IN THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai

Before Shri D. Manmohan, Vice President
and Shri B. Ramakotaiah, Accountant Member

ITA No. 3837/Mum/2011
(Assessment Year: 2006-07)

M/s. Atul Paints & Chemical Co. 5, Namandas Indl. Estate Dr. R.P. Road, Muland (W) Mumbai 400080 PAN - AAAFA 2539 E	Vs.	Addl CIT - 23(2) Pratyaksh Kar Bhavan Bandra Kurla Complex Bandra (E), Mumbai 400051
Appellant		**Respondent**

Appellant by: Shri B.V. Jhaveri
Respondent by: Smt. Usha Nair

Date of Hearing: 12.10.2011
Date of Pronouncement: 31.10.2011

ORDER

Per B. Ramakotaiah, A.M.

This appeal by the assessee is against the order of the CIT-23, Mumbai under section 263 of the IT Act dated 22.03.2011.

2. In this case assessment was originally completed under section 143(3) of the Act vide order dated 29.12.2008 assessing the total income at ₹3,01,47,782/-. On examination of record the CIT(A) was of the opinion that the order passed by the A.O. was erroneous and prejudicial to the interest of Revenue, therefore, a show cause notice under section 263 was served on the assessee to re-assess the income under the head 'Capital Gains'.

3. During the relevant previous year assessee has transferred/sold the development rights of the property admeasuring 3471.18 sq.mtrs (37350 sq. ft.) situated at Survey No. 250 pt., CTS No. 18pt, Village Mulund (W), Taluka Kurla, Mumbai for a sum of ₹3,25,00,000/-. The Stamp Duty authorities adopted the sale price at ₹6,31,69,000/-. The A.O. adopted the value as per the stamp duty authorities and reworked out the capital gain in the assessment order. The CIT was of the view that the cost of acquisition adopted by assessee at ₹168/- per sq.ft. based on the valuation report dated

20th February 2006 was erroneous as the land at that point of time as per the Indian Valuers Directory and also supported by the stamp duty authorities was at ₹72/- per sq.ft. and, therefore, he invoked the powers under section 263 to direct the A.O. to adopt the cost of acquisition at ₹72/- per sq.ft. as prescribed by the stamp duty authorities. Assessee is questioning the jurisdiction of the CIT under section 263 to adopt the said rate.

4. Assessee has raised four grounds on the validity of show cause notice under section 263, valuation report of registered valuer, role of commissioner and valuation of local authority in its grounds which are without prejudice to each other. The learned counsel submitted that in the course of the assessment proceedings the Joint CIT vide his letter dated 21st January, 2008 sought the following information from the assessee firm: -

> *"With regard to LTCG declared detailed explanation about the acquisition and taxability under long-term capital gain claimed by you on corresponding amount considered by you for working indexed cost working with supporting evidence."*

In reply thereto the assessee firm vide the letter of M/s.R.L. Sangoi & Co., Tax Consultants, stated as under: -

> *"With reference to above subject and as per your letter dated 21.01.2008, we state as under:*
>
> *"1. With regard to LTCG on Leasehold Land with shed thereon we have purchased this land from Mr. S.S. Uppal on 08.07.1975. Since, land became the property of assessee prior to 1.4.1981, assessee has opted U/s 55 to substitute FMV as on 1.4.1981 as deduction for cost of acquisition. Valuation Report of approved valuer enclosed with return contains 1975 agreement. In the financial year 1989-90 we constructed a shed for Rs.5,77,997/-. This all amount are shown in our Balance Sheet and Books of Accounts in respective years. The property in question is held for a period of more than 36 months and Capital Gain on it would be treated as Long Term Capital Gain. Rate of Tax on L.T.C.G. is paid @ 20% as per provisions of section 112. This working is properly shown as per statement of Long Term Capital Gain on sales of plot with shed."*

The assessee had filed Valuation Report of M/s. V.S. Modi Associates, Chartered Engineers, Government Approved Valuers and Surveyors. The aforesaid Government Approved Valuers valued the property of the assessee firm as on 01.04.198 1 wherein the valuer observed as under:

"In or around 1981, several industries in the vicinity of land were functioning. [example: Divecha Glass Factory, Ganesh Flour Mills, Power Line Products, Venus Tiles etc.] Therefore , in or about 1981, land in this area can be said to have very good potential for industrial development. Therefore, to value such type of land, one may start base figure as applicable to "land plus building" and then reduce "cost of construction" and "developers margin". We consider "Indian Valuers Directory & Reference book for market value of property in Mumbai as on 1.4.1981" as authoritative book on the subject as the same is complied by extracting information from various documents registered with sub-registrar. In this book, rate applicable for property under reference is Rs.400/-per sq. ft. (i.e. of "land plus building" for industrial use) See page 42 of said book. However, to derive "land value", one has to deduct cost of construction @ Rs.70/- per sq. ft. Normally this is the standard cost of construction [as per page 12 of said book.]. Further reduction has to be made normally between 20% for developer's margin. Therefore, rate per sq. ft. of land, based on its development potential is arrived *as under: -*

	Rs. Per sq. feet
"Rate of land plus building (as referred & discussed above)	*400*
Cost of Construction (as referred & discussed above)	*70*
	330
"Developers Margin @20% of 330 (as referred & discussed above)	*66*
Derived Value of Land	*264*

"However as per said book i.e. "Indian Valuers Directory and Reference Book Market Value of Property in Mumbai as on 1.4.198 1". the value of land given is Rs.72/- per sq. ft. there being good variation between the two values, we adopt rate of Rs.168/- per sq. ft. i.e. average of Rs.264/- and Rs. 72/-.

"Size of the plot of land under reference is 37350 sq. ft. Therefore, Value of the plot is

37350 sq.ft. X Rs. 168/- = Rs. 62,74,800.00"

After considering the aforesaid Valuation Report of the Government Approved Valuers, the Addl. CIT passed the order under section 143(3) of the Act and computed the Long-term Capital Gain at ₹2,98,90,062/- by disallowing Legal fees of ₹2,58,255/- and Brokerage expenses of ₹3,25,000/-.

It was further submitted that: (i) the jurisdictional conditions precedent to the application of section 263 is that the order sought to be revised must be erroneous in so far as it is prejudicial to the interest of the Revenue and neither of these conditions is satisfied, (ii) the A.O. passed the order under section 143(3) of the Act after taking into consideration the Government Approved Valuers Report for the purpose of computing the long-term capital gains. Therefore, the view adopted by the A.O. for the purpose of computing the long-term capital gains is one of the possible, plausible, permissible and bonafied view inasmuch as the Assessing Officer relied upon the Government Approved Valuer who is supposed to know the intricacies of the valuation of immovable property. Therefore, the view adopted by the Assessing Officer cannot be said to be erroneous view or the one which is unsustainable in law, (iii) There must be material before the CIT to hold that an order is "erroneous and prejudicial to the interests of the Revenue" and a mere change of opinion cannot render the order erroneous. The CIT has considered only the book "Indian Valuers" Directory & Reference" published by Architect Publishing Corporation of India which was considered by the Government Approved Valuer whose report was filed by the assessee and accepted by the A.O. while completing the assessment under section 143(3) of the Act, and (iv) The provisions of section 263 contemplate to cover within its ambit and scope the error which is committed by the AO and not those errors which are committed by any other authority.

5. The learned D.R., however, reiterated the contentions of the CIT that the value adopted by the A.O. was not correct and the A.O. has not enquired about the cost of acquisition as his order was really on adaptation of sale value and not cost of acquisition, therefore, the CIT(A) has correctly exercised the jurisdiction.

6. We have examined the record and rival contentions. It is on record that A.O. has issued show cause notice to the assessee to enquire about the working of the capital gains. It is also on record that assessee has replied in detail as stated in the arguments with reference to the working of long term capital gain of lese hold land and relied on the valuer's report. As seen from the valuation report, the said valuer gave a sale instance relying on the Indian Valuers Directory and Reference Book for market value of property where it was clearly stated that value of open land given was ₹72/- per sq.ft. He also referred to the rate applicable for property i.e. the rate of land and

building for industrial was at ₹400/- per sq.ft. and he arrived at the land value by taking the cost of construction and further developers margin to arrive at the derived value of land at ₹264/-. Therefore, he adopted the rate of ₹168/- per sq.ft. as an average of ₹264/- and ₹72/- to arrive at the cost of land at ₹62,74,800/-. This report was placed before the A.O., who in the assessment order reworked out the capital gains by adopting the sale price as that of stamp duty authority at ₹6,31,69,000/-. He also, vide para 3.2, disallowed certain expenses claimed by way of legal fees and brokerage. Accordingly the capital gains were reworked out at ₹2,98,90,062/- as against the capital gain of ₹2,93,06, 807/- offered by assessee. Even though assessee did make a contention that stamp duty authority's value is not acceptable under section 50C, however, that issue is not before us, but the point is that the A.O. did examine the issue of capital gains before reworking out the capital gains as stated above. Therefore, following the principles established by the Hon'ble Bombay High Court in the case of Grasim Industries Ltd. 321 ITR 92 it cannot be stated that the order is erroneous and prejudicial to the interest of Revenue unless the view taken by the A.O. is unsustainable in law.

7. Even though the A.O. did not mention elaborately about the price that was adopted for arriving at the cost of acquisition, that part being silent, it cannot be stated that he has not examined the issue as assessee has placed the valuation report in support of the contentions on record and also the valuer has relied on the Indian Valuer's report in arriving at a price at an average method which the CIT now disputes. The order cannot be termed as erroneous just because the A.O. did not write elaborately on the issue, as considered by the Hon'ble Bombay High Court in the case of CIT vs. Gabriel India Ltd. 203 ITR 108. This section does not visualize a case of substitution of the judgment of the CIT for that of the Income-tax Officer unless the decision is held to be erroneous. Nowhere the CIT established that the order is erroneous. The CIT's contention is only that the valuer has adopted a different value than prescribed for open land, therefore, the mistake, if any, is not in the order of the A.O. but in the order of the Government Valuer whose report is on record before AO.

8. Even otherwise as seen from the record the basis for issuing show cause notice dated 18.02.2011 was the information from the stamp valuation authority. The relevant part of CIT's show cause notice is as under: -

> *"The cost of land as on 1.4.1981 based on the valuation report of the valuer, M/s. V.S. Modi Associates was taken at ₹62,74,800/- (i.e. ₹168 per sq.ft.).* ***However, it was found that the value of the land as on 1.4.1981 was ₹72/- per sq.ft. as per information from the Stamp Valuation Authority.*** *It is seen that as per the valuation report of the valuer, M/s. V.S. Modi Associates, the value of the land was ₹72/- per sq.ft. which was enhanced to ₹168/- per sq.ft. after certain calculations. It was also seen from the records that the land was purchased on 8.7.1974 @ Rs.1.67 per sq.ft. In other words, the increase in the FMV of the land in just about 6 years is from Rs.1.67 to Rs.168/- per sq.ft. and* ***hence the value adopted by the valuer, M/s. V.S. Modi Associates is incorrect."*** *(emphasis supplied)*

9. As can be seen from the record the A.O., Assistant Commissioner of Income Tax 23(2) has issued a letter dated 03.02.2011 for which the office of the District Collector of Stamps, Kurla replied vide letter dated 09.02.2011. As per the free English translation provided of the letter received in Marathi it seems that the A.O. asked about the rates in 1981-82 and it was stated that the Government had not prepared Ready Reckoner in the year 1981. In the year 1989, for the first time Ready Reckoner was prepared and relevant instructions were issued in respect of how to adopt the valuation of properties of 1981 on the basis of the valuation adopted in the year 1989. According to the said rates the above open land was prescribed at ₹72/- per sq.ft. and for residential building at ₹240/- per sq.ft. and for shops and commercial premises at ₹480/- per sq.ft. As seen from the above letter it is very clear that there was no fixed guidelines as of year 1981 and it is only on estimation and presumptions the valuation was done, therefore, even the rate at which the CIT took decision of ₹72/-per sq.ft. is not based on any authentic documentation but only on certain instructions given how to adopt valuation of property based on Ready Reckoner 1989. In fact the valuation as made out by the Stamp Authority is also on the same basis which the valuer M/s. V.S. Modi Associates adopted in its valuation report.

10. Another aspect which is noticed is that this entire correspondence with the Stamp Authority was subsequent to the completion of assessment. At the time of passing the assessment order the A.O. has relied on the valuation report in which the valuer for the reasons stated therein has adopted the average value of the value of open land and value of land with buildings and adopted an average value so arrived at. Therefore, it cannot be stated that the information with regard to valuation was available at the time of passing the assessment order and the A.O. has erroneously taken a higher value. The letter itself indicates that the enquiry was made subsequent to the completion of assessment and we are of the opinion that the information obtained subsequently cannot be a basis for reopening the assessment under section 263. That can be a good information for invoking other provisions of the Act but cannot be stated that the order passed by the A.O. was erroneous and prejudicial to the interest of Revenue on the basis of the subsequent information obtained by the A.O., for the purpose of invoking section 263, as that information was not available on record at the time of completion of assessment. The A.O. has accepted the average value in arriving at cost of acquisition and passed a detailed order recalculating the capital gains after due examination. In view of this, it can be concluded that the A.O. has taken one of the possible views in adopting the cost of acquisition as supported by the valuation report. Therefore, the action of the CIT in invoking of section 263 is without any jurisdiction for the reasons stated above. We are of the opinion that the order is not erroneous and prejudicial to the interest of Revenue so as to exercise jurisdiction under section 263 by the CIT. For these reasons the order is set aside.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 31st October 2011.

Sd/-	Sd/-
(D. Manmohan)	**(B. Ramakotaiah)**
Vice President	**Accountant Member**

Mumbai, Dated: 31st October 2011

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – , Mumbai*
4. *The CIT– CIT 23, Mumbai City*
5. *The DR, "A" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

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