

आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND  
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 4532/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Income Tax Officer – 11(3)-4, Room No. 447, 4 <sup>th</sup> floor, Aayakar Bhavan, M.K. Road, Mumbai 400 020.	<b>बनाम/</b> v.	Shri Vasantlal R. Maniar, Bhandarkar House, 193-A, L Tilak Road, Vazira Naka, Borivali (W), Mumbai- 400 091.
स्थायी लेखा सं./PAN : AABPM6309H		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

आयकर अपील सं./I.T.A. No. 4508/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Shri Vasantlal R. Maniar, 704,Rajvaibhav Tower, Mahaveer Nagar, Dahanukarwadi, Kandivali West, Mumbai-400 067	<b>बनाम/</b> v.	Income Tax Officer – 11(3)-4, Room No. 447, 4 <sup>th</sup> floor, Aayakar Bhavan, M.K. Road, Mumbai 400 020.
स्थायी लेखा सं./PAN : AABPM6309H		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Revenue by	Shri Airiju Jaikumar
Assessee by :	Shri Vipul Joshi

सुनवाई की तारीख /**Date of Hearing** : 11-01-2016

घोषणा की तारीख /**Date of Pronouncement** : 29-01-2016

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member**

These cross appeals by the Revenue and the assessee are directed against the orders of the learned Commissioner of Income Tax(Appeals)- 2, Mumbai (Hereinafter called "the CIT(A)") dated 30-4-2012 pertaining to the

assessment year 2008-09. These appeals are heard together and disposed of by this common order for the sake of convenience and brevity.

2. The assessee has raised the following grounds of appeal in the memo of appeal filed with the Tribunal:-

“1. BREACH OF THE PRINCIPLES OF NATURAL JUSTICE

1.1. *The Commissioner of Income - tax (Appeals) - 2, Mumbai [“Id. CIT (A)“], erred in framing the appellate order without affording reasonable and fair opportunity of being heard to the Appellant.*

1.2 *It is submitted that in the facts and the circumstances of the case, and in law, the appellate order is required to be held as bad in law on account of breach of the principles of natural justice.*

2.1 *The Id. CIT (A) erred in confirming the action of the A.O. in computing capital gain tax liability arising on account of the godown, owned and used by a partnership firm, in the hands of the Appellant.*

2.2 *While doing so, the CIT (A) erred in:*

*(i) Basing his action only on surmises, suspicion and conjecture;*

*(ii) Taking into account irrelevant and extraneous considerations; and*

*(iii) Ignoring relevant material and considerations as submitted by the Appellant.*

2.3 *It is submitted that in the facts and the circumstances of the case, and in law, no such addition in the hands of Appellant was permissible.*

WITHOUT PREJUDICE TO THE ABOVE

3.1 *The Id. CIT CA) erred in confirming the action of the A.O. in substituting the stamp duty valuation as the consideration, in place of the agreed consideration, while computing the tax gain liability.*

3.2 *It is submitted that in the facts and the circumstances of the case, and in law, no such substitution was called for.*

*WITHOUT FURTHER PREJUDICE TO THE ABOVE*

4.1 *The Id. CIT CA) erred in directing the A.O. to make protective assessment in the hands of the partnership firm separately even in case some evidence is found that the firm was the owner of the godown.*

4.2 *It is submitted that in the facts and the circumstances of the case, and in law, no such direction was called for.*

5. *The Appellant craves leave to add, alter, delete or modify all or any the above ground at the time of hearing.”*

3. The Revenue has raised the following grounds of appeal in the memo of appeal filed with the Tribunal:-

*“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing that cost of acquisition of the property be taken as value as on 01-04-1981, duly indexed, without there being any evidence on record to show that the date of acquisition was prior to 01-04-1981.*

*2. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.”*

4. The brief facts of the case are that the assessee is a partner in a firm named M/s Desai Maniar & Kulkarni who is engaged in profession of plumbing engineer and consultants. During the course of assessment proceedings u/s 143(3) of income Tax Act, 1961 (hereinafter called “the Act”) read with Section 143(2) of the Act, it was observed by the learned assessing officer (Hereinafter called “the A.O.”) that during the previous year relevant to the assessment year, the assessee had sold the property situated at godown No. 33, The Model Co-Op. Housing Society Ltd. at 20, Tardeo Road, Sahakar Nivas, Mumbai – 400 034. The value of the property as per the valuation

report of the valuer filed by the assessee is shown at Rs. 16 lacs, however, as per the CASS report, the value of the property is shown at Rs. 44,82,274/-. During the course of assessment proceedings, the assessee contended that there is an agreement of transfer dated 9-7-2007 between Vasantlal Maniar i.e. the assessee and Phalguni Tushar Rathod for Rs. 17,12,875/-. The assessee contended that the property sold is situated at C.S. No. 13/733, Tardeo and not C.S. No. 13/738. The assessee submitted that for stamp duty calculation, the registrar of stamp duty had valued the said property at CS No 13/738 for Rs.44,82,274/-. In order to verify the correctness of the deal of the property, enquiry was made with the Joint Sub Registrar and accordingly the Sub registrar vide letter dated 28-10-2010 has stated that there is no such transaction in their record for C.S. 13/733. On further request, the Sub Registrar issued copy of index II of property at C.S. No. 13/738 and valued the property at Rs. 44,82,274/- and stamp duty was calculated at Rs. 2,24,200/- which was paid on the sale of the property. As per the copy of agreement produced before the A.O. by the assessee shows C.S. No. as 13/738, hence, the A.O. disagree with the submission of the assessee's claim about error in city survey number and accordingly the fair market value of property was taken as Rs. 44,82,274/- as per stamp duty valuation u/s 50C of the Act. The assessee further claimed that the said godown is owned by the firm M/s Desai Maniar & Kulkarni of which the assessee is a partner. However, no documentary evidence was filed to prove that the said property belongs to the firm and even the Balance Sheet of the said firm was not filed before the AO. The A.O. observed that the agreement is entered into by Vasantlal Maniar i.e. the assessee and Phalguni Rathod in individual capacity and not of the firm and the transaction amount has been credited in assessee's bank account. The A.O. held that the transaction is of assessee as an individual and not of the firm, hence, the income from transfer of long term capital asset is escaped in the returned income under the head capital gain, in the return of income filed by the assessee with the Revenue.

The A.O. also held that the assessee has not provided any purchase agreement nor he has filed his personal balance sheet to substantiate the cost of acquisition. Accordingly, the A.O. treated the amount of Rs. 44,82,274/- as long term capital gain and added the same to the total income of the assessee vide assessment orders dated 21.12.2010 passed by the AO u/s 143(3) of the Act.

5. Aggrieved by the assessment orders dated 21.12.2010 passed u/s 143(3) of the Act by the AO, the assessee carried the matter in the first appeal before the CIT(A).

6. Before the CIT(A), the assessee submitted that the godown was owned by the firm M/s Desai Maniar & Kulkarni and the entire purchase consideration was paid by the firm in the year 1973. It was submitted by the assessee that the property was wholly and exclusively used for the business of the firm and formed the block of assets on which depreciation was also claimed by the said firm and allowed by the Revenue. The name of the assessee stood in the records of the society only for the sake of convenience and the assessee held the property for an on behalf of the firm M/s Desai Maniar & Kulkarni. It was submitted that the godown was also been used by the firm right from the beginning and the firm M/s Desai Maniar & Kulkarni has already offered for taxation the short term capital gain earned on sale of the said godown in the assessment year 2008-09 by taking the sale consideration of Rs. 13,61,130/- and after taking deduction of cost of acquisition amounting to Rs. 10 lacs. Thus, the assessee submitted that no addition for long term capital gain is required to be made in the hands of the assessee. Without prejudice to the above, the assessee challenged that if the capital gain is taxable in the hands of the assessee, the A.O. grossly erred in valuing the property at Rs. 44,82,274/- u/s 50-C of the Act and also erred in not deducting the indexed cost of acquisition from the full value of consideration in terms of Section 48

of the Act. The assessee also contended that the A.O. failed to give an opportunity of producing any other evidence of investment in specified assets to claim exemption u/s 54EC of the Act and denied grant of benefit of exemption as per the Act. The CIT(A) after examining the facts and circumstances of the case held that the assessee has not been able to prove satisfactorily that the godown belong to the firm. No purchase deed has been produced to show as to how the assessee had become the owner of the godown and on what date in the year 1973 and how the payment was made for purchase of godown. It was observed that the godown was used by the firm from 1990, no proof has been furnished to justify that the firm was the owner of the godown rather than the partner of the firm i.e. the assessee. The CIT(A) further observed that although a nominal short term capital gain has been offered for taxation by the firm M/s Desai Maniar & Kulkarni but it does not prove that the firm was the real owner of the godown in the absence of any purchase deed. The CIT(A) accordingly held vide orders dated 30-04-2012 that long term capital gain must be assessed in the hands of the assessee on substantive basis because the assessee has signed the sale deed of this godown and deposited the sales consideration received on the sale of his godown in his bank account. It was also held by the CIT(A) that the income can be assessed protectively in the hands of M/s Desai Maniar & Kulkarni and the A.O. will intimate the complete facts of the case to the A.O. of M/s Desai Maniar & Kulkarni separately regarding declaration of short term capital gain in case some evidence is found later on that the firm was the owner of the godown. The CIT(A) held that until then the assessee is liable to pay long term capital gain on the sale of the godown. The CIT(A) directed the A.O. to ascertain the cost of the godown as on 1.4.1981 and allow indexation on the cost of acquisition in accordance with the Act to the assessee and work out the correct long term capital gain in the hands of the assessee by taking sale consideration of Rs. 44,82,274/- in respect of the godown.

7. Aggrieved by this decision of the CIT(A) vide orders dated 30.04.2012, both the assessee as well as the revenue are in appeal before the Tribunal.

8. The ld. Counsel for the assessee submitted that the said godown bearing No. 33 situated at Model Co-Op. Hsg. Soc. Ltd., 20 Tardeo Road, Sahakar Nivas, Mumbai-400 034 is owned by the firm M/s Desai Maniar & Kulkarni which is duly reflected in the books of account of the said firm since 1974 when the godown was acquired. The ld. Counsel for the assessee contended that the partnership firm has paid the amount for acquisition of this godown and the same is duly reflected in the balance sheet of the said firm. The ld. Counsel submitted that affidavits of the assessee and Sh Devidas Y. Kulkarni, partner of Desai, Maniar and Kulkarni both dated 29.10.2014 have also been filed before the Tribunal to state that the said godown is owned by the firm M/s Desai Maniar & Kulkarni. The ld. Counsel of the assessee submitted that the godown was situated at the Model Co-Op. Hsg. Soc. Ltd., 20 Tardeo Road, Sahakar Nivas, Mumbai -400 034 and one of the conditions for allotment of the godown was that it will be allotted to existing member of the society. Since the assessee was the member of the Model Co. Op. Housing Society Ltd., it was decided to apply for the allotment of the godown in the name of the assessee although the payments for the acquisition for the said godown in the year 1973-74 were made by the assessee out of the funds received from the said firm M/s Desai Maniar & Kulkarni and ownership of the said godown rest with the said firm. The ld. Counsel of the assessee submitted additional evidence's by way of balance sheet of the said firm M/s Desai Maniar & Kulkarni along with their assessment orders and also various communications with the government authorities/society whereby it was contended by the ld. Counsel of the assessee that since the acquisition of the said godown by firm M/s Desai Maniar & Kulkarni, the said firm was reflected as the owner of the said godown. The ld. Counsel submitted that the said firm M/s Desai Maniar &

Kulkarni showed the capital gain on the sale of the said godown during the previous year and has paid appropriate taxes to the Revenue.

9. The ld. D.R., on the other hand, relied on the order of the A.O. and contended that the ld. CIT(A) erred in allowing the benefit of cost of acquisition of the said godown although no such evidence was filed in respect of the acquisition of the said godown prior to 1-4-1981. The Ld. DR submitted that all these additional evidences filed by the assessee before the Tribunal has not been verified by the authorities below and should not be accepted.

10. We have considered the rival contention and also perused the material available on record. From the documents and the additional evidences filed by the assessee before the Tribunal, it is contended by the assessee that the said godown is owned by M/s Desai Maniar & Kulkarni and reflected in their Balance Sheet as the said firm is the owner of the said godown. We have observed that the assessee is contending that the said firm M/s Desai Maniar & Kulkarni was the owner of the said godown since its allotment in the year 1973-74 and consideration was paid by the said firm and not by the assessee and the income from capital gain on sale of the said godown is already offered for taxation by the said firm M/s Desai Maniar & Kulkarni . All these additional evidences which has been filed for the first time before the Tribunal, in our considered view, requires verification by the authorities below in order to comply with principles of natural justice. In our considered view, the interest of justice will be best served if the matter is set aside to the file of A.O. for de-novo determination of the issue with respect to the chargeability of capital gain on sale of the said godown in the light of the documents/additional evidence filed by the assessee. The assessee is directed to appear before the A.O. and file all relevant and necessary evidences with respect to the acquisition/sale of the said godown and the ownership status of the godown to resolve the controversy with respect to the

determination of exact description/location of the said property and its ownership status as well to ascertain who is liable to pay the appropriate taxes on the gains on the sale of the said godown. Needless to say that the assessee will be allowed proper and adequate opportunity of hearing by the AO in compliance with principles of natural justice in accordance with the law and the assessee will be allowed to file all necessary relevant evidences in support of his contentions. We order accordingly.

11. In the result, the appeals filed by the assessee as well as Revenue are allowed for statistical purpose.

Order pronounced in the open court on 29<sup>th</sup> January, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 29-01-2016 को की गई ।

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

sd/  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 29-01-2016

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व.नि.स./ R.K., Ex. Sr. PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai