



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"G" BENCH, MUMBAI**  
**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI RAJESH KUAMR, ACCOUNTANT MEMBER**

ITA no.5385/Mum./2016  
(Assessment Year : 2009-10)

Income Tax Officer  
Ward-21(1)(2), Mumbai

..... Appellant

v/s

M/s. Bhatia Industrial Company  
1<sup>st</sup> Floor, Todi Estate, Sun Mill  
Compound, Lower Parel  
Mumbai 400 013  
PAN - AAFFB4700K

..... Respondent

C.O. no.16/Mum./2018  
(Arising out of ITA no.5385/Mum./2016)  
(Assessment Year : 2009-10)

M/s. Bhatia Industrial Company  
1<sup>st</sup> Floor, Todi Estate, Sun Mill  
Compound, Lower Parel  
Mumbai 400 013  
PAN - AAFFB4700K

..... Cross Objector  
(Original Respondent)

v/s

Income Tax Officer  
Ward-21(1)(2), Mumbai

..... Respondent  
(Original Appellant)

Revenue by : Shri V. Vidhyadhar  
Assessee by : None

Date of Hearing - 09.04.2018

Date of Order - 25.04.2018

**ORDER****PER SAKTIJIT DEY, J.M.**

Aforesaid appeal by the Revenue and cross objection by the assessee are against the order dated 21<sup>st</sup> June 2016, passed by the learned Commissioner (Appeals)-33, Mumbai, for the assessment year 2009-10.

2. When the appeal was called for hearing, no one was present on behalf of the assessee. Even application seeking adjournment has not been filed. Therefore, we proceed to decide the appeal ex-parte qua the assessee after hearing the learned Departmental Representative.

3. In ground no.1, the Revenue has challenged the deletion of addition of ₹ 11,82,598.

4. Brief facts are, the assessee a partnership firm filed its return of income for the assessment year under consideration on 15<sup>th</sup> December 2009, declaring income of ₹ 1,27,433. During the assessment proceedings, the Assessing Officer noticing that the assessee has debited substantial expenditure under various heads called upon the assessee to explain how the expenditure are allowable either under section 37(1) or under section 57(iii) of the Income-tax Act, 1961 (for short "*the Act*"). Alleging that the assessee did not offer any explanation the Assessing Officer proceeded to examine the validity of

assessee's claim. After examining the nature of expenditure, the Assessing Officer concluded that the interest expenditure of ₹ 9,48,969, is not allowable either under section 37(1) or under section 57(iii) of the Act. Accordingly, he disallowed the expenditure. The assessee challenged the disallowance before the learned Commissioner (Appeals).

5. After considering the submissions of the assessee and material on record, the learned Commissioner (Appeals), though, agreed with the Assessing Officer that interest income of ₹ 9,49,394, is to be assessed under the head income from other sources, however, he held that the expenditure to the tune of ₹ 11,82,173 under the head administrative expenditure interest paid on loan, salary expenditure, and repair and maintenance expenditure are for the purpose of earning of interest income and for the purpose of existence of the assessee firm. Accordingly, he allowed deduction of ₹ 11,82,173 under section 57(iii) of the Act.

6. Learned Departmental Representative relied upon the observations of the Assessing Officer.

7. Heard the learned Departmental Representative and perused the material on record. As could be seen from the facts narrated by the learned Commissioner (Appeals), though, in the impugned assessment

year, no business has been carried out by the assessee, however, the assessee has not totally closed down its business, therefore, had to incur certain regular expenditure by way of staff salary, maintenance of factory premises, interest of loan, etc. He also found that the genuineness of expenditure incurred was never doubted by the Assessing Officer. Thus, the learned Commissioner (Appeals) concluded that, since, the expenditure incurred was for maintaining the existence of the firm as well as earning of the interest income, it is to be allowed. Learned Departmental Representative has failed to controvert the aforesaid finding of the learned Commissioner (Appeals) by bringing material on record. Therefore, we uphold the decision of the learned Commissioner (Appeals) on this issue. Ground no.1 is dismissed.

8. In ground no.2, Revenue has challenged the decision of the first appellate authority in deleting the addition made on account of long term capital gain.

9. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has sold an immovable property at Saki Vihar Road for a consideration of ₹ 2 crore. He further found that as per agreement dated 6<sup>th</sup> June 2008, with Vora Infrastructure Pvt. Ltd., assessee has taken earnest money of ₹ 1.85 crore in the preceding financial year. From the registered sale deed dated 6<sup>th</sup> June

2008, he found that the stamp duty authority has determined the market value of property at ₹ 8,80,59,000 for stamp duty purpose. When the Assessing Officer proposed to invoke the provisions of section 50C of the Act for computing the capital gain, the assessee submitted a report of registered valuer showing the value of property as on 1<sup>st</sup> April 1981, at ₹ 1,51,53,633, assessee also submitted a working of long term capital gain, wherein, adopting the value determined by the registered valuer at ₹ 1,51,53,633, as on 1<sup>st</sup> April 1981, the assessee claimed indexation benefit of ₹ 8,81,94,144. As a result, long term capital gain worked out for a negative figure of ₹ 1,35,144. The Assessing Officer after examining the valuation report of the registered valuer opined that the value of ₹ 1,51,53,633, adopted as on 1<sup>st</sup> April 1981 is unrealistically low. Therefore, he made a reference to the Departmental Valuation Officer (DVO) to determine the market value of the property as on 1<sup>st</sup> April 1981. As observed by the Assessing Officer, since, he did not receive the valuation report of the DVO and the assessment is going to be barred by limitation, he proceeded to compute long term capital gain by adopting actual cost of acquisition of ₹ 35,12,758, as the cost as on 1<sup>st</sup> April 1981 for indexation purpose and accordingly computed long term capital gain at ₹ 6,76,14,749. The assessee challenged the computation of capital gain before the learned Commissioner (Appeals), inter-alia, on the ground that the Assessing Officer has no power to make a reference to

the DVO for determining the market value of cost of acquisition as on 1<sup>st</sup> April 1981 in a case where the value shown by the assessee is more than the market value.

10. Learned Departmental Representative, though, agreed that as per the decision of the Hon'ble Jurisdictional High Court in CIT v/s PUja Prints, 360 ITR 397 (Bom.), the Assessing Officer has no power to make a reference to the DVO to determine the fair market value of cost of acquisition in a case where the value adopted by the assessee is more than the fair market value, however, he wanted to rely upon the observation of the Assessing Officer.

11. We have heard the learned Departmental Representative and perused material on record. As far as the factual aspect relating to the disputed issue are concerned, there is no dispute that the assessee in the relevant previous year has sold the immovable for a declared sale consideration of ₹ 2 crore. After verifying the registered sale deed, the Assessing Officer having found that the stamp duty authority has determined the value of the property at ₹ 8,80,59,000, for stamp duty purpose proposed to determine the long term capital gain under the provisions of section 50C(1). However, at that stage, the assessee submitted a working of long term capital gain by showing the cost of acquisition of the property as on 1<sup>st</sup> April 1981, at ₹ 1,51,53,633, and after indexation benefit the long term capital gain became a negative

figure of ₹ 1,35,144. In support of addition of the cost of acquisition as on 1<sup>st</sup> April 1981 for computing long term capital gain, assessee furnished a report of the registered valuer. The Assessing Officer being of the view that the cost of acquisition as on 1<sup>st</sup> April 1981 shown by the assessee at ₹ 1,51,53,633, is higher than the actual fair market value made a reference to the DVO to determine the fair market value of the property as on 1<sup>st</sup> April 1981. In the absence of any report from the DVO the Assessing Officer proceeded to adopt actual purchase cost of ₹ 35,12,758 to be the fair market value of the property as on 1<sup>st</sup> April 1981 and granted indexation benefit accordingly. Thus, it is a fact on record that the assessee acquired the subject property on 1<sup>st</sup> July 1957 for a cost of ₹ 35 lakh. Section 55(2)(v) provides that the assessee at its own option can adopt either the original cost of acquisition or the fair market value of the asset as on 1<sup>st</sup> April 1981. In the facts of the present case, it is evident, the assessee in exercise of its option under section 55(2)(v) has adopted the fair market value of the property as on 1<sup>st</sup> April 1981 at ₹ 1,51,33,633 for indexation benefit which was supported by a report of registered valuer. It is also evident, the Assessing Officer being of the view that the fair market value of the property as on 1<sup>st</sup> April 1981 adopted by the assessee for indexation purpose is higher than the actual fair market value made a reference to the DVO to determine the fair market value of the property as on 1<sup>st</sup> April 1981. In the aforesaid factual background, the

issue which arises for consideration is, whether in a case where the fair market value adopted by the assessee as on 1<sup>st</sup> April 1981, for the purpose of indexation, if in Assessing Officer's opinion is higher than the actual fair market value, can he make a reference to the DVO under section 55A of the Act to determine the fair market value of cost of acquisition as on 1<sup>st</sup> April 1981? On a reading of the provisions of section 55A as was applicable to the impugned assessment year, it is very much clear that only in a case where the value of the asset adopted by the assessee is less than its fair market value, the Assessing Officer can make a reference to the DVO under section 55A of the Act. Thus, as per existing provisions of section 55A applicable to assessment year 2009-10, the Assessing Officer has power to make a reference to the DVO for ascertaining the fair market value if the value declared by the assessee is less than the fair market value. The facts of the present case are different, since, the value adopted by the assessee is more than the fair market value as per the opinion of the Assessing Officer. That being the case, the Assessing Officer had no power under section 55A to ascertain the fair market value by making a reference to the DVO. Of-course, by amendment effected to section 55A by Finance Act, 2012 w.e.f 1<sup>st</sup> July 2012, the Assessing Officer can make a reference to the DVO under section 55A if in his opinion there is a variance between the value adopted by the assessee and fair market value. However, such amendment brought to section 55A of

the Act will apply prospectively. The Hon'ble Jurisdictional High Court in Puja Prints (supra), while dealing with identical nature of dispute held that as per the provisions of section 55A(a), as it existed prior to its amendment by Finance Act, 2012, the Assessing Officer can make a reference to the DVO only if the value adopted by the assessee is less than the fair market value. In the said decision, the Court has also observed that the amendment effected to section 55A(a) by Finance Act, 2012, will apply prospectively. Thus, in view of the aforesaid legal position, the Assessing Officer was not authorized under the Act to make a reference to the DVO for ascertaining the fair market value of the property as on 1<sup>st</sup> April 1981. That being the case, the only alternative left with the Assessing Officer is to grant the benefit of indexation on account of cost of acquisition as per section 55(2). In the present case, the assessee in exercise of option granted under section 55(2) having adopted the fair market value as on 1<sup>st</sup> April 1981, the same has to be accepted in the absence of any other value available with the Assessing Officer. To a pertinent question from the Bench the learned Departmental Representative fairly submitted that in case the fair market value of the property as on 1<sup>st</sup> April 1981 as declared by the assessee is adopted for indexation purpose, resultant long term capital gain will be a negative figure as per the working submitted by the assessee. In view of the aforesaid, we do not find any infirmity in the order of the learned Commissioner (Appeals) as it

is in conformity with the ratio laid down by the Hon'ble Jurisdictional High Court in PUja Prints (supra). Thus, we uphold the decision of the learned Commissioner (Appeals) on this issue by dismissing the ground raised by the Revenue.

12. In the result, Revenue's appeal is dismissed.

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13. In view of our decision in Revenue's appeal being ITA no.5385/Mum./2016, in the earlier part of the order, the grounds raised by the assessee in the cross objection are of mere academic importance, hence, have become infructuous. Accordingly, grounds raised are dismissed.

14. In the result, assessee's cross objection is dismissed.

15. To sum up, Revenue's appeal and assessee's cross objection are dismissed.

Order pronounced in the open Court on

**RAJESH KUMAR  
ACCOUNTANT MEMBER**

**SAKTIJIT DEY  
JUDICIAL MEMBER**

**MUMBAI, DATED:**

*Copy of the order forwarded to:*

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

*Pradeep J. Chowdhury  
Sr. Private Secretary*

By Order

(Asstt. Registrar/Sr.P.S)  
ITAT, Mumbai