आयकर अपीलीय अधिकरण, मुंबई **"ई"** खंडपीठ

Income-tax Appellate Tribunal -"E"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद,न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and C.N. Prasad,Judicial Member

आयकर अपील सं./ITA/6709/Mum/2012,निर्धारण वर्ष /Assessment Years: 2009-10

Income tax Officer-18(2)(1) Room No.110, Piramal Chambers Lalbaug Parel Mumbai-400 012.	**Vs.**	Smt. Smita Vinod Bhagwati Flat No.70, Shivalya,Shivaji Park, Dadar West,Mumbai-400 028. **PAN:AEDPB 2804 E**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent)**

CO/11/Mum/2014 निर्धारण वर्ष /Assessment Years: 2009-10

Smt. Smita Vinod Bhagwati Mumbai.	**Vs.**	Income tax Officer-18(2)(1) Mumbai.

Revenue by: Shri Sanjeev Kashyap-DR

Assessee by: Shri Bhupendra Shah

सुनवाई की तारीख**/Date of Hearing: 27.07.2016**

घोषणा की तारीख **/ Date of Pronouncement: 12.08.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

<u>लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-.</u>

Challenging the order dated 21.8.12 of CIT(A)-29 the Assessing Officer (A.O.) and the assessee have filed appeal/cross objection for the year under considera - tion.Assessee,an individual,is deriving income from salary,capital gain and other sources.She filed her return of income 28.07.2009 declaring income of Rs.9.52 lakhs the AO completed assessment u/s. 143(3)of the Act,on 27.11.12, determining her income at Rs.1.82 crores.

2.Effective Ground of appeal raised by the AO is about determining the Long Term Capital Gain (LTCG).During the assessment proceedings, the AO found that the assessee had shown an office premises for a total consideration of Rs.2.31 crores,that she had declared LTCG of Rs.81.85 lakhs in respect of her share inherited from mother and brother, that she claimed exemption u/s. 54F of the Act for entire capital gain on the basis of investment in land acquired for CIDCO and expenses were construction of house on the said land,that she had shown investment of Rs.1.92 crores.Taxable LTCG was worked out as under :-

Sale consideration Rs.1,89,96,590/-

Less: Selling expenses	Rs. 9,04,370/-
	Rs.1,80,92,220/-
Less: Index cost of acquisition	Rs. 99,06,368/-
	Rs. 81,55,852/-
Exemption u/s. F	Rs. 81,85,852/-
Long Term Capital Gain	Rs. Nil

He further found that the office premises was originally owned by the mother of the assessee,that she had executed a will on 23.8.1985 which was registered on 6.11.1997 before the Bombay High Court and probate was obtained by the beneficiaries,that as per the Will a discretionary trust was to be created consisting of three persons namely Jayesh V. Bhagwati(JVB), Smita V. Bhagwati(SVB) and Paresh V. Bhagwati(PVB),that assessee alongwith her brothers acquired the right in the office premises on their mother's death, that PVB, also passed away in 18.6.2006, that JVB issued a no objection letter to the Co-op. Society and requested it to transfer office premises in the name of the assessee,that after death of PVB, the surviving brother and sister became the beneficiaries, that JVB executed deed of release on 17.01.2008 in favour of the assessee releasing his share in the said premises for a consideration of Rs.83.45 lakhs,that after getting the release deed, she became the sole owner of the premises.Considering these facts, the AO held that there was no legal document made while surrendering the share of JVB acquired from deceased PVB, that only a letter was issued to the Co.op.Soc.,that JVB surrendered his share with - out receiving any monetary benefit, that on 25.01.2008, he sold half share in the premises to the assessee for Rs.33.45 lakhs. He observed that there was no legal document and the share was transferred without registering with any Govern - ment agency,that transfer could not be treated as valid,that JVB remained the legal owner of the estate of PVB,that as per the provisions of Transfer Property Act,immovable property could not be transferred by addressing a simple letter

to the Co.op Soc.,that the Co.-op. Housing Soc. was not an authority to take decision on such type of transfers,that the property Office No.601 was an impartible asset, that the property in question was an undivided unit that each of the beneficiaries was holding 1/3rd share in the office premises, that after death of PVB remaining members became entitled to half portion of the property, that it was surprising that JVB surrendered his ownwership right inherited from his brother without any consideration, the exercise was done with an intention to avoid tax liability in the hands of the assessee.

2.1. The AO also found that assessee had claimed deduction u/s. 54 of the Act, for construction of a property as stated earlier. He held that, as per mandate of the section the assessee had to complete the construction by 01.04.2011,that the gain on transfer of property arose on 02.04.2008, that she had purchased a plot of land from CIDCO and had started construction much after sale of office premises,that the 1st payment for the electricity installation was made on 27.01. 11,that no other payment like electricity bills etc. were made, vide his notice dated 15.09.2011, he directed the assessee to file copy of completion certificate. As per the AO she did not furnish completion certificate or occupation certificate stating that construction was not over.She held that the construction work remained incomplete or could not be completed within the stipulated time. Therefore,exemption claimed by assessee u/s. 54F,amounting to Rs.1.02 crores, was denied and the sum in question was added to her total income.

3.Aggrieved by order of AO, the assessee preferred an appeal before the First Appellate Authority(FAA). Before him,the assessee argued that AO had failed to appreciate that the method of computation of items of wealth as per Schedule -III of the Wealth tax Act were entirely different from the concept of FMV as prescribed by the Act,that the AO had disregarded all the decisions of the Tribunal filed before him in support of adoption of FMV as per Act rather than

adopting the method of valuation of WT,that she had inherited the office premises from her mother,that FMV of the asset was to be taken in terms of section 55(2)(b)(ii)of the Act,that there was no justification for not taking the FMV of the asset as on 01.04.1981.

3.1. After considering the submissions of the assessee and the assessment order,the FAA held that the assessee had claimed FMV of Rs.17.02 lakhs as on 01/04/1981 as per the valuation Report of a registered valuer,that the assessee had calculated indexed cost of acquisition as per the relevant cost inflation index,that the AO had adopted the cost of acquisition based on the Wealth tax value mentioned in the probate application disregarding the fact that valuation of a premises under the Wealth tax Act was entirely different from the FMV as on 01/04/81 to be adopted for the purpose of indexed cost of acquisition under the Act, that the AO was required to adopt the valuation report of the registered valuer submitted by the assessee,that he had wrongly adopted the Wealth tax value.He directed the AO to adopt the FMV of Rs.17.02 lakhs as on 01/04/81 as per the valuation report of the valuer,dated 11/09/2008 instead of the Wealth tax value given in the probate,amounting to Rs.75, 156/-. Finally, he allowed the appeal filed by the assessee.

3.2. With regard to the second issue,the FAA held that the AO had disallowed the exemption u/s.54F of the Act by assuming that the residential house was not constructed by ignoring the fact that the assessee had time period of three years for completing the construction of the house,that the section did not prescribe the completion of the construction of the residential house,that the thrust was on the investment of the consideration received on sale of original asset and the start of construction of a new residential unit, that the assessee had invested the consideration received on sale of original asset in the purchase of the plot of land and had started construction,that she had complied with the provisions of

section 54F of the Act,that that the dominant factor to be seen in the case under consideration was that the entire sum received by the assessee on sale of our old property had been utilised for the purchase of the new property,that the purchase value of the property was more than the long-term capital gain taxable in the hands of the assessee,that it was a crucial factor to decide the issue,that the conduct of the assessee demonstrated that she was in fact proceeding to construct a residential house,that she had spent the entire considera -tion received on sale of property towards the construction of the residential unit, that she had purchased the land utilising the entire consideration, that she had paid various amounts to the contractor for the construction of the house, that the total payment made up to 31/03/2011,amounted to Rs.31.62 lakhs apart from the amount invested in the land. Finally, he directed the AO to allow the claim of the assessee in respect of the benefit of the exemption claim u/s.54F of the Act.

4.During the course of hearing before us, the Departmental Representative (DR) argued that there was no difference between the act and the provisions of the Wealth tax act as far as the FMV was concerned, that AO did not have sufficient material to decide the FMV, that in the variation report sale instances were not given,that the valuation report was not proper, that the AO had rightly considered the Wealth tax value.The Authorised Representative(AR) contended that the AO did not find any fault with the valuation report, that provisions of the Wealth tax Act and Rule 1D of the WT Act could not be applied to determine the FMV. He relied upon the case of Madhu Tyagi.

4.1. With regard to the second ground,the DR relied upon the order of the AO and the assessee supported the order of the FAA.

5.We have heard the rival submissions and perused the material. We find that the basic difference between the opinion of the AO and the assessee is about the basis of FMV of the property in question. The AO had adopted the value as per the will that was based on the Wealth tax return, whereas the assessee had filed the valuation report of a registered valuer.For computing the LTCG provisions of section 55 of the Act have to be considered and not the Rule 1D, as envisage -ed by the Wealth tax Act.We find that in the case of B.Subhadra L/R B Paparaju,the Tribunal(92ITD285)has dealt with the identical issue and has held as under:

> *"51. The next issue to be considered is as to whether the values adopted under the Wealth-tax Act have to be adopted under the Income-tax Act.*
> *52. Rule 3 of Schedule III of the Wealth-tax Act, 1957 reads as follows :*
> *"PART B*
> *IMMOVABLE PROPERTY*
> *Valuation of immovable property*
> *3. Subject to the provisions of rules 4, 5, 6, 7 and 8, for the purposes of sub-section (1) of section 7, the value of any immovable property, being a building or land appurtenant thereto, or part thereof, shall be the amount arrived at by multiplying the net maintainable rent by the figure 12.5 :".*
> *Section 55(2)(b)(i) of the Income-tax Act, 1961, read as follows :*
> *"55(2) For the purposes of sections 48 and 49, "cost of acquisition", —*
> *(b)in relation to any other capital asset, —*
> *(i)where the capital asset became the property of the assessee before the 1st day of April, 1981, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1st day of April, 1981, at the option of the assessee;".*
> *The provisions of the Wealth-tax Act as seen above are not pari materia to the provisions under the Income-tax Act. The rules of valuation under both the enactments are different and are for different purposes. The term "fair market value" is not defined under the Income-tax Act. In Black';s Law Dictionary, the term is defined as follows :*
> *"The amount at which the property would change hands between the willing buyer and the willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts."*
> *There is a difference in the terms "fair market value" and "value". For the purpose of valuation under the Wealth-tax Act, it is mandatory to follow Schedule III. In most of the cases, the values so arrived at by applying Schedule III are totally different from the Fair Market Value. This is particularly true for flats and apartments rented out in large metropolitan cities (e.g., Marine Drive, Mumbai). Thus, we hold that the "value" as per Wealth-tax Act is different from "Fair market value" under the Income-tax Act. The Hon';ble Andhra Pradesh High Court, in the case of Smt. Indira Bai (supra) held that the value shown in the wealth-tax assessment would not constitute estoppel for the purpose of computing capital gains under the Income-tax Act.*

53. Hyderabad Bench ';A'; of ITAT in its order dated 26-12-2002 in I.T.A. No. 19/Hyd./2002 in the case of Smt. Vijaya Lakshmi V. Gadgil (supra) held in paragraph 28 of the order as follows :

"....the value returned for wealth-tax purposes is not, to our mind, conclusive of the matter mainly because that was a valuation made under a different statutory rule, even though the assessee had not indicated as to how exactly the value of Rs. 4 lakhs was arrived at and in terms of which statutory rule. At any rate, if there had been any under statement for wealth-tax purposes, that is a separate matter and it cannot be held as conclusive in the income-tax proceedings, which are separate and distinct."

Similar is the view taken by the Tribunal, Delhi Bench, in the case of Smt. Vasavi Pratap Chand (supra). We respectfully follows this decision as a plain reading of Schedule III of the Wealth-tax Act as well as section 55 of the Income-tax Act shows that they are not the same and the values arrived at under the Wealth-tax Act are as per certain rules framed under the Wealth-tax Act and in most cases they are different from ';fair market value';. Therefore, the adoption by the Assessing Officer of the values arrived at under the Wealth-tax Act for the purpose of computing capital gains under the Income-tax Act is wrong in law. The decision of the Bangalore Bench of the Tribunal in the case of D.N. Prasanna Kumar (supra) is not applicable to the facts of the case as in that case there was no other value than the value declared under the Wealth-tax Act, available and the Registered Valuer';s valuation report was considered defective and not reliable, whereas in this case three instances of sale were cited.

54. On facts, the Assessing Officer has adopted the value declared by the assessees under the Wealth-tax Act. He has rejected the value as claimed by the assessees. He has also rejected the value given by the Sub-Registrar, Triplicane, Chennai. As already stated, on a careful consideration of each of the letters and correspondence obtained from the Sub-Registrar, it is clear that the Sub-Registrar has originally and finally stated that the value is Rs. 3,87,580 per ground. The instances of sale relied upon by the Sub-Registrar for arriving at this value as well as those relied upon by the assessees are the same and these three sale instances are not controverted by the Revenue. There is no other value available with the Assessing Officer to substantiate his claim that the value would be something less than Rs. 3,87,580 due to tenants occupying the property etc. Recourse was not taken to section 55A. Neither the Assessing Officer nor the CIT(A) had embarked upon an exercise to arrive at the fair market value when they stated that the value might be something less for the reasons mentioned by them. So, there appears to be no choice but to go by the instances of sale. The Hon';ble jurisdictional High Court in the case of MRO and LAO v. Sri Sri Sri Jagannadhaswamyvari Temple, Palakonda, [Appeal No. 1654 of 1988, dated 26-3-1992], held that "When the rates in the Basic Value Register have been fixed on area-wise, without any scientific data, the values mentioned in the Basic Value Register cannot be treated as comparable values of market value at the relevant time". In this case, the value given by the Sub-Registrar is supported by registered sale documents. The letter dated 7-3-2000 bearing No. 493 is based on scientific data and thus that case does not come to the rescue of the Revenue. Simply rejecting a claim without a counter exercise does not give the desired result. Reference to Valuation Cell was a good option, which was not done. Thus, the only evidence that can be relied upon by this Bench is the instance of sale filed by the assessee by way of three sale deeds that had been executed at that time, in the adjoining areas, and the view of the Sub-Registrar, Chennai especially when we have held that the values

under the Wealth-tax Act cannot be adopted for the purposes of arriving at the fair market value for the purpose of computing capital gain under the Income-tax Act. Only the aforesaid value can, therefore, be adopted as fair market value as on 1-4-1981. The claim of the assessees was accepted by the Assessing Officer in the original assessment proceedings despite a petition against the acceptance of the same. Thus, we hold that the Assessing Officer has erred in adopting a rate of Rs. 39,063 in the reassessment proceedings and that on the facts and circumstances of the case, fair market value as on 1-4-1981 should be taken at Rs. 3,85,000 per ground."

Similarly in the case of Madhu Tyagi (19 SOT 612) the Tribunal has held that Wealth Tax cannot be imported for determining the FMV for LTCG purposes. In these circumstances we are of the opinion that the order of the FAA does not suffer from any legal or factual infirmity, so confirming his order we decide the First Ground of appeal, against the AO.

5.2. We find that the assessee had invested the entire consideration received on sale of the office premises for purchasing the plot of land and construction of a residential unit.The AO has not contravened both the facts-his only objection was that the unit was not completed within the period of three years of the sale. Here,we would like to refer to the case of Smt. Rajneet Sandhu (133TTJ64).In that matter,the Tribunal has held that there was no merit in the plea of Revenue authority that exemption u/s. 54F of the Act can be denied to an assessee on the ground that construction of the house had not been completed.It was further held that the requirement of section 54/54F was that the assessee should have either purchased a residential house being a new asset within a stipulated period or should have constructed a residential unit within 3 years from the date of transfer.We also refer to the case of Sardarmal Kothari (302ITR286) of the Hon'ble Madras High Court wherein the Court has discussed the fact of the case and has decided the issue as under:

"*The assessees filed their returns of income claiming exemption of capital gains tax under section 54F of the Income-tax Act, 1961. The Assessing Officer rejected the claim on the ground that the construction of the house was not completed. The Commissioner (Appeals) held that the assessees having invested the capital gains in the land had substantially completed the construction and directed the Assessing*

Officer to grant the benefit to the assessees. On appeal preferred by the Department, the Tribunal confirmed the order of the Commissioner (Appeals).

.....admittedly the assessees had purchased the land by investing the capital gains and had constructed residential houses. Circular No. 667 dated October 18, 1993 ([1993] 204 ITR (St.) 103), did not stipulate that the construction would have to be completed in order to have the benefit under section 54F of the Act. In order to get the benefit under section 54F of the Act, the assessee need not complete the construction of the house and occupy it ; it was enough if the assessee established the investment of the entire net con-sideration within the stipulated period."

Following the above,we are of the opinion that there is no need to disturb the order of FAA.Upholding his order, Ground No.2 is dismissed.

CO/11/Mum/2014:

6.The solitary Ground,raised in the CO,is about claim made during appellate proceedings about STCG.Before FAA, it was claimed that the STCG on sale of property ought to be exempted as a transaction between the blood relatives i.e. the assessee and her brother and therefore,it was exempt u/s. 56(2) of the Act, that the AO had erroneously taxed the sum of Rs.33.45 lakhs as STCG, that the decision of AO was against ratio of judgement of Hon'ble Bombay High Court, delivered in the case of Manjula J. Shah.The assessee relied upon 9 cases in her support.

6.1. After considering the submission of the assessee, the FAA held that the claim was not made before the AO,that it was settled law that assessee should raise the contention before the AO for the first time, that she did not file a revised return of income,claiming the above deduction.Finally, he dismissed the ground raised by her.

6.2. Before us,AR contended that it was a family arrangement, the matter was covered by case of Manjula J. Shah (355ITR474) of Hon'ble Bombay High Court. He also argued that FAA should have admitted the claim made by the assessee during the appellate proceedings. DR left the issue to the discretion of the Bench.

6.3. We find that the FAA had disallowed the claim made by the assessee because she had not raised the issue before the AO and now she had fled a revised return.In our opinion after the judgment of Pruthvi Brokers(349 ITR 336)of the Hon'ble Bombay High Court,the appellate authorities can allow claim made before them for the first time,even if a revised return is not filed. Therefore,in the interest of justice we are remitting back the issue to the file of FAA for fresh adjudication,who would decide the issue after affording reason - able opportunity to the assessee.Effective Ground of appeal,raised by the assessee in the CO is decided in her favour,in part.

As a result, appeal filed by AO is dismissed and CO is partly allowed.
फलतः निर्धारिती अधिकारी की अपील नामंजूर की जाती है और निर्धारिती का प्रत्याक्षेप अंशतः मंजूर किया जाता है.
Order pronounced in the open court on 12th August,2016.
आदेश की घोषणा खुले न्यायालय में दिनांक 12 अगस्त ,2016 को की गई।

Sd/-	**Sd/-**
(सी. एन. प्रसाद **/ C.N. Prasad**)	(राजेन्द्र **/ Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 12 .08.2016.
Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "E " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//
आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**