

**आयकर अपीलीय अधिकरण “बी” न्यायपीठ पुणे में ।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, PUNE**

**श्री आर. के. पांडा, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष**  
**BEFORE SHRI R.K. PANDA, AM AND SHRI VIKAS AWASTHY, JM**

**आयकर अपील सं. / ITA No. 1818/PUN/2014**

**निर्धारण वर्ष / Assessment Year : 2010-2011**

Dattatraya Kerba Lonkar,  
20/2/1, Kashinath Patil Nagar,  
Dhankawadi, Pune  
Pin-411043

PAN : AAGPL5233N

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Deputy Commissioner of Income Tax,  
Circle-2,  
Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Vipin Gujarathi

Revenue by : Shri P.L Kureel

सुनवाई की तारीख / Date of Hearing : 16.01.2017

घोषणा की तारीख / Date of Pronouncement : 30.01.2017

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM**

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-II, Pune dated 13.05.2014 for the assessment year 2010-2011.

2. The brief facts of the case as emanating from the record are:  
The assessee is engaged in the business of repairing and maintaining

refrigerators, bottle coolers, deep freezers, air conditioner etc. The assessee filed his return of income for the assessment year under appeal on 30.03.2011 declaring total income of Rs.71,48,520/- including income from capital gains. The case of assessee was selected for scrutiny under CASS, accordingly, first notice u/s 143(2) of the Income Tax Act, 1961 ( hereinafter referred to as 'the Act') was issued to the assessee on 29.08.2011. During assessment proceeding, the Assessing Officer made addition on account of long term capital gains arising from sale of land on the ground that assessee has understated the value of sale consideration while computing long term capital gain at the time of filing return of income.

Aggrieved by assessment order dated 20.03.2013, the assessee preferred appeal before Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) partly accepted the appeal of assessee and adopted sale consideration as per DVO's report and rejected other contentions of the assessee.

Against the findings of Commissioner of Income Tax (Appeals), the assessee is now in second appeal before the Tribunal. The assessee has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds:-

- 1) *The Honorable Commissioner of Income Tax (Appeals) erred in adopting the value certified by District Valuation Officer-II, I.T Department, Mumbai ( in short "DVO") Rs.3,14,86,000/- as full value consideration instead of the Agreement Value Rs.3,07,71,470/- without appreciating the fact that there was very minor difference between the valuation as per DVO and the Agreement Value. The honorable Commissioner of Income Tax (Appeals) failed to appreciate that valuation is an estimate and that the learned A.O has not brought on record anything to suggest that the appellant has received more*

*than the Agreement Value of Rs.3,07,71,470/-. The appellant hereby prays that the Agreement Value may please be considered as full value consideration.*

- 2) The honorable Commissioner of Income Tax (Appeals) erred in confirming the addition of Rs. 23,00,000/- to the consideration of the property under consideration made learned Assessing Officer without appreciating the facts that the consideration of Rs. 23,00,000/- was directly paid by the purchaser to Mr. Mansoor Aaga & Mrs. Shagufta Aaga out of the total consideration as per the Sale Deed dated 08.12.2009. The honorable Commissioner of Income Tax ( Appeals) failed to appreciate the fact that appellant was neither entitle to nor has received the said consideration and hence it is not taxable in his hands. The appellant hereby prays that the sale consideration may please be reduce by Rs. 23,00,000/-.*
- 3) The appellant hereby reserves the right to add, alter, amend or delete any grounds of appeal.*

3. Shri Vipin Gujarathi appearing on behalf of the assessee submitted that the assessee had inherited property comprising in Survey Number 11/9+14A/1B measuring 82R at village Kondhwa Khurad falling in the municipal limits of Pune. During the period relevant to assessment year under appeal, assessee sold the property/land situated at Kondhwa Khurd, Pune for total consideration of Rs.3,07,71,470/- and declared capital gain of Rs. 67,92,166/-.However, in the return of income, the assessee had declared gross sale consideration as Rs.2,32,71,470/-. For the purpose of stamp valuation, the value of land sold by the assessee was determined at Rs.5,75,81,250/-. Since the land in question was under litigation and was encroached from all sides, the value of land diminished considerably. The father of assessee during his lifetime had entered into multiple sale agreements in respect of the said land. One Ramesh Gopal Yadav on the basis of forged power of attorney, fraudulently executed various Sale Deeds in respect of the land in question and got the names of purchasers mutated in the revenue

record. There were multiple litigation with unauthorized occupants of land.

3.1. The ld. A.R submitted that during assessment proceedings valuation of property was referred to DVO under the provision of section 50C. However, till the time of passing of assessment order on 23.03.2013, the report of DVO had not come. The Assessing Officer adopted the sale consideration as per stamp duty valuation rate i.e Rs.5,75,81,250/-. The assessee carried the matter in appeal before the Commissioner of Income Tax (Appeals). The DVO vide report dated 23.12.2013 (placed on record at page No. 69 to 84 of the paper book) determined the fair market value of property at Rs.3,14,86,000/-.The Commissioner of Income Tax (Appeals) adopted the valuation of property as determined by the DVO and granted part relief to the assessee. The ld. A.R contended that there is marginal difference between actual sale consideration as per sale deed and the fair market value determined by the DVO. The difference is only Rs. 7,00,000/- which is approximately 2 per cent of the total value of the land. Valuation of the property is done on the basis of estimation. Where the difference in value of property adopted by the assessee and as determined by the DVO is less than 10 per cent, the value declared by the assessee should be accepted. In support of his submissions the ld. A.R placed reliance on the decision of Pune Bench of the Tribunal in the case of Rahul Constructions V/s. DCIT reported as 38 DTR 19. The ld. A.R further submitted that the Hon'ble Patna High Court in the case of Bimla Singh V/s. CIT reported as 308 ITR 71 has held that no addition is warranted if the

difference in value adopted by the assessee and the valuation made by the DVO is less than 15 per cent. The ld. A.R Prayed for adopting the value of property at Rs.3,07,71,470/- i.e as per Sale Deed for the purpose of computing long term capital gain.

4. In respect of ground No.2, the ld. A.R submitted that the Authorities below have erred in coming to the conclusion that the part of sale consideration amounting to Rs. 23 Lacs was paid by the purchaser of land to the assessee. In fact, from the total consideration, part of consideration i.e Rs. 23 Lacs was directly paid by purchaser to Mr. Mansoor Aaga & Mrs. Shagufta Aaga. Therefore, no capital gain has arisen to assessee to the extent of sum, directly paid to the aforesaid two persons. The ld. A.R pointed that the land was under litigation. Mr. Mansoor Aaga and Mrs. Shagufta Aaga had acquired part of land by way of sale agreement executed by Ramesh Gopal Jadhav on the basis of forged power of attorney. The assessee in order to settle the protected litigation compromised with Mr. Mansoor Aaga & Mrs. Shagufta M. Aaga. The ld. A.R placed on record a copy of compromise decree of Civil Court, Pune drawn on the basis of compromise between the aforementioned parties. The ld. A.R contended that since Rs. 23,00,000/- has not been received by the assessee, the assessee is not liable for tax liability on the said amount. The liability to pay tax cannot be fastened on the assessee merely on the ground of deemed capital gain. The ld. A.R submitted that either, the said amount should not be included in part of sale consideration received by assessee or in alternative after including the said amount, the same should be allowed as deduction u/s 48 of

the Act. The ld. A.R referred to sale deed dated 08.12.2009 at page 26 to 39 of the paper book to show that Rs. 8,00,000/- and Rs. 15,00,000/- ( total Rs. 23,00,000/-) were directly paid by the purchaser to Mansoor Aaga and Shagufta Aaga, respectively by way of cheque. In support of his contentions that the payment made to unauthorized occupants of land is allowable, the ld. A.R placed reliance on the following decisions:-

- 1) *CIT V/s. Shakuntala Kantilal* 190 ITR 56 ( Bom.)
- 2) *CIT V/s Abrar Albi* 247 ITR 312 ( Bom.)
- 3) *CIT V/s. Raman Kumar Suri* 255 CTR 257 ( Bom.)

5. Per contra Shri P.L Kureel representing the Department vehemently defended the findings of Commissioner of Income Tax (Appeals) in confirming the additions.

6. We have heard the submissions of the rival representatives and have perused the orders of Authorities below. We have also considered the decisions and documents on which ld. A.R has placed reliance. The assessee in appeal has impugned the findings of the Commissioner of Income Tax (Appeals) in adopting the value of property as determined by the DVO and addition of Rs. 23 Lacs on account of part consideration paid by the purchaser of land directly to Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga.

7. In respect of first ground of appeal relating to valuation of property, it is an admitted fact that as per Sale Deeds, the total sale consideration is Rs. 3,07,71,470/-. The Assessing Officer adopted sale value of property for the purpose of determining long term capital gain as per stamp duty valuation i.e Rs.5,75,81,250/-. The

reason for wide variation in the valuation of property for the purpose of stamp valuation and the actual sale consideration is stated to be on account of encroachment and multiple litigation qua the property. The matter was referred to DVO u/s 50C of the Act. By the time, DVO furnished his report; the Assessing Officer had passed the assessment order. The DVO's report was placed before the Commissioner of Income Tax (Appeals). The DVO determined the value of property at Rs.3,14,86,000/-. The Commissioner of Income Tax (Appeals) adopted the fair market value of property as determined by the DVO. The contention of the assessee is that since the difference between actual sale consideration and value determined by the DVO is marginal, actual value of sale consideration should be adopted for computing long term capital gain.

8. We find merit in the submission of Ld. A.R. The difference between the fair market value determined by the DVO and actual sale consideration is Rs.7,14,530/-i.e slightly more than 2 per cent of the sale consideration. The co-ordinate Bench of the Tribunal in the case of *Rahul Construction V/s. DCIT (supra)* has held that where difference between the sale consideration declared by the assessee and fair market value as determined by the DVO u/s 50C is less than 10 percent, the Assessing Officer was not justified in substituting the value determined for sale consideration disclosed by the assessee. The Co-ordinate Bench after considering the provisions of Section 50C of the Act and the provision of section 23A and 24(5) of the Wealth Tax Act held as under :-

*“13. A combined reading of the above provisions shows that the valuation adopted by the DVO is subject to appeal and the*

same is not final. In the instant case we find that as Against the value of Rs. 28,73,000/- adopted by the stamp valuation authorities, the DVO has determined the FMV on the date of transfer at Rs. 20,55,000/- . This itself shows that there is wide variation between the two values. Further, the value adopted by the DVO is also based on some estimate. We find that the difference between sale consideration shown by the assessee at Rs.19,00,000/- and the FMV determined by the DVO at Rs. 20,55,000/- is only Rs. 1,55,000 which is less than 10 per cent. The Courts and Tribunals are consistently taking a liberal approach in favour of the assessee where the difference between the value adopted by the assessee and the value adopted by the DVO is less than 10 per cent.

14. We find that the Pune Bench of the Tribunal in the case of Asstt. CIT V/s. Harpreet Hotels (p) Ltd. vide ITA Nos. 1156-1160/pn/2000 and relied on by the learned counsel for the assessee had dismissed the appeal filed by the Revenue where the CIT(A) had deleted the unexplained investment in house construction on the ground that the difference between the figure shown by the assessee and the figure of the DVO is hardly 10 percent.

15. Similarly, we find that the Pune Bench of the Tribunal in the case of ITO V/s. Kaaddu Jayghosh Appasaheb, vide ITA No.441/PN/2004 for the asst. yr 1992-1993 and relied on by the learned counsel for the assessee following the decision of the J&K High Court in the case of Honest Group of Hotels (P) Ltd. V/s CIT (2002) 177 CTR (J&K) 232 had held that when the margin between the value as given by the assessee and the Departmental valuer was less than 10 per cent , the different is liable to be ignored and the addition made by the A.O cannot be sustained.

16. Since in the instant case such difference is less than 10 per cent and considering the fact that valuation is always a matter of estimation where some degree of difference bound to occur, we are of the considered opinion that the A.O. in the instant case is not justified in substituting the sale consideration at Rs. 20,55,000 as Against the actual sale consideration of Rs. 19,00,000/- disclosed by the assessee. We, therefore, set aside the order of the CIT(A) and direct the A.O. to take Rs.19,00,000/- only as the sale consideration of the property. The grounds raised by the assessee are accordingly allowed."

9. The ld. A.R of the assessee has further placed reliance on the decision of Hon'ble Patna High Court in the case of Bimla Singh V/s. CIT (supra) wherein Hon'ble High Court has held that difference between the cost of construction shown by the assessee and as determined by the Assessing Officer being less than 15 per cent, the same is to be ignored for the purposes of addition. The Hon'ble Delhi



High Court in the case of CIT V/s. Sadna Gupta 352 ITA 595 held that unless and until there was some other evidence to indicate that extra consideration had flowed in transaction for purchase of property, report of DVO could not form basis of any addition on part of revenue. In absence of any evidence no reliance could be placed on the report of DVO for making addition.

10. Thus, in view of the fact that the difference between sale consideration and the market value determined by the DVO is not substantial and is approximately little over 2 per cent of the actual sale consideration, we find no reason for rejecting actual sale consideration mentioned in the Sale Deed for determining long term capital gain. Accordingly, the ground No.1 raised in appeal by the assessee is allowed. The Assessing Officer is directed to adopt actual sale consideration as mentioned in the Sale Deed as a fair market value for determining the long term capital gain.

11. The second ground raised in appeal is with regard to addition of Rs. 23 Lacs. Part of sale consideration alleged to have been directly paid by purchaser to Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga. The Commissioner of Income Tax (Appeals) in the impugned order has placed reliance on some of covenants of the Sale Deed dated 08.12.2009 jointly executed by the assessee, Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga in favour of Mr. Dattatraya Shankarrao Dhone. After referring to Clause-7 and 8 of the Sale Deed, the Commissioner of Income Tax (Appeals) rejected the contention of the assessee and disallowed Rs. 23 Lacs directly paid by purchaser of the land to Mr. Mansoor Abdul Gani Aaga and Smt.

Shagufta M. Aaga. The Commissioner of Income Tax (Appeals) erred in coming to the conclusion that while determining sale consideration, discount must have been made for litigation qua property.

We do not agree with the view taken by the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) cannot make addition by drawing references from selective sections of the Sale Deed. The content of the Sale Deed has to be read in whole. A perusal of Clause-9 of the Sale Deed show that it was mutually decided between the assessee who is seller No.1 in the sale Deed, Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga seller No. 2 and 3 respectively in the Sale Deed that Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga would receive Rs. 8 Lacs and Rs. 15 Lacs respectively from the purchaser. There is reference of compromise purshis in Civil Suit No. 1741 of 2015 between the assessee and various other persons including Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga. The Clause -9 of Sale Deed reads as under:-

*“9. Without accepting or agreeing any ownership, right, possession on the said property or any part thereof on basis of any document, the seller No. 1 and the seller No.2 and 3 have arrived at a compromise on the prolonged litigation and accordingly on account of investment in the illegal transaction, court case expenses and compensation, the seller No.1 had and has agreed to pay an amount of Rs.8,00,000/- ( Rupees eight lakhs only) and Rs. 15,00,000/- ( Rupees fifteen lacs only) to the seller No. 2 and 3 respectively and accordingly in the same Civil Suit the sellers herein have filed a compromise purshis on receipt of the total amount as stated in schedule of payment. Accordingly the seller No. 2 and 3 are signing the present sale deed along with the seller No. 1 in favour of the purchaser.”*

12. A further perusal of Clause-12 of the Sale Deed which gives the details of the sale consideration and the manner of payment of consideration reveal that Rs. 8 Lacs has been paid to seller No.2 i.e

Mr. Mansoor Abdul Gani Aaga vide pay order No. 016361 dated 03.12.2009 drawn on Vishweshwar Sahakari Bank Ltd, Branch Pune and Rs. 15 Lacs have been paid to seller No. 3, Smt. Shagufta M. Aaga vide pay order No. 016359 dated 03.12.2009 drawn on Vishweshwar Sahakari Bank Ltd, Branch Pune on the instruction of assessee. The assessee has also placed on record a copy of the compromise drawn before the Civil Judge, Senior Division, Pune in Civil Suit No. 1741/2015 in suit titled Shri Dattatraya Keraba Lonkar V/s. Shri Ramesh Gopalrao Jadhav and others. A perusal of the said compromise Deed shows that Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga are defendant No. 30 and 31 in the said suit.

13. A part of sale consideration amounting to Rs. 23 Lacs was paid on direction of the assessee to Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga in a compromise and to put an end to litigation and to remove all encumbrances from the land. This fact is further evident from perusal of clause-15 of the Sale Deed where it has been categorically stated that apart from Special Suit No. 1741/95, the entire property in question is not subject matter of any other legal matter.

14. The Hon'ble Bombay High Court in the case of CIT V/s. Shakuntala Kantilal (supra) has held that where the expenditure has been incurred to remove encumbrances for transferring land, the same is deductible. The relevant extract of the judgment is reproduced herein below:

*“The legislature, while using the expression “full value of consideration”; in our view, has contemplated both additions to as well as well as deductions from the apparent value. What it*

*means is the real and effective consideration. That apart, so far as Cl.(i) of s. 48 is concerned, we find that the expression used by the Legislature in its wisdom is wider than the expression “for the transfer”. The expression used is “the expenditure incurred wholly and exclusively in connection with such transfer”. The expression “in connection with such transfer” is, in our view, certainly wider than the expression “for the transfer”. Here Aagain, we are of the view that any amount of the payment of which is absolutely necessary to effect the transfer will be an expenditure covered by this clause. In other words, if, without removing any encumbrances including the encumbrance of the type involved in this case, sale or transfer could not be affected, the amount paid for removing that encumbrance will fall under cl. (i). Accordingly, we agree with the Tribunal that the sale consideration requires to be reduced by the amount of compensation. The first question, is , therefore, answered in the affirmative and in favour of the assessee.”*

Similar view has been taken by the Hon’ble Jurisdictional High Court in the case of CIT V/s. Miss Piroja C. Patel reported as 242 ITR 582 and in the case of CIT V/s. Abrar Alvi (supra).

15. A perusal of the orders of the Authorities below reveal that the Authorities below without verifying the fact whether the amount of Rs. 23 Lacs have actually been paid by the purchaser to the Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga, has out rightly rejected the contentions of assessee. We deem it appropriate to remit the issue back to the file of Assessing Officer for the limited purpose to ascertain whether the amount of Rs. 8 Lacs and Rs. 15 Lacs have been actually received by Mr. Mansoor Abdul Gani Aaga and Smt. Shagufta M. Aaga, as has been mentioned in the Sale Deed. If the said amount has been received by the aforesaid persons, the same is to be allowed as expenditure u/s 48 of the Act in the hands of assessee from total sales consideration. Accordingly, ground No. 2 raised in the appeal by the assessee is allowed for statistical purposes.

16. In the result, appeal of the assessee is partly allowed in the aforesaid terms.

Order pronounced on Monday, the 30<sup>th</sup> day of January, 2017.

Sd/-	Sd/-
(आर. के. पांडा / R.K. Panda)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 30<sup>th</sup> January, 2017.

SB

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-II, Pune.
4. The CIT-II, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,  
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

सहायक पंजीकार / Assistant Registrar  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune

