IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH 'A' CHANDIGARH

BEFORE Ms.SUSHMA CHOWLA, JUDICIAL MEMBER
AND SHRI MEHAR SINGH, ACCOUNTANT MEMBER

ITA No. 956/CHD/2012
Assessment Year: 2006-07

Shri Vishwanath Sharma, Village Lohagarh, Ward 6, NAC, Zirakpur.	V	ACIT, CC, Patiala.
PAN: ALHPS-6333E		
(Appellant)		(Respondent)

Appellant by : Shri Sudhir Sehgal
Respondent : Shri N.K.Saini

Date of Hearing : 29.11.2012
Date of Pronouncement : 12.12.2012

ORDER

PER MEHAR SINGH, AM

The present appeal filed by the assessee is directed against the order dated 24.07.2012 passed by the ld. CIT(A) u/s 250(6) of the Income-tax Act,1961 (in short 'the Act').

2. In this appeal, the assessee has raised the following Grounds of Appeal:

"1. That the Worthy CIT(A) has erred in upholding the addition OF Rs. 14,18,926/-in respect of long term capital gain by adopting the incorrect cost of acquisition as on 1.4.1981 and confirming the addition, as made by the Assessing Officer as per para-7 of the order.

2. That the CIT (A) has erred in not admitting the additional evidence in respect of certificate from Patwari.

3. That addition has been upheld against the facts and circumstances of the case and submission made by us has not been considered properly.

4. Notwithstanding above said grounds of appeal, it is submitted that the learned CIT(A) has erred in not considering that no addition can be made as no incriminating nature of documents were found and seized during the course of search and seizure operation in view of the Special Bench[1] Judgment in the case of All Cargo Global Logistics Limited & Others as reported in 147 TTJ 513.

5. That the Appellant craves leave to add or amend the grounds of appeal before the appeal is finally heard or disposed off."

3. In the course of present appellate proceedings, before the Bench, ld. 'AR' vehemently contended that the findings of both the AO and the CIT(A), are contrary to the express provisions of section 2(42A) of the Act and Explanation 1(i)(b) thereto, and section 49 of the Act. He narrated factual history of the case, and stated that the appellant sold a plot of land, acquired by the assessee, as gift from his mother. Consequently, it was argued that the provisions of section 49 of the Act are applicable, to the fact-situation of the present case. The assessee appellant applied 'fair market value' of the impugned asset, as on 01.04.1981, at Rs.100/-, per sq.yd., on the basis of certificate obtained from the Patwari, and a comparable case of sale evidence by registered deed dated 29.9.1982 (English version filed) for the purpose of computing the indexed cost of acquisition, being the fair market value of the said plot, as on 01.04.1981. Consequently, long term capital gain was computed by the appellant accordingly. Ld. 'AR' contended that the appellant opted for the 'fair market value' of the plot at Rs.100/- per sq.yd., as on 01.04.1981, as contemplated u/s 55(2) of the Act. It was, further, argued by the ld. 'AR' that the AO, wrongly held that as the assessee acquired the said plot on 25.03.2003, from his mother, through gift, the period of holding of the impugned asset by the appellant is to be

reckoned from such date, ignoring the period for which the impugned asset was held by the donor, his mother, the previous owner of the asset, as contemplated u/s 2(42A) and Explanation I(i)(b) thereto. Such findings of the AO were upheld by the CIT(Appeals). Ld. 'AR', further, placed reliance on the following decisions and prayed that such arbitrary, and perverse findings of the lower authorities, being contrary to the relevant provisions of the Act, be reversed.

1. CIT V Manjula J.Shah 68 DTR 269 (Bom)
2. Arun Shungloo Trust V CIT 68 DTR 279 (Del)
3. ACIT V SureshVerma 135 ITD (Del-Trib) 102
4. DCIT V Smt.Meera Khera 2-SOT (Mum-Trib)902
5. Smt.Mina Deogun V ITO 117 TTJ (Kol-Trib) 121
6. Mrs. Pushpa Sofat V ITO 89 TTJ (Chd-Trib)(SMC) 499

4. Ld. 'DR', on the other hand, placed reliance, on the order of the lower authorities.

5. We have carefully perused and considered the rival submissions, facts of the case, relevant records, Paper Book and the decisions relied upon by ld. 'AR'. In the present case, the appellant acquired the impugned plot by way of gift, and hence, the asset is covered under the provisions of section 49(1) of the Act, for the purpose of cost, with reference to certain modes of acquisition. The Explanation to section 49(1) of the Act defines the previous owner of the property. The appellant adopted the ‘fair market value’ of the said asset, within the meaning of section 55(2)(b)(ii) of the Act. In the specific context of the factual matrix of the case, it is pertinent and relevant to reproduce Explanation (1) to section 2(42A) of

the Act, for the purpose of determination of the period of holding of the said asset, by the appellant, which reads as under :

> ***[Explanation (1)(i) In Determining the period in which any capital asset is held by the assessee***
>
> ***b) "In the cost of a capital asset which becomes the property of the assessee in the circumstances mentioned in [sub section (1) of section 49, there shall be included the period for which the asset was held by the previous owner, referred to in that section;].***

6. The findings of the CIT(Appeals), as recorded in para 7 are reproduced hereunder, for the purpose of proper appreciation of the same:

> *"7. I have considered the basis of addition made by the AO and the arguments of the AR on the issue.* ***It is seen that the Assessing Officer has reworked the cost of acquisition on the basis of valuation of the plot as reflected in the gift deed dated 25/3/2003 on the basis of which the assessee has become owner of the plot. The assessee has not given any evidence as to on what basis the cost of the plot has been taken at Rs.100/- per sq yard as on 1/4/1981. The basis adopted by the Assessing Officer being based upon documentary evidence is logical.*** *Further it is seen that the assessee in his calculation of cost of acquisition has worked out the cost as on 1/4/1981 at Rs. 3,01,800/-whereas the same should be Rs. 75,450/-. Further the indexation has been taken from 1/4/1981 till the date of sale whereas the assessee became owner of the property only in year 2002-03. Therefore, the, cost of acquisition should be taken at Rs./81,020/- instead of Rs. 14,99,946/- taken by the assessee. The addition made by the Assessing Officer in this regard is therefore confirmed."*

7. A bare perusal of the findings of the CIT(Appeals), as reproduced above, clearly reveals that same are contrary to the relevant provisions of section 2(42A) of the Act and Explanation I(i)(b) thereto, as reproduced above. Ld. CIT(Appeals), has observed in his findings that the assessee has adopted cost of the said plot at Rs.100/- per square yard as on 1.4.1981, without any evidence, whereas the assessee became owner of the property only, in the year 2002-03, but indexation has been applied from 1.4.1981, till the date of

sale. In view of this, CIT(Appeals) gave findings that the cost of acquisition should be taken at Rs.81,020/- instead of Rs.14,19,946/-. However, such findings of the CIT(Appeals), run contrary to the provisions of section 2(42A) of the Act and Explanation 1(i)(b) thereto, as also the judicial precedents, on the issue in question, as discussed hereinafter. Non-inclusion of the period of holding of the impugned plot, by the previous owner, i.e. donor of the said plot, is patently a case where the express provisions of the Act were contravened by both AO and the CIT(Appeals), in their respective findings. The contentions of the ld. 'AR' are supported by the decisions relied upon by him. Both the Hon'ble High Courts and Tribunals have categorically held that while computing the capital gains of any asset acquired by the mode(s) specified u/s 49 of the Act, 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 the owner of the asset. The relevant and operative part of the decision of the Hon'ble Bombay High Court, in the case of CIT V Manjula J.Shah (2012) 204 Taxman 691 (Bom) is reproduced hereunder :

> *"Capital gains— Cost of acquisition— Relevant year for indexation vis-a-vis property acquired under gift— Property purchased by assessee's daughter on 29th Jan., 1993, gifted to assessee on 30th June, 2003— As the previous owner held the capital asset from 29th Jan., 1993, as per Expln. 1(i)(b) to s. 2(42A) the assessee is deemed to have held the capital asset as long-term "capital asset from 29th Jan., 1993— Therefore, in determining the indexed cost of acquisition under s. 48, the assessee must be treated to have held the asset from 29th Jan.f 1993 and accordingly the cost inflation index for 1992-93 would be applicable in determining the indexed cost of acquisition— Contention of Revenue that as the assessee held the asset w.ef. 1st Feb., 2003, the first year of holding the asset would be financial year 2002-03 and accordingly, the cost inflation index for 2002-03 would be applicable is devoid of merit, because in that case, the assessee would not be liable for long-term capital gains tax by applying the deemed fiction contained in Expln. l(i)(b) to s. 2(42A) and s. 49(1)(ii)- In construing the words 'asset was held by the assessee' in cl. (iii) of s. 48, one has to see the object with which the said*

words are used in the statute—In the absence of any indication in cl. (iii) of the Explanation to s. 48 that the words 'asset was held by the assessee' have to be construed differently, the said words should be construed in accordance with the object of the statute, that is, in the manner set out in Expln. l(i)(b) to s. 2(42A)— If the meaning given in s. 2(42A) is not adopted in construing the words used in s. 48, then the gains arising on transfer of a capital asset acquired under a gift will be outside the purview of the capital gains tax and the provisions of s.55(1)(b)(2)(ii) will become unworkable."

7(i) Similar, principle of law has been laid down by the Hon'ble Delhi High Court, in the case of Arun Shungloo Trust 68 DTR 279 (Del). The relevant part of the decision is reproduced hereunder :

"Capital gains— Cost of acquisition— Relevant year for indexation of cost vis-a-vis property acquired under gift, trust, etc.— There is no reason to hold that cl. (iii) of the Explanation below s. 48 intents to reduce or restrict the "indexed cost of acquisition" to the period during which the assessee has held the property and not the period during which the property was held by the previous owner— "held by the assessee" used in Expln. (iii) to s. 48 has to be understood in the context and harmoniously with other sections—Cost of acquisition stipulated in s. 49 means the cost for which the previous owner had acquired the property—Term "held by the assessee" should be interpreted to include the period during which the property was held by the previous owner— Assessee trust having acquired the property in trust on 5th Jan., 1996, which property was acquired by the previous owner sometime before 1st April, 1981, on sale of property by the assessee in asst. yr. 2001-02, it was entitled to the benefit of indexed cost of acquisition from 1st April, 1981, and not for the period on or after 5th Jan., 1996

Held

As per s. 49, the cost of acquisition in the hands of an assessee is treated as the cost of acquisition by the previous owner. Similar benefit/advantage is given in respect of cost of improvement. Secs. 48 and 49 have to be read harmoniously to give full effect to the legislative intent. On reading of cl. (iv) of Explanation to s. 48, it is apparent that the term "cost of improvement" would include the cost of improvement(s) made by the previous owner. The benefit of indexed cost of improvement would be available even if the capita! asset is acquired by the assessee under any gift, will or succession, trust etc. and improvement was made by the previous owner. If the contention of the Revenue is accepted, then benefit of indexed cost of acquisition will not be available to an assessee in a case covered by s. 49 from the date on which the asset was held by the previous owner but only from the date the capital asset was transferred to the assessee. This will lead to a disconnect and contradiction between "indexed cost of acquisition" and "indexed cost of improvement" in the case of capital assets where s. 49 applies. This cannot be the intention behind the enactment of s. 49 and Explanation to s. 48. There is, no reason or ground why the legislative would want to deny or deprive an assessee benefit/advantage of the previous holding for computing "indexed cost of acquisition" while allowing the said benefit for computing "indexed cost of improvement".

(Paras 10,13 & 14)

The construction placed by the Revenue will lead to inconsistency and incongruities, 'when one refers to s. 49 and cl. (iv) of Expln. (1) to s. 48. This will result in absurdities

because the holding of predecessor has to be accounted for the purpose of computing the cost of acquisition, cost of improvement and indexed cost of improvement but as per the Revenue not for the purpose of indexed cost of acquisition. Even for the purpose of deciding whether the transaction is a short-term capital gain or long-term capital gain, the holding by the predecessor is to be taken into consideration. Benefit of indexed cost of inflation is given to ensure that the taxpayer pays capital gain tax on the "real" or actual "gain" and not on the increase in the capital value of the property due to inflation. This is the object or purpose in allowing benefit of indexed cost of improvement, even if the improvement was by the previous owner in cases covered by s. 49. Accordingly there is no justification or reason to not allow the benefit of indexation to the cost o acquisition in cases covered by s. 49. This is not the legislative intent behind cl. (iii) of Explanation to s. 48. There is no reason and justification to hold that cl. (iii) of the Explanation below s. 48 intents to reduce or restrict the "indexed cost of acquisition" to the period during which the assessee has held the property and not the period during which the property was held by the previous owner. The interpretation relied by the assessee is reasonable and in consonance with the object and purpose behind ss. 48 and 49. The expression "held by the assessee" used in Expln. (iii) to s. 48 has to be understood in the context and harmoniously with other sections. The cost of acquisition stipulated in s. 49 means the cost for which the previous owner had acquired the property. The term "held by the assessee" should be interpreted to include the period during which the property was held by the previous owner.—CIT vs. Manjula J, Shah (2012) 68 DTR (Bom,) 269- ***concurred with.***

7(ii) The Hon'ble Calcutta Tribunal in the case of Smt.Meena Deogun V ITO 117 TTJ (Kol-Trib) 121 also held the same proposition. The relevant part of the decision is reproduced hereunder :

"Held :

If for the purpose of determining the period of holding of the capital asset by an assessee, the period for which the previous owner has held the capital asset is to be included, then different consideration cannot be applied for the purpose of s. 48. If ss. 2 (42A), 47(iii), 49(l)(ii)/(iii) and s, 55(2)(b)(ii) are read co-jointly then it appears that in law no "transfer" of a "capital asset" is considered to take place on inheritance and succession. The liability for capital gain arises only when the capital asset is actually transferred by the successor, it is only when the ultimate successor transfers the capital asset for a consideration the capital gains are assessed to tax. In assessing capital gain in the hands of successor, date of acquisition and period of holding is determined taking into consideration the date on which and the cost of which the first owner acquires the capital asset. It is for this reason s. 2(42A) uses the expression "in determining the period for which capital asset is held by the assessee". Sec. 48 incorporates computation mechanism for qualifying the 'capital gain' and therefore the expressions used in the computation formula should be given schematic interpretation. The scheme of taxation of "capital gain" can however, be understood by applying provisions of ss. 2(42A), 2(47), 47(ii), 48, 49(i)(ii) and 55(2)(b)(ii). As per the provisions of these sections where an assessee sells an inherited capital asset the capital gain is computed with reference to \ the period of holding and cost of acquisition incurred by the previous owner. It is so because in fact the successor assessee does not actually incur any cost. If for applying | other provisions relating to computation of capital gains, period of holding and cost i incurred by the previous owner is considered, then it will be improper to apply only the I cost inflation index, applicable to the year of inheritance. For the purpose of determining the period of holding intermediate transfers on account of succession are to be ignored. This proposition is quite clear from the Circular No. 636, dt. 31st Aug., 1992 which states that if an asset was acquired before 1st April, 1981 then the market value of the capital asset as on 1st April, 1981 is to be taken for indexation. In the present case the AO himself allowed the benefit of "fair market value" of the property as on 1st April,

1981 to be cost under s. 55(2)(b)(ii). Under s. 2(42A) the period of holding of the capital asset in the hands of the assessee was the period commencing from 16th April, 1958 till the date of transfer. It is therefore quite clear that as on 1st April, 1981 the asset was statutorily considered to be held by the assessee under s. 55(2)(b)(ii) r/w s. 2(42A). Therefore, the cost inflation index applicable for financial year 1981-82 and not to financial year 1998-99 should have been applied by the AO, Therefore, the AO is directed to re-compute the capital gains by applying cost inflation index of 100 per cent applicable for financial year 1981-82.—Mrs. Pushpa Sofat vs. ITO (2004) 89 TTJ (Chd) 499 : (2002) 81 ITD 1 (Chd) and Dy. CIT vs. Smt. Meera Khera (2004) 136 Taxman 174 (Mumbai)(Mag) ***relied on.***

7(iii) Similar view has been upheld on the issue in question by the Chandigarh Tribunal in Mrs.Pushpa Sofat V ITO 89 TTJ (Chd-Trib)(SMC) 499. The relevant part of the decision is reproduced hereunder :

"Capital gains—Computation—Indexed cost of acquisition of house inherited from father—Sale of house inherited from father—Cost of acquisition of house to the assessee has to be deemed to be the cost for which the previous owner had acquired it—As the house was acquired around the year 1972, the indexed cost of acquisition has to be worked out in the hands of previous owner by taking the cost as on 1st April, 1981, as 100 and applying the cost inflation index of the accounting year when the property was sold—As the cost of property by applying the cost inflation index in terms of s. 48(l)(a) was more than the sale consideration, no taxable capital gain accrued to the assessee."

8. The CIT(Appeals) disregarded the direct decisions quoted and relied upon by the appellant, during appellate proceedings before him. Having regard to the clear ratio laid down by the Hon'ble High Courts and Tribunals, in the decisions discussed above, the findings of the CIT(Appeals) cannot be sustained, in the matter, being contrary to the express provisions of section 2(42A) of the Act and Explanation (1)(i)(b) thereto and section 49(1)(ii) of the Act and Explanation thereunder.

9. Further, the appellant, before the CIT(Appeals), raised additional ground of appeal, in respect of computation of capital gains, by way of adoption of fair market value of the said asset, at Rs.100/- per sq.yd., as on 1.4.1981, as is evident from reproduction of the same at page 5 of his order. It was contended before the CIT(A), that the appellant has

statutory option for adoption of fair market value, as on 1.4.1981, as per the prevalent and relevant statutory provisions of the Act and the fair market value of an asset means, the price that the capital asset would ordinarily fetch, on sale, in the open market, on the relevant date. Such contentions and submissions of the appellant didn't find favour with the CIT(Appeals). The CIT(Appeals), upheld the adoption of the cost of acquisition of the said plot by the AO, as shown in the Gift Deed, dated 25.3.2003, as against the option for adoption of fair market value, exercised by the appellant u/s 55(2)(b)(ii) of the Act. It was, further observed by the CIT(Appeals) that the cost of acquisition is to be considered as on 25.3.2003, as the assessee appellant became the owner of the said plot, on 25.03.2003, by way of gift. In view of this, it is evident that the CIT(Appeals), merely followed the line of approach, in the matter, as adopted by the AO. Thus, both the AO and the CIT(Appeals), has acted against the express provisions of section 2(22B) and 55(2)(b)(ii) of the Act.

10. In this context, it is pertinent to refer to the fair market value, as defined u/s 2(22B) of the Act, and, hence, the same is reproduced hereunder :

> *"2[(22B) "fair market value" in relation to a capital asset, means-*
>
> *(i) the price that the capital asst would ordinarily fetch on sale in the open market on the relevant date; and*
>
> *(ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with the rules made under this Act :]*

11. The assessee, has adopted the 'fair market value' of the impugned asset, within the contemplation of section 55(2)(b)(ii) of the Act. For the sake of ready reference, and proper appreciation of the said section, the same is reproduced hereunder :

> *"55(2) For the purposes of section 48 and 49, "Cost of acquisition"-*
>
> *(b)- in relation to any other capital asset, -*
>
> ***"55(2)(b)(ii)** "Where capital asset became the property of the assessee by any of the modes specified in [sub-section (1) of section 49, and the capital asset became the property of the previous owner **before the [1st day of April, 1981] means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of April [1981] at the option of the assessee;"***

11(i). The index cost of acquisition has been defined u/s 48 and Explanation (iii) thereto, which is reproduced hereunder :

> *(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;*

12. In this context, it is pertinent to refer to the decision of the Hon'ble ITAT, Chandigarh Bench, in the case of Dy.CIT V Smt.Baljinder Kaur & others (2008) 115 TTJ (Chd) 982, wherein it has been held that it is a well settled proposition that the concept of 'fair market value' envisages existence of hypothetical seller and hypothetical buyer, in a hypothetical market. Therefore, determination of fair market value of capital asset, as on 1.4.1981, would involve a judgement of estimation, based on relevant factors. In the present case, appellant has filed a certificate from the Patwari, before the CIT(Appeals), indicating the fair market value of the impugned

asset at Rs.100/- per sq.yd., as on 1.4.1981 and the CIT(Appeals) has failed to bring any material on record, to rebut such documentary evidence. Similarly, a copy of registration of sale deed, dated 19.9.1982, (English version) has been filed by the appellant, pertaining to the sale of land, in that area, at Rs.133/- per sq.yard., as a comparable case. Needless to state here that once, the assessee appellant has exercised his option for adoption of fair market value of the impugned asset, within the meaning of section 55(2)(b)(ii) of the Act, as indicated above, the revenue authorities are required to act in consonance with the provisions of said section and cannot arbitrarily thrust upon the appellant the cost of acquisition, of the said plot, for the purpose of computation of capital gains. It is, further, incumbent upon the revenue authorities, to act judicially in consonance with and not contrary to the express provisions of section 2(42A) and Explanation 1(i)(b) thereto, section 2(22B) and section 55(2)(b)(ii) of the Act. The action of CIT(Appeals) renders the provisions of section 55(2)(b)(ii) of the Act redundant. Further, no material has been brought on record by the CIT(Appeals), to dislodge the option of adoption of 'fair market value' of the said plot, as on 1.4.1981. In the present case, the AO and the CIT(Appeals), adopted cost of acquisition of the said asset, taking the base year, as 2002-03, the year in which, the appellant acquired the said plot under gift, and applied the cost of indexation, for the purpose of computing the capital gains, as against the option exercised by the appellant u/s 55(2)(b)(ii) of the Act, for adoption of fair market

value of the asset in question, as on 1.4.1981. In view of the above legal and factual discussions, the findings of the CIT(Appeals), cannot be upheld. Consequently, Ground No.1, raised by the appellant is allowed.

13. Appellant did not press ground No. 2, 3 & 4, hence, the same are dismissed as not pressed. Ground No. 5 is general in nature and need no adjudication. Accordingly, the same is also dismissed.

14. In the result, appeal of the assessee is allowed in terms, as indicated above.

Order pronounced in the Open Court on 12th Dec.,2012.

Sd/-	Sd/-
(SUSHMA CHOWLA) JUDICIAL MEMBER	(MEHAR SINGH) ACCOUNTANT MEMBER

Dated: 12th Dec.,2012.

'Poonam'

Copy to:

The Appellant, The Respondent, The CIT(A), The CIT,DR

Assistant Registrar, ITAT
Chandigarh