

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "G", MUMBAI**

**BEFORE SHRI B.R. BASKARAN (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 6780/MUM/2016  
Assessment Year: 2009-10**

The ACIT-16(1), Room No. 439, AayakarBhavan, M.K. Marg, Mumbai - 400020	<b>Vs.</b>	Mr. Gerson V. Dacunha, 10, Fairlawn, 128, MK Road, Mumbai - 400020  PAN: ACTPC2417J
<b>(Appellant)</b>		<b>(Respondent)</b>

Revenue by : Shri V. Vidhyadhar (Sr. DR)  
Assessee by : Shri Satish Mody(Advocate)

Date of Hearing: 18/07/2018  
Date of Pronouncement: 28/09/2018

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been filed by the revenue against order dated 25.08.2016 passed by the Ld. Commissioner of Income Tax (Appeals) (for short 'the CIT (A)')-4, Mumbai, for the assessment year 2009-10, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee having income from salary, business or profession, capital gains and other sources filed its return of income for the assessment year under consideration declaring the total income of Rs.2,95,17,535/-. The same was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and accordingly AO issue notices u/s 143(2) and 142(1) of the Act. In response thereof the authorized representative of the assessee furnished the details called for and discussed the

case. It was noticed that during the previous year the assessee had sold his share in jointly owned land which he and his co-owners/family members became owner on the basis of a Will dated 02.01.1990. The testator had acquired the said property by virtue of her mother's Will dated 30.08.1947. The assessee after claiming incidental expenses of Rs. 19,74,500/- and reducing indexed cost of acquisition of Rs. 77,42,986/-, offered long term capital gain of Rs. 3,00,32,514/-. However, the AO re-computed the indexed cost holding that the assessee has acquired right, title and interest on 02.01.1990 and determined the same at Rs.45,01,736/-. The AO further enhanced the sale consideration by Rs. 50,00,000/- on the ground that there is no mention of market value adopted by the stamp duty authority. Accordingly, the AO completed the assessment on protective basis and determined the total income at Rs.3,87,33,290/-. In the first appeal, the Ld. CIT(A) deleted the addition made by the AO and directed the AO to accept the long term capital gain worked out by the assessee.

3. Aggrieved by the order of Ld. CIT (Appeals), the revenue has preferred this appeal before the Tribunal on the following effective grounds:-

1. *“Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition made by the AO of Rs. 50,00,000/- under the head Long Term Capital Gain.*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) was justified in allowing incidental expenses of Rs. 19,75,000/- without discussing the matter in his order and giving any factual finding regarding the genuineness of the expenses.*
3. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT (A) has erred in relying on the order of DCIT Vs. Manjula J. Shah 35 SOT 105 which has not*

*been accepted by the revenue and the SLP in this regards is yet to be decided in the apex court for finality.”*

4. The first grievance of the revenue is that the Ld. CIT(A) has wrongly deleted the addition of Rs.50,00,000/- made by the AO. We notice that since the stamp duty authority had not mentioned the market value adopted, the AO issued notice u/s 133(6) of the Act to the Sub-Registrar concerned calling for the information and in the mean time completed the assessment on protective basis by enhancing the sale consideration by Rs. 50,00,000/-. Before us, the Ld departmental representative (DR) relying on the assessment order submitted that since the assessee has failed to furnish the market value adopted, the Ld. CIT(A) ought to have confirmed the addition by the AO.

5. On the other hand, the Ld. counsel for the respondent/assessee relying on the appellate order passed by the Ld. CIT(A) submitted that since the AO had made the addition in question on assumption and presumption in the absence of any evidence to rebut the presumption of truth attached with the sale deed, there is no merit in the contention of the revenue.

6. We have heard perused the evidence on record in the light of the rival submissions of the parties. We notice that AO has made the addition on protective basis, however, no evidence was on record to justify the same. Even during appellate proceedings, the Ld. CIT(A) sought report from AO on this point but no evidence was brought on record to establish that the value of sale was more than what was shown by the assessee. So in absence of any evidence the addition cannot be justified. Hence, in our considered view, the Ld. CIT(A) has rightly deleted the addition made on ad-hoc basis. We accordingly, uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

7. The second ground pertains to the claim of the assessee towards incidental expenses of Rs. 19,75,000/-. The Ld. DR submitted that the Ld.

CIT(A) has wrongly allowed the expenses claimed by the assessee. The DR further contended that the Ld. CIT(A) has allowed the expenses without pointing out any evidence on record or without assigning any reason. On the other hand, the Ld. counsel for the assessee relied on the findings of the Ld. CIT(A).

8. We have gone through the orders passed by the authorities below. We notice that the AO rejected assessee the claimed incidental expenses of Rs. 19,75,000/-. However, the Ld. CIT(A) has allowed the same. We further notice that neither the AO has given any reason for rejecting the claim of the assessee nor the Ld. CIT(A) has given any reason for allowing the same. CIT(A) has only directed the AO to take the long term capital gain worked out by the assessee. Under these circumstances we are of the considered view that the matter requires fresh verification by the AO. Hence, we set aside the findings of the Ld. CIT(A) and remit this issue to the file of AO for conducting verification and decide the issue afresh after affording an opportunity of being heard to the assessee.

9. The third issue pertains to the issue relating to cost of indexation. The Ld counsel for the assessee pointed out the issue involved in the present case is covered in favour of the assessee by the decision of the Mumbai Tribunal in the case of *DCIT vs. Manjula J Shah*, 35 SOT 105, upheld by the Hon'ble Bombay High Court, 355 ITR 474. Since, the findings of the Ld. CIT(A) are based on the principles of law the Hon'ble jurisdictional High Court, there is no merit in the appeal of the revenue. On the other hand the Ld. DR submitted that though the issue is covered by the judgment of the Hon'ble High Court, However, the department has challenged the said judgment by filing SLP before the Hon'ble Supreme Court.

10. As pointed out by the Ld. counsel for the assessee, the Hon'ble jurisdictional High Court has upheld the decision of the coordinate Bench of the Tribunal rendered in the case of *DCIT vs. Manjula J Shah*(supra). In the said case it has been held that indexation of an asset should be calculated on

the basis of the cost of acquisition by the previous owner and the said cost of acquisition of the previous owner has to be calculated on the basis of indexed cost of acquisition as provided in explanation to section 48 of the Act. Since the Ld. CIT(A) has decided this issue in accordance with the principles of law laid down by the Hon'ble jurisdictional High Court and other High Courts and since the Hon'ble Supreme Court has not stayed the operation of the judgment of the jurisdictional High Court rendered in the case of *DCIT vs. Manjula J Shah*(supra) we have no reason to interfere with the findings of the Ld. CIT(A). We accordingly, upheld the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2009-2010 is partly allowed for statistical purposes.

Order pronounced in the open court on 28<sup>th</sup>September, 2018.

Sd/-  
(B.R. BASKARAN)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/09/2018

Alindra, PS

Sd/-  
(RAM LAL NEGI)

JUDICIAL MEMBER

**आदेशप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापितप्रति //True Copy//

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai**