आयकर अपीलीय अधिकरण "एक-सदस्य मामला" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI

श्री शक्तिजीत दे,न्यायिक सदस्य **एवं**

श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आकरअपील सं./ I.T.A. No.2801/Mum/2018
(**निर्धारण वर्ष** / Assessment Year: 2009-10)

Kaushik D. Mistry Room No.43, Tarachand Building, 2nd Floor, D.N. Singh Road Mumbai-400 010.	**बनाम**/ Vs.	**Income Tax Officer-20 (2)(3)** Mumbai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AJJPM-0652-J**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Nitesh Jain-Ld.AR
Revenue by	:	Shri Chaitanya Anjaria –Ld.DR

सुनवाईकीतारीख/ **Date of Hearing**	:	16/04/2019
घोषणाकीतारीख / **Date of Pronouncement**	:	23/04/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member):-

1. Aforesaid appeal by assessee for Assessment Year [AY] 2009-10 contest the order of Ld. Commissioner of Income-Tax (Appeals)-32, Mumbai [CIT(A)], *Appeal No. CIT(A)-32/ IT-141/ITO-20(2)(3)2015-16* dated 24/01/2018 on following effective grounds of appeal: -

1. On the facts and under circumstances of the case and in law, the Learned Assessing Officer has erred in computing the Indexed cost of Acquisition by taking the F.Y. 2000-01 instead of F.Y. 1980-81 as the base year of indexation

and the reasons for doing so are wrong and contrary to the facts and provisions of the law.

2. On the facts and under circumstances of the case and in law, the Learned Assessing Officer has erred in disallowing exemption u/s. 54 of Rs.3,55,000/- and the reasons for doing so are wrong and contrary to the facts and provisions of the law.

2. The dispute stem from the fact that the assessee, a *resident individual*, sold certain agricultural land situated in Gujarat during impugned AY for sale consideration of Rs.24 Lacs. The aforesaid property was inherited by the assessee from his father and the assessee was one of the four legal heirs of the said property. The property was purchased by the father prior to 01/04/1981. The assessee worked out *Long Term Capital Gains* of Rs.3,32,561/- against his share in the property and claimed deduction u/s 54 for Rs.3,55,000/- in view of the fact that it acquired tenancy right in a certain property. However, applying the provisions of Section 50C, the sale consideration was adopted as Rs.24,28,200/- and assessee's share in the same was worked out to be Rs.8,04,948/-. The point of first dispute is the fact that the assessee claimed indexation of the cost from financial year 1980-81 since the property was acquired by way of inheritance and the assessee's father had acquired the same prior to 01/04/1981. However, the benefit of indexation, in the opinion of Ld. AO, was to be granted from financial year 2000-01, being the first year in which the asset was first held by the assessee. The second point of dispute is that the benefit of deduction u/s 54 was denied since the aforesaid deduction, in the opinion of Ld. AO, was not available to acquire tenancy right in a rented property. The stand of Ld. AO, upon confirmation by first appellate authority, is under appeal before us.

3. We have carefully considered the rival submissions and perused relevant material on record. The basic facts as enumerated by us in *para 2* are not in dispute. We find that so far as the question to determine the year from which indexation benefit would be available to the assessee is concerned, the same is squarely covered by the judgment of Hon'ble Bombay High Court rendered in *CIT Vs. Manjula J.Shah [16 Taxmann.com 42],* wherein Hon'ble Court has concluded the identical issue in the following manner:-

> *"16) It is the contention of the revenue that since the indexed cost of acquisition as per clause (iii) of the Explanation to Section 48 of the Act has to be determined with reference to the Cost Inflation Index for the first year in which the asset was held by the assessee and in the present case, as the assessee held the asset with effect from 1/2/2003, the first year of holding the asset would be FY 2002-03 and accordingly, the cost inflation index for 2002-03 would be applicable in determining the indexed cost of acquisition.*
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> *17) We see no merit in the above contention. As rightly contended by Mr. Rai, learned counsel for the assessee, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the capital asset was 'held by the assessee'. Since the expression 'held by the assessee' is not defined under Section 48 of the Act, that expression has to be understood as defined under Section 2 of the Act. Explanation 1(i)(b) to Section 2(42A) of the Act provides that in determining the period for which an asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner shall be included. As the previous owner held the capital asset from 29/1/1993, as per Explanation 1(i)(b) to Section 2(42A) of the Act, the assessee is deemed to have held the capital asset from 29/1/1993. By reason of the deemed holding of the asset from 29/1/1993, the assessee is deemed to have held the asset as a long term capital asset. If the long term capital gains liability has to be computed under Section 48 of the Act by treating that the assessee held the capital asset from 29/1/1993, then, naturally in determining the indexed cost of acquisition under Section 48 of the Act, the assessee must be treated to have held the asset from 29/1/1993 and accordingly the cost inflation index for 1992-93 would be applicable in determining the indexed cost of acquisition.*
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> *18) If the argument of the revenue that the deeming fiction contained in Explanation 1(i)(b) to Section 2(42A) of the Act cannot be applied in computing the capital gains under Section 48 of the Act is accepted, then, the assessee would not be liable for long term capital gains tax, because, it is only by applying the deemed fiction contained in Explanation 1(i)(b) to Section 2(42A) and Section 49(1)(ii) of the Act, the assessee is deemed to have held the asset from 29/1/1993 and deemed to have incurred the cost of acquisition and accordingly made liable for the long term capital gains tax. Therefore,*

when the legislature by introducing the deeming fiction seeks to tax the gains arising on transfer of a capital asset acquired under a gift or will and the capital gains under Section 48 of the Act has to be computed by applying the deemed fiction, it is not possible to accept the contention of revenue that the fiction contained in Explanation 1(i)(b) to Section 2(42A) of the Act cannot be applied in determining the indexed cost of acquisition under Section 48 of the Act.

19) It is true that the words of a statute are to be understood in their natural and ordinary sense unless the object of the statute suggests to the contrary. Thus, in construing the words 'asset was held by the assessee' in clause (iii) of Explanation to Section 48 of the Act, one has to see the object with which the said words are used in the statute. If one reads Explanation 1(i)(b) to Section 2(42A) together with Section 48 and 49 of the Act, it becomes absolutely clear that the object of the statute is not merely to tax the capital gains arising on transfer of a capital asset acquired by an assessee by incurring the cost of acquisition, but also to tax the gains arising on transfer of a capital asset inter alia acquired by an assessee under a gift or will as provided under Section 49 of the Act where the assessee is deemed to have incurred the cost of acquisition. Therefore, if the object of the legislature is to tax the gains arising on transfer of a capital acquired under a gift or will by including the period for which the said asset was held by the previous owner in determining the period for which the said asset was held by the assessee, then that object cannot be defeated by excluding the period for which the said asset was held by the previous owner while determining the indexed cost of acquisition of that asset to the assessee. In other words, in the absence of any indication in clause (iii) of the Explanation to Section 48 of the Act that the words 'asset was held by the assessee' has to be construed differently, the said words should be construed in accordance with the object of the statute, that is, in the manner set out in Explanation 1(i)(b) to section 2(42A) of the Act.

20. To accept the contention of the revenue that the words used in clause (iii) of the Explanation to Section 48 of the Act has to be read by ignoring the provisions contained in Section 2 of the Act runs counter to the entire scheme of the Act. Section 2 of the Act expressly provides that unless the context otherwise requires, the provisions of the Act have to be construed as provided under Section 2 of the Act. In Section 48 of the Act, the expression 'asset held by the assessee' is not defined and, therefore, in the absence of any intention to the contrary the expression 'asset held by the assessee' in clause (iii) of the Explanation to Section 48 of the Act has to be construed in consonance with the meaning given in Section 2(42A) of the Act. If the meaning given in Section 2(42A) is not adopted in construing the words used in Section 48 of the Act, then the gains arising on transfer of a capital asset acquired under a gift or will be outside the purview of the capital gains tax which is not intended by the legislature. Therefore, the argument of the revenue which runs counter to the legislative intent cannot be accepted.

21) Apart from the above, Section 55(1)(b)(2)(ii) of the Act provides that where the capital asset became the property of the assessee by any of the modes specified under Section 49(1) of the Act, not only the cost of improvement incurred by the assessee but also the cost of improvement incurred by the previous owner shall be deducted from the total consideration received by the assessee while computing the capital gains under Section 48 of the Act. The question of deducting the cost of improvement incurred by

the previous owner in the case of an assessee covered under Section 49(1) of the Act would arise only if the period for which the asset was held by the previous owner is included in determining the period for which the asset was held by the assessee. Therefore, it is reasonable to hold that in the case of an assessee covered under Section 49(1) of the Act, the capital gains liability has to be computed by considering that the assessee held the said asset from the date it was held by the previous owner and the same analogy has also to be applied in determining the indexed cost of acquisition.

It is also noted that the ratio of above decision has become final since *Special leave Petition [SLP No. 19924/2012]* filed by the revenue against the same has recently been dismissed by Hon'ble Apex Court. Therefore, we conclude that the benefit of indexation would be available to the assessee from FY 1981-82 on fair market value as on 01/04/1981. The first ground of appeal stands allowed.

4. So far as the question of deduction u/s 54 is concerned, we find that the assessee has not acquired the ownership rights in the new property but merely acquired tenancy right which could not be equated with ownership rights. The conditions of Section 54 as well as Section 54F is that the assessee must purchase or construct the new property within the specified time. The acquisition of tenancy right, in our opinion, do not tantamount to purchase or construction of a new property, in any manner. Therefore, the assessee would not be eligible to claim the aforesaid deduction either u/s 54 or u/s 54F. Ground No. 2 stand dismissed.

5. Resultantly, the appeal stands partly allowed.

Order pronounced in the open court on 23rd April, 2019.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 23/04/2019
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

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

आदेशानुसार/ BY ORDER,

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