

IN THE INCOME TAX APPELLATE TRIBUNAL BENCH "A", KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

ITA No.372/Kol/2009

Assessment Year : **2004-05**

Stewarts & Lloyds of India ltd.
Kolkata
(PAN:AAECS 0445G)

-versus-

C.I.T., Circle-1,
Kolkata

(APPELLANT)

(RESPONDENT)

For the Appellant : Shri Soumen Adak, ACA & Shri Prakash Singh,ACA
For the Respondent : Shri Radhey Shyam, CIT.DR

Date of Hearing : 04.02.2016.

Date of Pronouncement : 02.03.2016.

ORDER

Per Shri N.V.Vasudevan, JM

This appeal by the Assessee is directed against the order dated 15.01.2009 of CIT, Circle-1, Kolkata passed u/s 263 of the Income Tax Act, 1961, (Act) relating to A.Y.2004-05.

2. The Assessee is a company. For A.Y.2004-05, assessee filed return of income declaring total income of Rs.2,15,82,920/-. In the return of income filed by the assessee, the assessee had declared long term capital loss on sale of its property located at Ambattur Industrial Estate, Plot No.40-A(NP) in Saidapet Taluk and Chingleput M.G.R. District in the State of Tamil Nadu, hereinafter referred to as "the Property". The property was a vacant plot measuring about 3.44 Acres with compound wall. The Computation of long term capital loss as given by the assessee was as follows :-

Particulars	Amount (Rs.)
A.Long Term Capital Gain on sale of Land located at Ambattur Industrial Estate, Plot No.40-A(NP) in Saidapet Taluk and	

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Chingleput M.G.R. District in the State of TamilNadu	
Sale Consideration (As per enclosed agreement for sale)	32,325,000
Less : Commission paid on the sale of aforesaid land	1,073,926
	31,251,074
Less :- Indexed cost of acquisition (Note 1)	<u>34,419,420</u>
Long-term Capital Gain/(Loss)	(3,168,346)
Note-1 Indexed cost of acquisition is determined as under :-	
Estimated Fair market value of Land as on 01-04-1981 (Year of acquisition – 1971)	
[As per valuation report attached]	<u>7,434,000</u>
Indexed cost of acquisition[74,34,000*463/100]	<u>34,419,420</u>

3. The assessee sold the property to Reliance Infocom Ltd., under a sale deed dated 02.12.2003 for a total consideration of Rs.3,25,00,000. The Sale consideration towards the value of the land and the compound wall was apportioned at Rs.3,23,25,000 for the value of land and Rs.1,75,000 towards compound wall. In the computation of long term capital loss, the assessee claimed that it had paid Rs.10,73,926 as commission for sale of the said plot. The assessee deducted the indexed cost of acquisition i.e.,Rs.3,41,19,420 calculated on the fair market value of the land as on 01.04.1981 of Rs.74,34,000 from the said net sale consideration of Rs.3,23,25,000 and computed the long term capital loss at Rs.31,68,346 and claimed carried forward the same to the A. Y. 2005-06.

4. The AO completed the assessment u/s 143(3) of the Act by his order dated 05.12.2006. In the said order, the AO had accepted long term capital loss as declared by the assessee.

5. AO thereafter moved a proposal to the C.I.T. requesting him to exercise powers u/s 263 of the Act as the assessment order dated 05.12.2006 passed u/s 143(3) of the Act was erroneous and prejudicial to the interest of the revenue. The CIT after considering

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the proposal of the AO and after perusing the records was of the view that the order passed by the AO was erroneous and prejudicial to the interest of the revenue. He accordingly issued a show cause notice dated 11.08.2008.

6. It was the case of the CIT in the show cause notice that on 3rd March, 1971, the Government of Tamilnadu assigned the property to the assessee by an Indenture for construction of building and erection of machinery and equipments for the manufacture of fabricated pipe works and tubular structures. The Assignment was subject to many conditions including the condition that the assignee i.e., the assessee (i) shall not use the plot for any purpose other than that for which it was assigned; (ii) shall commence construction within six months from the date of taking possession of the said plot and complete the construction within two years from the said date; (iii) shall comply with the building regulation and other conditions as specified in the Indenture of assignment. The consideration for assignment was Rs.20,000 per acre and the total consideration was Rs.68,800 for 3.44 acres of land. In the Indenture of assignment there were 19 conditions to be observed by the assessee. According to CIT from the above mentioned conditions in the Indenture of assignment it was very much clear that the Government of Tamilnadu assigned the developed plot of land to the assessee for its use and the assessee was not conferred the absolute right over the land by virtue of the Indenture. Therefore, according to CIT the assessee was not the owner of the property but a user of the property and right of the assessee over the property was limited to use of plot of land for business purposes. Later, by a G.O. Ms.N-959 dtd. 23.7.76, the Government of Tamilnadu handed over the management and maintenance of the Industrial Estate at Ambattur to Tamilnadu Small Industries Development Corporation Ltd. and transferred the ownership of the Industrial Estate at Ambattur to the said Corporation by G.O.Ms.N-785 dtd.7.8.88 and the said Corporation became the absolute owner of the Industrial Estate. Thereafter, at the request of the assessee, the said corporation sold the property to the assessee as per the sale deed dtd. 19.04. 1994 for a consideration of 68,800 already paid by the assessee as per the terms of the deed of assignment. In the sale deed, certain conditions were also imposed upon the assessee. One of the conditions was that the purchaser shall not

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transfer, sell or mortgage the property or change the ownership/constitution/partners/shareholders or directors within five years from the date of allotment without the prior approval of vendor i.e., Tamilnadu Small Industries Development Corporation Ltd.. But, however, beyond five years from the date of allotment, the purchaser was given the right to effect the changes after informing the vendor subject to compliance of the covenants contained in the sale deed. Therefore, according to CIT, from the language of the sale deed it was clear that the assessee became the owner of the property only in April, 1994 and further had right to dispose of the land only after five years from the date of the said sale deed dtd. 19.04.1994.

7. The property was sold by the Assessee to M/s.Reliance Infocom Ltd., under a sale deed dated 2.12.2003. It is only on this transfer capital loss in question was claimed in the return of income for AY 2004-05. According to CIT in the computation of long term capital loss, the assessee estimated the fair market value of the property as on 1/4/1981 at Rs.74,34,000 and calculated the cost of acquisition at Rs.3,44.19,420. The assessee claimed that the year of acquisition of the said plot was 1971 at a consideration of Rs.68,800 only. This according to CIT was wrong because according to CIT the year of acquisition was 19.4.1994 when a registered conveyance was obtained by the Assessee in respect of the property. According to CIT, in course of the regular assessment proceedings, for the A. Y. 2004-05, the Assessing Officer did not examine the long term capital loss calculated as above by the assessee and also he did not make any enquiry relating to the claim of the assessee that there was long term capital loss on sale of the property. The A.O. also did not make any enquiry as to whether the payment of commission on sale of the property amounting to Rs.10,73,926 was genuine and whether the assessee had constructed any factory building on the property and sold the factory building with the property to Reliance Infocom Ltd. on 02.12.2003. The Assessing Officer also did not examine the issue whether the fair market value of the land as on 01.04.1981 estimated in the valuation report filed with the return was at all applicable for calculation of Long Term Capital Loss since the assessee became the owner of the land only in April, 1994 when Tamilnadu Small Scale Industries Development Corporation had sold the property to

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the assessee by a Registered Deed and the assessee was only an assignee of the property till then and used the land as tenant/user by virtue of the Indenture of assignment dtd. 03.03.1971. The CIT was therefore of the view that the order of the AO was erroneous and prejudicial to the interest of the revenue and was liable to be revised in exercise of his powers of revision u/s.263 of the Act.

8. In reply to the show cause notice as above, the Assessee submitted that the Assessee became owner of the property by virtue of assignment deed dated 3.3.1971 and complied with all the conditions of the assignment and thus became de facto owner of the property much before 1.4.1981 and in terms of Sec.55(2)(b)(i) of the Act, it was entitled to adopt the fair market value of the property as on 1.4.1981. In this regard the Assessee pointed out that the definition of Transfer for the purpose of Sec.2(47) of the Act under clause (v) of Sec.2(47) of the Act also includes "Any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882". The Assessee pointed out that Sec.2(14) of the Act defines "Capital Asset" to mean property of any kind "held by an Assessee". The expression "held by an Assessee" only means that "de jure" ownership is not a condition precedent for regarding a person as owner of a capital asset. The Assessee placed reliance on the decision of the Hon'ble Madras High Court in the case of Madathil Brothers Vs. DCIT 301 ITR 345 (Mad) wherein it was held as follows:

"...the definition of "capital asset" refers to property of any kind "held" by an assessee. In contradistinction to the word "owner" or "owned", the definition uses the phrase "held". A reading of s. 45 as it stands today, shows that capital gain is chargeable on "any profits or gains arising from the transfer of the capital asset...". Read in the context of the definitions of "capital asset" and "transfer" the section carries no words of limitation to read that a transfer effected by a person backed up with a title passed on under a registered deed alone could be considered as resulting in a profit or gain assessable under s. 45. All that the present section looks at is the transfer of a capital asset held as understood under s. 2(14) and under s. 2(47). The question then is, what will be the effect of the amendment brought forth to s. 2(47) by the insertion of sub-cl. (v) to s. 2(47) relating to the definition of "transfer" under the Finance Act, 1987 w.e.f. 1st April, 1988. The definition under s. 2(47) is an inclusive one which starts by saying "transfer in relation to the capital asset includes"; as such, it is not possible to accept the stand of the respondent that the transactions

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falling under s. 53A of the Transfer of Property Act for the purpose of considering the capital gains would fall for consideration for the purpose of considering the same as falling under long-term capital asset only on and from the amendment inserted under the Finance Act, 1987, w.e.f. 1st April, 1988. The insertion is only declaratory of the law already there by reason of inclusive terms under s. 2(47) which is a wide definition in its import. The capital gain arising on the transfer of capital assets has to be worked out from the date of the agreement under which the assessee was put in possession of the property.....”

The Assessee also placed reliance on the following other decisions laying down identical proposition as laid down by the Hon’ble Madras High Court referred to above, viz., CIT Vs. Ved Praksh & Sons (HUF) 207 ITR 148 (P & H) and Griipwell Industries Ltd. Vs. ITO 99 ITD 368 (Mum).

9. The CIT however did not agree with the aforesaid contention put forth by the Assessee. He held that the words “held by an Assessee” would mean de jure ownership and such ownership was acquired by the Assessee only on 19.4.1994 when a registered conveyance was executed in its favour. In coming to the above conclusion, the CIT placed reliance on the decision of the Hon’ble Karnataka High Court in the case of CIT Vs. Dr.VV Mody 218 ITR 1 (Karn.) wherein the facts were that the assessee, an individual, was allotted a site by the Bangalore Development Authority on the 25th May, 1972 in accordance with the relevant rules of allotment. A lease-cum-sale agreement was executed according to which the assessee was required to pay a certain amount to the Bangalore Development Authority and at the end of the 10th year, secure a conveyance in his favour upon payment of the entire sale consideration. Consequently, a sale-deed was executed in favour of the assessee by the Bangalore Development Authority on the 29th March, 1982, registered on the 13th May, 1982. Shortly, thereafter, on 27th Nov., 1982, the assessee sold the site to a third person for a total consideration of Rs. 1,69,200. The question before the Court was as to whether it can be said that the Assessee “held the property” from the year 1971 or only when the registered conveyance was executed in his favour. The Hon’ble Karnataka High Court held as follows:

“12. The term capital asset as defined by s. 2(14) of the Act means property of any kind held by the assessee whether or not connected with his business or profession, but does not include the specified items of property. Leasehold rights held by an

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assessee do not fall under any one of the exclusions contemplated by the definition. The expression "property" is of the widest import and subject to any limitations which the context may require, it signifies every possible interest which a person can acquire, hold and enjoy—Refer Ahmed G.H. Arif & Ors. vs. CWT (1970) 76 ITR 471 (SC). It is, therefore, true that if any one of such interests was alienable by the holder of the same, it could give rise to a capital gain short or long-term depending upon the period for which the interest was held by the person concerned.

13. The question, however, is not whether the leasehold right held by the assessee could independent of the sale in favour of the assessee have been treated as a property right capable of generating a capital gain in the hands of the assessee. The question really is as to whether any such right existed and could be transferred by the assessee after the same had merged in the larger estate acquired by the assessee. This is particularly so because what is transferred by the assessee is not the lesser interest held by him earlier to his becoming the absolute owner but the total interest acquired by him in the form of absolute title to the property, transferred. In the circumstances, unless it was possible for the assessee to hold the two estates simultaneously and independent of each other, the transfer of the title in the property could not be deemed to be transferring the lesser and the larger estates both so as to make them amenable to a process of splitting for purpose of taxing the capital gain arising as a short-term or long-term gain. This, however, was not so in the present case. As from the 29th March, 1982, the assessee held only one estate representing the title to the property in question and any capital gain arising from the transfer of the said estate made on 27th Nov., 1982, could only be giving rise to a short-term gain. The Tribunal was in these circumstances in error in holding otherwise."

10. The CIT also held that the payment of property tax by the Assessee was only for the purpose of levy and recovery of property tax in view of clause-7 of the deed of assignment dated 3.3.1971 and that did not confer any ownership rights over the property in favour of the Assessee. With regard to the argument of the Assessee by placing reliance on Sec.2(47)(v) of the Act, the CIT was of the view that those provisions are not applicable when one of the contracting parties was Government. He also held that even otherwise the conditions necessary for application of Sec.53A of the Transfer of Property Act, 1887 were not present in the case of the Assessee.

11. For the above reasons, the CIT set aside the order of the AO in so far as it relates to acceptance of capital loss on sale of the property and directed the AO to frame assessment on the above issue by considering the date of acquisition of the property as 19.4.1994 and further directed the AO to enquire into the actual cost of acquisition and expenditure in connection with the transfer claimed by the Assessee.

12. Aggrieved by the order of the CIT, the Assessee has preferred the present appeal before the Tribunal.

13. We have heard the submissions of the learned counsel for the Assessee and the learned DR. The first argument of the learned counsel for the Assessee was that u/s.263 of the Act it is only the CIT who can suo motto initiate proceedings and in this case the AO has mooted the proposal for revision u/s.263 of the Act and therefore the order u/s.263 of the Act has to be held to be invalid, illegal. We are of the view that this argument is liable to be rejected. It is no doubt true that the CIT in the show cause notice u/s.263 of the Act has set out the proposal of the AO that his order suffered from an error and by reason of such error his order was prejudicial to the interest of the revenue. In para 3 of the show cause notice the CIT has clearly set out that he has perused the proposal and the assessment record and has also expressed satisfaction that the AO has failed to make proper verification and that there was an error in his order which was prejudicial to the interest of the revenue. There is no prohibition u/s.263 of the Act for the CIT to act on the basis of proposal by the AO and that the CIT has to initiate action u/s.263 of the Act only suo motto. So long as there is application of mind on errors brought to his notice and the other conditions u/s.263 of the Act are satisfied, there can be no grievance whatsoever to the Assessee. We therefore reject this argument made on behalf of the Assessee.

14. The next contention of the learned counsel for the Assessee was that Property 'held' by the assessee is relevant in computing capital gain and not 'owned'. According to him in all sections dealing with the computation of capital gain viz., Sec. 2(14) Capital Assets, Sec. 2(42A) Short Term Capital Assets and Explanation (iii) to Sec. 48 indexed cost of acquisition, the term used is 'held' and not 'owner' or 'owned'. According to him therefore, for the purpose of determining date of acquisition in computing long term capital gain, absolute ownership is not relevant. He again placed reliance on the decision of the Hon'ble Madras HC in Madathil Brothers -vs.-DCIT (2008) 301 ITR 345 (Mad) wherein it was held that the definition of 'capital asset' u/s 2(14) refers to property of any kind "held" by an assessee as distinguished from the word 'owner' or 'owned'. He also placed reliance on an identical view taken by

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Hon'ble Kolkata ITAT in Anindya Dutta -vs.- DCIT (2013)[ITA No. 473/Kol./2012]. His further submission was that the only difference between 'short term capital asset' and 'long term capital asset' is the period over which the property has been held by the assessee and not the nature of the title of the property. It was his submission that in the case of the Assessee, possession of land was given to the Assessee in 1970 and by way of sale deed executed in 1994, only improvement of the existing right in the said land has taken place. The said improvement will not have any impact on determination of holding period. He placed reliance upon the decision of Hon'ble Allahabad HC in CIT -vs.- Rama Rani Kalia 358 ITR 499 (All). It was further submitted that depreciation u/ s 32 of the Act is allowable, inter-alia, if the assets are wholly or partly owned by an assessee. Even in such cases, it has been held that legal ownership is not necessary and possession of assets would suffice for allowance of depreciation. Reference was made to the decision of the Hon'ble Apex Court in Mysore Minerals Ltd. -vs.- CIT (1999) 239 ITR 775 (SC) wherein it was held that anyone in possession of property for the time being in his own title and having right to use or occupy it and/ or to enjoy it in his own right for the purpose of business or profession would be the owner of the property though a formal deed of title may not have been executed and registered. It was argued that if possession and control over the property was sufficient to be owner of the asset for the purposes of sec. 32 it can be said that same would be more than sufficient to treat that the Assessee as owner of the property from 1970 for the purposes of computation of Capital Gains/loss. It was further submitted that enabling enjoyment of any immovable property falls within the definition of 'transfer' as per Sec. 2(47)(vi) of the Act. Sec. 2(47)(vi) of the Act, defines 'transfer', as transactions, which inter-alia, have the effect of transferring or enabling the enjoyment of any immovable property by way of any agreement or arrangement or in any other manner. It was pointed out that in the case of the Assessee, in terms of agreement dated 03-03-1971, the assessee was enjoying the possession of immovable property from 08-04-1970 onwards. Accordingly in terms of clause (vi) of Sec. 2(47) the plot of land was transferred to the assessee only on 08-04-1970. It was submitted that the decision relied upon by the Ld. CIT in CIT -vs.- Dr. V.V. Mody (1996) 218 ITR 1 (Kar) does not hold good since the same was rendered

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without considering the amendments made vide Finance Act 1987 in Sec. 2(47) by way of insertion of clause (v) & (vi) as held in the case of CIT -vs.- Smt. C. Shakuntala (ITA No. 117 of 2006) (Kar) & Smt. Anita Venugopalchar -vs.- ITO (ITA No. 3667/Mum/2010). Without prejudice, it was submitted that in view of Explanation 2 to Sec. 2(47) inserted by Finance Act, 2012 w.e.f. 01-04-1962 the impugned property has to be regarded as transferred to the Assessee on 08-04-1970 i.e. the date on which the possession of land was handed over. It was also pointed out that, Explanation 1 to Sec. 2(47) r.w.s. 269UA(d)(i) adopts definition of 'transfer' from clause (f) of Sec. 269UA which provides that the term 'transfer' includes lease for a term not less than 12 years. It was argued that in the case of the Assessee, possession of immovable property has been transferred for an indefinite period (certainly for more than 12 years) since 1971 and hence the same constitutes transfer u/s 2(47)(vi) of the Act.

15. The learned DR placed reliance on the order of the CIT and the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Dr.V.V.Modi (supra).

16. We have given a very careful consideration to the rival submissions. Sec.45 of the Act lays down that any profit or gain arising from the transfer of a capital asset effected in the previous year shall 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. Sec.2(47) of the Act defines "transfer" for the purpose of the Act and it reads thus:

(47) "transfer", in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein ; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in trade of a business carried on by him, such conversion or treatment ; or

(iva) the maturity or redemption of a zero coupon bond; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation[1]: For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA;

Explanation 2.— For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;’.

17. Sec.48 lays down the method of computation of long term capital gain and it reads as follows:

“Sec.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:

Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company:

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Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted :

Provided also that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset being bond or debenture other than capital indexed bonds issued by the Government :

Provided also that where shares, debentures or warrants referred to in the proviso to clause (iii) of section 47 are transferred under a gift or an irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section:

Provided also that no deduction shall be allowed in computing, the income chargeable under the head "Capital gains" in respect of any sum paid on account of securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004."!.

Explanation : *For the purposes of this section,—*

(i) "foreign currency" and "Indian currency" shall have the meanings respectively assigned to them in section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999);

(ii) the conversion of Indian currency into foreign currency and the reconversion of foreign currency into Indian currency shall be at the rate of exchange prescribed in this behalf;

(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;

(iv) "indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the year in which the improvement to the asset took place;

(v) "Cost Inflation Index", in relation to a previous year, means such Index as the Central Government may, having regard to seventy-five per cent of average rise in the Consumer Price Index (Urban) for the immediately preceding previous year to such previous year, by notification in the Official Gazette, specify, in this behalf."

18. From a reading of Sec.48 of the Act it is clear that from the full value of consideration received on transfer the cost of acquisition of the capital asset and the cost of its improvement are one of the permissible deduction to arrive at the capital

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gain/loss. The expression “cost of acquisition” has been defined in Sec.55 (2) of the Act. The clause of Sec.55(2) of the Act which is relevant in the present case is clause (b)(i) which reads thus:

“(2) For the purposes of sections 48 and 49, "cost of acquisition",—

(b) 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 as on the 1st day of April, 1981, at the option of the assessee;

19. It can be seen that clause (b)(i) of Sec.55(2)(b) would be attracted only when “the capital asset became the property of the Assessee” before 1st April, 1981. It was the plea of the Assessee that though a registered conveyance in respect of the property was obtained by the Assessee only on 19.4.1994, it became the owner of the property by paying the entire consideration as set out in the deed of assignment dated 3.3.1971 and by complying with the conditions of assignment much before 1.4.1981 and therefore under clause (b)(i) of Sec.55 of the Act, it was entitled to adopt the fair value market value as on 1.4.1981 as cost of acquisition while computing capital gain/loss.

20. The undisputed facts are that the property was assigned by the Tamil Nadu Government through Governor by a deed of assignment dated 3.3.1970. The consideration payable by the Assessee for the assignment of the property was a sum of Rs.34,400/-. The Assessee paid Rs.17,200/- on the date of assignment. The remaining sum was to be paid in two equal instalments, the 1st instalments to be paid within 2 years from the date of taking possession of the property and the second installment was to be paid within one year from the date on which the second instalment is due. It is also not in dispute that the monies payable by the Assessee as per the deed of assignment have been duly paid well before 1st April, 1981. It is not in dispute that the Assessee took possession of the property on 8.4.1970.

21. It is important to understand what is the interest in the property created by the deed of assignment dated 3.3.1970 in favour of the Assessee. The preamble to the

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deed of assignment refers to the Government having formulated a scheme for the laying of developed plots for industries at Ambattur and the layout plan in respect thereof having been approved by the Town Planning authorities. It thereafter refers to the Assessee having applied for assignment to them of the property. Thereafter there is a reference to the consideration for the assignment and the mode in which it has to be paid. Thereafter the deed of assignment recites that the Government assigns to the Assignee the property on the terms and conditions set forth. There are about 19 clauses thereafter. It will be useful to refer to certain clauses which are relevant for the present case

"12. The assignee shall not, without the previous sanction of the Director, transfer the whole or any part of his interest in the said plot or in any superstructures constructed thereon, or part with the possession of the said plot or superstructure or any portion thereof.

"15. Notwithstanding anything hereinbefore contained, in the event of a breach of any of the these conditions by the assignee, the Director may after giving reasonable notice, cancel this assignment and resume that plot and on such resumption, the said plot shall vest absolutely in the government free from all encumbrances and the assignee shall be paid for the land only the price actually paid by the assignee after deducting the penal interest, if payable under clause 14 above. "

16. If for any reason, the assignee desires to relinquish his right over the said plot, the director may resume the land and the assignee shall be paid/or the land only the price as actually paid by the assignee after deducting penal interest. if any, payable under clause 14 above. "

22. The deed of assignment does not say what interest over the property that is assigned to the Assignee. Nevertheless some interest is created in favour of the Assignee and that is clear from clause-12 of the deed of assignment. The deed of assignment cannot be construed as conveying absolute ownership/interest over the property in favour of the Assessee because such ownership/absolute interest is conveyed only by deed of sale dated 19.4.1994. The deed of assignment does not confer any right on the Assessee to demand conveyance from the Assignor nor was there any agreement to convey the property to the Assessee. The Assessee was therefore not an agreement holder in possession of the property. In such

circumstances, we fail to see as to how the Assessee can lay claim on the basis of Sec.2(47)(v) of the Act. The Assessee in the present case was neither a lessee nor an agreement holder in respect of the property. The capacity in which the Assessee was in occupation of the property prior to the sale deed dated 19.4.1994 was as a permissive user and that did create interest over the property in favour of the Assessee. By the deed of sale dated 19.4.1994 such possessory right got enlarged into an absolute ownership rights. We are of the view that the sale deed merely recognized the Assessee's ownership with reference to original deed of assignment dated 3.3.1970 and payment of full consideration in respect of the property prior to 1.4.1981. The title of the Assessee to the property can be traced to the original assignment deed dated 3.3.1970.

23. Sec.55(2)(b)(i) of the Act defines "Cost of acquisition" and the expression "where the capital asset became the property of the Assessee before 1st April, 1981" used therein has to be interpreted keeping in mind the policy and object of the statute. The benefit of indexation is also given so that the inflation in value is taken care of and only the real gain is brought to tax. The expression "where the capital asset became the property of the Assessee before 1st April, 1981 in the context of Sec.55(2)(b)(i) of the Act, is rather ambiguous, in the sense that it does not speak of the date of vesting of legal title to the property. Even the provisions of sec.2(47)(v) & (vi) of the Act which defines what is "transfer" for the purpose of the Act, considers possessory rights as akin to legal title. It is therefore necessary to look into the policy and object of the provisions giving exemption from levy of tax on capital gain. In the present case the Assessee had paid the entire consideration for the property prior to 1.4.1981. Therefore the claim of the Assessee that the property became property of the Assessee before 1st April, 1981 as it held the property from the year 1970 has to be accepted, keeping in mind the policy and object of the provisions giving the benefit of inflation by adopting fair market value as on 1.4.1981 in respect of properties acquired prior to that date. In our view that the legislature would not have intended to give a meaning to the expression "where the capital asset became the property of the Assessee before 1st April, 1981" used in Sec.55(2)(b)(i) of the Act, as referring to only vesting of legal

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title. It is unlikely that the legislature would wish to deny benefit of adopting Fair Market value as on 1.4.1981 while computing cost of acquisition for the purpose of Sec.48 of the Act, in a case where, otherwise the Assessee satisfies all parameters for grant of fair market value as on 1.4.1981. The expression “where the capital asset became the property of the Assessee before 1st April, 1981” as used in Sec.55(2)(b)(i) of the Act should not be therefore be equated to legal ownership. In the present case the Assessee had an antecedent interest over the property as early as 3.3.1970 and a vested right over the property by paying the entire sale consideration and complying with the other terms of the deed of assignment much prior to 1.4.1981. We are therefore of the view that the CIT was not justified in directing the AO to adopt the date of acquisition of the property by the Assessee for the purpose of computing capital gain u/s.48 as 19.4.1994. The claim of the Assessee that it was entitled to adopt fair market value of the property as on 1.4.1981 as cost of acquisition and consequent indexation benefit is correct. We reverse and modify the order of the CIT to this extent.

24. As far as what is the cost of acquisition and as to whether the expenditure incurred by the Assessee in connection with the transfer were allowable deduction or not, has not been examined by the AO while completing the assessment u/s.143(3) of the Act. To this extent we uphold the order of the CIT directing the AO to examine these two aspects and compute capital gain accordingly.

25. In the result the appeal by the Assessee is partly allowed.

Order pronounced in the court on 02.03.2016.

Sd/-
[Waseem Ahmed]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Date: 02.03.2016.
R.G.(.P.S.)

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Copy of the order forwarded to:

1. Stewarts & Lloyds of India Limited, 41, Chowringhee Road, Kolkata-700071.
2. The C.I.T., Circle-1, Kolkata.
3. CIT(DR), Kolkata Benches, Kolkata.

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches