

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ  
**IN THE INCOME TAX APPELLATE TRIBUNAL,  
“SMC” BENCH, AHMEDABAD**

**BEFORE SHRI PRAMOD KUMAR VICE PRESIDENT AND  
Ms MADHUMITA ROY JUDICIAL MEMBER**

अपील सं./ITA No. 2111/Ahd/2011  
निर्धारण वर्ष/Asstt. Year: 2008-09

Areez PirozshaKhambatta Prop. of Jafee Mfg. Co. B/H. Ellisbridge Gymkhana Ellisbridge Ahmedabad – 380006  PAN No.- ABMPK 6322L	Vs.	A.C.I.T – Circle – 10 Ahmedabad
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<b>(Applicant)</b>		<b>(Responent)</b>
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Assessee by :	Shri P. F. Jain, A.R
Revenue by :	Shri B. L. Meena, Sr. DR

सुनवाई की तारीख/**Date of Hearing** : 30/11/2018  
घोषणा की तारीख/**Date of Pronouncement**: 25/02/2019

**आदेश/O R D E R**

**PER Ms MADHUMITA ROY, JM:**

The instant appeal preferred by the assessee is against the order dated 27.07.2011 passed by the CIT(A) XVI, Ahmedabad, arising out of the order dated 16.12.2010 passed by the Assistant Commissioner of Income Tax, Circle-10, Ahmedabad for A.Y. 2008-09.

2. The assessee, an individual filed the return of income for A.Y. 08-09 on 29.07.2008 declaring total income at Rs. 1,84,900/-. The said return was processed under section 143(1) of the Act. Under scrutiny a notice under section 143(2) dated 25.09.2009 was issued followed by another notice dated 08.06.2010 along with a

questionnaire issued on the same day. It appears that the assessee has shown salary income, income from house property, loss from business and profession, long term capital loss and income from other sources. The dispute relating to the matter is this that the assessee has claimed long term capital loss of Rs. 86,90,445/- on the sale of lease hold land measuring about 1891.45 square meters. By virtue of a deed of lease dated 19.06.1924 registered with the office of the Sub-Registrar being No. 3185, the father of the assessee acquired the lease hold right of the said property for a period of 51 years on annual rent of Rs. 1601 upon which a building and chawl was constructed by the father of the assessee. After the expiry of the lease agreement the same was extended for a further period of 39 years by executing a renewal lease agreement on 25.01.1958 duly registered by and under Registration No. 706 of 1958. The assessee herein claimed to have sold this premises for a consideration of Rs. 41,0000/-. The valuation report submitted by the assessee determines the market value as on 01.04.1981 at Rs. 23,19,500/-. On examination of details, including relevant documents as furnished during the course of assessment proceeding the cost of acquisition and the indexation cost for working out capital gain have been questioned by the assessing officer and the assessee was given an opportunity to substantiate its claims for deduction of index cost from the sales consideration by issuing by show cause dated 01.12.2010 with the following contents.

*“On perusal of the computation of statement of total income furnished with the return of income, it is seen that you have claimed long term capital loss of Rs. 86,80,445/- on Asarwa premises. N perusal of valuation report dated 19/04/2007 it is seen that valuation is made for leasehold land and not for leasehold rights held by you. Further, it is mentioned that the lease period of 39 years had already expired on 31/12/1996 and after expiry of lease period renewal of lease has not been taken place and lease period is also not extended.”*

3. In reply to the show cause dated 01.12.2010 the assessee submitted the following on 14.12.2010.

*"On perusal of the computation of statement of total income furnished with the return of income, it is seen that you have claimed long term capital loss of Rs, 86,80,445/-on Asanva premises. N perusal of valuation report dated 19/04/2007 it is seen that valuation is made for leasehold land and not for leasehold rights held by you. Further, it is mentioned that the lease period of 39 years had already expired on 31/12/1996 and after expiry of lease period renewal of lease has not been taken place and lease period is also not extended."*

4. Upon perusal of the submission made by the assessee and the valuation report as well, the Learned Assessing Officer came to a finding that the assessee is not enjoying a long term lease hold right of 99 years but only for 39 years that too has already expired. According to the Ld. AO the assessee has not paid any premium and therefore the cost of acquisition is to be taken at NIL. The capital assets representing lease hold rights has been acquired by the assessee without payment of own money and therefore the cost of acquisition of lease hold right is NIL. Regarding the valuation report the Ld. AO further opined that the same speaks about valuation of lease hold land as on 01.04.1981 and not the valuation of lease hold right. The Assessing Officer observed that since there was no renewal or extension of lease, the lease hold rights of the assessee came to an end on 31.12.1996 upon the expiry of the extended period of 39 years. It was further contended by the Learned Assessing Officer that the property if any cost can be allocated to the assessee it could only to with respect to the cost of super structure owned and possessed by the assessee valuation whereof has been assessed at Rs. 1,58,998 and the index value was calculated at Rs. 8,76,078/-. With such observation the total long term capital gain was worked out at Rs. 40,23,822/-.

5. The long term capital gain of the assessee has been assessed at Rs. 40,23,822/- as against loss of Rs. 78,80,545/- as shown by the assessee in his return of income. In appeal the said addition was confirmed. Hence, the instant appeal.

6. At the time of hearing of the appeal the Ld. counsel appearing for the assessee submitted before us that the assessee before transferring the right, title and interest in respect of the land in question paid lease rent continuously since the lease has not been terminated by the lessor. It is the case of the assessee that by executing possession agreement (Kabja Karar) on 5<sup>th</sup> May, 2007 the assessee transferred his rights on the land as well as the constructed properties thereon for a consideration of Rs. 41,00,000/-. It was further submitted by the Ld. representative of the assessee that since the property was very old, for the purpose capital gain, valuation report was obtained and the market value as on 1<sup>st</sup> April, 1981 on the land in possession as well as the super structure thereon was estimated at Rs. 23,19,500/- on which indexation cost of Rs. 1,27,80,445/- was claimed. The long term capital asset loss becomes Rs. 86,84,445/- if the sale consideration of Rs. 41,00,000/- is deducted from the said total amount of Rs. 1,27,80,445/-. Since the assessee was in possession of the property the assessee remained the lessee as also argued by the Ld. AR. Further that the learned AO did not consider the loss on sale of the property as incurred by the assessee. According to the Ld. AR the Ld. AO erred in law and in fact in relying upon the provision of Sec 52(2)(a) of the Income Tax Act by adopting the value of lease hold right as NIL. The learned AO further erred in law in not allowing the cost of indexation of Rs. 1,27,80,445/- of lease hold land as on 1<sup>st</sup> April, 1981 as valued by the Government approved valuer and further that Ld.

AO also failed to allow the value of super structure owned by the tenants of Rs. 8,15,517/- as on 1<sup>st</sup> April, 1981 as also submitted by the learned AR. In fact, the Ld. AR argued that the long term capital loss of Rs. 78,80,545/- ought to have been accepted by the authorities below on basis of the working made by the valuer. Taking into consideration of the provision Sec. 48 of the Act fair market value as on 01.04.1981 as determined by the valuer ought to have been considered by the Ld. AO. He further relied upon the judgment passed by the Coordinate Bench in ITA No. 3063/Ahd/2010 (Natraj vs. DCIT).

7. On the other hand the learned representatives of the department submitted before us that since the assessee failed to extend the lease agreement by the lessor upon expiry of the same after 39years in the year 1998 the assessee has lost the lease hold right. He therefore, relied upon the order passed by the authorities below.

8. We have heard the respective parties and perused the relevant materials on records. As it appears from the records that the assessee is enjoying the lease hold right by virtue of a lease deed initially executed on 19.06.1924 registered with the office of the Sub-Registrar by and under registration No. 3185 on annual rent of Rs. 1601/- upon which the father of the assessee constructed the buildings and chawals as mentioned in the subsequent lease deed executed on 25.01.1958 whereby and whereunder the lease was extended for a further period of 39 years; the annual rent has become fixed at Rs. 1800/-. On 05.05.2007 the assessee transferred all his legal rights on the property to a third party for a consideration of Rs. 41,00,000/-. The

claim of the assessee towards capital loss of Rs. 86,80,445/- in his return of income has been disallowed and hence the case before us.

9. The moot point involved in this matter to be considered by us firstly as to whether the assessee was having any lease hold right on the property in question at the time of transferring his right, title and interest of the property by way of sale agreement to the third party on 05.05.2007. If the question is affirmative meaning thereby that the assessee was in possession of the lease hold right over the property in question then whether the authorities below has followed the prevailing rule in determining the capital gain of the assessee claimed in the return.

10. It appears from the records at page 90 of the paper book that clause 4 of the lease deed stipulates that upon completion of the period of lease the lessor will be entitled to take over possession of the land and the lessee would remove all the constructions made by him at his own cost. In the event the lessor wishes to purchase the construction made by lessee at the market value then for agreed sale price sale deed would be executed and each of the parties would bare 50 per cent expenses thereon. Otherwise the lessee would hand over possession of vacant land to the lessor by execution of cancellation deed of lease on their own expenses. Clause 11 of the said lease deed further stipulates that during the tenure of lease period the lessee, that is the assessee herein would be entitled to make any construction and to use the open land and to sublet the property to third party without being objected/protected by the lessor. Further that the municipal taxes and the land revenue was agreed to be paid by the assessee in respect of the land in question during the lease period. It is not in dispute that even after the expiry of the

lease deed extended on 1958 for a period of 39 years the assessee was in possession of the property. The rent receipts issued by the lessor including the receipt dated 04.09.2001 which is after the expiry of the lease period, is also being part of the records before us. We have also been informed by the Ld. AR at the time of hearing of the instant appeal that no suit of eviction against the lessee pending before any court of law, in fact, no such suit was ever filed by the lessor against the assessee. If that be so, then the lease becomes a perpetual lease in the absence of any objection raised by the lessor towards the lease hold right of the assessee or execution of cancellation deed of lease in terms of Clause 4 of the lease deed. The assessee is thus the deemed lessee at the time of sale of the property as on 05.05.2007. The first question has been thus answered in affirmative i.e. in favour of the assessee.

11. In that view of the matter the denial of accepting the valuation of the super structure owned by the tenants under the lessee to the tune of 8,15,516.80/- is not sustainable particularly when right to sublet has been conferred by the original lease deed upon the lessee. The main contention of the Ld. AO while rejecting the claim of the assessee is this that though the assessee claimed to remain in possession of the property in question as lessee, the lessor was the actual owner of the land at the time of sale of the property. The valuation report submitted by the assessee speaks about the valuation of lease hold land as on 01.04.1981 and not the valuation of lease hold right. The assessee while computing capital gain on sale of land deducted index cost of acquisition based on the fair market value as on 01.04.1981. But the authorities below was of the opinion that since no cost of acquisition was

incurred by the assessee in terms of the provision of sec. 55(2)(a)(ii) cost of acquisition was to be taken at NIL. But it is a settled principle of law that as per the scheme of sec 48 the asset hold by the assessee prior to beginning of 01.04.1981 fair market value of “asset” on 01/04/1981 has to be taken as “cost of acquisition” of asset and further that benefit of indexed cost of acquisition has to be allowed to the assessee while determining long term capital gain. Even if the assessee has acquired the land for NIL value prior to 01.04.1981 sec 48 shall be applicable and fair market value of lease hold land as on 01.04.1981 along with indexed cost of acquisition has to be determined in order to compute long term capital gain. It is relevant to mention that the legislature has intentionally not added the word land in the exhaustive list of capital asset mentioned in sec. 55(2)(a) and therefore application of sec. 55(2)(a)(ii) while valuing “cost of acquisition” of land for computing “long term capital gain” of the assessee as done in the case in hand is not sustainable in the eye of law. We repeat that the value of lease hold right in the property including the land of assessee has to be determined in accordance with the provisions of sec. 48 by valuing “fair market value” of land as on 01/04/1981 and indexed cost of acquisition has to be determined in order to assess long term capital gain and to be allowed. In this particular case in hand before us the index cost was also determined on that basis.

Such proposition of law has been affirmed by the judgment passed by the Coordinate Bench in the case of the Natraj vs. DCIT by the Coordinate Bench in ITA NO. 3063/Ahd/2010 has also been carefully considered by us relevant portion is whereof:-

“NATRAJ vs. DEPUTY COMMISSIONER OF INCOME TAX ITA  
No.3063/Ahd/2010

*"Capital gains—Leasehold land—Assessee acquired lease hold rights in a property for 98 years in 1966 and constructed a Cinema Hall at minimum cost of Rs,4 lakhs—Said land was sold in 2006— Assessee in computing capital gain on sale of land deducted indexed cost of acquisition based on the fair market value of land as on 1 April 1981 — AO and CIT(A) held that no cost of acquisition was incurred by assessee as per terms and conditions of registered lease deed, and therefore in accordance with provision of section 55(2)(a)(ii), cost of acquisition was taken at NIL—Held, as per scheme of Section 48, for asset held by assessee prior to beginning of 1st day of April, 1981, fair market value of "asset" on first day of April, 1981 has to be taken as "cost of acquisition" of asset and benefit of indexed cost of acquisition has to be allowed to the assessee while determining long term capital gain—In a case where assessee has acquired land for NIL value prior to 1.4.1981, even then section 48 shall be applicable and fair market value of lease hold land as on 1.4,1981 along with indexed cost of acquisition has to be determined in order to compute "long term capital gain"— Exhaustive list of capital assets are mentioned in Section 55(2)(a) and legislature has intentionally not added word "land", therefore, section 55(2)(a)(ii) would not be applicable while valuing "cost of acquisition" of land for computing "long term capital gain" of assessee— Value of lease-hold rights in land of assessee has to be determined in accordance with provision of section 48 by valuing "fair market value" of land as on 1.4.1981 and index cost of acquisition has to be determined in order to assess long term capital gains—Approved valuer has estimated fair market value of land as on 1.4.81 at Rs. 1,200/- per square yard without making suitable deduction on account of assessee's right in land being only that of "lessee" for 98 years—Since assessee had acquired leasehold rights only for 98 years and assessee not being owner thereof, Fair market value is determined at Rs.800/per square yard—AO is directed to determine "long term capital gain" after taking value of lease hold rights of assessee at Rs. 800/- per square yard as on 01.04.81—Appeal filed by assessee is allowed partly".*

5. *"We have considered rival submissions and have perused the orders of the AO and the CIT(A) and copies of the various documents filed in the compilation before us including the copy of the lease deed dated 15.09.1966 and also copy of the valuation report dated 11.09.2006 for fair market value as on 1.4.1981. We find that the Revenue Authorities in this case have been influenced and have based their decision on the fact that the assessee has not paid any "cash" at the time of execution of lease deed on 15.09.1966 and has only committed to invest in the construction of cinema building at a minimum cost of Rs.4 lakhs. We find that in accordance with the scheme of the Act and in particular the provision of Section 48, for the asset held by the assessee for the year prior to beginning of 1st day of April, 1981, the fair market value of the "asset" in question as on the first day of April, 1981 has to be taken as "cost of acquisition" of the asset and the benefit of indexed cost of acquisition has to be allowed to the assessee while determining the long term capital gain of the assessee. In this case, the assessee has acquired lease hold rights for a long term period of 98 years in the year 1966, which is clearly prior to 01.04.1981, and therefore for the purpose of determining the "long term capital gain", the fair market value of the leasehold rights of the assessee in the land as on 01.04.1981 has to be calculated and the indexed cost of acquisition has*

*to be determined. In this case, plea of the assessee was that it was bound by the terms of lease deed dated 15.09.1996 to spend a sum of Rs.4 lakhs in the construction of Cinema hall, and this amount should be taken as cost of acquisition of the plot of land. This plea of the assessee in our considered opinion, is not acceptable for the reason that building of cinema hall as per terms of the lease deed dated 15.09.1966 had to remain with the ownership of the assessee (lessee) and also for the reason that the cinema building itself was demolished before the date of sale of leasehold rights in the plot of land. However having rejected this plea of the assessee as not acceptable and the value of the land in question as on the date of execution of lease agreement i.e. 15.09.1966 is not taken at Rs.4 lakhs, the fair market value of the land as on 01.04.1981 of the leasehold rights of the assessee in the land still has to be decided and determined. In a case where the assessee has acquired some land for NIL value prior to a year starting from 1.4.1981, even then the provision of section 48 shall be applied and the fair market value of the land in question as on 1.4.1981 along with the indexed cost of acquisition has to be determined in order to arrive at the figure of "long term capital gain". In our considered view, the value for which the assessee has acquired the land in question prior to 1.4.1981 is not relevant for the determination of the "fair market value" of the land as on 1.4.1981. "*

*6. We find that the important issue before us for adjudication is whether the provision of section 55(2)(a)(ii) of the Act relied upon by the Revenue is applicable to the case of the assessee to value the land in question as on 1.4.1981, even though the land was acquired by the assessee for NIL value. We have already held in the foregoing paras of this order that where the assessee has acquired some land for NIL value prior to a year starting from 1.4.1981, even then the provision of section 48 shall be applicable and the fair value of the land in question as on 1.4.1981 along with indexed cost of acquisition has to be determined in order to arrive at the figure of "long term capital gain" and the value for which the assessee has acquired the land in question prior to 1.4.1981 is not relevant for determining the "fair market value" of the land as on 1.4.1981. However, the Revenue has relied on the amended provision of Section 55(2)(a)(ii) and have submitted that in accordance with this amended provision of law, in such a case as that of the assessee, the cost of acquisition shall be taken at NIL. None of the parties could cite any decision of Hon'ble Court or the Tribunal in their favour on this issue. Thus, important law point before us for adjudication is that whether in view of amended provision of Section 55(2) (a)(ii) of the Act, where the assessee has acquired a piece of land at NIL value in a year prior to 1.4.81, the "fair market value" of the land in question as on 1.4.81 for the purpose of determination of "cost of acquisition" as per provision of section 48 and 49 of the Act shall be taken at NIL. For the sake of ready reference we reproduce the provision of Section 55 (2) (a) of the Act as under:*

*For the purposes of sections 48 and 49, "cost of acquisition",—*

*(a) in relation to a capital asset, being goodwill of a business, or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours, —*

- (i) *in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price ; and*
- (ii) *in any other case not being a case falling under sub- clauses (i) to (iv) of sub-section of section 49, shall be taken to be nil;*

*7. A plain reading of this provision of law makes it clear that the for the purpose of sections 48 and 49, the cost of acquisition shall be taken at "NIL", in the case not falling under the provision of Section 55(2)(a)(i) or any other case not being case falling under sub-clause (i) to (iv) of subsection (!) of section 49, and shall apply only in relation to a capital asset, being goodwill of a business, or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours. The case falling under sub-clause (i) to (iv) of Section 49(1) are with regard to the case where the capital asset became the property of the assessee on the distribution of assets on partition of a Hindu undivided family or under a gift or will or by succession, inheritance or devolution, or any distribution of assets on the dissolution of a firm, body of individuals, or other association of persons, where such dissolution had taken place at any time before the 1st day of April, 1987, or on any distribution of assets on the liquidation of a company, or under a transfer to a revocable or an irrevocable trust, or under any such transfer as is referred to in certain clauses of section 47 or in the case of HUF by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969, and in this type of cases, the cost of acquisition of the asset shall be cost for which the previous owner of the property acquired it as increased by the cost in improvement of the assets etc. We find that the provision of section 55(2)(a) shall apply in relation to the capital assets mentioned in Section 55(2)(a) of the Act only. The capital assets as mentioned in Section 55(2)(a) are exhaustive and all inclusive of capital assets, such as goodwill, trade mark brand name, right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours, and being an exhaustive list of capital assets, any other capital asset such as land etc. could not be included for the purpose of valuation of "cost of acquisition" for sections 48 and 49 of the Act. It is well settled that when certain provision of law has clear language and leaves no room for ambiguity, there should be no violence to the provision as enacted by the Legislature and no words should be added or omitted while reading a specific provision of law. We find that the Legislature has intentionally not added word "land" in the provision of Section 55(2)(a) of the Act, and therefore, the provision of section 55(2)(a)(ii) of the Act would not be applicable while valuing the "cost of acquisition" of the land for the purpose of computation of "long term capital gain" of the assessee. Accordingly, we hold that the value of the lease-hold rights in the land in question of the assessee. has to be determined in accordance with the provision of section 48 of the Act by valuing "far market value" of the land as on 1.4.1981 and the index cost of acquisition has to be determined in order to assess long term capital gains in the hands of the assessee."*

In the light of the observation made by us hereinabove and in view of the ratio laid down by the judgment as cited above we do not find any reason for not

allowing the indexed cost claimed on the basis of the valuation report as made by the authorities below. The valuation made by the valuer in terms of Se. 48 of the Act taking into consideration the market value of the property as on 01.04.1981 and the computed loss of long term capital gain on that basis cannot be negated ultimately the resultant computation of capital gain on the basis of such valuation report as worked out by the assessee demands positive consideration by the Revenue.

12. In that view of the matter we do not find any merit in making addition by the authorities below. Thus, the addition is hereby deleted.

13. In the result, assessee's appeal is allowed.

**Order pronounced in the Court on 25/02/2019 at Ahmedabad.**

**Sd/-  
(PRAMOD KUMAR)  
VICE PRESIDENT**

**Sd/-  
(MADHUMITA ROY)  
JUDICIAL MEMBER**

Ahmedabad; Dated 25/02/2019

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad