IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F': NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER, AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER,

ITA No. 2155/Del/2011
[A.Ys : 2005-2006]

Shri Pankaj Dhingra B-57, Mayapuri Phase - 1 New Delhi	Vs.	The A.C.I.T Circle 27(1) New Delhi

PAN : AAOPD 6124 A

[Appellant] [Respondent]

Date of Hearing : 23.08.2016
Date of Pronouncement : .09.2016

Appellant by : Shri Sanjay Agarwal, CA

Respondent by : Shri Ashish Chandra Mohanty, Sr. DR

ORDER

PER CHANDRA MOHAN GARG, JM:-

This appeal has been filed by the assessee against the order of the CIT(A)-XXIV, New Delhi, dated 21/03/2011 passed in first appeal No. 213/2008-09 for A.Y 2005-06.

2. The assessee has raised as many as six grounds in this appeal. However, Ground Nos. 1, 4, 5 and 6 are general in nature and need no adjudication.

3. The main effective ground Nos. 2 and 3 reads as follows:

"2. That the learned CIT(A) has erred in upholding the notice u/s 147 of the Act issued to the appellant, although all the information was already available on record with the A.O.

3. That the learned CIT(A) has erred in treating the value of the property received through relinquishment deeds at NIL in spite of provisions of section 49 r.w.s 2(42A) of the Act."

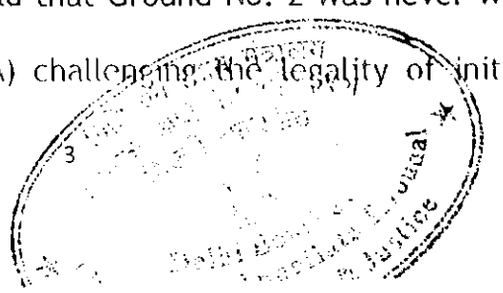
Ground No. 2

3. Apropos Ground No. 2, the ld. DR, at the very outset, drew our attention towards the relevant operative para 3.3 of the impugned order and submitted that the legal ground of the assessee challenging the validity of initiation of reassessment proceedings was not pressed before the CIT(A), therefore, the assessee cannot agitate this legal issue before the Tribunal.

4. Replying to the above contention of the ld. DR, the ld. AR of the assessee contended that the case of the assessee was represented by Shri Inder Mal Singh, Advocate, and in the affidavit dated 29.4.2016, he has deposed that Ground No. 2 was never withdrawn or communicated as not pressed before the AO. The ld. AR also pointed out that in the said affidavit, Shri Inder Mal Singh, in para 4 of the affidavit categorically denied that there was no reason to believe that ground of the assessee challenging

the legality of notice u/ 148 of the Act could be stated to have been withdrawn or not pressed. The ld. A.R. pointed out that the advocate having appeared before the AO has not been rebutted in any manner by the Revenue authorities and the same also gets support from the copies of the order sheet submitted by the department wherein in order sheet entry dated 17.2.2009, it has been mentioned that "Ground No. 2 not pressed", but there is no signature of Shri Inder Mal Singh, the assessee's representative in this regard.

5. We have heard the rival submission and have perused the relevant material on record. On careful consideration of the above rival submissions, at the very outset, we may point out that in the relevant order sheet entry dated 17.2.2009, appearance of Shri Inder Mal Singh, on behalf of t e has been noted by the Revenue authorities and on the left side of the entry, it has also been stated that "Ground No. 2 not pressed". On a plain reading of this order sheet, it is amply clear that the entry of order sheet as well as narration of 'Ground No. 2 not pressed' have been written by the same person and on the left side below note sheet, signature of Shri Inder Mal Singh, can be seen. However, on the extreme left side below "Ground No. 2 not pressed" there is no signature of the advocate. In the light of the unrebutted affidavit of Shri Inder Mal Singh and on the basis of foregoing discussion, we are inclined to hold that Ground No. 2 was never withdrawn or not pressed before the CIT(A) challenging the legality of initiation of



reassessment proceedings and issuance of notice u/s 147 and 148 of the Act. We may also point out that from the relevant operative para 3.3, we clearly observe that the CIT(A) decided this legal ground against the assessee on the basis of detailed deliberations in paras 3.1, 3.2 and 3.3. In the last line of para 3.3, the first appellate authority concluded that he did not find any error on law or fact committed by the AO in invoking the provisions of section 148 r.w.s 147 of the Act for the year under consideration. Thereafter, the CIT(A) dismissed the legal ground of the assessee by observing that this ground of appeal was not pressed by the counsel of the appellant-assessee. In this situation, we decline to accept the contention of the ld. DR that the assessee cannot agitate the legal ground N. 2 before the Tribunal because it was not pressed before the CIT(A). As we have already pointed out that Shri Inder Mal Singh, Advocate has categorically denied in his affidavit that there was no such situation of not pressing Ground No. 2 before the CIT(A) and the said ground was never withdrawn or communicated as not to be pressed before the first appellate authority. Accordingly, legal objection of the ld. DR is jettisoned. The ld. AR is allowed to argue Ground No. 2.

6. The ld. AR submitted that the assessee filed computation of income of capital gain, valuation report of the property sold as on 1.4.1981, tax audit report and financial account, conveyance deed dated 18.10.2004, copy of sale deed dated 25.10.2004 for property No. 15, Udyog Nagar, Rohtak and

purchase deed dated 21.7.2005 for property No. 24/2012, second floor, Punjabi Bagh, New Delhi alongwith return of income for A.Y 2005-06. The ld. AR also submitted that the assessee also filed acknowledgment of filing balance sheet and tax audit report for F.Y 2004-05 when the AO on 31.10.2005 alongwith return of income for the relevant A.Y 2005-06 and all these documents including copy of return have been placed in the assessee's paper book pages 1 to 117. The ld. A.R. pointed out that there was no extraneous material with the AO beyond these documents for initiating reassessment proceedings u/s 147 of the Act and issuing notice u/s 148 of the Act and thus the AO did not assume valid jurisdiction to initiate reassessment proceedings and hence the same may be quashed. The ld. AR vehemently pointed out that it is a clear case of change of opinion on the same material which was placed before the AO during the assessment proceedings. Therefore, the reassessment proceedings, notice and consequent assessment order passed u/s 143(3) r.w.s 147 of the Act may kindly be quashed.

7. The ld. AR further submitted that from copy of reasons recorded available at pages 151 of the assessee's paper book, it is amply clear that the AO made allegation that the assessee has sold his property for a consideration of Rs. 1.40 crores which is not verifiable as relevant details like bank account, copy of sale deed, etc. has not been furnished with return, therefore, he has reason to believe that income of Rs. 1,40,00,000/-

with regard to sale of property has escaped assessment for A.Y 2005-06. The ld. AR submitted that computation of capital gain before the AO which is also available at page 4 of the assessee's paper book alongwith return of income and other relevant documents including sale deed etc. were also filed before the AO. Therefore, the allegation in the reasons recorded is factually incorrect, hence it should be presumed that the AO had not assumed valid authority jurisdiction for initiation of reassessment proceedings and issuance of notice u/s 148 of the Act. The ld. AR fairly accepted that the return was originally processed and the same was not scrutinised during the original assessment proceedings. The ld. AR placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd and submitted that there should be live nexus between reason to believe and escapement of income and the AO cannot review the assessment u/s 148 of the Act without fulfilling the three conditions stipulated in the relevant provisions of the Act for reopening of assessment u/s 147 of the Act. The ld. AR further submitted that as per the ratio of the decision of the Hon'ble Delhi High Court in the case of CIT V. Indo Arab Air Services [2016] reported at 283 CTR 92 [Del] reassessment u/s 147 of the Act is not justified without availability of new tangible material after processing of return u/s 143(1) of the Act.

8. Replying to the above, the ld. DR pointed out that in para 3.1 to 3.3 of the impugned order, the CIT(A) properly considered the submissions of the assessee and thereafter he concluded that at the stage of initiation of reassessment proceedings and issuance of notice with limited enquiry has to be made only to see that whether there were reasonable ground before the AO to believe that income has escaped assessment. The ld. DR further pointed out that the assessee filed computation of income, computation of capital gain, sale deed, etc for claiming deduction but he did not file relinquishment deed dated 13.9.2001 alongwith return of income which raised doubt in mind of AO as subsequently AIR information was received by the AO that the assessee has sold property for consideration of Rs. 1,40,00,000/- during the relevant period. Thus, it is not a case of change of opinion. The ld. DR vehemently pointed out that there was tangible material before the AO in the shape of AIR information and there was no occasion for the AO to form opinion on the return and other documents filed by the assessee alongwith return because return was processed u/s 143(1) of the Act.

9. On careful consideration of the above rival submissions and vigilant perusal of the relevant documents pointed out by the parties during the rival arguments, at the very outset, we note that undisputedly, the return of income for the relevant A.Y was processed u/s 143(1) of the Act and there was no scrutiny by the AO during the original assessment proceedings. From the relevant operative part para 3.3 of the first appellate authority, we

observe that the CIT(A) placing reliance on the decision of Hon'ble Supreme Court in the case of ITO Vs. Biju Patnaik reported at 188 ITR 247 [SC] wherein the Hon'ble Apex Court has sounded the note of caution at the stage of notice u/s 147/148 of the act that at the stage of notice, the court is not to go into the merits of the controversy whether a particular income is taxable. In the present case also, the AO received AIR information regarding sale of property by the assessee against consideration of Rs. 1.40 crores and this was tangible material before the AO for valid assumption of jurisdiction. We may also point out that after proper application of mind on the AIR information, the AO formed belief that the income of the assessee with regard to sale of property has escaped assessment for A.Y 2005-06 as the assessee did not file complete relevant papers alongwith relinquishment deed and return of income which created doubt in the mind of the AO and cumulative effect of the AIR information and doubt was that the AO had reason to believe that income with regard to sale of property has escaped assessment. On careful and vigilant reading of decisions of cited and relied by the ld. AR, we are of the view that the benefit of ratio of these decisions is not available to the assessee in the present case as the AO had AIR information which was property analysed before initiation of reassessment proceedings u/s 147 and issuance of notice u/s 147 of the Act by proper applicable of mind to the information and assessment records. Therefore, the present case is not a case of change of opinion, there was tangible material before the AO for initiation of reassessment proceedings. Thus we

decline to accept the legal ground of the assessee that the AO had not assumed valid jurisdiction for invoking provisions of section 147/148 of the Act for the year under consideration. Consequently, legal Ground No. 2 of the assessee is dismissed.

Ground No. 3.

10. Apropos Ground No. 3, we have heard the arguments of both the rival representatives and have carefully perused the relevant material placed on record of the Tribunal. The ld. AR submitted that the original return was filed alongwith all necessary and relevant documents including copies of sale deed dated 25.10.2004 and purchase deed dated 21.7.2005 supported by computation of income and capital gains and the return was processed u/s 143(1) of the Act placing reliance on the decision of the Hon'ble Supreme Court in the case of Kuppuswamy Chettiar Vs. A.S.F.A Arumugam Chettiar and Another reported at [1967] AIR 1935 [SC] the ld. AR submitted that the remaining three parts of the property was acquired by the assessee from his father through other three legal heirs, without any consideration. Thu it was a gift. He pointed out that in the relinquishment deed dated 13.9.2001 it was stated that no consideration is being paid by the assessee to the said transferors. The ld. AR vehemently

argued that the indexation was to be given from the date of acquisition of sold property from the date of acquisition of property by the original owner i.e. from the date 1.4.1981 only as the property was acquired on 21.5.1980 by way of registered lease deed.

11. The ld. A.R. pointed out that the ratio of the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Arun Shungloo Trust VS. CIT [2012] 249 CTR 294 [Del] and submitted that the benefit of indexed cost of improvement by previous owner in cases covered u/s 49 of the Act, would be allowed. The ld. AR further placing reliance on the decision of ht Hon'ble High Court of Bombay in the case of CIT Vs. Manjula J. Shah [2013] 355 ITR 474 [Bom] dated 11.10.2011 passed in ITA No. 3378 of 2010 contended that the expression 'asset' held by the assessee in clause (iii) of Explanation to section 48 of the Act has to be construed in consonance with the meaning given in section 2(42A) of the Act. The ld. AR also pointed out that since in the present case the assessee has been held liable for payment of long term capital gains to tax by treating the period which the capital asset in question was held by the assessee, the indexation of the cost of acquisition incurred by the original owner should be taken for the purpose of indexation. The ld. AR vehemently argued that

the AO as well as the CIT(A) erred in taking cost of indexation on relinquished part of property as NIL because as per section 49(1) of the Act cost of acquisition by the previous owner has to be taken for the purpose of indexation.

12. Replying to the above, the ld. DR contended that immediately the previous owner i.e. the persons who executed relinquishment deed on 13.9.2001 in favour of the assessee had not spent any sum for acquiring the shares in the property in question hence, cost of indexation was rightly taken as NIL and indexation was rightly given from 2001 as the property was transferred in the name of the assessee and the same was acquired by the assessee on 13.9.2001 only when the relinquishment deed was executed and registered.

13. No other argument was placed by both the parties.

14. On careful consideration of the above rival submissions, at the very outset, we note that the following undisputed facts emerged from the record:

(i) The property in question was acquired by the father of the assessee Shri Prem Nath Dhingra on 21.8.1980 by way of registered lease deed.

(ii) Shri Prem Nath Dhingra died on 31.3.2001.

(iii) The assessee acquired 1/4th share in the property by way of inheritance and remaining 3/4th was acquired also by way of inheritance, by other three successors namely, Smt. Sudharshan Dhingra [wife], Shri Puneet Dhingra [son] and Smt. Poonam Dhingra [daughter].

(iv) On 13.9.2001 all above named three successors relinquished their entire respective rights in the property by executing a registered deed in favour of the assessee.

(v) The assessee sold the property in question on 25.10.2004 during F.Y 2004-05 pertaining to A.Y 2005-06 under consideration.

(vi) There is no dispute between the parties regarding long term capital gain on 1/4th part which assessee directly acquired by way of inheritance from his deceased father wherein the AO computed long term capital gain

by taking cost of acquisition of his deceased father and by giving indexation from 1.4.1981.

15. However, main controversy remained wherein the assessee wanted to provide same treatment for remaining 3/4th part for calculation of long term capital gain as was given for 1/4th part and the AO wants to tax the same by taking NIL cost of acquisition and by giving indexation from 2001.

16. First of all, we may point out that as per copy of relinquishment deed dated 13.9.2001 we clearly observe that no consideration was paid by the assessee to the transferors.thus it was a transaction of gift from mother, brother and sister to the assessee as no consideration was paid by the transferee assessee to the transferors. In the light of ration of the decision of the Hon'ble Apex Court in the case of Kuppuswami Chettiar [supra] if such a transfer of property by way of registered relinquishment deed without consideration is a gift u/s 123 of the Transfer of Property Act, 1882.

17. The next question for adjudication before us is as to whether the cost of acquisition as applied by the AO was NIL and

indexation given by the AO from 2001 is justified and correct as per relevant provisions of the Act.

18. In the Income tax Act, 1961, Chapter IV, the provisions of computation of income has been provided in section E of the said chapter the provisions of computation of capital gain have been legislated wherein section 45 of the Act is related to the head of the income of capital gain. Section 48 of the Act provides provision relating to computation of capital gain and section 49 of the Act provides cost with reference to certain modes of acquisition. Thus we deem it proper to refer sections 48 and 49 of the Act, which read as follows:

> *"48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing[67] as a result of the transfer of the capital asset the following amounts, namely :—*
>
> *(i) expenditure incurred wholly and exclusively in connection with such transfer[68];*
>
> *(ii) the cost of acquisition of the asset and the cost of any improvement[6] thereto:*
>
> *49. 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[80], or*

[81][(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) [82][or clause (v)] [83][or clause (vi)] [84][or clause (via)] [85][or clause (viaa)] [86][or clause (vica) or [87][clause (vicb)] or [88][clause (xiii) or clause (xiiib) or clause (xiv) of section 47]];

[89][(iv) such assessee being a Hindu undivided family, by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969,]

the cost of acquisition of the asset[89a] 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.

[90][Explanation.—In this [91][sub-section] the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) [92][or clause (iv)] of this [93][sub-section].]"

19. At this juncture, for proper adjudication, the controversy posed to us for adjudication in the present case, it is also relevant to take cognizance of the provisions prescribed in the sub clause (b) to clause (i) to Explanation 1 to section 2(42A) of the Act which reads as under:

*"**Provided further** that in case of a share of company (not being a share listed in a recognised stock exchange) or a unit of a Mutual Fund specified under clause (23D) of section 10, which is transferred during the period beginning on the 1st day of April, 2014 and ending on the 10th day of July, 2014, the provisions of this clause shall have*

effect as if for the words "thirty-six months", the words "twelve months" had been substituted.

[26][Explanation 1].—(i) In determining the period for which any capital asset is held by the assessee—

(a) in the case of a share held in a company in liquidation, there shall be excluded the period subsequent to the date on which the company goes into liquidation ;

(b) in the case of a capital asset which becomes the property of the assessee in the circumstances mentioned in [27][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 the said section."

20. In view of the letters and spirit of the above provisions, we note that section 48 provides that "capital gain" shall be computed by deducting from full value of consideration received or accruing as a result of transfer of capital asset two amounts viz. first, expenditure incurred wholly and exclusively in connection with such transfer and secondly, the cost of acquisition of asset and cost of improvement, if any, thereto, the section 49(1) of the Act provides the provisions for calculation of cost with reference to certain modes of acquisition including transfer under a gift or will and transfer by succession, inheritance or devolution etc.

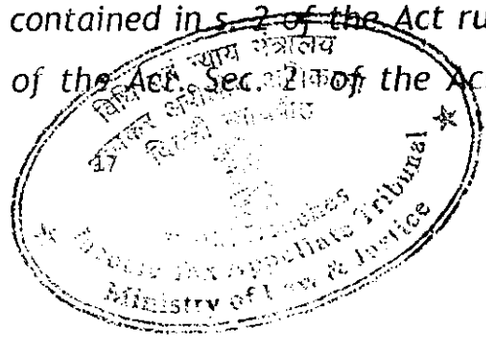
21. Explanation to sub-section (1) to section 49 of the Act provides that in this provision, the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of

acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) [92][or clause (iv)] of this [sub-section], meaning thereby, the words used by the Legislature in the last part of sub-section (1) to section 49 viz "previous owner of the property" means the last previous owner who had not acquired the property by way of gift or will as mentioned in sub clause (i), on any distribution of assets on the dissolution of a firm etc as mentioned in clause (ii) or by inheritance, inheritance or devolution as mentioned in sub clause (a) of clause (iii) of sub-section (1) to section 49 of the Act.

22. Furthermore, sub-clause (b) to clause (i) to Explanation 1 to section 2(42A) of the Act provides that when the assessee becomes owner of the property in the circumstances mentioned in clause (i) to sub section (1) to section 49 of the Act, then shall be included period of which the asset was held by the previous owner referred to in said section i.e. 49(1) of the Act.

23. In the case of CIT Vs. Manjula S. Shah [supra], the Hon'ble Bombay High Court interpreted the provisions of clause (iii) to Explanation to section 48 r.w.s 2(42A) of the Act in paras 20 to 23 wherein it was held as under:

> *"20. To accept the contention of the Revenue that the words used in cl. (iii) of the Expln. to s. 48 of the Act has to be read by ignoring the provisions contained in s. 2 of the Act runs counter to the entire scheme of the Act. Sec. 2 of the Act expressly*



provides that unless the context otherwise requires, the provisions of the Act have to be construed as provided under s. 2 of the Act. In s. 48 of the Act, the expression 'asset held by the assessee' is not defined and, therefore, in the absence of any intention to the contrary the expression 'asset held by the assessee' in cl. (iii) of the Explanation to s. 48 of the Act has to be construed in consonance with the meaning given in s. 2 (42A) of the Act. If the meaning given in s. 2(42A) is not adopted in construing the words used in s. 48 of the Act, then the gains arising on transfer of a capital asset acquired under a gift or will be outside the purview of the capital gains tax which is not intended by the legislature. Therefore, the argument of the Revenue which runs counter to the legislative intent cannot be accepted.

21. Apart from the above, s. 55(1)(b)(2)(ii) of the Act provides that where the capital asset became the property of the assessee by any of the modes specified under s. 49(1) of the Act, not only the cost of improvement incurred by the assessee but also the cost of improvement incurred by the previous owner shall be deducted from the total consideration received by the assessee while computing the capital gains under s. 48 of the Act. The question of deducting the cost of improvement incurred by the previous owner in the case of an assessee covered under s. 49(1) of the Act would arise only if the period for which the asset was held by the previous owner is included in determining the period for which the asset was held by the assessee. Therefore, it is reasonable to hold that in the case of an

assessee covered under s. 49(1) of the Act, the capital gains liability has to be computed by considering that the assessee held the said asset from the date it was held by the previous owner and the same analogy has also to be applied in determining the indexed cost of acquisition.

22. The object of giving relief to an assessee by allowing indexation is with a view to offset the effect of inflation. As per the CBDT Circular No. 636 dt. 31st Aug., 1992 [(1992) 107 CTR (St) 1 : (1992) 198 ITR (St) 1] a fair method of allowing relief by way of indexation is to link it to the period of holding the asset. The said circular further provides that the cost of acquisition and the cost of improvement have to be inflated to arrive at the indexed cost of acquisition and the indexed cost of improvement and then deduct the same from the sale consideration to arrive at the long term capital gains. If indexation is linked to the period of holding the asset and in the case of an assessee covered under s. 49(1) of the Act, the period of holding the asset has to be determined by including the period for which the said asset was held by the previous owner, then obviously in arriving at the indexation, the first year in which the said asset was held by the previous owner would be the first year for which the said asset was held by the assessee.

23. Since the assessee in the present case is held liable for long-term capital gains tax by treating the period for which the capital asset in question was held by the previous owner as the period for which the said asset was held by the assessee, the

indexed cost of acquisition has also to be determined on the very same basis.

In the result, we hold that the Tribunal was justified in holding that while computing the capital gains arising on transfer of a capital asset acquired by the assessee under a gift, 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."

[Emphasis respectfully supplied by underlining]

24. Turning to the factual matrix of the present case in hand, on evaluation of facts and circumstances in the light of above noted relevant provisions of the Act, we note that the property in question was originally acquired by the father of the assessee Shri Prem Nath Dhingra on 21.9.1980 and he died on 31.3.2001. Thereafter, by way of inheritance, the assessee got 1/4th share and remaining ¾ was held by mother, brother and sister of the assessee who collectively gave it to the assessee by way of executing a registered relinquishment deed on 13.9.2001 and the property was sold by the assessee on 25.10.2004. On the 1/4th part, the AO allowed cost of acquisition incurred by the father of assessee and indexation was also given w.e.f 1.4.1981. However, the AO denied to give the same treatment to the other ¾ part

and treated the cost of acquisition as NIL and granted indexation w.e.f year 2001 only.

25. At the risk of repetition, we may point out that since in the present case the assessee acquired 3/4th portion of property by way of relinquishment deed without paying any consideration to the transferors, it is a transaction of gift as per section 123 of the Transfer of Property Act, 1882 and in the case of Transfer of capital assets by way of gift the provisions of sub section (ii) to section (1) to section 49 of the Act applies and as per Explanation to the said provision, previous owner of the property would be original owner of the property would be original owner Shri Prem Nath Dhingra, who acquired property on 21.9.1980 and cost of acquisition incurred by the previous owner. It is pertinent to note that the transferors of the property in question had not accrued or earned any capital gain in this transaction and the property had been given to the assessee-transferee without any consideration as a gift. It is also undisputed fact that the transferors did not incur any cost for acquisition of right over 3/4th part of the property as it was received by them by way of inheritance, nor they received any consideration from the assessee at the time of transferring the same to the assessee by way of registered relinquishment of deed executed on 13.9.2001

in favour of the assessee thus we have held that the transaction of such transfer from these three persons to the assessee is a transaction of gift. The ld. DR could not controvert this fact that the transferors have not claimed any indexation for the period for which the asset was held by the first previous owner i.e. Late Shri Prem Nath Dhingra to the period ended on 13.9.2001 when these three persons relinquished their rights over the property in favour of the assessee. It is also not the case of the AO and CIT(A) that the assessee is claiming double indexation.

26. When we further analyse the second limb of transaction in favour of the assessee from the successors of Late Shri Prem Nath, then in the totality of facts and circumstances of the present case, we are of the considered opinion that the cost of acquisition has to be taken as the cost of acquisition by the previous owner and as per Explanation to sub-section (1) to section 49 of the Act previous owner obviously means the previous owner of capital asset who acquired it by any mode of acquisition other than that referred to clause (i) to clause (iv) to Explanation 1 to the said section. We further note that as per sub-clause (b) to clause (i) of Explanation to section 242A of the Act in the case of a capital asset which become the property of

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the assessee in the circumstances mentioned in sub-section (1) of
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section 49, the period for which the asset was held by the
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included for the purpose of determination of the fact as to
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whether the capital asset was held more than 36 months
whether the capital asset was held more than 36 months
immediately preceding that of transfer or not. If for this purpose
immediately preceding that of transfer or not. If for this purpose
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holding, which was not claimed by the intermediatory transferor
who gifted the property to the assessee after receiving the same
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by inheritance and did not claim any indexation, has to be
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acquisition for the assessee who is being taxed for capital gain.
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27. In the present case, in regard to transfer of impugned 3/4th
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the 3/4th portion was acquired by the three above named persons
the 3/4th portion was acquired by the three above named persons
in inheritance and on 13.9.2001 by way of registered
in inheritance and on 13.9.2001 by way of registered
relinquishment deed the said three persons relinquished their
relinquishment deed the said three persons relinquished their
entire respective right over the 3/4th portion without any
entire respective right over the 3/4th portion without any

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consideration. Thus it has been held by us in the earlier part of this order that such transfer of 3/4th portion is a gift in favour of the assessee.

28. It is peculiar circumstance of this case in hand that the assessee got rights over the 3/4th portion of the property by way of gift from persons who also acquired the rights over that portion of property by way of inheritance. Further, in the present case, on the transfer of property to the assessee the said three transferors did not receive any consideration from the assessee thus it has been held that it is transaction of transfer of property by gift and they never claimed any indexation from the date of acquisition by the first previous owner for which they were entitled as per Explanation to section 49(1) of the Act r.w.sub-clause (b) to clause (i) to section 2(42A) of the Act. In this situation, these three persons were never subjected to tax on capital gain and hence they never has an occasion to claim the same and therefore, they never claimed indexation from the date of acquisition by their late predecessor i.e. first previous owner of the property who acquired it on 21.5.1980. The transfer of property from first previous owner to above said three persons is a mode of acquisition of property by way of inheritance as per sub clause (a) to clause (iii) of sub-section (1) of section 49 of

the Act and these persons were entitled for claiming indexation from 21.5.1980 to 13.9.2001 which was never claimed.

29. The transfer of the property from the said three persons to the assessee by way of gift on 13.9.2001 is a mode of acquisition by way of gift per clause (ii) to subsection (1) of section 49 of the Act for which the assessee again entitled to indexation under the provisions of Explanation to section 49(1) of the Act r.w.sub clause (b) of clause (i) to Explanation to section 2(42A) of the Act. In our considered opinion, it is not the case of the authorities below that the assessee is claiming indexation which has already been provided to the intermediatory transferors [i.e. the said three persons] and when all the right have been relinquished by way of registered relinquishment deed, then the right to claim indexation for the period of 21.5.1980 to 13.9.2001 also included in the said relinquishment. In this scenario, we can safely presume that these three persons never claimed indexation for the period during which the property was held by the first previous owner till the date of relinquishment in favour of the assessee i.e. from 21.5.1980 to 13.9.2001 for which they were legally entitled. In this situation, this right of claiming indexation as per provisions of the Act, also presumed to be

included in the transaction of gift which was the way of transfer of property in favour of the assessee without any consideration.

30. We may also point out that in the second limb of transaction wherein the assessee acquired the rights over the property by way of gift from his mother, brother and sister and then for the purpose of indexation, the said period from 21.5.1980 to 13.9.2001 cannot be ignored and left as charity to the department which is vehemently charging the tax. In that view of the matter, the said three persons relinquished their entire rights over the 3/4th portion of property including the right to claim indexation for the period the first previous owner held the property till his death and from the date of death to the date of relinquishment of rights over the property in favour of the assessee by these three transferors/gifters i.e. from 21.5.1980 to 13.9.2011.

31. The ld. DR also contended that the word used in clause (iii) of Explanation to section 48 of the Act has to be read stand alone by ignoring the provisions contained in section 2 of the Act. However, we decline to accept the same as in the beginning of section 2 of the Act it is provided that "In this Act, unless the

context otherwise requires" thus the provisions of the Act have to be construed as provided in section 2 of the Act. We may further observe that in the section 48 of the Act, the meaning or definition of the expression 'asset held by the assessee' has not been provided thus, as per relevant provisions of the Act and the said three transferors simply gifted the 3/4th portion of property to the assessee without claiming any legally eligible indexation and indeed they had no opportunity to claim such indexation for the said period from 21.5.1990 to 13.9.2001 as they were not subjected to capital gain tax on that transfer of property to the assessee as gift. In our humble opinion, the entire rights over the 3/4th portion of the property in heritance were transferred by these three persons which also include right to claim indexation for the period for which the previous deceased owner and said gift or transferors held the property and thus the indexation has to be given from the date of acquisition of property by the deceased first previous owner i.e. 21.5.1980.

31. In view of the foregoing discussion, we reach to a logical conclusion that the assessee is entitled to get benefit of indexation for the period w.e.f. 21.5.2001 to 25.10.2004. [the date on which the assessee sold the property] including the property during which the property was held by the assessee

deceased first previous owner. At this stage, we may point out that in the absence of any legislative intent contrary to the expression 'asset held by the assessee' in clause (iii) to Explanation to section 48 of the Act, the meaning has to be given and construed in consonance with the meaning given in section 2(42A) of the Act. If this meaning given by relevant sub clause (b) to clause (i) to Explanation to section 2(42A) is ignored or not taken into consideration for expression 'asset held by the assessee' and such meaning is not adopted in construing the words used in section 48 of the Act, then the capital gains accrued under transfer of property acquired by way of gift etc. under scope of section 49(1) of the Act would be out of the ambit of taxing provisions of capital gains which cannot be an intention of legislature. We, therefore, dismiss the contention of the ld. DR that the meaning cannot be borrowed from section 2(42A) of the Act for the expression 'asset held by the assessee' as used in clause (iii) of the Explanation to section 48 of the Act.

32. In our considered opinion, the purpose behind allowing indexation is to offset the effect of inflation which brings down the value of money. Further, as per the CBDT Circular No. 636 dated 31.8.1992 a fair method of allowing benefit of indexation to the assessee is to relate or link it to the period of holding by

the assessee and in case of transfer of property by inheritance, the said period also includes the period for which the property was held by the deceased previous owner and in case of gift the period for which the asset was held by the gifter. The Act does not explain the basis of indexation in a situation when the asset was acquired by way of inheritance and thereafter it was further transferred to son and brother by way of gift without claiming any indexation for the period from the date of acquisition by the deceased first previous owner to the date of transfer by way of gift. It is a well accepted principle that the beneficiary provision must be interpreted liberally to achieve the intention of the legislature behind such provision but in a balancing and justified manner otherwise the legislative intent behind beneficiary provisions would be defeated.

33. In view of the above noted conclusion in the factual matrix of the present case, we are of the considered opinion that the assessee got right over the property by way of gift from the persons who acquired the property without paying any consideration by way of inheritance and they never claimed indexation or any other benefit under the Act on such transfer. In our opinion, they were merely an intermediatory or medium, between the deceased first owner and the assessee, who received

property from their husband or father on his death and transferred the same to the assessee as a gift without any consideration. Thus, in view of beneficiary provision of section 49(1) r.w. provision contained in sub-clause (b) to clause (i) to Explanation to section 2(42A) of the Act while computing the capital gains arising on such transfer of capital assets acquired by the assessee partly under succession and partly gift, the indexed cost of acquisition has to be computed with reference to the year in which first previous owner held the asset and not the year in which assessee became the owner of the asset as per provisions of clause (ii) to sub-section (i) to section 49 of the Act.

34. In the present case, a we have noted above that the transferors to the assessee neither received any consideration from the assessee nor claimed any benefit of indexation by the giftors/transferors who gifted the 3/4th portion to the assessee and thus the period during which the property was held by the deceased first previous owner till his death and the period for which the said three persons held the property till relinquishment, i.e. 21.05.1980 to 13.9.2001 and the period for which the assessee held the property from the date of relinquishment by gift till the date of ultimate sale which

accrued capital gain for the assessee i.e. from 13.9.2001 to 25.10.2004 for the assessee and thus such indexation had to be given from 1.4.1981 as the property was purchased by the first owner on 21.5.1980. Accordingly, Ground No. 3 of the assessee is allowed.

35. In the result, the appeal of the assessee stands partly allowed on merits only.

The order is pronounced in the open court on 30.09.2016.

(L.P. SAHU)
ACCOUNTANT MEMBER

(C.M. GARG)
JUDICIAL MEMBER

Dated: 30th September, 2016

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

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Asst. Registrar,
ITAT, New Delhi