IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A(SMC)' BENCH, KOLKATA

Before Shri P.M. Jagtap, Accountant Member

I.T.A. No. 723 /KOL/ 2015
Assessment Year: 2006-2007

Shib Narayan Kehettry-HUF,.....Appellant
44, Ram Dulal Sarkar Street,
Kolkata-700 006
[PAN: AAGHS 7318 B]

-Vs.-
Income Tax Officer,.....Respondent
Ward-38(4), Kolkata
Appearances by:

Shri S.K. Tulsian, A.R., for the assessee
Smt. Sucheta Chattopadhyay, JCIT, D.R., for the Department

Date of concluding the hearing : July 25 , 2016
Date of pronouncing the order : September 28, 2016

O R D E R

This appeal filed by the assessee is directed against the order of ld. Commissioner of Income Tax (Appeals)-11, Kolkata dated 10.03.2015 and the issues involved therein relate to the computation of long-term capital gain arising to the assessee from sale of his property situated at 9, Amartola Street, Kolkata-700 001.

2. The assessee in the present case is an HUF, which derives income from rent, service charges and investment. The return of income for the year under consideration was filed by it on 01.08.2006 declaring total income of Rs.12,32,357/-. In the said year, a property situated at 9, Amartola Street, Kolkata was sold by the assessee for a consideration of Rs.48,00,000/- and after claiming deduction on account of indexed cost of acquisition at Rs.48,01,020/-, long-term capital loss of Rs.1,020/- was disclosed by the assessee in the return of income. During the course of assessment proceedings, it was noticed by the Assessing Officer that the value of the property sold by the assessee was taken at Rs.1.69 crores for

the purpose of determining stamp duty by the Registering Authority. He, therefore, made a reference to the Departmental Valuation Officer for valuation of the property of the assessee as on 01.04.1981 and 30.03.2006. In the valuation report submitted to the Assessing Officer, the value of the property of the assessee was determined by the DVO at Rs.9,66,900/- as on 01.04.1981 and Rs.78,01,000/- as on 30.03.2006. When the valuation report of the DVO was confronted by the Assessing Officer to the assessee, it was submitted by the assessee that the stamp duty valuation originally done at Rs.1.69 crores was subsequently reduced to Rs.61,99,950/- by the order of the Governor. It was also submitted by the assessee that the property in question was received by the family in Grant from the Collector, Kolkata on 06.02.1899 and since the said Grant was free of cost, the cost of acquisition of the property in question, which had been partitioned from time to time, was not ascertainable. Relying on the decision of the Hon'ble Supreme Court in the case of CIT –vs.- Srinivasa Setty (B.C.) reported in 128 ITR 294, it was contended by the assessee that the sale of property in question, whose cost of acquisition was not ascertainable could not give rise to any capital gain chargeable to tax. This contention of the assessee was not found acceptable by the Assessing Officer. According to him, the Governor by the relevant Notification had given only a concession in the Stamp Duty payable on sale of the property in question and there was no reduction in the market value of the said property as taken for the purpose of payment of Stamp Duty. He also held that the cost of acquisition of the property in question sold by the assessee was definitely ascertainable and, therefore, the decision of the Hon'ble Supreme Court in the case of Srinivasa Setty (B.C.) was not applicable. In this regard, he relied on the subsequent decision of the Hon'ble Supreme Court in the case of CIT –vs.- D.P. Sandu Bros., Chembur (P) Limited reported in 273 ITR 1 (SC), wherein it was held that an asset which is capable of acquisition at the cost would be included within the provisions pertaining to the head "Capital Gains" as opposed to assets in the acquisition of which no cost at all can be conceived. He also relied on the decision of the Special Bench of ITAT in

the case of Vijaysinh R. Rathod [106 ITD 153], wherein it was held that the cost of acquisition in the hands of the forefathers of the assessee being the previous owner, if cannot be ascertained, is to be the fair market value on the date on which capital assets became property of the previous owner and in that case also, the assessee would be entitled to substitute the fair market value as on 01.04.1981 under section 55(2) of the Act. Accordingly, the long-term capital gain arising from the transfer of the property of the assessee in question was determined by the Assessing Officer at Rs.29,95,507/- after reducing the indexed cost of acquisition of Rs.48,05,493/- (Rs.9,66,900 x 497 /100) from the total sale consideration of Rs.78,01,000/- as taken on the basis of D.V.O's valuation in the assessment completed under section 143(3) vide an order dated 28.11.2008.

3. Against the order passed by the Assessing Officer under section 143(3), an appeal was preferred by the assessee before the ld. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the ld. CIT(Appeals) upheld the order of the Assessing Officer determining the long-term capital gain arising from the sale of the property of the assessee at Rs.29,95,507/- for the following reasons given in his impugned order:-

> *"The submission of the assessee and the facts are duly considered. The claims of the assessee are not acceptable. It is held that the Income Tax Act 1961 has scope for determining the Capital Gains in respect of assets whose cost of acquisition is not ascertainable. The amendments brought in the Act after the decision in B.C. Srinivasa Setty (Supra) case have changed the scenario.*
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> *The Supreme Court in CIT vs. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC) had held that if cost of acquisition of a capital asset was not determinable, then even though the sale consideration received would be a capital receipt but it would not be taxable, because cost of acquisition was incapable of being ascertained and the computation as envisaged under Section 48 of the Act was not possible. The effect thereof was that in such cases the*

assessee would not be liable to pay capital gains tax on the sale consideration received. The aforesaid decision was in relation to consideration received for transfer of goodwill. The said principle was extended to tenancy rights, by .Delhi High Court in Bawa Shiv Charan Singh vs. CIT, Delhi, [1984] 149 ITR29, observing that the tenancy right had no cost of acquisition and, therefore, capital gains cannot be computed. Faced with the aforesaid decisions, the Legislature inserted Section 55(2) on the statute and amendments were made stipulating that in the specified transactions, including payment received for surrender or relinquishing tenancy rights, where it was not possible to ascertain cost of acquisition, the cost of acquisition would be taken to be NIL for computing the capital gains. However, where it was possible to ascertain the cost of acquisition, such cost would be taken into consideration for computing taxable gains under Sections 48 and 49 of the Act. The said insertion is applicable with effect from assessment year 1994-95. Thus the law of B. C. Srinivasa Setty has been largely overruled by legislature.

Subsequently the Supreme Court while dealing with a case of A.Y. 1987-88 (prior to insertion section 55(2) of me Act) in CIT vs. D.P. Sandu Bros. Chembur (P) Ltd. [2005] 273 ITR 1 (SC) still held that when the tenancy right gets acquired with effect from a particular date it would be possible that it was acquired at a cost and this was a question of fact. Reference was made to the decision of the Supreme Court in A.R. Krishnamurthy & Anr. Vs. CIT [1989] 176 ITR 417 (SC), wherein it has been held that it cannot be said conceptually that there would be no cost of acquisition for grant of lease and cost of acquisition of lease hold rights could be determined. Thus, the Supreme Court in categorical terms has held that the judgment in the case of B.C. Srinivasa Setty's case (supra) would not be applicable to capital gains earned on surrender of tenancy rights. These cases clearly pay down that the intention must be to ascertain the cost of acquisition, been of tenancy rights.

More recently the Full Bench of the High Court of Punjab & Haryana in the case of Commissioner of Income-tax v.Raja Malwinder Singh[2012] 206 Taxman 137 (P& H)(Mag.) held that in relation to section 49 of the Act, when cost of acquisition of capital asset cannot be ascertained but the asset has a market value, capital gain will be attracted by taking cost of acquisition to be fair market value as on date of acquisition. In this case the assessee sold certain plots of land on which tax under the

head 'Capital gains' was sought to be levied. The assessee contested the levy by submitting that cost of acquisition by the previous owner was incapable of being ascertained. The previous owner was an ex-ruler of the Pepsu State and the asset was acquired under the instrument of annexation and, thus, its cost of acquisition could not be ascertained. This plea was rejected and the Assessing Officer proceeded to assess capital gain taking the cost of acquisition equal to the market value as on 1-1-1954/1-1- 1964 depending on the dates specified under section 55(2) as applicable to the year of assessment. On appeal, the Commissioner (Appeals) also rejected the plea of the assessee that the cost of acquisition being incapable of ascertainment, no capital gain was attracted. However, the Tribunal reversed the said view following the judgment of the Supreme Court in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 (S.C.), On revenue's appeal the High Court held that in the instant case, theassdssde had acquired the property by succession from the previous owner. According to the stand of the assessee, the cost of acquisition by the previous owner could not be ascertained. However, he failed to exercise the option of going either by market value on the date of acquisition or by the cost to the previous owner in which case the only option available to the Assessing Officer was to proceed to compute capital gain by taking the cost of the asset to be the fair market value on the specified date, i.e ., 1-1-1954 as per applicable provision for the assessment year 1977-78 and as on 1-1-1964 for the assessment year 1978-79. The Court held that even in a case where the cost of acquisition cannot be ascertained, section 55(3) statutorily prescribes the cost to be equal to the market value on the date of acquisition. This being the position, capital gain is not excluded even on the plea that value of the asset in respect of which capital gain is to be charged was incapable of being ascertained. If the market value can be ascertained, it has to be taken to be equal thereto and if the value cannot be ascertained, it has to be equal to the market value on a specified date at the option of the assessee. It was not the case of the assessee that land had no market value at all on the date of its acquisition. The contention that the value was incapable of being ascertained was to be rejected and the value in such case has to be taken as being equal to market value on a specified date.

In this case the stand of the Revenue that the principle of excluding taxability of capital gains where an asset is not capable of being valued, such as goodwill,

cannot extend to capital assets like land which are capable of being valued. The judgment of the Hon'ble Supreme Court in B.C. Srinivasa Setty [1981] 128 ITR 294 (SC) was not applicable to such a situation. The Full Bench High Court did not follow its earlier Division Bench judgment in the case of CIT v. Amrik Sing [2008] 299 ITR 1 (P&H) and a judgment of the Madhya Pradesh High Court in CIT v. H.H Maharaja Sahib Shri Lokendra Singhji [1986] 162 ITR 93 (MP) which were given on the basis of the principle laid down in B.C. Srinivasa Setty [1981] 128 ITR 294 (SC). The Full Bench also held that even in a case where the cost of acquisition cannot be ascertained, section 55(3) statutorily prescribes the cost to be equal to the market value on the date of acquisition. This being the position, capital gain is not excluded even on the plea that value of the asset in respect of which capital gain is to be charged was incapable of being ascertained.

Subsequently the High Court of Punjab & Haryana in the case of Thakur Dwara Shri Krishanji Maharaj Handiyaya v.Commissioner of Income-tax, Patiala(2014) 366 ITR 381 (P&H)has passed a similar order. In this case the agricultural land of assessee was situated within the municipal limits of Bamala which was acquired by the Improvement Trust, Bamala and a compensation of Rs. 2.77 crores was awarded to the assessee. The assessee contended that since the land was gifted to the assessee by the Maharaja of Patiala, the cost of acquisition of the said land was the same as that was in hands of the Maharaja. Since the Maharaja did not incur any cost, the land was not chargeable to tax under section 45 of the Act. The Assessing Officer rejected the said plea of the assessee by holding that as per the provisions of section 55(3), even in cases where the cost of acquisition of the previous owner could not be ascertained, the same had to be computed by taking into account the fair market value of the assets as on 1-4-1981. Hence, the Assessing Officer adopted the market value of the land as on 1-4-1981 and computed the capital gains in relation to the acquisition of land. On appeal, the Commissioner (Appeals) set aside the order passed by the Assessing Officer and deleted the addition on account of capital gains made by the Assessing Officer. On the revenue's appeal, the Tribunal accepted the appeal by placing reliance on the Full Bench decision of this Court in CIT v. Raja Malwinder Singh [2011] 334 ITR 48(P&H). In this case also the assessee-appellant had submitted that the cost of acquisition in the present case had to be taken as the cost to the previous owner under Section 49 of the Act and the

explanation to Section 49 specifically provides that previous owner is one who has acquired the asset by a mode other than referred to in clauses 1, 2, 3 and 4 of this sub section. It was further argued that the previous owner under the Act is a person who has acquired the asset by payment of money i.e. the cost incurred for acquisition of the asset. In case the previous owner has not incurred any cost neither the provisions of Section 55(2) (b) nor the provisions of Section 55 (3) of the Act would apply. Support was drawn from judgment of the Apex Court in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294(SC). The High Court rejected such a contention and held in favour of Revenue.

Further on 28.8.2014 a similar decision has been passed by the High Court of Delhi in the case of Commissioner of Income-tax v. Gulab Sundri Bapna[2014] 227 Taxman 161 (Delhi)(Mag.).In this case the Assessee had tenancy rights in a land and the Sub-lease was for 17 years and assessee constructed a factory thereon. On land acquisition, assessee claimed that they were entitled to compensation, The Value of sub-lease rights of assessee was ascertained and compensation was assessed and paid. The assessee contended that the enhance compensation is not liable to Capital Gains. The High Court held that the ratio of the Supreme Court decision in CIT v. D.P. Sandu Bros. Chember (P.) Ltd. [2005] 273 ITR 1 (S.C.) has to be applied and the Court has to proceed on the basis that cost of acquisition of leasehold rights could be determined and was capable of being ascertained and this was the position even before section 55(2) was amended by Finance Act, 1994 with effect from 1st April, 1995. Applying the ratio of the decision of the Supreme Court in D.P. Sandu Bros.'s case (supra), it has to be held that the tenancy right had computable cost of acquisition and, therefore, the consideration received on surrender or acquisition was taxable as capital gains even prior to 1st April, 1995. The Court noted that in this case the sub-lease was for 17 years and even construction had been raised by the predecessors of the respondent assessee.In D.P. Sandu's Bros. case (supra), Supreme Court in categorical terms has held that the cost of acquisition could be computed in case of acquisition of tenancy rights. In the present case, sub-lease in question was for a period of 17 years and the respondent assessee also had constructed a super-structure, a factory, which was constructed by the predecessor of the respondent assessee. The Court noted that the assessees were entitled to compensation on acquisition of their land under the

sub-lease and they were paid accordingly too. The Court held that this indicates that the tenancy right had value and, therefore, compensation was paid and once it is held that it was possible to ascertain the cost of acquisition of tenancy rights then it follows that capital gains could be computed and shall be payable.

Applying the above case laws, it is held that the appeal of the assessee in this connection cannot be accepted for several reasons. The Grant of land as a Puttah to certain loyalists was directly connected to payment of consideration and economic benefit to the erstwhile occupiers of India. The Puttah was given to one Gokool Chand Khettry and its transmission to Ram Narayan Kshettry is not explained. Further when his son Shib Narayan Khettry filed a Suit for Partition, an award was passed in his favour in respect of only one plot of land i.e. premises no. 9 Amratolla Street. The manner in which the other heirs or claimants were paid off (in kind or in cash or through portion of estate etc) has not been spelt out. The cost of litigation is not given either. Subsequently Shib Narayan Kshettry constructed a property on the said plot which is an indicator of complete ownership. These incidents indicate that the Puttah had a cost and the same can be estimated on many basis.

Further the Supreme Court in the case of CIT vs. D.P. Sandu Bros. Chembur (P) Ltd. [2005] 273 ITR 1 (SC) has held that tenancy rights also have a cost of acquisition. The amendmentsIn section 55(2) of the Act wherein clause 55(2)(b) of the Act as well as the provisions of section 55(3)of the Act have largely made the issue of capital gains on transfer of land free of the ruling in the case ofB.C. Srinivasa Shetty case (supra).

The decisions of the Full Bench of the High Court of Punjab & Haryana in Commissioner of Income-tax v. Raja Malwinder Singh [2012] 206 Taxman 137 (P& H) (Mag.)is directly on the issue at hand and the facts are the same. The Hon'ble High Court has rejected the argument that the cost in the hands of erstwhile Ruler was Nil and hence the machinery provisions of section 48 of the Act were unworkable. This order has been repeated in the case of Thakur Dwara Shri Krishanji Maharaj Handiyaya v. Commissioner of Income- tax, Patiala [2014) 366 ITR 381 (P&H). The High Court of Delhi also in the case of Commissioner of Income-tax v. Gulab Sundri Bapna[2014] 227 Taxman 161 (Delhi)(Mag.) has attributed value to

> *tenancy rights. The case laws relied upon by the assessee are either not related to land or are cases of succession by Will etc U/S 49(1)(iii a) of the Act. In the present case the assessee is a HUF and the property under dispute has been claimed as a HUF property only and in such a case there is no succession, inheritance or devolution involved as the ownership never changed. Further the decisions cited above in Revenue's favour are more closer to the facts of the case".*

Aggrieved by the order of the ld. CIT(Appeals), the assessee has preferred this appeal before the Tribunal on the following grounds:-

> *"(1)The orders of the lower authorities are arbitrary, unreasoned, void, erroneous and bad in law, to the extent to which they are prejudicial to the interests of the appellant.*
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> *(2) On the facts and in the circumstances of the case, the learned CIT(A) erred in dismissing the claim of the appellant that since the property at 9, Amratola Street, Kolkata-70000 1, did not have any cost of acquisition, no Capital Gains tax was chargeable on the transfer of such property.*
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> *(3) On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the finding of the A.O. that even if there was no cost of the property since the land had been acquired by the forefathers of the members of the appellant HUF without paying any consideration, the value of the property as on 01.04.1981 was to be considered as cost of acquisition for the purpose of computation of Capital Gains on transfer of the property.*
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> *(4) On the facts and in the circumstances of the case, the learned CIT(A) erred in neglecting to take into consideration the fact that although the valuation of the property transferred for Stamp Duty purpose was originally Rs.1,69,99,800/-, later on, however, the said valuation was reduced by the order of the Governor to Rs.61,99,950/- only as against the valuation of Rs.78,01,000/- adopted by the District Valuation Officer".*

4. I have heard the arguments of both the sides and also perused the relevant material available on record. Ground No. 1 raised by the

assessee in this appeal is general, which does not call for any specific adjudication as agreed even by the ld. counsel for the assessee.

5. As regards the issue raised in Grounds No. 2 and 3 challenging the very taxability of the long-term capital gain arising from the transfer of the property in question of the assessee, the ld. counsel for the assessee at the time of hearing before me has raised the same contention as raised before the authorities below that since the said property did not have any cost of acquisition, it was not possible to determine the capital gain arising from the sale thereof and there was no question of levy of any capital gain tax as held by the Hon'ble Supreme Court in the case of Srinivasa Setty (B.C.) (supra). However, as rightly held by the authorities below and further reiterated by the ld. D.R. at the time of hearing, the decision of the Hon'ble Supreme Court in the case of Srinivasa Setty (B.C.) (supra) is applicable when the cost of acquisition of the property is not ascertainable and this position has been clarified by the Hon'ble Supreme Court in its subsequent decision rendered in the case of D.P. Sandu Bros., Chembur (P) Limited (supra) by holding that an asset which is capable of acquisition at a cost would be included within the provisions pertaining to the head "Capital Gains" as opposed to assets in the acquisition of which no cost at all can be concealed. The ratio of the various decisions of the Hon'ble High Courts as well as the Tribunal as referred to and relied upon by the Assessing Officer and by the ld. CIT(Appeals) in their respective orders further supports the case of the Revenue on this issue and respectfully following the same, I find no infirmity in the impugned order of the ld. CIT(Appeals) upholding the order of the Assessing Officer in bringing to tax long-term capital gain arising to the assessee from the sale of its property in question. Grounds No. 2 & 3 of the assessee's appeal are accordingly dismissed.

6. As regards the issue raised in Ground No. 4 relating to the claim of the assessee that the valuation as determined for the purpose of payment of Stamp Duty originally at Rs.1.69 crores was subsequently reduced to

Rs.61,99,950/- by the order of the Governor, it is observed that this claim of the assessee was rejected by the Assessing Officer as well as by the ld. CIT(Appeals) on the ground that there was reduction in Stamp Duty only by the order of the Governor and not the reduction in value of property as adopted originally for the purpose of payment of Stamp Duty. A copy of the relevant order of the Governor is placed by the ld. counsel for the assessee at page no. 36 of the paper book along with the copy of the relevant Gazette at page no. 37. A perusal of the same, however, shows that the relevant details as regards the basis on which Stamp Duty concession was given are not available. It is also not clear as to whether such concession was given by way of reducing the market value of the property for the purpose of Stamp Duty as claimed by the assessee. I, therefore, consider it just and proper to restore this matter to the file of the Assessing Officer for deciding the same afresh after giving proper and sufficient opportunity of being heard to the assessee and after verifying the claim of the assessee from the relevant record. Ground No. 4 is accordingly treated as allowed for statistical purposes.

7. In the result, the appeal of the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the open Court on September 28, 2016.

Sd/-

(P.M. Jagtap)
Accountant Member

Kolkata, the 28th day of September, 2016

Copies to : *(1)* ***Shib Narayan Kehettry-HUF,***
44, Ram Dulal Sarkar Street,
Kolkata-700 006

(2) ***Income Tax Officer,***
Ward-38(4), Kolkata

(3) *Commissioner of Income Tax (Appeals)-11, Kolkata;*

(4) *Commissioner of Income Tax- ,*

(5) The Departmental Representative
(6) Guard File

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.