

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

BEFORE SHRI JASON P. BOAZ ACCOUNTANT MEMBER  
AND SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No. 1976/MUM/2011  
(Assessment Year : 2007-08)

The Income Tax Officer – 19(3)(1),  
Room No.307, 3<sup>rd</sup> Floor,  
Piramal Chambers, Lalbaug,  
Parel, Mumbai 400 012  
Vs.

... Appellant

Smt. Elsa Silva,  
401, Cozy Dell, St. Andrew Road,  
Bandra(W),  
Mumbai – 400050  
PAN:ANTPS 7419P

.... Respondent

Appellant by : Capt. Pradeep Arya  
Respondent by : Shri Bhupendra Shah

Date of hearing : 17/11/2015  
Date of pronouncement : 27/11/2015

**ORDER**

**PER JASON P. BOAZ, A.M:**

This appeal by the Revenue is directed against the order of the CIT(A)-30, Mumbai dated 15/12/2010.

2. The facts of the case, briefly, are as under:-

2.1 The assessee filed her return of income for Assessment Year 2007-08 on 18/9/2007 declaring income of Rs.1,41,979/-. The case was selected for scrutiny. In the course of assessment proceedings, the

Assessing Officer observed that in the year under consideration, i.e. Assessment Year 2007-08, vide Agreement dated 11/12/2006 ( in short ' said Agreement') the assessee alongwith others, sold development rights of the property bearing Plot No.24 and 25 bearing CTS No.H/463 at village Santacruz, Sub-District Bandra,Bombay Sub-urban District for a consideration of Rs.4,46,00,000/- ( in short 'the said property') to M/s.Athithi Builders & Constructions Pvt. Ltd. The consideration was paid by cheque separately to each of the parties to the said Agreement as under:-

i) Mrs. Elsa Silva (Assessee)	Rs.2.73 crores
ii) Mr. Alex Silva (Tenant)	Rs.0.50 crores
iii)Mr. D.P. Koli (Old Developer)	<u>Rs.1.23 crores</u> <u>Rs.4.46 Crores</u>

2.2 In the return of income for assessment year 2007-08, the assessee, in respect of her share of consideration of Rs.2,73,00,000/- computed the Long Term Capital Gain (LTCG) thereon at NIL as under :-  
Assessee's share of sale consideration :Rs.2,73,00,000/-

Less:

i) Indexed cost of acquisition	Rs.1,89,81,128/-	
ii) Expenses incurred	<u>Rs. 53,73,300/-</u>	<u>Rs.2,43,54,428/-</u>
Long Term Capital Gains		Rs. 29,45,573/-

Less:

Exemption under section 54EC	<u>Rs. 29,45,573/-</u>
Taxable LTCG	<u>N I L</u>

2.3 The Assessing Officer did not accept the computation of LTCG on sale of the said property as submitted by the assessee and proceeded to re-work the assessee's LTCG thereon at Rs.3,13,64,560/- as under :-

Sale consideration as per market consideration  
Decided by Stamp Authorities in the said Agreement  
under section 50C for the whole of the said property  
in the assessee's hands - Rs.4,60,73,000/-

Less:

(i)	Indexed cost of Acquisition (1/6 <sup>th</sup> share)	Rs.12,96,526/-
(ii)	Indexed cost of Acquisition (5/6 <sup>th</sup> share)	Rs.35,38,614/-
(iii)	Expenses Incurred (less Rs.5.00 lacs paid to Sri Jude Bello and Trever Bello)	<u>Rs.48,73,300/-</u>
	LTCG	Rs.3,63,64,560/-

Less:

Exemption under section 54EC	<u>Rs. 50,00,000/-</u>
Taxable LTCG	<u>Rs.3,13,64,560/-</u>

2.4 The Assessing Officer accordingly completed the assessment for the Assessment Year 2007-08 under section 143(3) of the Income tax Act, 1961 vide order dated 21/12/2009 determining the income of the assessee at Rs.3,15,06,540/-, in view of the re-computation of the taxable LTCG on sale of the said property at Rs.3,13,64,560/-.

3. Aggrieved by the order of assessment for Assessment Year 2007-08 dated 21/12/2009, the assessee preferred an appeal before the

CIT(A)-30, Mumbai. The Ld. CIT(A) disposed off the appeal vide order dated 15/12/2010 allowing the assessee partial relief.

(i) In the impugned order, the Ld. CIT(A) upheld the Assessing Officer's action in adopting the value of the said property AT Rs.4,60,73,000/- as per the provisions of section 50C of the Act, as determined by the Stamp Authorities for payment of stamp duty.

(ii) The Ld. CIT(A) further held that the payments of Rs.1.32 crores to Shri D.P.Koli (the old developer) and Rs.0.50 crores to Shri Alex Silv(tenant, ' Santa Wines' ), paid directly by cheque by M/s. Athithi Builders & Construction Pvt. Ltd., in accordance with the terms and conditions of the said Agreement dated 11/12/2006, was to be deducted from the re-stated sale consideration of Rs.4.60 crores, while computing the LTCG of the assessee.

(iii) As far as the issue of indexed cost of acquisition was concerned, the Ld. CIT(A), following the decision of the Special Bench of ITAT, Mumbai in the case of Manjula J. Shah (2009) 126 TTJ(Mum)(SB) 145 directed the Assessing Officer to adopt the same with reference to the year in which the previous owner Mrs. Hilda D' Souza (mother of the assessee who expired intestate on 1/11/1978) first held the asset or w.e.f. 1/4/1981.

(iv) The Ld. CIT(A) also allowed the assessee's claim for expenditure of Rs.5,00,000/- incurred on payment of Rs.2,50,000/- each to Shri Traver Bello and Shri Judo Bello for withdrawing their rights and title of any nature from the said property.

4. Aggrieved by the order of the CIT(A)-30, Mumbai, the Revenue has preferred this appeal raising the following grounds:-

*(1) "On the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in allowing the expenditure on account of payment to Shri D.P.Koli of Rs.1.23 Crores and payment of Rs.0.50 Crores to Shri Alex Silva on account of surrender of tenancy rights ignoring the fact that-*

*(a) No documentary evidence was filed by the assessee despite having been called upon not so during the course of assessment proceedings.*

*(b) The onus is on the assessee to establish the claim of such expenditure and it would not be in the fitness of the things for the Assessing Officer to establish that the assessee has either received or not received the entire consideration or whether part of the consideration was paid.*

*(2) On the facts and in the circumstances of the case and in law, the Learned CIT(A) has erred in directing to take the full value consideration as on 01.04.1981 towards the cost of acquisition without appreciating the fact that the assessee along with her sisters brothers were jointly entitled to the right over the asset subsequently in the F.Y. 2002-03.*

*(3) On the facts and in the circumstances of the case and in law, the Learned CIT(A) failed to appreciate the fact that the Clause (b) of Section 2(42A) is only for determining the period held by the assessee for the purpose of treating the asset as a long term capital asset and Explanation (iii) to Section 48 clearly states that the Cost Inflation Index shall be from the first year in which the asset was held by the assessee.*

*4) The decision of the Special Bench of the ITAT in the case of Manjula J. Shah ITA No. 7315/Mum/2007 dated 16.06.2009 has not been accepted by the Department.*

*(5) On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in allowing expenditure on account of payment to Shri Traver C. Bello of Rs.2.50 Lacs and payment of RS.2.50 Lacs to Jude C. Bello on account of surrender of tenancy rights without appreciating the fact that the assessee's representative vide letter dated 14.09.2009, it was expressly stated and confirmed that the two parties had received the payments as ex-gratia not withstanding the fact that they did not have any right, title or interest of any nature whatsoever in and upon said property or the share certificate in relation to said property.*

*6. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the A.O be restored.*

*7. The appellant craves to amend or alter any ground or add a new ground which may be necessary."*

**5. Ground No.1: Payment to Shri D.P.Koli (Rs. 1.23 crores) and Shri Alex Silva (Rs.0.50 crores)**

5.1 In this ground, the Revenue contended that the Ld. CIT(A) had erred in allowing the expenditure on account of payment to Shri D.P. Koli of Rs.1.23 crores and to Shri Alex Silva of Rs.0.50 crores for surrender of tenancy rights, ignoring the fact that the assessee had failed to discharge the onus for establishing the claim of aforesaid expenditure with documentary evidence. The Ld. DR was heard and strongly relied on the findings/observations of the Assessing Officer in the order of assessment.

5.2.1 Per contra, the Ld. AR for the assessee supported the findings of the Ld. CIT(A) on this issue in the impugned order. The Ld.AR drew the attention of the Bench to Para 11 & 12 of the order of the Ld. CIT(A) wherein, after considering the Assessing Officer's views in assessment order, the assessee's submissions and other material on record, the Ld. CIT(A) after recording his finding of fact at Para-11(a) to (h) thereof upheld the claim of the assessee that the payment of Rs.1.23 crores by cheque directly to Shri D.P.Koli (the old developer in possession of the said property) by M/s. Athithi Builders and Construction Pvt. Ltd. as per the said Agreement dated 11/12/2006 was not to form part of the consideration for computing the LTCG of the assessee in the case on hand.

5.2.2 In respect of the payment of Rs.0.50 crores by M/s.Athithi Builders & Construction Pvt. Ltd. by cheque directly to Shri Alex Silva for surrender of tenancy rights in the said property viz. occupation of a shop of approx. 500 sq.ft. 'Santa Wines' since 1970; the Ld. AR for the assessee drew the attention of the Bench to Paras 15 to 19 of the impugned order of the Ld. CIT(A), wherein after examining the views of the Assessing Officer, the assessee's submissions and material on record, the Ld. CIT(A) has rendered a factual finding that it was established that Shri Alex Silva was holding tenancy rights in the said property and the said payment was for relinquishment of tenancy rights. The Ld. AR submitted that the CIT(A) in view of the above finding held that the payment of Rs.0.50 crores to Shri Alex Silva should not be considered as part of the consideration for computing the LTCG of the assessee in the case on hand.

5.2.3 The Ld. AR submitted that the Ld. CIT(A) at Para-17 of the impugned order has observed that the payments of Rs.1.23 crores to Shri D.P.Koli and Rs.0.50 crores to Shri Alex Silva reflected at page 13 of the said Agreement had been directly received by them by cheque from M/s. Athithi Builders & Construction Pvt. Ltd. and held that this establishes that the assessee had not received the entire consideration in the said Agreement as stated by the Assessing Officer. The Ld. AR contends that in view of the above factual finding rendered by the Ld. CIT(A) ground at S.No.1 ought to be dismissed.

5.3.1 We have heard the rival contentions and perused and carefully considered the material on record. Admittedly, the assessee alongwith

Shri D.P.Koli and Shri Alex Silva vide Agreement for development dated 11/12/2006 entered into with M/s. Athithi Builders and Constructions Pvt. Ltd.( in short 'Athithi Builder') transferred the development rights in property bearing Plot No.24 & 25(part), bearing CTS No.14/463 situated at village Santa Cruz, Sub District Bandra, Bombay for a consideration of Rs.4,46,00,000/- ( now restated under section 50C of the Act at Rs.4,60,73,000/-).The Assessing Officer at Para-6(F) of the order of assessment at (a) to (g) thereof was of the view that Shri D.P.Koli who was paid Rs.1.23 crores by 'Athithi Developers' for relinquishment of tenancy rights actually has no right, title or interest, etc. in the said property and, therefore, the amount stated to have been paid to him was to be considered as the assessee's consideration for the purpose of computing LTCG in the assessee's hand in respect of the said property. At Para 6(R) of the order of the assessment, the Assessing Officer observed that since the tenancy right of Shri Alex Silva has not been established with supporting documentary evidence, the amount of Rs.0.50 crores stated to have been paid to him was also to be considered as the assessee's consideration for the purposes of computing the LTCG in the assessee's hands, in respect of the said property.

5.3.2 On a perusal of the orders of the authorities below and the material on record we find that as per the said Agreement dated 11/12/2006, at Page -13 thereof, 'Athithi Builders' has acquired the development rights of the said property after paying separately and directly by cheque Rs.2.73 crores to the assessee, Rs.1.23 Crores to Shri D.P.Koli and Rs.0.50 crores to Shri Alex Silva. This clearly evidence that

the assessee has received only Rs. 2.73 crores as her share of the consideration of Rs.4,46 cores. As rightly observed by the Ld. CIT(A), the Assessing Officer overlooked the fact that Shri D.P.Koli had acquired the development rights in the said property vide Agreement dated 07/04/1992 and has been in possession of the said property till 2006. We also find that the Assessing Officer had disregarded the fact that the payment of Rs.1.23 crores was made by cheque directly to Shri D.P. Koli by 'Athithi Builder' which emerged out of a single declaration dated 29/05/2004 made by Shri Koli. In this factual matrix as discussed above, we find that before us, Revenue has not been able to bring on record any material evidence to controvert the factual finding of the Ld. CIT(A) that the payment of Rs.1.23 crores made directly by cheque to Shri D.P.Koli by 'Athithi Builders' cannot be treated as application of income by the assessee or as consideration received by the assessee for the purpose of computation of her share of LTCG on the sale of the said property.

5.3.3 In respect of the payment of Rs.0.50 crores to Shri Alex Silva, by cheque by 'Athithi Builder', the material on record evidences that he was in occupation of a shop admeasuring approximately 500 sq.ft. in the said property and was running a business in the name and style of "Santa Wines" since 1970. The Ld. CIT(A) has also observed that the Assessing Officer has disregarded the supporting evidence in this regard i.e. Form D- Registration Certificate of Establishment for Bombay Shops and Establishment Act, 1948, which establishes that Shri Alex Silva was holding tenancy rights. In the factual matrix, as discussed above, we find that before us Revenue has not been able to controvert the factual

finding of the Ld.CIT(A) that the payment of Rs.0.50 crores made directly by cheque to Shri Alex Silva cannot be treated as application of income by the assessee or as part of the consideration received by the assessee for the purpose of computation of her share of LTCG on sale of the said property.

5.3.4 In view of our findings in Paras 5.3.1 to 5.3.3 (supra), we dismiss ground No.1 raised by the Revenue.

6. **Ground No. 2 to 4 - Indexed Cost of Acquisition:**

6.1 In these grounds, which are considered together for adjudication, Revenue contends that the Ld. CIT(A) had erred in allowing the assessee full value for indexed cost of acquisition as on 01/04/1981 without taking into consideration the fact that the assessee and her siblings were jointly entitled to the right of the asset in Financial Year 2002-03. It is contended that as per the Explanation (iii) to Section 48 of the Act, the cost inflation index shall be from the first year in which the asset was held by the assessee and not as on 01/04/1981. It was also submitted that the decision relied on by the Ld. CIT(A) to allow the assessee's claim, i.e. of the ITAT, Special Bench, Mumbai in the case of Manjula J. Shah (2009) 126 TTJ (Mumbai) (SB) 125 has not been accepted by the Department, and the appeal in this regard is pending disposal before the Hon'ble Bombay High Court. The Ld. DR was heard in the matter and he placed strong reliance on the decision of the Assessing Officer on this issue.

6.2 Per contra, the Ld. AR for the assessee supported the finding in the impugned order by the Ld. CIT(A) in determining the date of indexation of the cost of acquisition of the said property as on 01/04/1981. The Ld. AR submitted that the said property was inherited by the assessee(1/6<sup>th</sup> Share) from late Smt. Hilda D' Souza, mother of the assessee, who died intestate on 1/11/1978. The Ld. AR contends that inspite of adopting the value of the said property as on 1/4/1981 at Rs.36,57,250/- as per the valuation report submitted by the assessee, the Assessing Officer did not allow the indexed cost of acquisition from 1/4/1981. The Ld. AR further submitted that when the cost of acquisition to the previous owner is to be considered for computing the indexed cost of acquisition, the Assessing Officer ought to have allowed the share from 1/4/1981 as the previous owner Smt Hilda D'Souza had expired in 1978. It is further contended by the Ld. AR that this proposition which has been upheld by the Special Bench of ITAT, Mumbai in the case of Manjula J Shah (supra) has now been confirmed by the decision of the Hon'ble Mumbai High Court in (2011) 16 taxman.com 42 (Bom) which has held this issue in favour of the assessee and against the Revenue. The Ld. AR submits that in view of the above factual and legal , matrix of the case, Revenue's grounds are liable to be dismissed.

6.3.1. We have heard both the parties and perused and carefully considered the material on record, including the judicial pronouncements cited. In the course of assessment proceedings, the Assessing Officer observed that the assessee while computing the assessee's LTCG on transfer of the said property had taken the indexed

cost of acquisition w.e.f. Financial Year 1981-82 and the value of the asset as on 1/4/1981 at Rs.36,57,550/- as per the assessee's valuation report. The Assessing Officer while accepting the value of the said property at Rs.36,57,250/- did not accept the assessee's computation of indexed cost of acquisition and proceeded to rework the same w.e.f. Financial year 1993-94 for 1/6<sup>th</sup> of the property and Financial Year 2002-03 for 5/6<sup>th</sup> of the property. We find that the said property was inherited by the assessee from her mother. In this factual matrix, the cost of acquisition of the asset by the previous owner (in the case on hand of Smt. Hilda D'Souza who expired in 1978) is to be considered for computing the indexed cost of acquisition. Therefore, as rightly held by the Ld. CIT(A), the indexed cost of acquisition in the case on hand ought to be Financial Year 1981-82 while computing the LTCG in the hands of the assessee. This proposition is squarely covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of CIT vs. Manjula J. Shah reported in (2011) 16 taxman.com 42 (Bombay), wherein it was held that while computing capital gains arising on transfer of a capital asset, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became owner of the asset. Respectfully following the decision of the Hon'ble Bombay High Court in the case of Manjula J. Shah (supra), we uphold the order of the Ld. CIT(A) in directing the Assessing Officer to adopt the cost inflation index of the acquisition of the capital asset with reference to the year in which the previous owner first held the asset i.e. w.e.f. 1/4/1981 for the purpose of computation of the LTCG of the assessee in respect of the transfer of the said property.

**7. Ground No.5- Payment to Traver Bello and Jude Bello totalling Rs.5.00 lakhs:**

7.1 In this ground, Revenue contends that the Ld. CIT(A) erred in allowing the expenditure claimed on payments of Rs.2.50 lakhs each to Shri Traver Bello and Shri Jude Bello which were admittedly received by them as ex-gratia, inspite of the fact that they did not have any title, right or interest in the said property.

7.2 We have heard both the Ld. DR for the Revenue and the Ld. AR for the assessee on this issue, and have perused and carefully considered the material on record, including the judicial pronouncement relied upon by the assessee. From the material on record, it is seen that the assessee paid Rs. 2.50 lakhs each to Shri Taver Bello and Shri Jude Bello, sons of the assessee's sister Iris Bello for withdrawing their title or rights of any nature in respect of the said property before the Superintendent of Land Records, in order to enable her to sell/transfer the said property to the developer without any dispute or legal hassles. We agree with the observation of the Ld. CIT(A) that the Assessing Officer has disallowed the Rs.5.00 lakhs paid to Shri Traver Bello and Shri Jude Bello on a wrong appreciation of facts that these parties had no rights or interest in the said property. In this view of the matter, we uphold the decision of the Ld. CIT(A) in directing the Assessing Officer to allow the assessee's claim for deduction Rs.5.00 lakhs paid to the aforesaid two persons from the sale consideration while computing the LTCG of the assessee in respect of the said

property. Consequently, Ground No.5 raised by the Revenue is dismissed.

8. The Grounds at Sl.Nos.6 and 7 are general in nature and, therefore, no adjudication is called for thereon.

9. In the result, the Revenue's appeal for Assessment Year 2007-08 is dismissed.

Order pronounced in the open court on 27/11/2015.

Sd/-

(RAMLAL NEGI)  
JUDICIAL MEMBER  
Mumbai, Dated 27/11/2015

Sd/-

(JASON P. BOAZ)  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to :**

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

//True Copy//

Vm, Sr. PS

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**