

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER**

**ITA NO. 1412/MUM/2015 : (A.Y : 2006-07)**

Mr. Merwyn Elies D'mello Vs. ACIT, Circle-2,  
Rosy Villa, 2<sup>nd</sup> floor, Cross Garden Thane (Respondent)  
Road, Bakul Street,  
Bhayander (West), Dist. Thane  
**PAN : AACPD0902A (Appellant)**

**Assessee by : Shri Hitesh Shah  
Revenue by : Shri Santosh Mankoskar**

**Date of Hearing : 27/06/2016  
Date of Pronouncement : 30/06/2016**

**ORDER**

The captioned appeal by the assessee is directed against the order of CIT(A)-II, Thane dated 02.08.2013, pertaining to the Assessment Year 2006-07, which in turn has arisen from the order passed by the Assessing Officer dated 11.05.2009 under section 155 of the Income Tax Act, 1961 (in short 'the Act').

2. The instant appeal has been filed by the assessee assailing the order of CIT(A)-II, Thane for the Assessment Year 2006-07 raising the following effective Ground of appeal :-

"2. *On the facts and circumstances of the case, the Learned Income Tax Officer erred in having referred valuation of the property for valuing the cost of acquisition at the Fair Market Value as on 1<sup>st</sup> April, 1981*

*although the appellant had already furnished approved valuer's report in respect of such valuation done at Rs.16,91,025/- as against the FMV adopted by the A.O. Rs.5,21,913/- based on report of the DVO.*

*The appellant therefore being aggrieved prays that the aforesaid valuation of Fair Market Value as on 01/04/1981 as obtained by the appellant be adopted for the purpose of calculation of capital gains on sale of the property."*

3. Facts of the case :-

3.1 The assessee had filed his return of income on 27.3.2007 for Assessment Year 2006-07 declaring total income at Rs.9,10,550/- which included Short Term Capital Gains of Rs.8,67,084/-. Assessment of the assessee for the impugned year was completed u/s 143(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dated 29.12.2008. Assessee alongwith other co-owners Rosy, Venchure, Mervyn D'mello and Mrs. Judy Thomas D'Souza transferred the development rights in respect of 8400 sq. meters of land at Old Survey No. 446 (Part) New Survey No. 130, Hissa No. 1, Navghar Taluka, Dist. Thane to PNK Construction for an aggregate consideration of Rs.90,34,200/-. The stamp duty value of the property was determined at Rs.3,20,28,000/-. Considering the same to be too high, assessee sought two independent valuation reports and adopted the higher value returned by the valuers and computed the Capital Gains accordingly. As the property was acquired before 1.4.1981, assessee obtained valuation report and took the same to be the cost of acquisition. As the assessee had objected to the adoption of the Fair Market Value (FMV) of the valuation authority, the matter was referred to the Departmental Valuation Officer (DVO) as per Sec. 50C(2) of the Act. However, the same could not be received

within the time limit and the Assessing Officer completed the assessment by adopting the value as on 1.4.1981 as per the valuation report obtained by the assessee. Later on, the order was rectified u/s 155 of the Act after receiving report of the Departmental Valuation Officer. The Valuation Officer vide his report dated 19.2.2009 valued the property as under :

F.M.V. as on 1.4.1981	Rs. 5,21,913/-
F.M.V. as on 9.12.2005 (date of sale)	Rs.1,68,65,645/-

Adopting the above valuation, the assessment was rectified by the Assessing Officer u/s 155 of the Act. Aggrieved by the order, assessee preferred first appeal before the CIT(A). The assessee accepted the sale value determined by DVO. The sole contention raised by the assessee was that the FMV as on 1.4.1981 as taken by the assessee can only be taken into account for the purpose of computation of Capital Gains and it cannot be revised downwards on the basis of DVO's report as per the provisions of Sec. 55A of the Act. The CIT(A) dismissed the contentions raised by the assessee more or less on the reason that the assessee accepted the valuation report of the DVO and Capital Gains were correctly reworked by the Assessing Officer. Aggrieved by the said stand of the CIT(A), assessee is in appeal before the Tribunal and reiterated his stand that the FMV as on 1.4.1981 taken by the assessee on the basis of the approved valuer's report cannot be revised downwards by adopting the value reported by DVO as per Sec. 55A of the Act. The learned representative for the assessee submitted that the Assessing Officer had no jurisdiction to refer the valuation u/s 55A of the Act on the reason that FMV declared by assessee as on 1.4.1981

was more than the FMV estimated by the DVO. The Id. DR, however, relied on the decision of CIT(A).

4. I have heard both the parties. The provisions of Sec. 55A as stood at the relevant time are reproduced below :

*“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 the opinion that the value so claimed is less than its fair market value”*

*(emphasis supplied by us)*

The aforesaid provision clearly supports the assertion of the assessee. I also notice that the assessee is a co-owner of the property and same issue has already been considered in the case of the other co-owners by ITAT, Mumbai vide ITA No. 7870/Mum/2010 in the case of Bony Elies D'mello and also in the case of Rosy Elies D'mello vide ITA No. 7076/Mum/2011. Upon perusal of the above orders we find that the issue pertains to the same property and the same year and in both the cases it was held that reference by Assessing Officer to DVO u/s 55A for valuation of FMV of the property as on 1.4.1981 is not valid for the reasons that FMV declared by the assessee as per Government Registered Valuer's report was more than the FMV as estimated by the DVO. Since determination of the FMV as on 1.4.1981 was based on the report of DVO, the same was invalid and value adopted by assessee as

on 1.4.1981 was directed to be accepted. Also, the following observation in the case of Rosy Elies D'mello are relevant :-

13. *The Hon'ble Gujarat High Court in the case of Hiaben Jayantilal Shah has held on this issue as follows :—*

*"Under clause (a) of section 55A the Assessing Officer is entitled to make the reference to the Valuation Officer in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by the registered valuer, if the Assessing Officer is of the opinion that the value so claimed is less than the fair market value. In any other case, as provided under clause (b) of section 55A, the Assessing Officer has to record an opinion that (i) the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed; or (ii) having regard to the nature of the asset and other relevant circumstances, it is necessary to make such a reference. As can be seen from the communication dated nil from DVO to the petitioner insofar as the fair market value of the property as on 1st April, 1981 is concerned, the petitioner had claimed the same at a sum of Rs. 6,25,000 as per registered valuer's report. Therefore, the Assessing Officer was required to form an opinion that the value so claimed is less than the fair market value. The estimated value proposed by the DVO is shown at Rs. 3,97,000, which is less than the fair market value shown by the assessee as on 1st April, 1981. Therefore, clause (a) of section 55A cannot be made applicable. Clause (b) of section 55A can be invoked only in any other case, namely when the value of the asset claimed by the assessee is not supported by an estimate made by a registered valuer. In the facts of the present case, clause (b) of section 55A also cannot be invoked. Therefore there is no question of having recourse to sub-clause (ii) of clause (b) of section 55A of the Act."*

*14. In view of the aforesaid decisions, we are of the view that reference by the Assessing Officer to the DVO under section 55A for valuation of FMV of the property as on 1-4-1981 is not valid for the reasons that FMV declared by the assessee as per Government registered valuer's report was more than the FMV as estimated by the DVO. Since determination of the FMV as on 1-4-1981 was based on the report of the DVO, the same is held to be invalid. Consequently, estimation of the FMV of the property as on 1-4-1981 as made by the assessee is directed to be accepted. Ground No.1 of the assessee is allowed".*

5. Therefore, it is very clear that as per the provisions of Sec. 55A(a) reference to Valuation officer can be made only in case where the value of the asset as claimed by the assessee based on the estimate of a registered valuer is less than its FMV. In view of the above, the appeal of the assessee is allowed and the FMV as adopted by the assessee as on 1.4.1981 is directed to be taken into account while calculating the capital gains.

6. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 30<sup>th</sup> June, 2016.

Sd/-  
**(G.S. PANNU)**  
**ACCOUNTANT MEMBER**

Mumbai, Date : 30<sup>th</sup> June, 2016

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned

- 4) The CIT concerned
- 5) The D.R, "SMC" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar  
I.T.A.T, Mumbai