IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A",MUMBAI
BEFORE SHRI R.S. SYAL (AM) & SHRI R.S. PADVEKAR (JM)

I.T.A.No.3051/Mum/2010
(A.Y.2006-07)

Shri Atul G. Puranik,C/o. Om Graphics, 1s floor, 129, Mody Street, Desai Chambers, Fort, Mumbai-400 001. PAN: AAZPP2737J	Vs.	Income-tax Officer-12(1)(1), Room No.115, 1st floor, Aaykar Bhavan, M.K. Road, Mumbai-400 020.
Appellant		Respondent

Appellant by		Shri Soli Dastur.
Respondent by		Shri Rajeev Agarwsal.

O R D E R

PER R.S. SYAL, AM :

This appeal by the assessee arises out of the order passed by the CIT (Appeals) on 10-03-2010 in relation to the A.Y. 2006-07. Various grounds raised in this appeal deal with a solitary issue about the chargeability of the income under the head `Capital gains'.

2. Briefly stated, the facts of the case, as stated by the Assessing Officer, are that the assessee received a sum of Rs.2.50 crores in the year under consideration on account of sale of land known as Plot No. 83, Sector-18, in Village Site Kamothe-II of 12.5% (Erstwhile Gaothan Expansion Scheme) measuring 7299.41 sq. metres (hereinafter called `the Plot'). The Plot was sold by the assessee to M/s. Pathik Construction vide agreement dated 25-08-2005. In the return filed for the assessment year under consideration, the assessee did not offer any income under the head 'capital gain' on account of such transfer of the Plot. A note was appended along with the computation of income, reading as under :

"The assessee's father owned a plot of agricultural land which was acquired by the Government of Maharashtra in February, 1970 for CIDCO. The assessee was allotted a plot of land under the 12.5% Gaothan Expansion Scheme by CIDCO at Village Kamothe-II, Distt. Raigad. The same has been assigned for Rs.2,50,00,000/-. The said original agricultural land was not a capital asset u/s. 2(14)(iii) of the I.T. Act. The said plot from CIDCO also does not become capital asset u/s.2(14)(iii) and hence the section 45 does not apply to assignment of said plot."

3. The facts leading to the above referred transaction are that certain lands belonging to the assessee's father, Late Shri Gangadhar Vishnu Puranik, were acquired by the Govt. of Maharashtra vide Notification dated 03-02-1970 and subsequent Notification dated 28-12-1972 issued u/s. 6 of the Land Acquisition Act, 1884. Compensation was paid to Shri Gangadhar Vishnu Puranik in the period between 1973 to 1975 by the Special Land Acquisition Officer at the rate of Rs. 5 per square meter. The assessee's father expired in the year 1980. A further claim for addition compensation was made before the Addl. Distt. Judge, Raigad, Alibag. On an examination of witness Shri Ashok Puranik, also one of the co-owners from Puranik family and an Engineer himself, the Add. Distt. Judge, vide his order dated 25.04.2000 awarded compensation at the rate of Rs.16/- per sq. metre for the reason that the lands acquired by the Government from Shri Gangadhar Vishnu Puranik, were acquired by the Puranik family for industrial purposes. It was also noticed that the lands under reference were situated within the extended limits of Panvel Municipal Council . Shri Ashok Puranik deposed before the Addl. Dist. Judge that Puranik family had prepared plans to develop the lands for industrial estate and the lands abutting village Aeudgaon were intended for the establishment of Dhutpapeshwar Industrial Estate and those were already converted into N.A. use prior to 1965. The matter was still further agitated by the legal heirs of the deceased Shri Gangadhar Vishnu Puranik. The Plot under CIDCO 12.5% Scheme was allotted to the

assessee in the capacity of legal heir vide agreement dated 08-08-2005 on lease basis. The assessee transferred the leasehold rights of said plot to M/s. Pathik Construction vide agreement 25-8-2005 for a sum of Rs.2.50 crores. In the opinion of the AO, the assessee got the Plot as revised compensation because the original lands acquired by the Govt. had N.A. potential and further such lands were within the extended limits of Panvel Municipal Council. He relied on certain judgments to form an opinion that the original lands acquired were not agricultural lands. Further, since the assessee sold the Plot allotted to him under the 12.5% Scheme for a consideration of Rs.2.50 crores, in the view of the AO, this land was a capital asset and its transfer attracted the provisions of sec. 45.

4. During the course of assessment proceedings, the assessee came out with another reason for not offering any capital gain, by claiming that the cost of acquisition of the Plot was Rs.2,88,35,000/- (i.e. area of the plot 7300 sq. mts. Multiplied with the Market rate prevalent at Rs.3950 per sq. mtr). The AO did not accept this contention as well, because in his opinion the Plot was acquired by the assessee as a matter of additional compensation received in lieu of land acquired by the Govt. belonging to his father in 1972. He held that sec. 49 was attracted and the cost of acquisition was to be taken as the cost at which the land was acquired by the previous owner. In this regard, he noted that the value of the original lands acquired by the Special Land Acquisition Officer was fixed at Rs.10,69,006/-, by valuing it at Rs.6 per sq. mtr. or Rs.4/- per sq. mtr or Rs.3.50 per sq. mtr. depending on the survey numbers. By order of Addl. Judge dated 25-04-2000, the market value of land was revised at Rs.16/- per sq. mtr. For the sake of convenience, the average rate of Rs.5/- per sq. mtr. was taken by him for original compensation of Rs.10,69,006/- and accordingly revised compensation was worked out at Rs.11/- per sq. mtr. at Rs.23,51,813/-.

Deducing 1/5th as assessee's share, the AO determined the cost of acquisition of the Plot at Rs.4,70,362/- (i.e. Rs.23,51,813/- divided by Rs.5). As the assessee got possession of the Plot from CIDCO vide agreement dated 08-08-2005 and sold the same to M/s. Pathik Construction for a consideration of Rs.2.50 crores, the AO held that capital gain was to be charged as short-term capital gain. It was noticed by him that since the assessee had submitted market rates prevailing for lands at Kamothe-II published by Panvel Nagar Palika from 01-04-2004 to 31-12-2004 at Rs.3950 per sq. mtr., the AO computed the market value of the Plot at Rs.2,88,35,000/- (Rs.3950 X 7300 sq. mtrs.) as per the provisions of sec. 50C of the I.T. Act. The amount of capital gain was thus worked out as under :

"Value of the asset sold on 25.8.2005
(i.e. land at Village Kamothe sold to
M/s. Pathik Construction on 25.8.2005) : *Rs.2,88,35,000*
Less: Cost of acquisition as worked out in
Para 5(ii) : *Rs. 4,70,362*
Short Term Capital Gains : ***Rs.2,83,64,638"***

5. The assessee preferred appeal before the ld. first appeal authority, *inter alia*, contending that the land acquired by the Land Acquisition Officer were agricultural lands and hence the plot of land allotted under 12.5% Scheme at village Kamothe-II would also retain the same character as that of agricultural land. This contention did not find favour with the ld. CIT(A). It was also argued that the cost of the Plot allotted should be considered as the market value of the land at the time of allotment and hence the provisions of sec. 49 were not applicable. The ld. CIT(A) was unconvinced with this argument also, as in his opinion, the Tribunal order relied by the assessee in *ACIT vs. Nirmal Bhogilal* (ITA No.2942/Mum/02) dt. 23.11.2005, was not applicable because in that case it was only if the land was allotted without any financial criteria that the market value of similar plot in the locality was held to be taken as representing the cost

of acquisition. The last major contention put forth on behalf of the assessee on non-applicability of sec. 50C was also found untenable. Resultantly, the assessment order was upheld on this point.

6. Before we proceed to deal with the rival contentions, it is necessary to set the record straight in as much as there are certain factual inconsistencies recorded in the assessment order. The first, being that the assessee was not allotted the Plot on ownership basis for perpetuity but only on lease basis, as stated by the ld. AR to be for sixty years. The second very crucial fact is that the lease rights in the Plot were allotted to the assessee on 18.08.2004 and not on 08.08.2005 as noted by the AO. In fact, 08.08.2005 is the date on which the lease agreement between the assessee and the Government was executed. These facts are clear from the Statement of facts and Grounds taken before the ld. CIT(A). It has been mentioned in Para 1.3 of the Statement of facts before the ld. first appellate authority that the assessee furnished several documents to the AO vide his letter dated 19.11.2008, *inter alia*,: ` *(vi) CIDCO's letter dated 18.08.2004 allotting plot of land on lease basis admeasuring arund 7300 sq.mts. at Village Kamothe, Taluka Panvel, Distt. Raigadh.'* Further Ground no. 1.4(iii) taken before the ld. CIT(A) states the date of allotment as 16.08.2004. These facts were available both before the AO as well as the CIT(A). None of the authorities below have chosen to controvert them. Now we will decide the controversy before us in the light of correct and complete facts as afore noted.

7. We have heard the rival submissions and perused the relevant material on record. There is no dispute on the fact that the assessee's father late Shri Gangadhar Vishni Puranik was owner of certain lands which were acquired by the Govt. of Maharashtra by Notification dated 03-02-1970 and subsequent Notification dated 28-12-1972. The possession of the lands was taken over by

the Govt. in March 1973 by awarding original compensation @ Rs. 5/- per sq. mtr. some where in the financial year 1973-74. The assessee's father passed away in 1980. The assessee, along with other co-owners, became the legal heir of his father. The grant of compensation at Rs.5/- per sq. mtr. was challenged which was enhanced by the Addl. District Judge to Rs.16/- per sq. mtr. vide his order dated 25-04-2000. Thereafter, 12.5% Scheme was introduced and according to the ld. A.R., the said sum at Rs.16/- per sq. mtr. was returned and the assessee was allotted the Plot on 16-08-2004 on lease basis for sixty years. The lease agreement was executed on 08-08-2005. The assessee assigned such rights in the Plot to M/s. Pathik Construction for a consideration of Rs.2.50 crores on 25-08-2005. On a specific query, the ld. A.R. submitted that when the assessee received additional compensation at Rs.11/- per sq. mtr. (Rs.16/- per sq. mtr. as ordered by the Addl. Dist. Judge minus Rs.5/- per square meter as the original compensation allotted to the assessee's late father), the said sum was duly offered for taxation in the relevant year and it was also stated that when a sum at the rate of Rs.16/- per sq. mtr. was returned to the Govt. in lieu of the Plot, no adjustment on account of capital gain tax paid at the time of receipt of Rs.11/- per sq. ft. as additional compensation, was claimed. There is no material on record to show that the assessee, in fact, offered any sum for taxation at the rate of Rs.11 per square meter. As will be seen *infra*, the fact that whether or not the assessee offered this sum for taxation in an earlier year is not germane to the issue under consideration. From the narration of facts, it becomes manifest that there are two distinct transactions in this case. The first, is the acquisition of lands of assessee's father against which the assessee, as legal heir, was given lease of the Plot on 16-08-2004. This transaction got completed when the assessee got the leasehold rights in the Plot on such date, which falls in the previous year relevant to the asstt. year 2005-06. Whatever

was the amount of profit or gain on this transaction was accordingly chargeable to tax in A.Y. 2005-06. The second transaction is the transferring of such leasehold rights in the Plot to M/s. Pathik Construction on 25-08-2005 for a consideration of Rs.2.50 crores, which event falls in the previous year relevant to the assessment year under consideration. It is thus evident that out of the above referred two transactions, we are concerned in the present appeal only with the second transaction, which took place in the year under consideration.

8. Now, we will take up the arguments raised by the ld. A.R., one by one.

I. THE PLOT WOULD RETAIN CHARACTER OF AGRICULTURAL LAND

9. The ld. A.R. contended that the Govt. acquired original lands of assessee's father in 1972 which were agricultural in nature. He submitted that the lease rights in the Plot would retain the same character as that of the original lands acquired by the Land Acquisition Officer, being the agricultural land. Developing this argument, it was put forth that since the assessee transferred agricultural lands (being rights in the Plot assuming to have the character of original agricultural lands acquired by the Government), in this year, there will not arise any liability to pay tax under the head `Capital gain' because the agricultural land is excluded from the definition of `Capital assets' given in section sec. 2(14) of the Act. In the opposition, the ld. DR relied on the impugned order in this regard.

9.1 The assessee acquired lease rights in the Plot in consideration of acquisition of original lands owned by the assessee's father in the earlier years. A lot of discussion has been made by the authorities below on the question of determination of the character of such lands as agricultural lands or otherwise. In

our considered opinion, it is only an academic exercise in so far as the issue in question is concerned, being the assignment of lease rights in the Plot. It is obvious for the reason that when the assessee was allotted the lease rights in the Plot in the preceding year on 16.08.2004, that transaction got completed. The amount of capital gain, if chargeable, should have been included in the total income of the assessee on account of such first transaction in the preceding year. We are refraining from giving any finding as to whether the original lands of the assessee's late father acquired by the Government, were agricultural lands or not. It is not in our domain to give any such finding as it is/was for the AO to decide as per law. Suffice to say, we are concerned with the events occurring in the previous year relevant to the assessment year under consideration.

9.2 Once the first transaction was over on the receipt of rights in the Plot, then the ties of such rights in the plot got severed from those of lands which were acquired in the years 1970/1972. A new asset emerged in the shape of rights in the Plot. It is this asset, whose nature is required to be determined at the time of its subsequent transfer, which is a second transaction diverse from the first transaction which was completed in the last year. It was fairly admitted and rightly so, that the rights in the Plot, in itself, could not be categorized as agricultural land within the meaning of section 2(14)(iii).

9.3 Section 45 clearly provides that any profits or gains arising from the **transfer of a capital asset** effected in the previous year shall, save as otherwise provided in sections 54 to 54H, be chargeable to income-tax under the head 'Capital gains' and shall be deemed to be the income of the previous year in which the transfer took place. What is relevant for applicability of sec. 45 is the profits or gains arising from the transfer of a capital asset effected in the previous year. It is only the nature of asset transferred in the year which is to be

taken into consideration for computing profit or gains chargeable to tax under the head 'Capital gains'. Only the nature of the capital asset so transferred in the previous year is to be viewed *de hors* the source from which it was acquired. If a `Capital asset' as per sec. 2(14) is purchased out of agricultural income, that would not lose its character of capital asset notwithstanding the fact that the income exempt from tax was employed for purchasing such capital asset. Whenever such resulting capital asset is transferred leading to any profit or gain, such amount shall be charged to tax u/s.45 of the Act. The sole criteria for considering whether the asset transferred is capital asset u/s.2(14) or not is to consider the nature of the asset so transferred in the previous year and not the origin or the source from which such asset came to be acquired.

9.4 Adverting to the facts of the instant case, once the assessee acquired rights in the Plot, which in itself is admittedly not an agricultural land, there is no question of considering it to be an agricultural land on the premise that it was allotted to the assessee against acquisition of agricultural land. Further the question whether the lands acquired by the Govt. in the years 1970/72 were agricultural land or not is beyond our purview as we are concerned only with the second transaction of transfer of rights in the Plot, which event took place in the year under consideration. We, therefore, hold that the assessee's contention that the rights in the Plot should also be considered as agricultural land transferred during the year, is bereft of any force and is jettisoned. As such, we advance further to determine the amount of capital gain arising to the assessee in the year in question on the transfer of rights in the Plot.

II. COST OF ACQUISITION OF RIGHTS IN THE PLOT AND SECTION 49(1)

10. During the course of assessment proceedings, the assessee contended that the cost of acquisition of the Plot was Rs.2,88,35,000/-, being the amount

determined by applying market rate of the Plot at Rs.3950/- per sq. mtr. on the date of transfer. The AO, on the other hand, came to the conclusion that the cost of acquisition was liable to be taken at Rs.4,70,362/- as the cost at which the asset was acquired by the previous owner u/s.49. Such amount was determined by considering the rate of revised compensation at Rs.11/- per sq. mtr. The ld. CIT(A) echoed the assessment order on this point. The ld. counsel for the assessee contended that the authorities below were not justified in upholding the application of section 49(1) as such a provision was not applicable to the present facts. Per contra, the ld. DR reiterated the reasoning given by the AO in this regard.

10.1 In order to ascertain whether or not sec. 49(1) is applicable to the facts of the instant case, it is imperative to have a look at the language of the section, which is reproduced as under :

> *"49 (1) Where the capital asset became the property of the assessee—*
> *(i) on any distribution of assets on the total or partial partition of a Hindu undivided family;*
> *(ii) under a gift or will;*
> *(iii) (a) by succession, inheritance or devolution, or*
> *(b) on any distribution of assets on the dissolution of a firm, body of individuals, or other association of persons, where such dissolution had taken place at any time before the 1st day of April, 1987, or*
> *(c) on any distribution of assets on the liquidation of a company, or*
> *(d) under a transfer to a revocable or an irrevocable trust, or*
> *(e) under any such transfer as is referred to in clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or clause (vica) or clause (vicb) of section 47;*
>
> *(iv) such assessee being a Hindu undivided family, by the mode referred to in sub- (2) of section 64 at any time after the 31st day of December, 1969,*
>
> *the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as*

increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be."

10.2 A bare perusal of the provision indicates that where the capital asset became the property of the assessee in any of the situations contemplated in clauses (i) to (iv), the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of improvements, etc. The Explanation below sub-section (1) defines the expression "previous owner of the property" to mean the last previous owner who acquired it by a mode of acquisition other than those referred to in clauses (i) to (iv) of this sub-section. The sum and substance of sec. 49(1) is that where a capital asset becomes the property of the assessee by any of the modes specified in clauses (i) to (iv), such as gift or will, succession, inheritance or devolution, etc., the cost of acquisition of such capital asst in the hands of the assessee receiving such capital asset shall be deemed to be the cost for which it was acquired by the person transferring such capital asset in the prescribed modes. The rationale behind this provision is that the transfer of such asset by the person receiving in any of the modes prescribed, should not go tax free. In order to compute capital gain on the transfer of any capital asset, the existence of cost of acquisition is an essential element. If there is no cost of acquisition and the case is not covered u/s 55(2), then the computation provisions shall fail and no liability to tax shall arise u/s 45. As no cost is actually incurred by the assessee in acquiring the assets under such modes, and on the further transfer of such assets, the capital gain is contemplated by the legislature, the mechanism of section 49 has been put in place to remedy the situation. This provision deems the cost of acquisition of the assessee as the cost for which it was acquired by the previous owner as increased by the cost of any improvements incurred by the previous owner.

10.3 However, in order to apply the mandate of sec. 49(1), it is *sine qua non* that the capital asset acquired by the assessee in any of the modes prescribed in clauses (i) to (iv) should become the subject matter of transfer and only in such a situation where such capital asset is subsequently transferred, the cost to the previous owner is deemed as the cost of acquisition of the asset. It is apparent from the language of sub-sec. (1) itself which opens with the words: "Where the capital asset became the property of the assessee" and after enumerating certain situations, provides that "the cost of acquisition of ***the asset*** shall be deemed to be the cost for which the previous owner of the property acquired it." The phrase `the asset' used in the later part of the provision relates to the capital asset which became the property of the assessee in the given circumstances. The natural corollary which, therefore, follows is that the cost to the previous owner is considered as the cost of acquisition only of the capital asset, which becomes the property of the assessee in the modes given in clauses (i) to (iv). But once such capital asset is transferred and another capital asset is acquired, there is no applicability of sec. 49(1) to such converted asset.

10.4 Coming back to the facts of the instant case, the viewpoint of the AO that the cost of acquisition in this case on the assigning of rights in the Plot to M/s Pathik Construction should be considered as the amount of compensation originally awarded on the acquisition of lands from assessee's father, relying on sec. 49(1), does not appear to be sound. This provision can not have any application at the stage when the assessee transferred the rights in the Plot to a third party in the year in question, because what has been transferred in this year is the right in the Plot, which was not inherited by the assessee from his father. The assessee only received the capital asset in the shape of right to receive compensation from the Government on the death of his father. Cost to

the previous owner u/s 49(1) would be relevant at the time of computing the capital gain in the preceding year, when compensation was received in the shape of right in the Plot. Once the first transaction on the allotment of rights in the Plot came to an end, the provisions of sec. 49(1) also ceased to operate. It could not have been applied to the second independent transaction on the sale of such rights to M/s. Pathik Construction in the year in question. We, therefore, hold that the authorities below were not justified in applying sec. 49(1).

10.5 Having held that sec. 49(1) is not applicable, the immediate question which arises for consideration then is that what is the cost of acquisition of rights in the Plot transferred on 25-08-2005 to M/s. Pathik Construction. The ld. A.R. argued that the market value of the plot of land on the date of allotment should be taken as the cost of acquisition, as has been held by the Tribunal in ACIT v. Nirmal Bhogilal (supra). From the factual matrix of the case, it is noted that the assessee was allotted rights in the Plot on 16-08-2004 as compensation for the acquisition of lands acquired by the Special Land Acquisition Officer way back in the years 1970/72. The value of rights in the Plot is *quid pro quo* for the acquisition of lands from assessee's father in the past. In other words, the market value such rights in the Plot was considered by the State Govt. as compensation for acquisition of land in earlier years. If such rights in the Plot had not been allotted, then the assessee would have been given cash equivalent to the market value of such rights as compensation for acquisition of lands. As it is a transaction with the Government, the question of any under-hand payment also stands ruled out. Sec. 48 deals with the mode of computation of income chargeable under the head 'Capital gains'. It provides that such income shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, the cost of acquisition of

the asset and the cost of improvement, if any, along with the expenditure incurred wholly and exclusively in connection such transfer. The full value of the consideration received or accruing as a result of the acquisition by the Govt. is the amount given as consideration for such acquisition or in the alternative the market value of any other capital asset given to the assessee against such acquisition. As in the instant case the Govt. has allotted rights in the Plot as the full value of consideration on the acquisition of lands by it in the years 1970/72, the market value of such right is to be considered as full value of consideration at the time of computing capital gain on the first transaction in the preceding year. Once a particular amount is considered as full value of consideration at the time of its purchase, the same shall automatically become the cost of acquisition at the time when such capital asset is subsequently transferred. Thus, the full value of consideration should mean the market value of the lease rights in the Plot for sixty years at the time of the first transaction which was completed on 16-08-2004, and the same amount shall become the cost of acquisition when such rights in the Plot became subject matter of transfer in the current year on 25-08-2004. We, therefore, set aside the view taken by the ld. CIT(A) on this issue and hold that the market value of such lease rights for sixty years in the Plot as on 16-08-2004 shall constitute the cost of acquisition for the purpose of computing capital gain when it was assigned for a consideration of Rs.2.50 cores on 25-08-2005. The AO is directed to determine the cost of acquisition in terms indicated above after allowing a reasonable opportunity of being heard to the assessee.

III. FULL VALUE OF CONSIDERATION AND SECTION 50C:

11. The AO adopted the value of asset sold on 25-08-2005 at Rs.2.88 crores by applying the provisions of sec.50C for the purposes of computing capital gain.

His view was based on the assessee's submission that the market rate prevailing for land at Village Kamothe-II published by Panvel Nagar Palika during 1.4.2004 to 31.12.2004 was Rs.3950 per sq. meter. The ld. CIT(A) upheld the action of the AO on this score. The ld. counsel for the assessee contended that the authorities below were unjustified in applying section 50C. Per contra, the ld. DR supported the impugned order on this issue.

11.1 In order to appreciate the rival contentions on this issue, it would be apt to consider the prescription of sec. 50C(1), which is as under :

> *"50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereinafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be full value of the consideration received or accruing as a result of such transfer*

11.2 On going through the above provision, it transpires that where the full value of consideration shown to have been received or accruing on the transfer of an asset, being land or building of both, is less than the value adopted or assessed or assessable by stamp valuation authority, the value so adopted etc. shall, for the purposes of sec. 48, be deemed to be full value of consideration received or accruing as a result of such transfer. This section has been inserted by the Finance Act 2002 w.e.f. 01-04-2003 with a view to substitute the declared full value of consideration in respect of land or building or both transferred by the assessee with the value adopted or assessed or assessable by stamp valuation authority. But for this provision, there is nothing in the Act, by which the full value of a consideration received or accruing as a result of transfer of land or building or both is deemed to be any amount other than that actually received. From the language of sub-sec. (1), it is clear that

the value of land or building or both adopted or assessed or assessable by the stamp valuation authority shall, for the purpose of section 48, be deemed to be the full value of the consideration received or accruing as a result of such a transfer. Two things are noticeable from this provision. Firstly, it is a deeming provision and secondly, it extends only to land or building or both. It is manifest that a deeming provision has been incorporated to substitute the value adopted or assessed or assessable by stamp valuation authority in place of consideration received or accruing as a result of transfer, in case the latter is lower than the former. It is further relevant to note that the mandate of sec. 50C extends only to a capital asset which is "land or building or both". It, therefore, follows that only if a capital asset being land or building or both is transferred and the consideration received or accruing as a result of such transfer is less than the value adopted or assessed or assessable by the stamp valuation authority, the deeming fiction under sub-sec. (1) shall be activated to substitute such adopted or assessed or assessable value as full value of consideration received or accruing as a result of such transfer in the given situation.

11.3 It is a settled legal proposition that a deeming provision cannot be extended beyond the purpose for which it is enacted. The Hon'ble Apex Court in *CIT v. Amarchand N. Shroff (1963) 48 IT 59 (SC)* has considered the scope of a deeming provision and came to hold that it cannot be extended beyond the object for which it is enacted. Similar view has been reiterated by the Hon'ble Supreme Court in *CIT vs. Mother India Refrigeration Industries P. Ltd. (1985) 155 ITR 711 (SC)* by laying down that "legal fictions are created only for some definite purpose and these must be limited to that purpose and should not be extended beyond their legitimate field". In *CIT vs. Ace Builders P. Ltd. (2006) 281 ITR 210 (Bom)*, the Hon'ble jurisdictional High Court considered the facts of

a case in which the assessee was a partner in a firm which was dissolved in the year 1984 and the assessee was allotted a flat towards the credit in the capital asset with the firm. The assessee showed the flat as capital asset in its books of account and depreciation was claimed and allowed from year to year. In the previous year relevant to asst. year 1992-93, the assessee sold the flat and invested the net sale proceeds in a scheme eligible u/s.54E of the Act and accordingly declared Nil income under the head 'Capital gains'. The AO formed the view that since the block of building ceased to exist on account of sale of flat during the year, the written down value of the flat was liable to be taken as cost of acquisition u/s.54E of the Act. He further held that since the assessee had availed depreciation on such asset, which was otherwise a long-term capital asset, the deeming provision u/s.50 would apply and it would be treated as capital gain on the sale of short-term capital asset and hence no benefit u/s.54E could be allowed. When the matter came up before the Hon'ble Bombay High Court, it was noticed that sub-sections (1) and (2) of sec. 50 contained a deeming provision and such fiction was restricted only to the mode of computation of capital gain contained in sections 48 and 49 and hence it did not apply to other provisions. The assessee was held to be eligible for exemption u/s.54E in respect of capital gain arising out of the capital asset on which depreciation was allowed.

11.4 In view of the aforenoted judgments rendered by the Hon'ble Apex Court and that of the Hon'ble jurisdictional High Court, it is clear that a deeming provision can be applied only in respect of the situation specifically given and hence cannot go beyond the explicit mandate of the section. Turning to sec. 50C, it is seen that the deeming fiction of substituting adopted or assessed or assessable value by the stamp valuation authority as full value of consideration is

applicable only in respect of "land or building or both. If the capital asset under transfer cannot be described as `land or building or both', then sec. 50C will cease to apply. From the facts of this case narrated above, it is seen that the assessee was allotted lease right in the Plot for a period of sixty years, which right was further assigned to M/s. Pathik Construction in the year in question. It is axiomatic that the lease right in a plot of land are neither `land or building or both' as such nor can be included within the scope of `land or building or both'. The distinction between a capital asset being `land or building or both' and any `right in land or building or both' is well recognized under the I.T. Act. Sec. 54D deals with certain cases in which capital gain on compulsory acquisition of land and building is charged. Sub-sec.(1) of sec. 54D opens with : "Subject to the provisions of sub-section (2), where the capital gain arises from the transfer by way of compulsory acquisition under any law of a capital asset, being *land or building or any right in land or building*, forming part of an industrial undertaking…..". It is palpable from sec. 54D that `land or building' is distinct from `any right in land or building'. Similar position prevails under the W.T. Act, 1957 also. Section 5(1) at the material time provided for exemption in respect of certain assets. Clause (xxxii) of sec. 5(1) provided that "the value, as determined in the prescribed manner, of the interest of the assessee in the assets (not being any *land or building or any rights in land or building* or any asset referred to in any other clauses of this sub-section) forming part of an industrial undertaking" shall be exempt from tax. Here also it is worth noting that a distinction has been drawn between `*land or building'* on one hand and `*or any rights in land or building'* on the other. Considering the fact that we are dealing with special provision for full value of consideration in certain cases u/s.50C, which is a deeming provision, the fiction created in this section cannot be extended to any asset other than those specifically provided therein. As sec. 50C applies only to a

capital asst, being land or building or both, it cannot be made applicable to lease rights in a land. As the assessee transferred lease right for sixty years in the Plot and not land itself, the provisions of sec.50C cannot be invoked. We, therefore, hold that the full value of consideration in the instant case be taken as Rs.2.50 crores.

12. To sum up, we hold that capital gain on the transaction of assignment of lease rights in the Plot is to be computed in the year in question by adopting the full value of consideration on 25-08-2005 at Rs.2.50 crores and the cost of acquisition shall be worked out afresh as per law by the AO by taking the market value of lease rights for sixty years in the Plot as on 16-08-2004.

13. In the result, the appeal is allowed for statistical purposes.

Order pronounced on the 13th day of May, 2011.

Sd/-	**Sd/-**
(R.S. PADVEKAR)	**(R.S. SYAL)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai:13th May , 2011.

NG:
Copy to :
1. Department.
2.Assessee.
3 CIT(A)-23,Mumbai.
4 CIT-XII,Mumbai.
5.DR,"A" Bench,Mumbai.6.Master file.
(TRUE COPY)

BY ORDER,

Asst.Registrar, ITAT, Mumbai.

	Details	Date	Initials	Designation
1.	Draft dictated on	09-05-11		Sr.PS/
2.	Draft Placed before author	10-05-11		Sr.PS/
3.	Draft proposed & placed before the Second Member			JM/AM
4.	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/
6.	Kept for pronouncement on			Sr.PS/
7.	File sent to the Bench Clerk			Sr.PS/
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9.	Date on which file goes to the AR			
10.	Date of dispatch of order			

*