

IN THE ITAT CHANDIGARH BENCH 'B'

Manjit Singh

v.

Deputy Commissioner of Income-tax

IT APPEAL NO. 1037 (CHD.) OF 2011

[ASSESSMENT YEAR 2008-09]

SEPTEMBER 28, 2012

ORDER

Mehar Singh, Accountant Member – The present appeal filed by the assessee is directed against the order dated 07.09.2011 passed by the Id. 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 Id. CIT(A)-I, Ludhiana has erred in confirming the addition made by the Assessing Officer under the head long term capital gain by adopting the fair market value of land as on 1.4.1981 at Rs. 27,030/- per acre against Rs. 5 lacs per acre adopted by the assessee.

2. That the Id. CIT(A)-I, Ludhiana has failed to ignore the documentary evidence in the shape of certificate from the Patwari as well as Tehsildar which was based on field enquiries by the Patwari and rejection of that report of the Tehsildar/Patwari by the CIT(A) was not proper.

3. That the CIT(A) has erred in not considering the reply filed by the Tehsildar who had responded to enquiries made by the Assessing Officer u/s 133(6) and gave the Fair Market Value of the land as on 1.4.1981 after making detailed enquiries from the various prominent person viz Nambardars/Sarpanchs who confirmed the market rate of Rs. 5 lacs per acre.

4. That the CIT(A) has failed to appreciate that fair market value of land and registry value are different as in the case of assessee himself the sale was made for Rs. 43,25,000/- per acre and circle rate was Rs. 5 lacs per acre and, thus, if fair market value has been declared at

Rs.43,25,000/- per acre then the same basis should have been adopted as cost of acquisition as on 1.4.1981, based on fair market value. Titus, the contradictory stand have been confirmed by the CIT(A) against the facts and circumstances of the case.

5. Notwithstanding the above ground of appeal the Assessing Officer having already accepted fair market value of the land in the same area @ Rs. 1.80,000/- per acre, which was located deep inside the Village having odd shape and other defects, and the land sold under consideration being situated on the main road having better location, size and shape, the rate should have adopted for higher than the Rs. 1,80, 000/- per acre as accepted by the Assessing Officer u/s 143(3) of the Act for the Assessment Year 2005-2006.

6. The CIT(A) has not been able to rebut the identical case of Shri Abdul Rashid Rather of Amritsar Bench as cited before him and under detailed submissions as made before him.

7. That the Appellant craves leave to add or amend he 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’ contended that the grounds of appeal revolve around non-adoption of circle rate of Rs. 5 lacs per acre as Fair Market Value as on 01.04.1981, for the purpose of computation of capital gains by the AO and upholding the findings of the AO by CIT(A). Ld. ‘AR’ referred to various pages of the Paper Book, such as pages from 50 to 62, 39. Ld. ‘AR’ also placed reliance on the decision of the Amritsar Bench in the case of *Abdul Rashid v. ITO* in IT Appeal No. 104/ASR/2009, A.Y. 2004-05 dated 23.7.2009. Ld. ‘AR’ also placed reliance on the decision of the Chandigarh Bench in *Dy. CIT v Smt.Baljindcr Kaur* [2009] 29 SOT 8 (CHD) (URO). Ld. ‘AR’ also filed written submissions in the form of synopsis. A bare perusal of the synopsis reveals that assessee appellant is aggrieved by the order passed by the AO and upheld by the CIT(A) in adopting Fair Market Value of the asset as on 1.4.1981 at Rs. 27,030/- per acre. Ld. ‘AR’ contended that CIT(A) accepted the rate of Rs. 43.25 lacs per acre as sale rate, as disclosed on the basis of one agreement in respect of land, seized from the premises of Shri G.K. Colonizer against circle rate of Rs. 5 lacs, but ignored the adoption of Rs. 5 lacs as Fair Market Value of the same land as on 1.4.1981. The appellant has adopted Fair Market Value of the land as on 1.4.1981 on the basis of

certificate of Halka Patwari, as endorsed by the Tehsildar, issued on the basis of enquiries conducted from the field staff, various Sarpanches and Panchayat members, with their signature appended thereon. Ld. 'AR' further pointed out that the Fair Market Value of the land vis-a-vis sale consideration as recorded in Registered Sale Deed cannot be the same. Relevant part of the brief synopsis is reproduced hereunder :

“2.The facts in brief are that the assessee is an agriculturist and had sold some land to G.K. Colonizers and during the course of search on G.K. Group of cases, one agreement was seized from where, it came to the notice of the department that the assessee had sold agricultural land at the rate of Rs. 43.25 lacs per acre, against the circle rate of Rs. 5 lacs per acre and the assessee accepted that rate of sale as per agreement and filed the return of income and adopted the sale rate as per agreement.

3. For the justification of land rate as on 1.4.1981, the assessee filed the certificate from the Revenue Officer, wherein he had certified the “Fair Market Value of the land at Rs. 5 lacs per acre as on 1.4.1981 and the evidence of the same had been enclosed in the paper book at page 11.

4. Not satisfied with that certificate, the AO made enquiries from the Tehsildar for ‘fair market value.’ of land as on 1.4.1981 and that letter has been reproduced by the Assessing Officer in the assessment order. The Tehsildar made detailed enquiries from the Nambardar, Patwari, Sarpanches of Villages and gave a exhaustive report as per copy placed at pages 12 to 17 of the paper book. The report is very exhaustive.”

4. Ld. 'AR' pointed out that the CIT(A), cannot adopt contradictory approach, in the adoption of the Fair Market Value of the land, as on 1.4.1981, ignoring the sale consideration of Rs. 43.25 lacs per acre, of the said land, disclosed by the assessee, as recorded in the Agreement, seized in the course of search operation, as full value of consideration u/s 48 of the Act. It was, further, pointed out by the Ld. 'AR' that the department has already accepted Rs. 1,80,000/- per acre as Fair Market Value of the land as on 1.4.1981 located in the same village and at an adverse location for the assessment year 2005-06. Ld. 'AR' also analyzed the finding of the CIT(A) in the written synopsis and the same are reproduced as under:

<i>“Finding of the CIT (A)</i>	<i>Assessee’s reply</i>
<p>The CIT (A) has stated that the reason given by the assessee appears to be logical but then, he has stated that the enquiries made by Talisildar is on the basis of report of halka Patwar based upon some verbal enquiries from resident of the area, which according to the CIT(A) is not correct</p>	<p>The Revenue Officer is entrusted with the task of determining the value of land and the fact that on the basis of enquiries made it/s 133 (6), the field enquiries were made, which are part of the report of the Tehsildar, certifies beyond any doubt, about fair market value at Rs. 5 lacs per acre as on 1.4.1981 and, therefore, the findings of the CIT are not correct. The Revenue Officer as per the judgment of the Amritsar Bench of the ITAT is the final authority in determining the value of the property and not the AO. The enquiries are detailed and even the CIT (A) has mentioned that reason, given by assessee, are logical</p>
<p>As per CIT(A), the registered documents has to be considered.</p>	<p>We have demonstrated, firstly, that on the basis of compensation being paid to farmers, which is much higher than the registered rate, no reliance could be placed on such finding of the CIT (A). Then, there is a difference in wording in section 55(2)(b)(ii) and on other sections, CIT (A) has not been able to find any fault in explanation of assessee, coupled with the documentary evidences</p>
<p>The CIT(A) has stated that the Sale value was on the basis of Agreement to sell and as such The same basis had to be adopted For determining the cost.</p>	<p>The CIT(A) has failed to consider that if the sale value is being taken into consideration, much more than the circle rate and, accordingly, for determining the ‘Fair Market Value’ as on 1.4.1981, the same kind of consideration had to be adopted as in the case</p>

		of Shri Abdul Rashid by the Amritsar Bench of the ITAT. The CIT(A) has failed to consider that sale consideration adopted much more than the circle rate.
The CIT has stated that language of section (2)(b) (ii) was not intended to have different meaning for the purposes of calculation of capital gain and, as such, that documentary evidence has to be taken into consideration in determining the fair market value (ii) has to be given meaning as per section only.		The CIT has failed to consider that the enquiries made from the 55 Revenue department u/s 133 (3) has clearly brought out the rate which is more than the registered sale consideration. Further the language in section 55(2)(b)iii) has to be given meaning as per section only.
The CIT has not disputed that the rate of Rs. 1,80,000/- had been adopted for A.Y. 2005-06 And according to CIT, the same is not binding upon the AO for A.Y. 2008-09.		The CIT (A) has failed to consider die fact that the facts and circumstances were same and the rate of Rs. 1,80,000/- was of the land in the same village but was in remote location and the land of the assessee is also in the same area but much better located. The CIT(A) has only sidetracked the issue. There also the department wanted to apply the rate of Rs.43.25 lacs per acre and then on the basis of consistency, as per the judgment of jurisdictional High Court, which we have cited in the judgment set, the finding of the CIT(A) is erroneous. “

5. Ld. ‘DR’ on the other hand, supported the findings of the lower authorities and placed reliance thereon.

6. We have carefully perused the rival submissions, facts of the case and the judicial precedents, relied upon by the parties. During the course of assessment proceedings, AO found that assessee had sold land and computed long term capital gain thereon, by adopting the ‘Fair Market Value’

of the land, as on 1.4.1981, at Rs.5 lacs per acre, on the basis of certificate issued by the Patwari on the basis of local enquiries. In the course of assessment proceedings, Patwari Shri Gurbinder Singh S/o Shri Banta Singh, appeared before the AO, on 9.11.2010, and explained that he had enquired from prominent persons of the area about Fair Market Value of the land, situated on the main Rahon Road, as prevailing during the year 1980-81 and accordingly, on the basis of such enquiries, issued the certificate specifying the market value of the land as Rs.5 lacs per acre. The AO, with a view to verifying the veracity of the said certificate, requisitioned certain details and made: enquiry u/s 133(6) of the Act, in assessee's case, from the Tehsildar (East) Ludhiana, vide letter dated 13.12.2010. Tehsildar, vide letter dated 20.12.2010, intimated that average value of the land of Shri Manjit Singh S/o Tirath Singh, resident of Village Meharban is Rs.27,030/- per acre. He, further, informed that Shri Mohan Singh S/o Shri Budh Singh, S/o Shri Attar Singh had sold 16 kanal 2 marla of his land to M/s Amar Industries Ltd. @ Rs. 54,300/- per acre. Tehsildar, further, stated that as per report of the field-staff, enquiry from the Sarpanch and the eminent personnels of the village, revealed that in the year 1980-81, rate of agricultural land on the main Rahon Road was approximately Rs.5 lacs per acre.

7. The assessee and his brother, sold land measuring 58 kanal 5 ½ marla, situated at main Rahon Road, Ludhiana, for net consideration of Rs. 3,11,88,214/-. As the land was owned jointly by the assessee and his brother, sale consideration to the share of the assessee is worked out at Rs. 1,55,94,107/-. As the land was acquired prior to 1.4.1981, the long term capital gain was computed by considering Fair Market Value of the land in terms of provisions of section 55(2)(b)(i) of the Act. The Id. 'AR', placed reliance, on the decision in *CIT v. Ajax Products Ltd.* [1965] 55 ITR 741 (SC), *Smt. Tarulata Shyam v CIT* [1977] 108 ITR 345 (SC) and *Keshavji Ravji & Co. v CIT* [1990] 183 ITR 1 and contended that plain language used in a statute, should be interpreted as it is, without importing anything extraneous, with a view to giving full effect, to the legislative intent. Such judgments were cited by the assessee, before AO, to support his contentions, in respect of the interpretation of the provisions of section 45 read with 48, 55 and 55A of the Act. The assessee, further, placed strong reliance on the principle of consistency by citing the decision before AO in the case of *CIT v. Leader Valves Ltd.* [2007] 295 ITR 273 (Punj. & Har.); *CIT v Dalmia Dadri Cement Ltd.* [1970] 77 ITR 410 (Punj. & Har.); *Radhasoami Satsang v CIT* [1992] 193 ITR 321, *Berger Paints v. CIT* [2004] 266 ITR 99; *Dy. CIT v. United*

Vanaspati Ltd. [2004] 88 ITD 313 (Chd.)(TM) and *CIT v. Arthur Anderson & Co.* [2009] 318 ITR 229 (Bom.). The assessee contended before AO that having regard to the principle of consistency, as enunciated in the abovesaid decisions, equity demands that 'Fair Market Value' of the land, as on 1.4.1981 be determined having regard to the full value of consideration as adopted at Rs. 43,25,000/- per acre vis-a-vis the circle rate of the same land, in that year at Rs.5 lacs per acre, for computing stamp duty, as the appellant had disclosed and AO adopted full value of sale consideration of the land in question, for the purpose of section 48 of the Act at Rs. 43,25,000/- per acre.

7(i) It is, further, argued that circle rate is the guiding factor for computing stamp duty, for the purpose of registry. Such factum validly confirms that registry rate has no relevance with the market rate or 'Fair Market Value' of asset/land. By following the same proposition, it can be reasonably concluded that registries, during the period 1.4.1980 to 31.1.1981, were made at quite lower rates, as compared to the market rates, as pointed out by the assessee, before AO. The explanation filed by the assessee did not find favour with the AO and he adopted average rate of land at Rs. 27,030/-, as the 'fair Market Value' of the land as on 1.4.1981, for the purpose of computing the capital gain, in this case. The AO, observed that assessee has not brought on record any comparable instance, for the purpose of adoption of 'Fair Market Value' at Rs.5 lacs per acre of the land in question, as on 1.4.1981. The AO, adopted average rate of land, as reported by the Tehsildar. However, in the same some communication, the Tehsildar has reported the rate of agricultural land, on the main Rahon Road, approximately at Rs.5 lacs per acre. Thus, AO, has adopted contents of the communication of the Tehsildar only in part and, thus, ignored the remaining contents of the same. It is, thus, evident that the AO, adopted the average sale rate of the land in that area, on the basis of registered sale deeds as 'Fair Market Value' of the land in question, for the purpose of computation of capital gains

8. The CIT(A), upheld the finding of the AO, as is evident from paras 15 & 16 of the order, as reproduced hereunder :

“15. I have considered the AO's basis for adopting fair market value at Rs. 27,030/- as against Rs. 5,00,000/- claimed by the assessee and the AR's arguments on the issue. The appellants claim rests on the certificate issued by the patwari, which in turn is based upon verbal enquiries

conducted by him to arrive at the fair market value as on 1.4.1981. Secondly the appellant relies heavily on the acceptance of the fair market value by the Assessing Officer in the case of the assessee for A.Y. 2005-06 at Rs. 1,80,000/- per acre. The AR's contention is that once the value claimed on the basis of patwari's certificate has been accepted, fair market value claimed on the basis of same principle should logically be accepted for the year under consideration. The reasoning given by the AR, on the face of it, appears logical but if one digs little deeper it becomes apparent that even for A.Y. 2005-06 the AO did not examine this issue in its entirety as the certificate of the patwari is based upon some verbal enquiries conducted by him from the residents of the area wherein they speculated as to what could have been the fair market value of the land 25 years ago. This kind of exercise is nothing but a farce as the revenue officials are in possession of documents which clearly evidence the fair market value as on the said date. The Tehsildar in his report given to the AO has clearly brought on record few sales instances to arrive at the average rate of Rs. 27,030/-. I do not understand as to where was the need to go around and make verbal enquiries about the value of land 25 years ago when clear documentary evidence was available with the said authority. The AR's claim that registered value or the value for the purpose of stamp duty does not represent the fair market value is not acceptable because it leads you from position of certainty as contained in the registered document to complete uncertainty and unverifiability as expressed in the report based upon verbal opinions. The AR has claimed that the assessee adopted sale consideration at Rs. 43,25,000/- per acre as against circle rate of Rs. 5,00,000/- per acre which means that the fair market value was different from the circle rate. Here it needs to be kept in mind that the sale value adopted by the assessee is on account of documents found and seized during the course of search operation and there was no option but to adopt this value as it happened to be the actual sale consideration and was based upon a documentary evidence. The language in section 55 (2)(b)(ii) was not intended to have different values for the purpose of calculation of the capital gain and the intention was not to place reliance on any evidence other than documentary evidence in determining the fair market value. It needs to be appreciated that the assessee would have proceeded to adopt 'the registered sale price as sale consideration had there been no search action in his case leading to discovery of actual sale consideration. In the circumstances, the assessee cannot turn back and rely on generally prevalent practice in real estate transactions to suppress the actual sale consideration

and rubbish the evidentiary value of registered sale price as reported by revenue authorities. Therefore I do not find any merit in AR's argument on the issue.

16. The AR has also raised the issue of consistency on the ground that for A.Y. 2005-06 the AO had accepted the certificate of the Patwari in determining the fair market value of asset sold. The action of the AO in accepting Patwari's report on the basis of verbal enquiries allegedly conducted by him for A.Y. 2005-06 is erroneous and therefore can not be accepted to be binding upon the AO for A.Y. 2008-09. The detailed reasons for holding the said certificate as erroneous have been detailed in para 5 of this order. As such the addition made by the AO by adopting the fair market value of land sold at Rs. 27,030/- is confirmed."

9. We feel it essential, to refer to the relevant provisions of the Act, on the issue in question. The relevant provisions in the matter are reproduced hereunder :

"45. (1) 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, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 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.....

48. The income chargeable under the head "Capital gains" 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 following amounts, namely :—

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto:

"55(2)(b(i) in relation to any other capital asset,—]

(i) where the capital asset became the property of the assessee before the [1st day of April, [1981]], means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the [1st day of April, [1981]], at the option of the assessee ;

55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the [Assessing] Officer may refer the valuation of capital asset to a Valuation Officer—

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the [Assessing] Officer is of opinion that the value so claimed is less than its fair market value ;

(b) in any other case, if the [Assessing] Officer is of opinion—

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do,

and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clauses (ha) and (i) of sub-section (1) and sub-sections (3A) and (4) of section 23, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the [Assessing] Officer under sub-section (1) of section 16A of that Act.”

10. Ld. CIT(A), in his appellate order observed that he had considered the basis for adoption of ‘Fair Market Value’ at Rs. 27,030/-, as against Rs. 5 lacs claimed by the appellant having regard to submission made by the ld. ‘AR’, on the issue. The claim of the appellant, for adoption of Rs.5 lacs as ‘Fair Market Value’ per acre, as on 1.4.1981, is based on the certificate issued by the Patwari, in the light of enquiries conducted by him. The appellant also placed reliance on ‘Fair Market Value’ as accepted by the AO, in assessee’s case for the assessment year 2005-06, at Rs. 1,80,000/- while completing assessment u/s 143(3) of the Act. The contention of the appellant was rejected by the CIT(A), on the ground that the AO, while completing the assessment u/s 143(3), for the assessment year 2005-06, failed to examine the issue, in its entirety, as the certificate of the Patwari is based upon some verbal enquiries, conducted from the residents of

the area, with a view to ascertaining the 'Fair Market Value' of the asset, as on 1.4.1981. Ld. CIT(A), dubbed such mode of enquiry conducted by the Patwari, as a farce, as the revenue officials are not in possession of documents, which clearly evidence the 'Fair Market Value' of the land as on 1.4.1981. The Tehsildar, in his report, submitted to the AO, pointed out few sales instances to arrive at the average rate of Rs. 27,030/-. Ld. CIT(A) has equated the average rate of Rs.27,030/- as 'Fair Market Value' as on 1.1.1981 of the said land. It is pointed out that sale instances, on the basis of the Registered Sale Deeds cannot be construed as the 'Fair Market Value' as defined u/s 2(22B) of the Act. This factum is proved in the assessee's own case by the Registered Sale Deed, dated 14.3.2005, specifying the sale consideration at Rs. 4,50,000/- of the land measuring 4 Kanal 10 Marla, sold by the appellant, whereas in the course of search operations, appellant agreement to sell of the same land, records sale consideration at Rs. 43,25,000/- per acre i.e. Rs. 5,40,000/- per kanal. However, as per Registered Sale Deed, the sale rate is worked out at Rs. 1 lakh per 'kanal'. Therefore, there is invariably a wide gap between the sale consideration, as shown in the Registered Sale Deed vis-a-vis sale consideration as recorded in the 'Agreement to Sell'. It is, in view of this hard fact, the legislature introduced the provisions of section 50C of the Act, as special provision for full value of consideration, in certain cases, whereby, for the purpose of section 48 of the Act, full value of consideration received or accruing as a result of transfer of the asset, the value adopted or assessed or assessable by any authority of the State Government for the purpose of payment of stamp duty, in respect of transfer, is deemed, as the full value of consideration, for the purpose of section 48 of the Act. The average rate at Rs.27,030/-, as on 1.4.1981, adopted by the AO and upheld by the CIT(A), is the average rate of the Registered Sale Deeds, which cannot be construed as 'Fair Market Value', within the meaning of provisions of section 2(22B) of the Act. The contention before CIT(A) that the sale consideration, as specified in the Agreement to Sell at Rs. 43.25 lacs per acre, as against circle rate of Rs. 5 lacs per acre, establishes that 'Fair Market Value' of the land is different from its circle rate. However, this contention of the assessee did not find favour with the CIT(A), on the ground that the assessee had no option but to declare the said sale consideration of Rs. 43.25 lacs as mentioned in the Sale Agreement, in view of the seizure of the said document. Further, the CIT(A), is of the opinion that contents of the seized documents cannot be taken as evidence for the purpose of determination of 'Fair Market Value', for the purpose of charging capital gains tax. Such rejection of the contentions raised by the appellant is

not legally and factually tenable, as the revenue can not resort to principle of approbation and reprobation, in respect of the same transaction pertaining to the land in question. The interpretation of the CIT(A) of the provisions of section 55(2)(b)(i), that in terms of such provisions, it is never intended to have different values, for the purpose of calculation of capital gains and the intention was not to place reliance on any evidences, other than the documentary evidence in determining the 'Fair Market Value', is not in consonance with the legislative intent contained in such provisions. The Fair Market Value, as contemplated u/s 2(22B) r.w.s. 55(2)(b)(i), may be different than the sale consideration, as recorded in the Registered Sale Deed. The definition of 'Fair Market Value', as provided u/s 2(22B) of the Act is reproduced hereunder:

“2(22B) 'fair market value “, in relation to a capital asset, means—

(i) the price that the capital asset 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 CIT(A), further, observed that assessee would have proceeded to adopt the price as recorded in the Registered Sale Deed, as full value of consideration of the land, had there been no search action in his case, leading to discovery of actual sale consideration, as specified in the 'Agreement to Sell'. The Id. CIT(A), further, observed that in the circumstances, the assessee cannot turn back and rely on generally prevalent practice, in real estate transactions, to support the actual sale consideration and rubbish the evidentiary value of registered sale price, reported by the revenue authorities. The line of argument and logic, adopted by the CIT(A), does not stand the test of rationality and, hence, not tenable in the light of the sale consideration of Rs. 43.25 lacs per acre, as adopted by the AO, as full value of consideration of the land sold by the appellant, while computing capital gains. The appellant is not relying on prevalent practice in

real estate transactions, as construed by the Id. CIT(A), but his contention is founded on the sale consideration, as recorded in the sale agreement at Rs.43.25 lacs per acre, which cannot be construed, as sale consideration founded on practice in real estate transactions. In a nutshell, CIT(A), concluded that 'Fair Market Value' is synonymous and equal to the average rate of the sale consideration, as specified in the Registered Sale Deeds, ignoring the definition of 'Fair Market Value' as provided u/s 2(22B) of the Act, as reproduced above and the impact of actual sale consideration recorded at Rs. 43.25 lacs in the seized 'Agreement to Sell'. The Id. CIT(A), also disregarded the principle of consistency as espoused by the appellant before him, in the context of assessment year 2005-06.

12. We have perused the impugned assessment order, for the assessment year 2005-06 passed u/s 143(3) of the Act,, wherein, after detailed discussions and application of mind, the AO has adopted 'Fair Market Value' of the land, as on 1.4.1981, at Rs. 1,80,000/- per acre. Therefore, the logic and rationale, as adopted by the CIT(A),in rejecting the contentions and explanation of the appellant, does not stand to legal and factual position and the rule of consistency.

13. In this context, it is pertinent to reproduce the certificate issued by the Tehsildar, Ludhiana (East) as annexed at page 12 of the Paper Book (English Translation):

(True Translation for Punjabi to English)

“From:

The Tehsildar,

Ludhiana (East)

To

Dy. Commissioner of Income Tax,

Circle 3, Old Red Cross Building,

Udham Singh Nagar, Ludhiana

No.1 Spl/Reader Dated 20.12.10.

Sub : Calling the information u/s 133(6) of the Income-tax Act, 1961 in the case of Sh. Manjit Singh for AY 2008-09 (relevant to financial year 2007-08)

Reference: with reference to your office letter No. DCIT/Cir-III/Ldh/2010-11/2728 dated 13.12.2010

With reference to the information demanded vide your above referred letter regarding the agri. land of Sh. Manjit Singh S/o Tirath Singh resident of Village Meherban, report from the field-staff has been obtained, vide which the average price of the agricultural land in the area works out to be Rs. 27030/-and 18/- paise per acre for the year 1980-81 based on the report of mutations. The report of the field-staff for the year 1980-81 contains data related to the agricultural land for which mutations were made. Further, as per wasika No. 4312 dated 14.11.80 Sh. Mohan Singh S/o Budh Singh s/o Attar Singh sold agricultural land area measuring 16 kanal 2 marla at the rate of Rs. 54300/- per acre to M/s Amar Industry. Ludhiana. As per the report of the fields-staff, the market price of agricultural land situated on the main Rahon Road is verified as about Rs. 500,000/-per acre during the year 1980-81 as per the inquiries made from the village Sarpanch. and prominent citizens.

The information is submitted for further necessary action.

Sd/-

Tehsildar

Ludhiana

(East)”

14. A bare perusal of the certificate issued by the Tehsildar, as reproduced above clearly reveals that average price of agriculture land in the area, has been worked out at Rs.27,030/- per acre during the year 1980-81, based on the report of mutations. Thus, the average price of agricultural land in the area has been worked out by the Tehsildar, on the basis of sale consideration as

recorded in the mutations. However, Tehsildr has mentioned in the same letter, the market price of the agricultural land, situated on the main Rahon Road at Rs. 5 lacs per acre, during the year 1980-81, as per enquiries made from Village Sarpanch and prominent citizens.: It needs to be mentioned here that the sale instances, as recorded in the respective Sale Deeds, on the basis of which Tehsildar worked out the average price of agricultural land at Rs. 27,030/-, pertains to the agricultural land situated in the area. However, Tehsildar has specifically mentioned location of the land as situated at the main Rahon Road, whereby market price of agricultural land has been verified at Rs. 5 lacs per acre. Therefore, there is a marked difference in the location of agricultural land situated in the area and the impugned land situated at main Rahon Road, consequently leading to different market rate of land at different locations.

15. The document seized in the course of search operation u/s 132(1) of the Act, can be used as an evidence, even in a situation where the search has been held as illegal by the competent Court. In view of this, the revenue is competent to use that contents of the seized documents in its favour, on the basis of such documents seized in the course of illegal search. Similarly, assessee is also competent to use the same, to support his contentions, wherever need it.

16. The assessee appellant placed reliance on the interpretation of the statutory provisions and the principle of consistency. In this context, it is pertinent to mention here that principle of consistency can be invoked if the facts and circumstances, as prevailing in various assessment years, are identical. However, generally the principle of *res judicata* is not applicable, to the income tax proceedings. In the present case, sale consideration, as adopted by the assessee, on the basis of seized 'Agreement to Sell' at Rs. 43.25 lacs per acre, as the full value of sale consideration, cannot be ignored, in the context of determination of the 'Fair Market Value' of the same land, as on 1.4.1981.

17. Ld. 'AR' placed reliance on the decision of the ITAT, Amritsar Bench in the case of *Abdul Rashid (supra)* and decision of the Chandigarh Bench in the case of *Smt. Baljinder Kaur (supra)*. A bare perusal of the same reveals that assessee gets support from such decisions, in respect of contention raised by the appellant, in the matter of adoption 'Fair Market Value' of the land in question as on 1.4.1981. The relevant part of the decision of the Chandigarh Bench is reproduced hereunder :

“Capital gains—Cost of acquisition—Fair market value as on 1st April, 1981—In terms of an agreement to sell dt. 6th Feb., 1981, with one Z, assessee had agreed to sell a portion of the impugned land at the rate of Rs. 11.50 lacs per acre—Though that agreement did not materialize, it supports the fair market value adopted by the assessee—Second primary evidence is the report of the registered valuer wherein also the value of the land has been estimated @ Rs. 11.50 lacs per acre—This rate is adopted on the basis of a sale deed of a comparable property located in the vicinity of assessee’s land-Comparable instance considered by the registered valuer was also considered by the DVO to evaluate a property in the same village in the case of one K, and the valuation report of the DVO valuing that property as on 1st Jan., 1981 has been accepted by the AO in the case of K— That apart, assessee’s land enjoyed an advantageous position because of its location—Aforesaid evidence led by the assessee has not been shown to be lacking in bona fides— AO has not made out a case as to why he has preferred the rate collected from the revenue Department—Thus, there was no justification for the AO to reject the fair market value of land determined @ Rs. 11.50 lacs per acre—Therefore, capital gain is to be computed by taking the fair market value of land @ Rs. 11.50 lacs per acre as the cost of acquisition”

18. It is pertinent to highlight here that the appellant offered the sale consideration, as recorded in the seized ‘Agreement to Sell’, for the purpose of section 45 r.w. section 48 of the Act, which was accepted by the AO and the CIT(A), for the purpose of computation of capital gains. However, AO as well as CIT(A) turned a volte-face, in considering such sale consideration recorded in seized ‘Agreement to Sell’ for the purpose of determining ‘Fair Market Value’ of the said land as on 1.4.1981. This approach of the authority is contradictory in nature, as the land and transaction related thereto, are factual in nature. The revenue is not permitted to adopt different yardsticks, in respect of a single transaction, under reference, as per its suitability. The revenue has adopted sale consideration of the said land, for the purpose of computation of capital gains at Rs. 43.25 lacs per acre, but rejected the same while determining the ‘Fair Market Value’ of the said land, as on 1.4.1981. Such approach cannot be justified under any civilized jurisprudence and on the touchstone of pragmatic and factual rationality. Further, the contention of the appellant is supported by the certificate issued by the Patwari and duly endorsed by the Tehsildar, in his communication in question, as reproduced above, whereby the market price of the agricultural land situated, on main Rahon Road is verified at about Rs.5 lacs per acre, during

the year 1980-81, as per enquiries made. In this context, it is pertinent to mention here that AO has failed to invoke the provisions of section 55A of the Act, for the purpose of ascertaining the 'Fair Market Value' of the land, as on 1.4.1981, as the provisions of section 55A of the Act contain a legislative intent and mandate, for such specific purpose of ascertaining 'Fair Market Value' of the asset, as on 1.1.1981, by the expert valuer. Further, it is pertinent to mention that 'Fair Market Value' in relation to a capital asset has been defined u/s 2(22B) of the Act. Fair Market Value in relation to capital asset, means the price that the capital asset would ordinarily fetch on the sale in the open market on the relevant date). Sale consideration, as found recorded in the Sale Agreement in question, which was seized in the course of search operation, is nothing but 'Fair Market Value', as negotiated and arrived at by the purchaser and the seller, in respect of said land, having regard to the market conditions, location of the land and other relevant factors. Such sale consideration, as recorded in 'Agreement to Sell' is not same as recorded in the Registered Sale Deed of the said land. Therefore, adoption of average value of land by the revenue, at Rs.27,030/- per acre, on the basis of Registered Sale Deeds, cannot be considered as 'Fair Market Value' within the definition of Fair Market Value in relation to a capital asset, as contained u/s 2(22B) of the Act. The rationale and philosophy behind insertion of section 50C of the Act is that there is a wide gap between the sale consideration shown in the Registered Sale Deed and the 'Fair Market Value' of the asset sold. Therefore, legislature deemed it fit, to introduce the deeming provisions of section 50C, which contemplate a deeming situation in respect of full value of consideration, for the purpose of levy of capital gains. Thus, conceptually and factually, there is wide difference between the sale consideration, as recorded in the registered sale deed and the 'Fair Market Value' of the asset.

19. In view of this, consideration as shown in the Registered Sale Deed cannot be equated with 'Fair Market Value', as defined in the Act u/s 2(22B) of the Act. /Therefore, adoption of average value of land at Rs. 27,030/- per acre as on 1.4.1981, as 'Fair Market Value' of the land in question, for the purpose of computation of capital gains, is not legally and factually tenable. 'Fair Market Value' represents the price that a seller is willing to accept and a buyer is willing to pay in the open market. The price or sale consideration as specified in the Registered Sale Deed of an asset in India represents the price or sale consideration negotiated or determined not in the open market but in the parallel operating market where such transactions crystallized in a

clandestine manner. In view of this, sale consideration of an asset, as recorded in the Registered Sale Deed is generally understated and, hence, cannot be taken as 'Fair Market Value' as on 1.4.1981 for the purpose of computation of 'Capital Gains'.

20. The ITAT, Chandigarh 'B' Bench in the case of *Smt. Baljinder Kaur (supra)* held that it is well settled that the concept of 'Fair Market Value' envisages existence of a hypothetical seller and a hypothetical buyer in a hypothetical market. Therefore, intrinsically speaking, the determination of 'Fair Market Value' of a capital asset as on 1st April, 1981 would involve an element of estimation based on relevant factors. An 'Agreement to Sell' is a relevant factor in determination of 'Fair Market Value', as on 1.4.1981, in the present appeal.

21. In view of the above legal and factual discussions, and having regard to the fairness, the Fair Market Value of the land in question, deserves to be taken at Rs. 3.50 lacs per acre, as on 1.4.1981, for the purpose of computation of capital gains. Consequently, appeal of the assessee is partly allowed.

22. In the result, appeal of the assessee is partly allowed.