



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"E" BENCH, MUMBAI**  
**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA no.258/Mum./2012  
(Assessment Year : 2008-09)

Income Tax Officer, Ward-20(3)(3)  
521, Piramal Chambers  
Lalbaug, Parel, Mumbai 400 012

..... Appellant

v/s

Smt. Sadhana Bharat Valia  
Vishwam, Plot no.15, JVP Scheme  
Vile Parle (W), Mumbai 400 049  
PAN - AACPV6846P

..... Respondent

Cross Objection no.147/Mum./2012  
(Arising out of ITA no.258/Mum./2012)  
(Assessment Year : 2008-09)

Smt. Sadhana Bharat Valia  
Vishwam, Plot no.15, JVP Scheme  
Vile Parle (W), Mumbai 400 049  
PAN - AACPV6846P

..... Cross Objector  
(Original Respondent)

v/s

Income Tax Officer, Ward-20(3)(3)  
521, Piramal Chambers  
Lalbaug, Parel, Mumbai 400 012

..... Respondent  
(Original Appellant)

Assessee by : None  
Revenue by : Shri Sunil Kumar Agarwal

Date of Hearing - 25.02.2016

Date of Order - 04.03.2016

**ORDER****PER SAKTIJIT DEY, J.M.**

Departmental appeal and the assessee's cross objection are directed against the order dated 25<sup>th</sup> October 2011, passed by the learned Commissioner (Appeals)-31, Mumbai, for the assessment year 2008-09.

When the appeals were called for hearing, none appeared on behalf of the respondent assessee. However, considering the nature of dispute, we deem it appropriate to proceed for deciding the issues ex-parte qua the respondent assessee on merit after hearing the learned Departmental Representative and on the basis of material available on record.

**ITA no.258/Mum./2012 – Department's Appeal**

2. The grounds raised by the Department are as under:–

*I. The learned CIT(A) is not justified in setting aside the issue of cost of asset to the A.O.. which is not permissible as per the provisions of section 251. of I.T. Act.*

*II. The learned CIT(A) has erred in law and in circumstances of the case directing the A.O. to estimate the cost of construction @ 40% of the sales consideration, ignoring the fact that there is no cost of construction attributable to the assessee.*

*III. The appellant prays that the order of the CIT(A) on*

*the above grounds be set aside and that the A.O.be restored.*

*IV. The appellant craves leave to amend or alter any ground or to submit additional new ground which may be necessary.*

3. As could be seen, grounds no.(iii) and (iv) are general, hence, do not require any specific adjudication.

4. As far as ground no.(i) is concerned, briefly stated the facts are, assessee an individual filed her return of income on 17<sup>th</sup> July 2008, declaring total income of ₹ 2,71,354. In the course of assessment proceedings, the Assessing Officer noticed that assessee during the relevant previous year, has sold a firm house and declared long term capital gain. Further, the assessee also declared short term capital gain on sale of shares. As per AIR information available with the Assessing Officer, he found that assessee has made transaction for value of ₹ 2,01,26,516, in immovable property. He, therefore, called upon the assessee to furnish the relevant copies of the agreement. In response to the query raised by the Assessing Officer, assessee submitted that the transactions reflected in AIR information relates to tenancy agreement dated 26<sup>th</sup> September 2007, wherein the assessee jointly with her husband has transferred the right to use of a flat in a proposed building for an

interest free refundable security deposit of ₹ 2 crore out of which on execution of agreement assessee had received an amount of ₹ 50 lakh and deposited the same in the bank account of her husband Shri Bharat P. Bhatia. The Assessing Officer, after verifying the details, found that the assessee owned a bungalow jointly with her husband. Both of them decided to re-develop the bungalow by constructing a building consisting of ground plus seven floors. For the aforesaid purpose assessee along with her husband entered into an agreement with Satish C. Gaduya and Vimla S. Gudoya on 26<sup>th</sup> July 2007 towards leasing out of a flat being no.401, admeasuring 2535 sq.ft. in the 4<sup>th</sup> Floor of a building proposed to be developed. As per the said tenancy agreement, assessee and her husband were supposed to receive interest free refundable security deposit of ₹ 2 crore and an amount of ₹ 200 per month. The said tenancy agreement was also registered, the sub-registrar with Andheri on 28<sup>th</sup> September 2007. He observed, on execution of agreement an amount of ₹ 50 lakh was paid to the assessee. After considering all these facts, the Assessing Officer was of the view that the nature of transaction in reality is transfer of a capital asset which the assessee has termed as tenancy. He, therefore, called upon the assessee to justify her claim. Though, in response to the query raised by the Assessing Officer assessee made detailed submissions justifying her

claim but the Assessing Officer finding no merit in the submissions of the assessee held that the so called tenancy agreement entered into by the assessee is a colourable device for avoiding payment of tax on income derived from the transfer of the property. Observing that the land cost is very low and cost of construction is not much to the assessee, Assessing Officer estimated the cost of the property sold at ₹ 1.20 crore being 60% of the sale value and estimated the profit at ₹ 80 crore being 40% of the sale value out of which he worked out assessee's 50% share at ₹ 40 lakh and brought it to tax. Being aggrieved of such addition made by the Assessing Officer, assessee preferred appeal before the learned Commissioner (Appeals).

5. Learned Commissioner (Appeals), after considering the submissions of the assessee in the context of facts and material on record, did not agree with the Assessing Officer that the income arising from transfer of the property is business income. However, he was of the view that the transaction entered into by the assessee by virtue of the tenancy agreement has resulted in transfer of capital asset, hence, the resultant income has to be assessed under the head "*capital gain*". He, therefore, directed the Assessing Officer to consider the interest free security deposits received by the assessee as sale consideration and compute capital gain after

allowing deduction towards cost of construction, etc. However, learned Commissioner (Appeals) directed the Assessing Officer to consider the cost of construction at 40% of the sale consideration of ₹ 2 crore which worked out to ₹ 80 lakh for computing the capital gain accordingly.

6. We have heard the learned Departmental Representative and perused the material available on record. As could be seen from the ground raised, Department is not aggrieved with the decision of the learned Commissioner (Appeals) in directing the Assessing Officer to assess the consideration received as capital gain instead of business income. Department is only challenging the authority of the learned Commissioner (Appeals) in setting aside the issue of cost of asset to the Assessing Officer. However, on a perusal of the findings of the learned Commissioner (Appeals) at Para-2.3.1, we do not find any basis for the aforesaid allegation by the Revenue. On a perusal of the operative portion of the learned Commissioner (Appeals)'s order, it is observed that learned Commissioner (Appeals) has given a specific and categorical finding that the income derived from transfer of right in the property in question is not business income of the assessee but income under the head "*capital gain*" and has accordingly directed the Assessing Officer to compute capital gain as

per the provisions of law. Therefore, in our view, the ground raised by the Department is misconceived as learned Commissioner (Appeals) has not set aside the matter to the file of the Assessing Officer but has given him a specific direction to treat the income under the head "*capital gain*" instead of "*business income*" and compute capital gain. Accordingly, finding no merit in the ground raised, we dismiss the same.

7. As far as ground no.(ii) is concerned, the Department is aggrieved with the direction of the learned Commissioner (Appeals) to estimate the cost of construction at 40% of the sale consideration for the purpose of computing capital gain.

8. We have heard the learned Departmental Representative and perused the material available on record. We find that learned Commissioner (Appeals) estimated the cost of construction at 40% of the sale consideration without substantiating the reasons for doing so. On what basis, he has estimated the cost of construction at 40% is not forthcoming from his order as he has neither brought any comparable instances of cost of construction nor any other material to justify his conclusion. In the aforesaid facts and circumstances, we direct the Assessing Officer to allow cost of construction with indexation after taking into consideration

submissions of the assessee and other relevant facts. It is open to the Assessing Officer to make necessary enquiry to find out comparable cases for ascertaining cost of construction which could reasonably have been incurred for constructing the building. This ground is allowed for statistical purposes.

9. In the result, assessee's appeal is partly allowed for statistical purposes.

Cross Objection no.147/Mum./2013

10. The aforesaid cross objection has been filed by the assessee merely supporting the order of the learned CIT(A). In view of our finding in the aforesaid departmental appeal, the grounds raised by the assessee have become infructuous, hence, dismissed.

11. In the result, cross objection filed by the assessee is dismissed.

12. To sum up, Department's appeal is partly allowed for statistical purposes and assessee's cross objection is dismissed.

Order pronounced in the open Court on 04.03.2016

**Sd/-  
RAMIT KOCHAR  
ACCOUNTANT MEMBER**

**Sd/-  
SAKTIJIT DEY  
JUDICIAL MEMBER**

**MUMBAI, DATED: 04.03.2016**

*Smt. Sadhana Bharat Valia*

*Copy of the order forwarded to:*

- (1) The Assessee;*
- (2) The Revenue;*
- (3) The CIT(A);*
- (4) The CIT, Mumbai City concerned;*
- (5) The DR, ITAT, Mumbai;*
- (6) Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

(Dy./Asstt. Registrar)  
ITAT, Mumbai