



IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH MUMBAI

BEFORE SHRI C.N. PRASAD, JM

&

SHRI M.BALAGANESH, AM

ITA No.6100/Mum/2017

(Assessment Year :2011-2012)

Madhukar Pandurang Bhoir, Room No.2, Krishnabai Bhoir Chawal, Opp. Amar Krida Maidan, balkum Pada No.2, Thane	Vs.	ITO, Ward-1(2), Thane
PAN/GIR No.APIPB 6629 M		
(Appellant)	..	(Respondent)

AND

ITA No.6124/Mum/2017

(Assessment Year :2011-2012)

ITO, Ward-1(2), Thane	Vs.	Madhukar Pandurang Bhoir, Room No.2, Krishnabai Bhoir Chawal, Opp. Amar Krida Maidan, balkum Pada No.2, Thane
PAN/GIR No.APIPB 6629 M		
(Appellant)	..	(Respondent)

Assessee by	Shri Rajeev Khandelwal, AR
Revenue by	Shri D.G. Pansari, Sr.AR CIT
Date of Hearing	11/04/2019
Date of Pronouncement	29/05/2019

आदेश / ORDER

PER M. BALAGANESH (A.M):

These two appeals in ITA No.6100&6124/Mum/2017 for A.Y.2011-2012 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-3, Mumbai both dated 04.07.2017 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3)of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 28.03.2014 by the Id. Income Tax Officer – 1(2), Thane (hereinafter referred to as Id. AO).

2. The only issue to be decided in this appeal of both the assessee as well as the revenue is as to whether the long term capital gains of Rs 1,09,75,319/- could be brought to tax in the facts and circumstances of the case. Both the assessee as well as the revenue are in appeal before us with regard to determination of quantum of long term capital gains and hence both the appeals are taken up together and disposed off by this common order for the sake of convenience.

3. The assessee is an autorickshaw driver and had filed his return of income for the Asst Year 2011-12 on 30.3.2013 declaring total income of Rs 64,801/-. The assessee was never assessed to income tax. He had filed his return for the Asst Year 2011-12 in view of the fact that he along with other family members (co-owners) had sold lands situated at Village Majiwade, Thane which were held by them since 1956 onwards. The said lands were sold to M/s Shree Sainath Enterprises vide Agreement of Sale dated 26.5.2010 for Rs 5,34,82,000/-. The assessee received a consideration thereon of Rs 90,00,000/- as per the mutual understanding with other family members. The assessee reinvested the money in construction of own house and declared limited long term capital gains and paid taxes thereon and filed the return of income for the Asst Year 2011-12. The Id AO observed that the assessee filed copy of bank statements, copies of sale agreement etc during the course of assessment proceedings. The assessee also filed copy of purchase deed of new property , copy of registered valuer's report as on 1.4.1981 for adopting the cost of land and workings of capital gains before the Id AO. Based on the amount found credited in the bank account of the assessee to the tune of Rs 90,00,000/- out of the total sale consideration of Rs 5,34,82,000/- , the Id AO observed that assessee's share in the subject mentioned land was 16.83% ($9000000/53482000*100$). The Id AO substituted the full value of consideration of ancestral property in terms of

section 50C of the Act by adopting the value determined by stamp valuation authorities. The applicability of provisions of section 50C of the Act was accepted by the assessee. The Id AO accordingly determined the assessee's share of 16.83% on consideration fixed u/s 50C of the Act to Rs 1,36,04,278/-. The Id AO showcaused the assessee as to why the long term capital gains arrived by him at Rs 1,09,75,319/- should not be brought to tax as against long term capital gains offered by the assessee at Rs 65,104/-. This was arrived by the Id AO by adopting the cost of acquisition of land as on 1.4.1981 at Rs 21,97,000/- and after indexation of the same and taking into account assessee's share of 16.83% thereon. The Id AO also stated in the show cause notice that he had claimed exemption u/s 54F of the Act in respect of reinvestment in new house property to the tune of Rs 62,50,000/- , but since no evidence was produced in this regard, the Id AO proposed to deny the claim of exemption u/s 54F of the Act. The Id AO accordingly brought the sum of Rs 1,09,75,319/- as long term capital gains in the assessee on sale of ancestral land, being the assessee's share thereon.

4. Before the Id CITA, the assessee stated that he along with other 10 co-owners had sold an ancestral land measuring 6800 sq.meteres S.No. 29/3 (4880 Sq.mt) and 23/10 (1920 sq.mt) located in Village Majiwada, Thane, on 26.5.2010 for an amount of Rs 5,34,82,000/-. In the bank account of the assessee, an amount of Rs 90 lacs was deposited, which included an amount of Rs 75 lacs received from the purchaser on account of sale of the property. In the return of income, the assessee claimed long term capital gains of Rs 65,104/- and paid tax thereon @ 20% amounting to Rs 13,020/- which was worked out as under:-

Sale Consideration	-	<u>5,34,82,000</u>
Assessee's share @ 16.83%	-	90,00,000
Less Indexed cost of acquisition		

As per valuation report dated 21.3.2013 of DS Enterprises	-	26,84,895

Surplus		63,15,104
Less: Reinvestment in house property		62,50,000

Long Term Capital Gain		65,104

Tax at 20% thereon		13,020

4.1. The Id AO computed the long term capital gains as under:-

Sale consideration u/s 50C	-	<u>8,08,33,500</u>
Assessee's share @ 16.83%	-	1,36,04,278
Less Indexed cost of acquisition 2197000*711/100*16.83%	-	26,28,959

Surplus		1,09,75,319
Less: Reinvestment in house property		0

Long Term Capital Gain		1,09,75,319

4.2. Before the Id CITA, the assessee stated that the Id AO erred in considering the assessee share at 16.83% as against 1/11th (9.09%) share in the total ancestral land. It was pleaded that the Id AO erred in not granting exemption u/s 54F of the Act in respect of reinvestment made by the assessee in new house property. The assessee gave the revised workings of capital gains before the Id CITA as under:-

Sale consideration as per section 50C – assessee share (80833500*9.09%)		73,47,765
Less: Indexed cost of acquisition based on another Registered valuer's report as on 1.4.1981 (6528000 * 711 / 100 * 9.09%)		42,19,040

Long Term Capital Gain		31,28,725

Less: Reinvestment in construction of house u/s 54F (restricted to long term capital gain)	31,28,725 -----
Taxable Capital Gain	NIL -----

4.3. It was pleaded by the assessee before the Id CITA that he is an auto rickshaw driver and had not filed his income tax returns either in the past or in the future. Since a sum of Rs 75 lacs was received from a Builder on sale of ancestral land along with other family members, the assessee had to file income tax returns as otherwise, he would be well within the maximum amount not chargeable to income tax. It was stated that he was totally illiterate and the return was filed by the tax consultant and the workings were based on the valuation report which was also obtained by the then tax consultant and there were certain mistakes in the working. The assessee further submitted before the Id CITA as under:-

- a) He has no objection to the sale consideration taken at Rs 8,08,33,500/- u/s 50C of the Act by taking the assessee's share thereon at 9.09%.
- b) The assessee substituted the cost of acquisition land as on 1.4.1981 by yet another registered valuer's report dated 5.5.2016 who had estimated the market value of land as on 1.4.1981 at a value of Rs 65,28,000/- as against originally considered at Rs 21,97,000/- and thereafter indexation benefit was granted thereon and assessee's share thereon was considered at 9.09%.
- c) The assessee submitted that even though he had made substantial amount towards reinvestment in new house property, the exemption u/s 54F of the Act is restricted to the revised capital gains computed hereinabove. In this regard, the assessee submitted a valuation report dated 4.5.2016 from MS Consultant and Engineers wherein the fair market value of the house was taken at Rs 1,07,00,000/- .

4.4. As these were additional evidences, the Id CITA forwarded the same to the Id AO seeking for a remand report. The Id CITA also observed that the assessee had made several cash withdrawals to the tune of Rs 20 lacs from the bank account in which sale proceeds of Rs 75 lacs was deposited and the same were meant for construction of new house. Accordingly, the Id CITA stated that the exemption u/s 54F of the Act is to be restricted only for Rs 20 lacs as against Rs 107 lacs claimed by the assessee based on estimation before the Id CITA. The Id CITA also observed that except the assessee, the other 10 co-owners had not filed their returns and accordingly directed the Id AO to take necessary action at his end. On all these points, a remand report was called for by the Id CITA from the Id AO.

4.5. The Id AO submitted a remand report dated 4.10.2016 wherein he had stated the following :-

a) The full value of consideration was determined by the Id AO as per section 50C of the Act at Rs 8,08,33,500/- which cannot be disputed by the assessee. Though there are 11 co-owners mentioned in the sale deed, the share of each co-owner was not defined thereon. Hence the claim of the assessee that his share is only 9.09% cannot be accepted. Instead his share would be adopted at 16.83% as specified in the return of income by the assessee.

b) With regard to cost of acquisition of land as on 1.4.1981 is concerned, the Id AO stated that Shri Sameer S Shinde, Govt. Approved Valuer had submitted a valuation report dated 5.5.2016 determining the market value of land as on 1.4.1981 . The Id AO issued a letter u/s 133(6) of the Act to the Joint Sub-Registrar, Thane-1 for providing the fair market value of above mentioned property as on 1.4.1981 as per stamp duty valuation. The same was provided by the Sub-Registrar at Rs 1,23,000/-.

c) With regard to the claim of exemption u/s 54F of the Act, the Id AO stated that assessee had incurred expenditure amounting to Rs 20 lacs only towards reinvestment in new house property. In this regard , the assessee also submitted the copy of letter of local corporator dated 19.5.2016 wherein the local corporator had confirmed that the assessee had incurred expenditure only to the extent of Rs 20 lacs. However, the assessee had not submitted any bills or vouchers supporting his claim of Rs 20 lacs as expenditure incurred for construction of house.

4.6. With regard to the correct share of co-ownership, the assessee explained before the Id CITA as under:-

As per Para B of the Sale deed, the details of the persons who inherited the property are given. The land was originally owned by Ramachandra Bhoir but Shri Dau Tukaram was tilling the land and was therefore owner as per 'Kaida-Kanoon' of Maharashtra Tenancy Act. The land was registered in the name of Dau Tukaram on 18.01.1956. Dau Tukaram died in 1959. His legal heirs, Jana Tukaram, Kamal Jana Bhoir and Pandurang Bhoir had already died in 1933, 1941 and 1967. The other legal heirs were Krishnabai Pandurang Bhoir (Wife of Pandurang) , Motiram Pandurang Bhoir (Son) and Kashiram Pandurang Bhoir , had also died. The remaining alive legal heirs are Raghunath Pandurang Bhoir, Dharmo Bhoir, Lakshmi Nana , Gopinath Pandurang Bhoir, Madhukar Pandurang Bhoir, Parvati Kashinath Bhoir, Kalpana Janardhan Bhoir, Archana Ravindra Madvi , Amol Kashinath Bhoir and Ajay Kashinath Bhoir. An amount of Rs 2.67 crores was paid to the legal heirs at the time of registration of agreement, Rs 2.13 crores at the time when the formalities of 32G i.e Maharashtra Tenancy Act were completed and Rs 43.58 lacs at the time of possession of property and handing over documents. In Clause 2 of the agreement, it is mentioned that the co-owners decided to

distribute the payment received by them amongst themselves in amicable way. It is also mentioned that if there any dispute occurs about the sharing of sale consideration, the legal heirs will do it among themselves and the purchaser will not be responsible for the same. The family would also assist the purchaser in the Demarcation of the boundaries of the land (Clause 3). The title clearance will be the responsibility of the seller (Clause 4). In case of any encroachment, the purchaser will be responsible for the NOC (Clause 6).

From the agreement, it can be made out that there were not only large number of legal heirs, and there were some encroachments also on the land. The purchaser being the Lodha Group had determined the share of the sellers based on these facts. In fact, as the purchaser is a known builder and developer in the area and has big political clout had ensured that the encroachers are removed by giving proper compensation to them. Due to this reason, though the market price of the property was high but the purchaser were given only Rs 5.34 Cr. As the negotiation and removal of encroachment was done by the developer, therefore the assessee does not have any detail about the payments made to such encroachers. In this background, as the market value of the property is Rs 8.08 Cr, therefore assessee did not object to taking sale consideration as per 50C. The assessee got Rs 75 lacs by cheque from the builder.

As there were many families involved in the deal and each family has many legal heirs, as a part of settlement among family members, received Rs 15 lacs from various persons and redistributed the same amongst different family members by cheque and by cash.

It was in this background, it was requested before the AO during remand proceedings that though there are more than 11 legal heirs, if the market value is taken at 50C, the share of the assessee may be taken at 1/11th as per the agreement.

4.7. With regard to the valuation of the property as on 1.4.1981, the assessee explained that vide letter dated 12.5.2016, a copy of valuation report as on 1.4.1981 at Rs 65,28,000/- was submitted. In the report, the property measurement was mistakenly taken as 68000 sq.mt instead of 6800 sq.mt by the valuer. This was clarified by the valuer in a letter to the AO, wherein he had worked out the value as on 1.4.1981 at Rs 6,52,800/-. The assessee pleaded that he was not aware that during the course of assessment proceedings, the then AR had submitted a valuation report in which the property was valued at Rs 21,97,000/-.

4.8. With regard to claim of exemption u/s 54F of the Act in respect of reinvestment in house is concerned, the assessee stated that the claim of Rs 62,50,000/- in the return was made based on the booking done by him in a flat with Vihang Developers. The assessee had paid Rs 6,50,000/- (300000 + 350000) as booking amount with the builder, which was paid by cheque and Rs 99,000/- by cheque for service tax and VAT. Accordingly, the AR took figure of Rs 62,50,000/- for exemption u/s 54F of the Act. However the project has not been completed till date. Since no supporting documents were produced, the same was not allowed during the assessment proceedings. The assessee submitted that he had constructed new house on his own land which was located near the land sold during the year. The valuation of the house was got done from M S Consultant who had valued the house at Rs 1,07,00,000/-, which includes Rs 65,00,000/- as cost of land and Rs 42,00,000/- as construction cost, based on the construction rate of Rs 800 per sq.ft. It was pleaded that he

had not maintained any details of bills and vouchers. He had given the contract to Shabari Civil Contractors and who had given the quotation of Rs 3,90,000/- for the RCC and Civil work, without material cost. The payment of Rs 5,00,000/- was paid by cheque to Shabari Civil Contractors for the RCC and Civil work without material cost as the scope of work increased. The assessee had purchased the material in cash and has withdrawn about Rs 25 lacs in cash for the construction of the house. As the house was constructed within 2 years of the sale of property, it is requested that the assessee may be given the exemption u/s 54F of the Act.

4.9. Finally the assessee gave the revised computation of capital gains as under:-

Sale consideration as per section 50C – assessee share (80833500*1/11)	73,48,500
Less: Indexed cost of acquisition based on Registered valuer's report as on 1.4.1981 (2197000 * 711 / 100 * 1/11)	14,20,061

Long Term Capital Gain	59,28,439
Less: Reinvestment in construction of house u/s 54F	20,00,000

Taxable Long Term Capital Gain	39,28,439

5. The Id CITA with regard to various propositions as detailed above held as under-

a) Sale consideration fixed as per section 50C of the Act at Rs 8,08,33,500/-.

b) Share of assessee was accepted at 1/11th by observing as under:-

“ii. Share of the assessee: In the return and assessment proceedings, the share of the assessee was taken at Rs. 90,00,000 (16.83% of 5,34,82,000). In appellate proceedings, it was stated that

there were 11 co-owners and the assessee share was 1/11th. When confronted that in the bank account, there is deposit of 90,00,000 and the 1/11th share comes to only 48,62,000, it was stated that the builder had given only Rs. 75,00,000 to the assessee in lieu of the sale consideration. An amount of Rs. 15,00,000 was received from different members of the family as mentioned in annexure - 2 of letter dated 10.11.2016 and at the same time an amount of Rs. 33,90,000 was given to various family members as shown in annexure - 3 in letter dated 10.11.2016 by account payee cheques and self cheques. There were other cash withdrawals also (Annexure 4 and 5) which were used for construction of the house and for giving to other family members who did not have account. It was pleaded that the assessee being illiterate has not maintained any details in respect of these transactions. It was also stated that the tax consultant of the assessee representing at the time of assessment proceedings, did not go into the details and circumstances associated with the deal resulting into many mistakes in the computation of Capital Gains.

In the light of this discussion, it is obvious that the property had many families who were legal heirs and none of them is income tax assessee. Further in the agreement, the shares of the co-owners are not clearly mentioned. In fact the clause in the agreement that the co-owners would decide and distribute the sale consideration among themselves -in an amicable way is corroborated by the bank account, showing receipts and payments by cheque amongst different family members of Bhoir family. In my considered opinion, as the assessee had received only Rs. 75 lacs from the Purchaser, therefore it would not be proper to take Rs. 90 Lac as sale consideration for considering the share of the assessee. It is only the assessee who has filed the return, therefore he cannot be at a disadvantage in comparison to others who have not filed the Income Tax Return. It is also important to mention here that Sh. Anthony D'souza, CA who is representing the assessee for appellate proceeding has agreed to take the value as per 50C, despite the fact that the Purchaser being known builder of the area had allegedly made payments for vacating various encroachers who had built small shanties on the land. It would be unfair if the share of the assessee is first determined on the basis of amount received by him from the builder and then applying the same ratio to the value taken as per 50C, without considering the circumstances stated above regarding the shares of other family member and the payments probably made for removing encroachments. In my considered view, it would be appropriate to take share of the assessee as 1/11th. **In the result, the first ground of appeal is allowed."**

c) Cost of acquisition as on 1.4.1981 was adopted at Rs 1,23,000/- based on the value provided by the Thane Sub-Registrar. The Id CITA held in this regard as under:-

As there being different valuation report with many mistakes and there being no scientific method followed, the AO called for the valuation from Thane Sub Registrar who vide letter dated 15.06.2016 worked out the value of the property at Rs. 1,23,000. The registrar has given the detail working based on available "ready reckoner rates. In my considered view, the working given by Thane Registrar are most authentic with details of how the value is arrived at. As there were two plots, one being Survey no. 29/3, with area 4880 and the other survey no. 32/10 with area 1920, separate rate have been taken as shown below,

i. S. No. 29/3 area of 4880 sq.mt means 0.48.8 Hectare, in 1981 the market value:-

1989 market value - Rs. 4,50,000/- per hectare 1981 value - 0.488 x 180000 = Rs. 87.840/-Means Rs. 88.000/-

ii. S. No. 32/10 area of 1920 sq.mt. means 0.19.2 Hectare land, in 1981 the market value-
1981 market value - 0.192 x 180000 = Rs. 34.560/- means Rs. 35.000/-.

iii. Total market value in 1981 (i + ii) = 88,000 + 35,000 = Rs. 1.23.000/-

The counsel of the assessee in his letter dated 15.06.2007, submitted that it would not be proper to adopt cost of the (and at Rs. 7,23,000 as on 0104.1981, calculated by the Sub Registrar. Relying on the judgement of ITAT, Kolkatta in the case of Salim Makkad, WTA No 3/Kol/2014 order dated 22.02.2001, he stated that the cost is only for the purpose of Stamp Duty valuation and not the market value. Hon'ble ITAT in the said judgement discussed the ratio laid down by Hon'ble Supreme Court UP Jalnigam Vs Kalra Properties Pvt Ltd,(1996) AIR 1170(Supreme Court). Hon'ble Court had held that "the market value shall be determined only on the basis of the evidence adduced by the claimant and in rebuttal thereof by the State, as to the prevailing market value of that particular land. The basic valuation is only for the purpose of collecting the stamp duty and that, therefore, it cannot form foundation to determine the market value." Relying on the judgement Hon'ble ITAT, Kolkatta held that "the DVO and the AO have not placed on record any comparable sale instances in and around the land in question. In the absence of any evidence to the

contrary to prove that the fair market value of the land was higher than what was disclosed in the return. I have no option but to direct the AO to accept the value of the land as declared in the return. The AO is to adopt the valuation of the land as declared by the appellant in this regard".

*I have examined the submission of the assessee. In the judgement it is held that the stamp duty valuation cannot be the foundation for the market value, as the DVO and AO had not placed on record any sale instances. The case of the assessee has different facts. In fact the AO had accepted the valuation by D S Enterprises submitted during the course of assessment proceedings, wherein the value of the land was taken at Rs. 323 per sq.mt (2197000). By submitting another valuation by Sh Shinde, who valued the land at Rs. 96 per sq.mt, the authenticity of the first valuation became doubtful. Further the quality of the valuation can be judged from the fact that the valuer did not even take the area of the land correctly. Under such circumstances, the AO got the valuation done from Thane Registrar who valued the land based on comparable sale instances. The reliance of the assessee on the judgement is therefore faulty as the assessee could not adduce proper evidences in support of valuation of the land as on 01.04.1981, whereas the value taken by Thane Sub Registrar is based on comparative sale instances. Under such circumstances, for the purpose of computing Capital Gains, the value of the land is taken at 1,23,000 and the Indexed cost and assessee share is determined accordingly. **The ground of appeal taken by the assessee is dismissed.***

d) With regard to investment in new house and consequent claim of exemption u/s 54F of the Act is concerned, the Id CITA adopted the cost of construction of new house at Rs 20 lacs by observing as under:-

"In the light of discussion above, it is seen that there are evidences in the form of Valuer report, photographs, payments to Shabari Civil Contracts and the certificate from the Corporator regarding construction of house. However there is no concrete evidence of cost of construction. Though the valuer has valued the house at Rs. 42 Lacs but he has not given any basis for the said valuation, which is also admitted by the counsel of the assessee. The area shown by the valuer is also not matching with the area shown by the Civil Contractor who did the construction. The quotation of Shabari Civil Contracts show the total area 1841 sq.ft. It is found that the assessee had total cash withdrawals of Rs. 25 Lacs and part of which was stated to be given to the family members and the remaining amount was used for construction of the house. The only payment made by cheque is Rs. 5 Lacs to Shabari Civil Contracts.

Taking into accounts all these factors, the assessee could not have spent more than Rs.20 Lacs on the construction of the house, including payment made to Shabari and payments for purchase of material in cash. The Corporator has also taken the amount spent on construction at Rs. 20 Lacs which is discussed in the remand report by the AO and the counsel of the assessee has also requested for taking the same amount for deduction u/s 54F. In view of these facts, the AO is directed to allow deduction u/s 54F amounting to Rs. 20 Lacs.”

5.1. With the aforesaid observations, the Id CITA recomputed the long term capital gains as under:-

Sale consideration as per section 50C – assessee share (80833500*1/11)	73,48,500
Less: Indexed cost of acquisition as on 1.4.1981 (123000 * 711 / 100 * 1/11)	79,502

Long Term Capital Gain	72,68,998
Less: Reinvestment in construction of house u/s 54F	20,00,000

Taxable Long Term Capital Gain	52,68,998

6. Aggrieved, both the assessee as well as the revenue are in appeal before us. The revenue is in appeal on the following issues :-

- a) Accepting the assessee's share of ownership of land at 9.09% instead of 16.83% by the Id CITA.
- b) Exemption u/s 54F of the Act granted for Rs 20 lacs towards cost of construction of new house.

6.1. The assessee is in appeal on the following issues :-

- a) Adoption of sale consideration as per provisions of section 50C of the Act as assessee had only sold tenancy rights and not the land per se.
- b) Adoption of cost of acquisition as on 1.4.1981 at Rs 1,23,000/- as against Rs 65,28,000/- claimed by the assessee.
- c) Error in computation of claim of exemption u/s 54F of the Act.

6.2. The assessee had also raised an additional ground to adopt the average value of values given by two government approved valuers as cost of acquisition as on 1.4.1981.

7. We have heard the rival submissions and perused the materials available on record. At the outset, we find that the entire trace of the title to the property had been fully explained in page 8 para 2 of Id CITA's order which is nothing but the submission of the assessee before the Id CITA in response to the remand report of the Id AO. In the said reply, the assessee had categorically stated that Late Shri Dau Tukaram was tilling the land and was therefore owner as per 'Kaida-Kanoon' of Maharashtra Tenancy Act and subject mentioned land was registered in the name of Dau Tukaram. Later on his demise, the property got vested with the legal heirs and down the line, the assessee along with other 10 co-owners became the owners of the land. Moreover, the assessee had also stated in the said submission that as per Clause 4 of the agreement, the title clearance will be the responsibility of the seller (i.e assessee and other 10 co-owners). During the course of hearing, the English Translation of the Development Agreement was called for by the bench, which was produced by the Id AR before us. The Id AR's argument that only tenancy rights were transferred and not sale of land by the assessee needs to be examined by the Id AO as admittedly, this translated version was not available before the Id AO in the first round of proceedings. Hence we deem it fit and appropriate, in the interest of justice and fairplay, to afford an opportunity to the Id AO to examine the said documents (i.e the translated version) and decide as to whether the same represent sale of tenancy rights thereon by the assessee. The Id AO thereafter should examine the applicability of provisions of section 50C of the Act for transfer of tenancy rights. We make it clear that the remand herein is only on the limited aspect of examination of transfer of tenancy rights by

the assessee and the connected various arguments advanced by the Id AR before us are left open and no decision is rendered herein by virtue of this order. Accordingly, the Ground No.1 raised by the assessee is allowed for statistical purposes.

7.1. With regard to the share of ownership of assessee, we find that the Id CITA had given detailed reasoning for accepting the revised claim of the assessee that his share in the subject mentioned land is only 1/11th (9.09%) and not 16.83%. It is also brought on record that there is absolutely no evidence to state that 16.83% is the share of the assessee. It is true that nowhere the share of the assessee or his co-owners have been specifically mentioned in the sale deed. In that circumstances, the general law would prevail wherein the share of each co-owner would be treated as equal. Merely because the assessee erroneously applied / offered 16.83% share in the return of income, that need not be accepted as sacrosanct as there is no evidence to prove the same. It cannot be brushed aside that the assessee on receipt of sale consideration had made certain payments to family members and had also received certain monies from family members which are already reproduced in order of Id CITA. We also find that as per Clause 2 of the agreement which is reproduced in order of Id CITA, that sharing of consideration among the various co-owners would be the responsibility of the seller and the purchaser would no way be involved in the same and his title to the property would never get disturbed due to dispute, if any, that may arise out of sharing of consideration among the various co-owners. Moreover, we have already seen that there were various discrepancies made by the assessee, his erstwhile tax consultant, registered valuers etc as detailed hereinabove by adopting different figures in the computation of capital gains. Taking into account the totality of the facts and circumstances, the Id CITA had rightly adopted the share of assessee at 1/11th, which in our

considered opinion, is correct and need not be disturbed. Accordingly, the Ground No. 1.1 & 1.2 raised by the revenue is dismissed.

7.2. With regard to cost of acquisition as on 1.4.1981 of the subject mentioned land which was sold is concerned, we find that the Id CITA had given detailed reasoning by pointing out various discrepancies in the valuation report given by two government approved valuers i.e one value at Rs 21,97,000/- and another at Rs 6,52,800/-. Admittedly, the Id AO had accepted the value of Rs 21,97,000/- in the assessment proceedings. While this is so, any tinkering to the said value on a lower side would effectively tantamount to enhancement made by the Id CITA, which could be done only after giving enhancement notice to the assessee in accordance with the provisions of the Act. From the reading of the entire order of Id CITA, it is nowhere mentioned that the Id CITA had proposed to make any enhancement to the income of the assessee on a particular aspect of the issue. Hence the action of the Id CITA in adopting the value as on 1.4.1981 based on the value given by Thane Sub-Registrar at Rs 1,23,000/- cannot be adopted in the instant case. Since the value of Rs 21,97,000/- has been accepted by the Id AO in the assessment proceedings, we direct the Id AO to adopt the same as cost of acquisition as on 1.4.1981 which had to be duly indexed and assessee's share at 1/11th should be considered and given deduction. In view of this finding, the admission of additional ground raised by the assessee is not required and is accordingly dismissed. We also make it clear that the decision herein need to be applied based on final outcome of whether it is sale of tenancy rights or sale of land by the assessee. Accordingly, the Ground No. 2 of assessee is partly allowed for statistical purposes.

7.3. With regard to claim of exemption u/s 54F of the Act towards construction of new house within the prescribed period by the assessee is concerned, the Id CITA had granted exemption to the assessee to the

tune of Rs 20 lacs based on cash withdrawals made from the bank by the assessee for purchase of materials and also based on the report of corporator who had stated that atleast Rs 20 lacs would have been spent by the assessee towards construction . Based on this, the Id CITA had allowed exemption u/s 54F of the Act to the tune of Rs 20 lacs, which in our considered opinion, does not call for any interference. Accordingly, the Ground No. 3 raised by the assessee is allowed and Ground No. 2 raised by the revenue is dismissed.

7.4. Thus we direct the Id AO to recomputed the capital gains based on the aforesaid directions.

7.5. The Ground No. 1,3 & 4 raised by the revenue are general in nature and does not require any specific adjudication.

8. In the result, the appeal of the assessee is partly allowed for statistical purposes and appeal of the revenue is dismissed.

Order pronounced in the open court on 29/05/2019

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Mumbai; Dated 29/05/2019
Prakash Kumar Mishra, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai