IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.5097/Mum./2015
(Assessment Year : 2010–11)

Late Shri Gordhandas S. Garodia
Through L/h Shri Mahesh G. Garodia
149/156, Garodia Shipping Centre
Garodia Nagar, Ghatkopar (E)
Mumbai 400 077
PAN – AACPG2914R ……………. Appellant

v/s

Dy. Commissioner of Income Tax
Circle–22(1), Mumbai ……………. Respondent

ITA no.5113/Mum./2015
(Assessment Year : 2010–11)

Asstt. Commissioner of Income Tax
Circle–27(1), Mumbai ……………. Appellant

v/s

Late Shri Gordhandas S. Garodia
Through L/h Shri Mahesh G. Garodia
149/156, Garodia Shipping Centre
Garodia Nagar, Ghatkopar (E)
Mumbai 400 077
PAN – AACPG2914R ……………. Respondent

Assessee by : Dr. K. Shivram a/s
Shri Rahul K. Hakani
Revenue by : Shri Abhijit Patankar

Date of Hearing – 13.09.2017	Date of Order – 01.11.2017

<u>O R D E R</u>

<u>PER SAKTIJIT DEY, J.M.</u>

Captioned cross appeals arise out of order dated 3rd August 2015, passed by the learned Commissioner (Appeals)–25, Mumbai, pertaining to assessment year 2010–11.

<u>ITA no.5097/Mum./2015</u> – Assessee's Appeal

2. Ground no.1, is not pressed, hence, dismissed.

3. Ground no.4, being general is not required to be adjudicated upon.

4. In ground no.2, the assessee has challenged disallowance of business loss of ₹ 4,15,973, and treating the income derived by the assessee from Portfolio Management Services (PMS) transaction as short term capital gain.

5. Brief facts are, the deceased assessee represented through his legal heir was an individual. As observed by the Assessing Officer, the assessee was the co–owner of Arthur and Jenkins Salt Works. For the assessment year under consideration, the assessee filed his return of income on 23rd November 2010, declaring total income at ₹ 1,67,26,51,378. During the assessment proceedings, the Assessing Officer found that the assessee had invested an amount of ₹ 5 crore in

ICICI Prudential PMS. However, in the computation of income, the assessee has neither shown any gain nor loss from the said investment. He, therefore, called for necessary information regarding the investment from ICICI Prudential Assets Management Co. Ltd. From the information obtained, it was found that as per the income and expenditure statement, there was a deficit of ₹ 3,58,789 during the year. Further, it was found that the assessee has derived a net gain of ₹ 14,41,964 on sale of securities. When this fact was confronted to the assessee, it was submitted by the assessee that the transaction relating to investment made in ICIC Prudential PMS being in the nature of business, the loss suffered by the assessee amounting to ₹ 4,15,973 should be treated as business loss and set–off against income against other sources. The Assessing Officer, however, did not find merit in the submissions of the assessee. On verifying the details of transactions, the Assessing Officer was of the view that gain derived from sale of securities is to be treated as capital gain as it was an investment activity of the assessee and not adventure in the nature of trade. He, therefore, assessed the net gain derived from sale of securities as short term capital gain. While doing so, he disallowed PMS expenditure claimed by relying upon the decision of the Tribunal. Though, the assessee challenged the addition made on account of capital gain, however, learned Commissioner (Appeals) also sustained the addition made by the Assessing Officer.

6. Dr. K. Shivaram, learned Counsel appearing for the assessee submitted that looking at the volume of PMS transaction it is nothing but a business transaction of the assessee, hence, the gain derived therefrom should not be assessed as capital gain. Without prejudice to the aforesaid contention, he submitted, even if the gain derived from PMS transaction is treated as capital gain, management fees, security transaction tax and audit fee should be considered as part of cost of acquisition for computing capital gain.

7. Learned Departmental Representative strongly relying upon the observations of the learned Commissioner (Appeals) and the Assessing Officer submitted that from the accounting treatment given by the assessee to the investment made, clearly indicates the intention of the assessee that it is an investment activity and not adventure in the nature of trade. In this context, he drew our attention to the Schedule–III of Balance Sheet of ICICI Prudential Assets Management Co. Ltd. Further, the learned Departmental Representative submitted, PMS expenditure is not allowable while computing capital gain. In this context, he relied upon the decision of the Tribunal, Mumbai Bench, in Capt. Animesh Chandra Batra v/s DCIT, [2016] 158 ITD 604.

8. We have heard rival contentions and perused the material available on record in the light of the decisions relied upon.

Undisputedly, the assessee has invested an amount of ₹ 5 crore in the mutual fund which is managed by ICICI Prudential Assets Management Co. Pvt. Ltd. The amount received from the assessee towards mutual fund, in turn, was invested in various scrips of companies listed in the stock exchange to maximize the gain to the assessee. Thus, from the aforesaid fact, it is evident that the intention of the assessee was for the purpose of investment and not trading. That being the case, the Assessing Officer was justified in assessing the gain derived from sale of securities as short term capital gain. Merely because the assessee has invested a huge sum of ₹ 5 crore it cannot be treated as a business activity of the assessee. As far as allowability of PMS cost and other expenditure, the learned Counsel appearing for the assessee fairly submitted that the issue has been decided against the assessee by virtue of decision of the Tribunal, Mumbai Bench, in Capt. Animesh Chandra Batra (supra). In view of the aforesaid, we uphold the order of the learned Commissioner (Appeals) by dismissing the ground no.2 raised by the assessee.

9. In ground no.3, the assessee has challenged the addition of an amount of ₹ 50 crore while computing long term capital gain on sale of Salt Pan Land.

10. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee has offered an amount of ₹

162,73,59,506 as short term capital gain on sale of a property. After calling for necessary details from the assessee regarding the sale of property and verifying the same, the Assessing Officer found that in the relevant previous year, the assessee has sold development rights on 500 acres of Salt Pan Land at Village Kanjur and Bhandup to Shapoorji Pallonji And Company Ltd., for a total consideration of ₹ 521 crore vide agreement dated 13th August 2009. He also found that the lease rights over the major part of land was acquired by the assessee prior to 1981 and a part of it was acquired by virtue of decree of the Hon'ble Jurisdictional High Court on 20th November 1986. He also found that the assessee and his son being co–owners of the property, the assessee had shown 50% of the amount received on sale of development rights towards long term capital gain. The Assessing Officer after going through the sale agreement with Shapoorji Pallonji And Company Ltd., found that the total sale consideration as per sale agreement amounted to ₹ 521 crore. However, while computing long term capital gain assessee has reduced an amount of ₹ 50 crore and worked out the net taxable sale consideration at ₹ 471 crore. When the Assessing Officer called upon the assessee to explain the reason for reducing the amount of ₹ 50 crore, it was submitted by the assessee, as per the terms of agreement the amount of ₹ 50 crore was receivable only after a part of land under CRZ regulation is permitted to be utilised for development purposes. It was submitted, since, the

land in question is still under CRZ regulation, assessee has neither received the amount of ₹ 50 crore nor was entitled to receive it. The Assessing Officer, however, did not find merit in the submissions of the assessee. He was of the view, though, as per clause 3.4 of the sale agreement, the assessee reduced ₹ 50 crore, since, receipt of such sum is contingent upon permission for development on the portion of land covered under CRZ Regulation, however, such contingency cannot be considered for the purpose of determining the taxable capital gain, since, capital gain arises on transfer of the asset, whether it is actually received or not. He observed, since, as per the sale agreement, the total sale consideration is ₹ 521 crore, the said amount has to be considered for the purpose of computing capital gain. Accordingly, the Assessing Officer proceeded to compute capital gain on the sale of consideration of ₹ 521 crore. the assessee challenged the aforesaid decision of the Assessing Officer in an appeal preferred before the learned Commissioner (Appeals).

11. The learned Commissioner (Appeals) after considering the submissions of the assessee, however, agreed with the Assessing Officer that the capital gain has to be computed on the total sale consideration of ₹ 521 crore. The learned Commissioner (Appeals) referring to clause 2.1 of the sale agreement observed that for transfer of development right of the total sale area, the assessee is to receive

sale consideration of ₹ 521 crore in four stages. He observed, the payment of ₹ 50 crore at the fourth stage is to be made on pro–rata basis according to the area realized for development. He observed, however, as per the agreement the mutually agreed total consideration is ₹ 521 crore. Hence, capital gain has to be computed on the total sale of consideration of ₹ 521 crore.

12. The learned Authorised Representative submitted, though, the total sale consideration as per sale agreement is ₹ 521 crore, however, as per clause–3.4 of the said agreement, an amount of ₹ 50 crore out of the total sale consideration would be payable towards the area which are covered by the CRZ notification, rules and regulations of Government of India. Hence, the said amount would be payable to the assessee only in the event, the said area is permitted to be developed and/or utilised for development purpose on pro–rata basis to the area realized for development by the competent authority. The learned Counsel submitted, since, till date the area remains under CRZ regulation, no permission for development work has been given and consequently the assessee has not received the amount of ₹ 50 crore out of the total sale consideration. Drawing our attention to sale agreement, learned Authorised Representative submitted, the assessee has obtained the lease over a land for the period of 99 years and in the meanwhile the lease period has expired since February

2016. Therefore, as on date, the assessee has no right to receive the balance amount of ₹ 50 crore. He submitted, in any case of the matter, the assessee has not received the amount of ₹ 50 crore actually, hence, such income cannot be assessed at the hands of the assessee. The learned Counsel submitted, since the right to receive the amount is not legally enforceable as it is dependent upon certain contingencies, the assessee has no vested right on the amount of ₹ 50 crore. In support of his contention, learned Authorised Representative relied upon a decision of the Hon'ble Jurisdictional High Court in CIT v/s Mrs. Hemal Raju Shette, [2016] 68 taxmann.com 319. Without prejudice to the aforesaid submissions, the learned Counsel submitted to safeguard the interest of Revenue, the assessee is ready to furnish an undertaking before the Assessing Officer offering to tax the amount of ₹ 50 crore in case it is received in any future assessment year.

13. Learned Departmental Representative relied upon the observations of the Assessing Officer and the learned Commissioner (Appeals).

14. We have patiently and carefully considered rival contentions and perused the material available on record. We have also applied our mind to the decisions relied upon before us. It is evident from the discussions of the Assessing Officer and the learned Commissioner (Appeals) in their respective orders that they have not disputed the

fact that assessee has not received the amount of ₹ 50 crore on sale of development rights of the land. However, relying upon a specific clause of the sale agreement between the assessee and the developer which speaks of total sale consideration payable to the assessee, the Departmental Authorities have concluded that long term capital gain has to be computed on the total sale consideration of ₹ 521 crore irrespective of the fact whether the assessee has received the amount of ₹ 50 crore out of such sale consideration. In this context, it is necessary to examine the sale agreement dated 13th August 2009, between the assessee and M/s. Shapoorji Pallonji And Company Ltd., the developer. As per the sale deed, the assessee agreed to sell development right of about 500 acres of Salt Pan Land to the developer. As per clause K of the agreement, certain areas out of the property sold are governed by the CRZ regulation. As per clause 2.1 of the sale agreement, the developer shall pay to the lessees (assessee) total sum of ₹ 521 crore for the entire land admeasuring 500 acres including the FSI available to the said property. As per clause 2.3 of the agreement, the sale consideration shall be payable by the developer to the assessee as under:–

i) ₹ 175 crore paid before execution of sale deed;

ii) ₹ 200 crore paid in favour of the lessee in proportion to and as per the lessee’s direction;

iii) ₹ 96 crore to be paid to the lessees within 90 days of execution of the sale deed; and

iv) Finally as per clause 2.3.4 of the sale deed, the balance sum of ₹ 50 crore is payable to lessees towards the areas which are covered by the CRZ notification, rules and regulations of Government of India and shall be payable upon the said area being permitted to be developed and/or utilised for the development purpose.

15. It further provided that the said consideration of ₹ 50 crore shall be paid pro–rata to the areas released for development from CRZ regulation. Clause 2.3.5 further reiterate that the balance amount of ₹ 50 crore shall be payable only if the area covered by the CRZ notification is permitted for development. Further, clause 2.5 of the agreement provides that in case area of the property is less than 500 acres, the lessees shall be liable to return the consideration paid under the agreement on a pro–rata basis. Thus, a reading of clause 2.3.4 and 2.3.5 of the agreement makes it clear that the payment of final tranch of ₹ 50 crore is contingent upon release of part of land covered under CRZ regulation for development work. There is no dispute to the fact that till date a portion of the land is still covered under the CRZ regulation and no permission has been granted for development work relating to the said part of the land. Therefore, as per the terms and

conditions of the sale deed, the assessee has not received amount of ₹ 50 crore. In view of the specific restriction imposed under clause 2.3.4 of the sale agreement, the Departmental Authorities cannot read the clause specifying the total sale consideration payable to the assessee under clause 2.1 in isolation. In our considered view,, the sale agreement has to be read as a whole to find out the real intention of the parties with regard to sale of land as well as consideration payable for such sale. When there is a specific clause in the agreement imposing condition for payment of ₹ 50 crore, on happening of certain events, unless such condition is fulfilled and restriction has been removed, it cannot be said that the assessee is liable to be assessed for the entire sale consideration mentioned in clause 2.1 of the agreement irrespective of the fact whether the assessee has actually received ₹ 50 crore or not. It is well settled principle of law that assessment has to be made on the basis of real income received by the assessee. In the facts of the present case, it is an admitted factual position that the assessee has not received the amount of ₹ 50 crore. There is also no certainty that the assessee would at all may receive the amount of ₹ 50 crore even in future. Therefore, the assessee cannot be subjected to capital gain on the amount of ₹ 50 crore, though, it may be a part of the total sale consideration mentioned in the agreement, considering the fact that the assessee was supposed to receive the said amount on fulfillment of certain conditions and as per

the facts on record, the assessee has not received the said amount, since, the conditions have not been fulfilled.

16. The observations of the Departmental Authorities that capital gain has to be computed on the total sale consideration, whether or not the assessee has received the amount of ₹ 50 crore, in our view, is legally untenable. In this context, we may refer to the relevant statutory provisions governing the issue. At first, we shall refer to section 45 of the Act which reads as under:–

> *"Capital gains.*
> *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."*

17. A plain reading of section 45 of the Act would suggest that any profit or gain arising from transfer of a capital asset shall be deemed to be the income of the assessee of the relevant previous year, wherein, such transfer takes place. Thus, as per this provision, taxability of capital gain would depend upon arising of profit from transfer of a capital asset. Section 48 of the Act which provides the mode of computation of capital gain says that income chargeable under the head capital gain shall be computed by reducing certain amounts from full value of the consideration received or accruing as a

result of transfer of the capital asset. The expression *"full value of consideration received or accruing"* would mean the amount actually received by the assessee or consideration which has accrued to the assessee. The expression *"accrue"* means a right acquired by the assessee to receive income. Unless, a debt due by somebody has been created in favour of assessee, it cannot be said that he has acquired a right to receive the income or that income has accrued to him. An amount can accrue to assessee if he acquires a legally enforceable right to receive it from the debtor. Keeping in perspective the aforesaid statutory provisions, if we examine the facts of the present case, it cannot be said that assessee has either derived the profit or gain amounting to ₹ 50 crore during the relevant previous year in terms of section 45(1) of the Act, nor it can be said that the amount of ₹ 50 crore would form part of full value of the consideration received or accruing as a result of transfer of the capital asset. At the cost of repetition, we must observe that the amount of ₹ 50 crore was payable to the assessee subject to fulfillment of certain conditions as enumerated in the sale deed. It is patent and obvious, the conditions as mentioned in clause 3.4 of the sale deed have not been fulfilled. Therefore, the assessee does not have any legally enforceable right under the agreement to receive the amount of ₹ 50 crore. In these circumstances, computation of capital gain on the amount of ₹ 50 crore, in our view, is not only improper but against the scheme of the

Act. The entire purpose of the Income Tax Act, 1961 is to assess the real income of the assessee. Therefore, the Departmental Authorities cannot assess any hypothetical or notional income to tax. Having held so, we feel it appropriate to refer to the decision of the Hon'ble Jurisdictional High Court in Mrs. Hemal Raju Shette (supra). The facts of the case are, by virtue of an agreement the assessee transferred its share holding in a particular company. As per the terms of agreement, initial consideration of ₹ 2.70 crore was to be received immediately and deferred consideration of ₹ 20 crore was to be received over a period of four years based on a formula. As per the working of the formula a situation may arise where no amount on account of deferred consideration could be receivable by the assessee. It so happened, the assessee could not receive part of the deferred consideration in assessment year 2006–07. However, the Assessing Officer held that, since, as per the terms of the agreement, assessee was to receive the deferred consideration in four assessment years, it is liable to pay capital gain tax. When the issue ultimately came up for consideration of the Hon'ble Jurisdictional High Court, the Hon'ble Court after relying upon a number of decision of the Hon'ble Supreme Court held as under:–

> *"8. In the present case, from the reading of the above clauses of the agreement the deferred consideration is payable over a period of four years i.e. 2006-07, 2007-08, 2008-09 and 2009-10. Further the formula prescribed in the agreement itself makes it*

clear that the deferred consideration to be received by the respondent-assessee in the four years would be dependent upon the profits made by M/s. Unisol in each of the years. Thus in case M/s. Unisol does not make net profit in terms of the formula for the year under consideration for payment of deferred consideration then no amount would be payable to the respondent-assessee as deferred consideration. The consideration of Rs.20 crores is not an assured consideration to be received by the Shete family. It is only the maximum that could be received. Therefore it is not a case where any consideration out of Rs.20 crores or part thereof (after reducing Rs.2.70 crores) has been received or has accrued to the respondent- assessee. As observed by the Apex Court in Morvi Industries Ltd. v. CIT [1971] 82 ITR 835. "The income can be said to accrue when it becomes due.... The moment the income accrues, the assessee gets vested right to claim that amount, even though not immediately." In fact the application of formula in the agreement dated 25th January, 2006 itself makes the amount which is receivable as deferred consideration contingent upon the profits of M/s.Unisol and not an ascertained amount. Thus in the subject assessment year no right to claim any particular amount gets vested in the hands of the respondent-assessee. Therefore, entire amount of Rs.20 crores which is sought to be taxed by the Assessing Officer is not the amount which has accrued to the respondent-assessee. The test of accrual is whether there is a right to receive the amount though later and such right is legally enforceable. In fact as observed by the Supreme Court in E.D. Sassoon & Co. Ltd. v. CIT [1954] 26 ITR 27 "It is clear therefore that income may accrue to an assesee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in presenti, solvendum in futuro …. …. ….". In this case all the co-owners of the shares of M/s. Unisol have no right in the subject assessment year to receive Rs.20 crores but that is the maximum which could be received by them. This amount which could be received as deferred consideration is dependent/contingent upon certain uncertain events, therefore, it cannot be said to have accrued to the respondent-assessee. The Tribunal in the impugned order has correctly held that what has to be taxed is the amount received or accrued and not any notional or hypothetical income. As observed by the Apex Court in CIT v. Shoorji Vallabhdas & Co. [1962] 46 ITR 144 "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which liability to tax is attracted, viz., the accrual of its income or its receipt; but the substance of

> *the matter is income, if income does not result, there cannot be a tax, even though in book-keeping an entry is made about a hypothetical income, which does not materialize." In this case Rs.20 crores cap in the agreement is not income in the subject assessment year. It has been observed by the Apex Court in the case of K.P. Varghese v. ITO [1981] 131 ITR 597/7 Taxman 13 that one has to read capital gain provision along with computation provision and the starting point of the computation is "the full value of the consideration received or accruing". In this case the amount of Rs.20 crores is neither received nor it has accrued to the respondent-assessee during the subject assessment year. We are informed that for the subsequent assessment year (save Assessment Year 2007-08 for which there is no deferred consideration on application of formula), the Assessee has offered to tax the amounts which have been received on the application of formula provided in the agreement dated 25th January, 2006 pertaining to the transfer of shares."*

18. The ratio laid down by the Hon'ble Jurisdictional High Court, as aforesaid, squarely applies to the facts of the present case. In view of the aforesaid, we hold that the amount of ₹ 50 crore having neither been received by the assessee nor accrued in the financial year relevant to the assessment year under dispute, it cannot be considered as a part of sale consideration for computing capital gain in the impugned assessment year. The Assessing Officer is free to proceed in accordance with law if and when such income arises. With the aforesaid observation, ground no.3, is allowed.

19. In view of our decision in ground no.3, ground no.3.1, having become infructuous is dismissed.

20. In the result, assessee's appeal is partly allowed.

<u>ITA no.5113/Mum./2015</u> – Revenue's Appeal

21. Grievance of the Revenue is against the decision of the learned Commissioner (Appeals) in directing the Assessing Officer to adopt the cost of property shown by the assessee as per the report of the registered value.

22. Brief facts are, during the assessment proceedings, the Assessing Officer found that while computing the cost of acquisition, assessee on the basis of a valuation report of the registered valuer has adopted the cost of asset as on 1st April 1981 at ₹ 29.77 crore, The Assessing Officer found that major part of the lease hold rights was acquired by the assessee only in November 1986 for ₹ 6.20 crore which has not been taken note of by the registered valuer. He also observed that rate adopted by the registered valuer is based on ready reckor, hence, not approved by the Government. Therefore, he was of the view that the valuation done by the registered valuer cannot be accepted. Accordingly, he made a reference to the District Valuation Office (DVO) under section 55A(a) of the Act for determining fair market value of the capital asset as on 1st April 1981. The DVO in his report dated 25th February 2013, determined the value of capital asset at ₹ 23,14,33,000. The Assessing Officer adopting the value determined by the DVO computed the capital gain. The assessee challenged the decision of the DVO before the learned Commissioner (Appeals).

23. The learned Commissioner (Appeals) following the decision of the Hon'ble Jurisdictional High Court in CIT v/s Pooja Prints, [2014] 360 ITR 697, decided the issue in favour of the assessee by holding that as per the existing provisions under section 55A(a), the Assessing Officer could not have made a reference to the DVO for determining the FMV in a case where he is of the opinion that the value shown by the assessee is less than the FMV.

24. We have heard rival contentions and perused the material available on record. It is manifest from the assessment order that the Assessing Officer being of the view that cost of acquisition shown by the assessee on the basis of registered valuer’s report is more than FMV had made a reference to the DVO for determining the FMV of the capital asset transferred by the assessee. As held by the Hon'ble Jurisdictional High Court in Pooja Prints (supra), as per the existing provisions of section 55A(a), which was applicable to the relevant assessment year, a reference can be made to the DVO only if the value declared by the assessee in the opinion of the Assessing Officer is less than its fair market value. In the facts of the present case, the situation is reverse. The Assessing Officer made a reference to the DVO under section 55A(a) having entertained an opinion that the value adopted by the assessee is more than the FMV. Respectfully following the decision of Hon'ble Jurisdictional High Court (supra), we

uphold the order of the learned Commissioner (Appeals) on this issue. Grounds raised are dismissed.

25. In the result, Revenue's appeal is dismissed and assessee's appeal is partly allowed.

Order pronounced in the open Court on 01.11.2017

Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 01.11.2017

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Dy./Asstt. Registrar)
ITAT, Mumbai