such appeal was filed and what was its fate. Reliance placed on Annex. R-I is of no consequence because it does not indicate anything, except the date of appearance on 18th Sept., 2001. Respondents have not even cared to file the substantial question of law on which their appeal was said to had been admitted. In absence of any cogent material, we have no hesitation to hold that the reference by way of commission in exercise of powers u/s 131(1)(d) of the Act, in the facts and circumstances of the case in hand and the consequent notice issued by the DVO, were without jurisdiction and as such could not be sustained.

With the result, this petition is allowed however, parties are left to bear their own costs.