IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.2488/M/2011
Assessment Year: 2007-08

Shri Dharmakumar C. Kapadia, 7, Sudama Bldg., 4th Floor, 214, Walkeshwar Road, Mumbai – 400 006 **PAN: AADPK 4654K**	Vs.	Asst. Commissioner of Income Tax, Range-16(1), Matrumandir, 2nd Floor, Tardeo, Mumbai – 400 007
(Appellant)		(Respondent)

ITA No.2489/M/2011
Assessment Year: 2007-08

Shri Ravindra C. Kapadia, Flat No-61, 6th Floor, 243, Khatau Apartment, Walkeshwar Road, Mumbai – 400 006 **PAN: AACPK 2194H**	Vs.	Asst. Commissioner of Income Tax, Range-16(1), Matrumandir, 2nd Floor, Tardeo, Mumbai – 400 007
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Nitesh Joshi, A.R. & Shri Vipul K. Mody, A.R.
Revenue by : Shri Love Kumar, D.R.

Date of Hearing : 05.05.2015
Date of Pronouncement : 30.06.2015

O R D E R

Per Sanjay Garg, Judicial Member:

The above titled two appeals preferred by different but related assessees (brothers) against the orders of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] both dated 21.01.2011 have been heard together and are being disposed of by this common order. The issues involved in both the appeals are identical in nature. For the sake of convenience, the facts have been taken from ITA No.2488/M/2011.

<u>ITA No.2488/M/2011</u>

2. The assessee has taken the following grounds of appeal:

> "1. The learned Commissioner of Income-tax (Appeals) erred in upholding that the appellant is not entitled to a deduction in respect of "fair market value" of rights in the residential property.
>
> It is submitted that the learned assessing officer in computing the Capital Gains on surrender of tenancy rights, ought to have allowed the deduction in respect of "fair market value" of rights in the property as on 1-4-1981 acquired by the appellant prior to 1970.
>
> It is further submitted that the tenancy rights under rent control laws have distinct value and is equivalent to the ownership rights. The conclusion arrived at by the learned Commissioner of Income-tax (Appeals) and the learned assessing officer is contrary to the law.
>
> 2. The learned Commissioner of Income-tax (Appeals) erred in upholding the order of the learned assessing officer not allowing deduction Section 54 of the Act from long term capital gains arising on surrender of tenancy rights.
>
> It is submitted that the capital gains arising on surrender of tenancy in a residential property is equivalent transfer/sale of a residential property and as such the appellant is entitled to deduction under section 54 of the Act."

3. The facts in brief are that the assessee has claimed indexation of cost of acquisition of tenancy rights which had been sold by the assessee in relation to which the income under the head 'Capital gains' was offered by the assessee. The Assessing Officer (hereinafter referred to as the AO) denied the indexation in view of the provisions of section 55(2)(a) as per which the cost of acquisition of tenancy rights is to be treated as nil, if the assessee has not paid any purchase price for the acquisition of the same.

4. Before the Ld. CIT(A), the assessee submitted that on the death of the father of the assessee, the tenancy rights devolved on the assessee and his

brother. He submitted that the tenancy rights were duly protected by law and as such the assessee and his brother were de-facto owners of the portions of the premises occupied by them. It was claimed that since the rights of the assessee were like that of an owner of the property, hence the cost of acquisition of the tenancy rights was required to be taken as fair market value of the property as on 01.04.1981 for the purpose of computing the capital gains while allowing the indexation cost. The Ld. CIT(A), however, held that there was no evidence on the file that the father of the assessee namely Shri Charandas Kapadia was the tenant of the property. Even it was not known as to from what date the tenancy rights came into existence. He observed that the assessee had placed on record the copy of family settlement dated 14.09.1962 and the copy of agreement dated 09.05.2006. As per the family settlement of 1962, the property was allotted to Shri Krishanraj Dwarakadas Kapadia. There was no reference of allotment or tenancy to the father of the assessee namely Shri Charandas Kapadia. He further observed that only in the agreement dated 09.05.2006 it has been stated that Shri Charandas Kapadia was a monthly tenant in the property and upon his death on 22.05.2000, the tenancy rights devolved upon the assessee and his brother. He, therefore, held that the assessee was unable to establish the date from which the tenancy rights came into existence and further that since no cost was incurred for acquiring the said rights, hence the cost of acquisition of tenancy rights was to be treated as nil as per the provisions of section 55(2)(a). The Ld. CIT(A) further held that the impugned asset that was transferred being tenancy right and not being a residential property, hence the assessee was not entitled for deduction under section 54 of the Act which was available on transfer of building, land appurtenant thereto and being a residential house. Aggrieved by the order of the Ld. CIT(A), the assessee has come in appeal before us.

5. Before us, the Ld. A.R. of the assessee has submitted that the observation of the Ld. CIT(A) that there was no reference in the documents that the father of the assessee namely Shri Charandas Kapadia was a tenant of property is not correct. He has invited our attention to his application dated 18.06.12 moved before this Tribunal for admission of additional evidence wherein he has sought to produce in evidence the rent receipts in respect of rent paid to the landlord Shri Krishanraj Dwarakadas Kapadia by the father of the assessee namely Shri Charandas Kapadia. The Ld. A.R. has submitted that some of the rent receipts pertained to the period before 01.04.1981. He has submitted that the evidence in the shape of rent receipts prior to 01.04.1981 proves that the father of the assessee was tenant of the property prior to 01.04.1981 and further that the tenancy rights have devolved upon the assessee and his brother.

6. The Ld. AR has further contended that as per the provisions of section 55(2)(a)(ii), the cost of acquisition is not to be treated as nil, if the case falls under sub clause (i) to (iv) of sub section (1) to section 49 of the Act. He has further contended that as per section 49(1)(iii), if a capital asset becomes the property of the assessee by succession, inheritance or devolution then the cost of acquisition of the asset is to be deemed to be the cost for which the previous owner of the property acquired it. He has further contended that since the tenancy rights were obtained by his father Shri Charandas Kapadia in 1962 i.e. prior to 01.04.1981, hence the cost of acquisition should be taken as fair market value of the tenancy rights as on 01.04.1981. He has further submitted that even otherwise the tenancy rights of the assessee were akin to the ownership rights in the property; hence the assessee was entitled to deduction under section 54 of the Act.

7. The Ld. D.R., on the other hand, has relied upon the findings of the lower authorities.

8. We have considered the rival submissions. For the sake of refrance, the relevant provisions of section 55 and section 49 are produced hereunder.

"Cost with reference to certain modes of acquisition.

49. [(1)] Where the capital asset became the property of the assessee—

(*i*) on any distribution of assets on the total or partial partition of a Hindu undivided family;

(*ii*) under a gift or will;

(*iii*) (*a*) by succession, inheritance or devolution, or

[(*b*) on any distribution of assets on the dissolution of a firm, body of individuals, or other association of persons, where such dissolution had taken place at any time before the 1st day of April, 1987, or]

(*c*) on any distribution of assets on the liquidation of a company, or

(*d*) under a transfer to a revocable or an irrevocable trust, or

(*e*) under any such transfer as is referred to in clause (*iv*) or clause (*v*) or clause (*vi*) or clause (*via*) *or clause (*viaa*) or clause (*vica*) or clause (*vicb*)] or clause (*xiii*) or clause (*xiiib*) or clause (*xiv*) of section 47;

[(*iv*) such assessee being a Hindu undivided family, by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969,]

the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

……"

<u>Section 55:</u>

Meaning of "adjusted", "cost of improvement" and "cost of acquisition".

55. (1) For the purposes of sections 48 and 49,—

……..

……

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

(*a*) in relation to a capital asset, being goodwill of a business [or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business], tenancy rights, stage carriage permits or loom hours,—

(*i*) in the case of acqisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price ; and

(*ii*) in any other case [not being a case falling under sub-clauses (*i*) to (*iv*) of sub-section (1) of section 49], shall be taken to be *nil* ;

(aa) in a case where, by virtue of holding a capital asset, being a share or any other security

…….

…….

(3) Where the cost for which the previous owner acquired the property cannot be ascertained, the cost of acquisition to the previous owner means the fair market value on the date on which the capital asset became the property of the previous owner.

………"

9. A perusal of the above provisions reveals that if the capital asset as mentioned under section 55(2)(a) which includes tenancy rights is acquired by purchase from previous owner, the purchase price will be the cost of acquisition. In any other case, if it does not fall under the sub clauses (i) to (iv) of sub caluse (1) of section 49, then the cost of acquisition will be treated as nil. As per the provisions of section 49(1)(iii) where the capital asset becomes the property of the assessee by succession, inheritance or devolution, then the cost of acquisition of the asset is deemed to be the cost for which the previous owner of the property acquired it. However, we find that section 55(2)(b) deals with capital asset other than that being discussed in section 55(2)(a) of the Act. Since the tenancy rights have been dealt with/discussed in section 55(2)(a), hence, in our view, the provisions of section 55(2)(b) are not attracted in the case of the assessee. However, section 55(3) states that where cost for which the previous owner acquired the property cannot be ascertained the cost of acquisition to the previous owner will be the fair market value on the date on which the capital asset became the property of the previous owner. However, this aspect has not been considered by the lower authorities. Even the date of acquisition of tenancy rights by the father of the assessee is required to be ascertained and further whether the father of the assessee had acquired

the tenancy rights on paying some price or not and whether the provisions of section 55(3) are applicable to the case of the assessee are the questions of facts and law which are required to be determined by way of appreciation of evidence. The Ld. CIT(A) has observed that from the evidence on the file it was not established that on which date the tenancy rights came into the possession of the father of the assessee. The assessee by way of additional evidence wants to produce the rent receipts allegedly issued by the landlord Shri Krishanraj Dwarakadas Kapadia in favour of the father of the assessee Shri Charandas Kapadia. A perusal of the alleged Photostat copies of the rent receipts shows that there are certain notable differences and discrepancies in the said receipts when the said receipts are compared with each other e.g. the signatures of the landlord Shri Krishanraj Dwarakadas Kapadia appears to be different on different receipts and even there is tampering in dates of receipts and further in one of the receipts the date has been mentioned as 31^{st} Jan 06 by striking off '199'. However, the possibility of any or some of the receipts to be true or correct cannot be ruled out. In our view, the facts on this issue required detailed examination, hence, we restore this issue to the file of the AO with the direction that the AO will give proper opportunity to the assessee to produce the evidences relating to the tenancy rights and cost of the acquisition of the tenancy rights by the father of the assessee in the property in question and thereafter to decide the issue afresh as per provisions of law and in the light of observations made above.

10. The issue relating to ground No.2 is as to whether the provisions of section 54 are applicable in case of transfer of tenancy rights. The Ld. A.R. of the assessee has fairly admitted that the issue is covered against the assessee by the decision of the co-ordinate Bench of the Tribunal in the case of "Meher R

Surti vs. ITO" (2013) 27 ITR 340(T) (Mum. - Tri.). So, the issue raised vide ground No.2 is accordingly dismissed.

ITA No.2489/M/2011

11. The assessee in this case is the brother of Shri Dharmakumar C. Kapadia i.e. the assessee in ITA No.2488/M/2011, which case has been discussed above. The assessee in this appeal has similarly claimed the capital gains on transfer of his share in tenancy rights which has been claimed to have devolved upon both the brothers on the death of their father Shri Charandas Kapadia. The facts and issues raised in this appeal are very much identical in nature. In view of our findings given above while deciding the appeal of the brother of the assessee, the ground No.1 of this appeal is accordingly restored to the file of the AO with the directions as given above while adjudicating ITA No.2488/M/2011, and ground No.2 is accordingly dismissed.

12. In the result, both the appeals are **partly allowed for statistical purposes**.

Order pronounced in the open court on 30.06.2015.

Sd/-
(R.C. Sharma)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 30.06.2015.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai

The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.