

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'E' BENCH**

**ITA No.4085/Mum/2009  
Assessment Year: 2004-2005**

**DEPUTY COMMISSIONER OF INCOME TAX  
17 (3), MUMBAI**

**Vs**

**SHRI SHANTILAL J SHAH  
SUMITRA BUILDING, FLAT NO 07  
3rd FLOOR, 295/A, BHIMANI STREET  
MATUNGA (CR) MUMBAI-400091  
PAN NO:AACPS7964B**

**T R Sood, AM and Vijay Pal Rao, JM**

**Dated: March 4, 2011**

**Appellant Rep by: Shri Sumeet Kumar  
Respondent Rep by: Shri K Gopal**

**ORDER**

**Per: T R Sood:**

In this appeal Revenue has raised following three grounds:

*1. On the facts and in the circumstances of the case and in law, the Id. CIT[A] erred in deleting the addition made on account of recomputation of capital gains which has been worked out after valuation of property at 15% higher than the cost price, since there are no evidences.*

*2. On the facts and in the circumstances of the case and in law, the Id. CIT[A] erred in deleting the addition made on account of cost of construction of flats of tenants without taking into account the fact that assessee has not realized the sale consideration on the area given to the tenants.*

*3. On the facts and in the circumstances of the case and in law, the Id. CIT[A] erred in directing the AO to allow the claim of the assessee of Rs.15,00,000/- made u/s.54F without appreciating the fact that assessee is having right to retain area upto 51.33 sq.mt. only as against the area of 71.72 s.mt. retained by the assessee.*

2. Ground No.1: After hearing both the parties, we find that the dispute raised is in respect to adoption of fair market value as on 1-4-1981. During the assessment proceedings AO noticed that assessee had purchased a property at Rs.75,000/- on

31-10-1979 and the fair market value adopted on 1-4-1981 for computing capital gain etc. was Rs.4,71,360/- which, according to the AO, was very high because there was a gap of only 18 months. It was pointed out that it was a case of distress sale but AO did not find any merit in this claim because no evidence was produced. The AO further noticed that the registered valuer had determined the valuation on the basis of approximation of the fair market value prevalent at the time which is not correct because assessee has purchased the property in 1979.

3. Before the CIT(A) it was submitted that the property was purchased cheap as it was a distress sale. Further the valuation of same has been determined by a registered valuer and assessee had a right to choose the fair market value as on 1-4-1981. The Id. CIT(A) found force in this submission and accepted the claim of the assessee vide para-7 which reads as under:

*"7. I have carefully considered the information on record. It is pertaining to note that the property was purchased at Rs.75,000 on 31/10/1979. The F.MV as on 01/04/1981 adopted by the appellant was Rs.4,71,360. The appellant claimed that the property was purchased at low price as it was distress sale. However this was not supported by any evidence whether during assessment/appellant proceedings. The property was occupied with the tenancy during the year 1979 and also during the year 1981. The Assessing Officer estimated F.MV at Rs.86,250, 15% of the sale cost price of Rs.75,000 without giving any reason whatsoever. The Assessing Officer is not competent to determine the FMV of the property as it requires expertise. Ideally he should have referred the matter to departmental valuation officers or should have adopted the value as per the ready reckoner. In the instant case the registered value of the appellant took the value as per ready reckoner and since the property was occupied with the tenancy, 20% of the value was discounted as per the B.M.C. norms to derive at the cost of the plot. Since the Appellant adopted the value as per BMC rate, the long term capital gains worked by appellant is correct and addition made by the AO is deleted."*

4. Before us, Ld.DR strongly supported the order of the AO and again emphasized that assessee has purchased a tenanted property and, therefore, there was hardly any scope for appreciation within a period of 18 months from the date of purchase.

5. On the other hand, Ld.counsel of the assessee reiterated the submissions made before the lower authorities and emphasized that assessee had purchased the property very cheap because it was a tenanted property. He further submitted that the registered valuer has made the valuation on the basis of balance potential of 1200 sq.ft. on the basis of value published in the Indian Valuer Directory. He referred to the valuation report at pages 152 to 158 of the paper book. He submitted that AO has not referred the matter to the DVO and AO cannot be called an expert on valuation, therefore, he was duty bound to adopt the value given in the valuation report. In the light of this report, according to him, the valuation was justified.

6. We have considered the rival submissions carefully. We find only some force in the submissions of the Ld.counsel of the assessee. It is a common knowledge that tenanted property fetch very low value and assessee might have been able to purchase the property little cheap and the discount on such distress sale may go up even upto 20% to 30%. However, at the same time the property was purchased on 31-10-1979 and, admittedly, even on 1-4-1981 the property remained tenanted only. On a specific query by the Bench, Ld.counsel of the assessee admitted that

none of the tenant had left the property as on 1-4-1981, therefore, there was hardly any chance of appreciation. The only appreciation possible was that whatever discount assessee got could be added to the fair market value. It seems the valuation has been done on potential area, but such potential area could not come into the picture unless tenants left the property. At the same time, normally, there is a provision in the Act for reference to the DVO because AO has merely added 15% to the purchase cost for determining the fair value which may also not be correct. Further no purpose would be served if the matter is set aside for reference to the DVO because the valuation date is almost 30 years old. Therefore, it would be fair to estimate some value and bring the matter to finality. Considering all the facts and circumstances of the case, we are of the view, that fair market value of the property as on 1-4-1981 would be Rs.2,50,000/-. Therefore, we set aside the order of the Id. CIT(A) and direct the AO to adopt the value of the property at Rs.2,50,000/- as on 1-4-1981 for computing the capital gains.

7. Ground No.2: After hearing both the parties, we find that during the assessment proceedings AO noticed that assessee has raised claim for cost of construction for the area which was given to the old tenants. The AO rejected this claim because, according to him, since assessee has not received any sale consideration from old tenants, therefore, this cost should also not be claimed.

8. Before the Id. CIT(A) it was mainly submitted that permission was given by the government for re-development of the property subject to the condition that the existing tenants could be accommodated without any additional cost and, therefore, assessee had to give accommodation free of cost to the existing tenants, but at the same time, cost had been incurred and, therefore, same has to be allowed. The Id. CIT(A) agreed with these submissions and decided the issue vide para-11 which is as under:

*"11. I have considered the information on record. As per letter dated 07-08-2002 of MHADA, the permission to redevelop was granted subject to condition that tenants are provided flats, free of cost. To determine the profit of the project the total sale consideration and total construction cost should be considered. A.O. is not correct in disallowing cost of construction of flats pertaining to tenants on the ground that no sale consideration was received. The fact that appellant incurred expenditure for construction these flats and incurring such expenditure was must, without which appellant would not have completed the project. In view of this the A.O is directed to allow this expenditure and addition made of Rs.64,72,000 is hereby deleted."*

9. Before us, Ld.DR strongly supported the order of the AO.

10. On the other hand, Ld.counsel of the assessee supported the order of the CIT(A).

11. After considering the rival submissions, we agree with the findings of the Id. CIT(A). When an old building is redeveloped and there is an understanding with the tenants that they would be accommodated without additional cost and even the plans have been approved with the condition that existing tenants would get accommodated without additional cost, naturally, the assessee could not have recovered any sale consideration from such existing tenants, but at the same time assessee had incurred cost on the over all project including the area allotted to the existing tenants and, therefore, such cost has to be allowed. Therefore, we find nothing wrong in the order of the Id. CIT(A) and confirm the same.

12. Ground No.3: As far as ground No.3 is concerned, both the parties agreed that the same is consequential to the issue raised in the first ground, therefore, we set aside the order of the Id. CIT(A) and remit the matter back to the file of the AO with a direction to reexamine the same in the light of our decision in respect of ground No.1.

13. In the result, appeal is partly allowed.

(Order pronounced in the open Court on this 4.3.2011.)