IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.339 OF 2011

Rohan Developers Pvt. Ltd.)
a private limited company, registered under)
the Companies Act, 1956 and having its)
registered office at Gordhan Building No.II,)
12/14 Dr. Parekh Street, Prathana Samaj,)
Mumbai 400 004.) ... Petitioner

Vs.

1. Income-tax Officer (International Taxation)-3)
(1), Mumbai having office at Ground Floor,)
Scindia House, Narottam Morarji Marg,)
Ballard Estate, Mumbai 400 038.)
2. Director of Income-tax (International Taxation)
-II Mumbai, having his office at Scindia House)
Narottam Morarji Marg, Ballard Estate,)
Mumbai 400 038.)
3. Union of India through the Secretary,)
Department of Revenue, Ministry of Finance,)
North Block, New Delhi 110 001.) ... Respondents

Mr. J. D. Mistri, Senior Advocate a/w. Mr. Nitesh Joshi i/b. Mr. Atul K. Jasani for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM : K. R. SHRIRAM &
N. J. JAMADAR, JJ.

DATE : FEBRUARY 03, 2022

ORAL JUDGMENT :- (*Per K. R. Shriram, J.*)

1. Petitioner is a company engaged in the business of development and re-development of various properties in the city of Mumbai. One Mrs. Dolly Jehangir Gazdar held an undivided ½ (one half) share in a piece of land admeasuring about 8071.64 square yards situated at Dr. Ambedkar Road (Sopari Baug Road) with the buildings standing thereon in Parel Sewri Division in BMC F/South Ward, Mumbai from the year 1972. The other ½ (one half) share in the said property belonged

to her brother one Mr. Meherwan Nadirshaw.

2. Mrs. Dolly Jehangir Gazdar expired on 10th June 1982 leaving her last Will and Testament dated 20th June 1979. The Probate of her Will was granted by the Bombay High Court on 5th November 2004. Under the said Will, she had bequeathed her share in the said property to her aunt - Mrs. Rhoda Rustom Framjee and her brother - Mr. Meherwan Nadirshaw in equal shares. Accordingly, the undivided 1/4th share in the said property vested in Mrs. Rhoda Rustom Framjee from the year 1982. Mrs. Rhoda Rustom Framjee expired on 12th May 1992 leaving her last Will dated 3rd June 1977, whereunder she bequeathed all her estate including 1/4th share in the said property to her husband Mr. Rustom Framjee. Mr. Rustom Framjee expired on 17th September 2006 leaving behind two sons as his legal heirs namely, Mr. Sohrab Rustom Framjee and Mr. Pesh Rustom Framjee. As per the Will of Mr. Rustom Framjee dated 19th February 2006, he bequeathed his estate including his 1/4th share in the said property to his two sons in equal shares. Though no probate has been granted in respect of the Wills of Mrs. Rodha Rustom Framjee and Mr. Rustom Framjee, their only sons - Mr. Sohrab Rustom Framjee and Mr. Pesh Rustom Framjee have accepted the said Wills and acted upon the same.

3. Accordingly, Mr. Pesh Rustom Framjee (hereinafter referred to as “seller”) became owner of 1/8th share in the said property. Petitioner had decided to buy that 1/8th share of seller and since Mr. Pesh Rustom Framjee (seller) was a non-resident in so far as the Income Tax Act, 1961 (the Act) is concerned and he had not filed his return of income for any of the earlier years as there was no taxable income in India in those years in his hands, petitioner filed an application before respondent No.1 under Section 195(2) of the Act requesting him to issue a LOW tax rate Certificate for Deduction of Tax at Source in respect of consideration for purchase of immovable property from seller.

4. By an order dated 21st December 2010, respondent No.1 directed petitioner to deduct tax of Rs.28,74,100/-. It is this order, which is impugned in this petition. Admittedly, petitioner has deposited this amount of Rs.28,74,100/- with the Revenue even though it is petitioner's case that the amount directed to be deducted as tax at source has been incorrectly calculated and according to petitioner, only a sum of Rs.74,523/- was the tax that had to be deducted. For ease of reference, the computation, as given in the petition, is reproduced hereunder:-

	As per petitioner	**As per respondent No.1**
Calculation of indexed cost		
Value as on 01 04 1981	2,77,22,348	2,77,22,348
Cost inflation index for 1981	100	-
Cost inflation index for FY 1992-93	-	223
Cost inflation index for FY 2009-11	711	711
Multiplication factor applied on 1/4/81 value	711/100	711/223
Indexed cost of whole	19,71,05,894	8,83,88,293
Indexed cost of 1/8th share	2,46,38,237	1,10,48,537
Calculation of tax on long term capital gain		
Sale consideration of 1/8th share	3,00,00,000	3,00,00,000
Less: indexed cost of 1/8th share	2,46,38,237	1,10,48,537
	53,61,763	1,89,51,463
Less: investment in bonds under S54EC	50,00,000	50,00,000
Long term capital gains chargeable to tax	3,61,763	1,39,51,463
Tax @20.60%	**74,523**	**28,74,100**

5. According to petitioner, under Section 49(1)(ii) of the Act, cost of acquisition of the said property in the hands of seller is deemed to be the

cost for which the said property was acquired by late Mrs. Dolly Jehangir Gazdar. It is also petitioner's case that under clauses (29A) and (42A) of Section 2, the period of holding of late Mrs. Dolly Jehangir Gazdar, Mrs. Rhoda Rustom Framjee and Mr. Rustom Framjee are also to be included in the period of holding of seller for ascertaining whether the said property is held by him as a short term capital asset or as a long term capital asset. Therefore, in its application under Section 195(2) of the Act, petitioner annexed a copy of draft computation of long term capital gains of the seller in respect of the transfer of the said property. Petitioner took the benefit of the option provided in the provisions of Section 55(2)(b)(ii) of the Act, which provides that where a capital asset became the property of the assessee by any of the modes specified in Section 49(1) and the capital asset became the property of the previous owner before the 1st day of April 1981, cost of acquisition means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of April 1981 at the option of the assessee. Based on the scheme of the Act as is provided in Section 49(1)(ii), clauses (29A) and (42A) of Section 2 and Section 55(2)(b)(ii) of the Act, petitioner claimed that indexation of the cost of acquisition under the second proviso to Section 48 should be available from the financial year 1981-

82. Transfer of the property to petitioner had taken place in the financial year 2010-11.

6. The only point of dispute between petitioner and respondent No.1 on the issue of computation of capital gains is with respect to the year from which benefit of indexation is to be granted. According to petitioner, indexation should be granted from financial year 1981-82 as a previous owner, who had acquired the property by any means other than those specified in Section 49 was late Mrs. Dolly Jehangir Gazdar, who had acquired her share in the said property in the year 1972, i.e., before 1981, while, respondent No.1 has granted such indexation from financial year 1992-93.

7. According to petitioner, the view of respondent No.1 is contrary to the decision of the Special Bench of the Income Tax Appellate Tribunal (ITAT) in the case of ***DCIT Vs. Manjula J. Shah***[1].

8. Pursuant to the above, petitioner has, on or about 7th January 2011, paid over tax of Rs.28,74,100/- and interest thereon of Rs.43,112/-. It is petitioner's case that the direction in the impugned order dated 21st December 2010 determining the capital gains at Rs.1,39,51,463/- and consequently tax thereon at Rs.28,74,100/- is contrary to the provisions of the Act. Petitioner is, therefore, seeking the following two prayers in the petition:-

> "*a) for a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity of the said impugned order dated 21st December, 2010 (being Exhibit "F" hereto) quash and set aside the same;*
>
> *b) for a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India directing Respondent No.1 to determine the long term capital gains arising on account of transfer of the 1/8th (one eighth) share of Mr. Pesh Rustom Framjee in the said property at Rs.3,61,763/-and tax thereon at Rs.74,523/- and consequently grant a refund of the excess tax paid along with interest to the Petitioner;*"

9. In the affidavit in reply, respondent is of course justifying the action of respondent No.1 in passing the order dated 21st December 2010 impugned in the petition. Respondent is also admitting that a Full Bench of ITAT has taken a view, which is contrary to the view taken by respondent No.1. However, according to respondent, the department is contesting the order of ITAT and the issue has not been settled by the Hon'ble High Court.

10. Time and again, Courts have held that the principles of judicial discipline require that the orders of the higher appellate authorities

1 **35 SOT 105 (Mumbai)**

should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the department or is the subject matter of an appeal cannot be a ground for not following it unless its operation has been suspended by a competent court. This has been reiterated by this Court in its order dated 31st January, 2022 ***Karanja Terminal & Logistic Private Limited Vs. Principal Commissioner of Income Tax***[2] (unreported).

11. In any case, the contest of the department against the order of ITAT in **DCIT Vs. Manjula J. Shah** has come to an end by a judgment of this Court in **Commissioner of Income Tax Vs. Manjula J. Shah**[3]. This Court confirmed the findings of the Full Bench of ITAT and while dismissing the appeal held, *(i) that when the Legislature by introducing the deeming fiction seeks to tax the gains arising on transfer of a capital asset acquired under a gift or will the capital gains under section 48 have to be computed applying the deemed fiction. Therefore, the fiction contained in Explanation 1(i)(b) to section 2(42A) has to be applied in determining the indexed cost of acquisition under section 48; (ii) that by applying the deeming provision contained in Explanation 1(i)(b) to section 2(42A) the assessee was deemed to have held the asset from January 29, 1993 to June 30, 2003, by including the period for which the asset was held by the previous owner and, accordingly, held liable for long-term capital gains tax. While computing the capital gains, the indexed cost of acquisition had to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset.*

12. It will be useful to reproduce the relevant portion of the judgment:-

> *" It is the contention of the Revenue that since the indexed cost of acquisition as per clause (iii) of the Explanation to section 48 of the Act has to be determined with reference to the*

2 **Writ Petition No.1397 of 2020**

3 **[2013] 355 ITR 474 (Bom)**

cost inflation index for the first year in which the asset was held by the assessee and, in the present case, as the assessee held the asset with effect from February 1, 2003, the first year of holding the asset would be the financial year 2002-03 and, accordingly, the cost inflation index for 2002-03 would be applicable in determining the indexed cost of acquisition.

We see no merit in the above contention. As rightly **18** *contended by Mr. Rai, learned counsel for the assessee, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the capital asset was "held by the assessee". Since the expression "held by the assessee" is not defined under section 48 of the Act, that expression has to be understood as defined under section 2 of the Act. Explanation 1(i)(b) to section 2(42A) of the Act provides that in determining the period for which an asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner shall be included. As per the previous owner held the capital asset from January 29, 1993, as per Explanation 1(i)(b) to section 2(42A) of the Act, the assessee is deemed to have held the capital asset from January 29, 1993. By reasons of the deemed holding of the asset from January 29, 1993, the assessee is deemed to have held the asset as a long-term capital asset. If the long-term capital gains liability has to be computed under section 48 of the Act by treating that the assessee held the capital asset from January 29, 1993, then, naturally in determining the indexed cost of acquisition under section 48 of the Act, the assessee must be treated to have held the asset from January 29, 1993, and , accordingly the cost inflation index for 1992-93 would be applicable in determining the indexed cost of acquisition.*

If the argument of the Revenue that the deeming fiction **19** *contained in Explanation 1(i)(b) to section 2(42A) of the Act cannot be applied in computing the capital gains under section 48 of the Act is accepted, then, the assessee would not be liable for long-term capital gains tax because it is only by applying the deemed fiction contained in Explanation 1(i)(b) to section 2(42A) and section 49(1)(ii) of the Act, the assessee is deemed to have held the asset from January 29, 1993, and deemed to have incurred the cost of acquisition and, accordingly, made liable for the long-term capital gains tax. Therefore, when the Legislature by introducing the deeming fiction seeks to tax the gains arising on transfer of a capital asset acquired under a gift or will and the capital gains under section 48 of the Act has to be computed by applying the deemed fiction, it is not possible to accept the contention of Revenue that the fiction contained in Explanation 1(i)(b) to section 2(42A) of the Act cannot be applied in determining the indexed cost of acquisition under section 48 of the Act.*

20 *It is true that the words of a statute are to be understood*

in their natural and ordinary sense unless the object of the statute suggests to the contrary. Thus, in construing the words "asset was held by the assessee" in clause (iii) of Explanation to section 48 of the Act, one has to see the object with which the said words are used in the statute. If one reads Explanation 1(i)(b) to section 2(42A) together with sections 48 and 49 of the Act, it becomes absolutely clear that the object of the statute is not merely to tax the capital gains arising on transfer of a capital asset acquired by an assessee by incurring the cost of acquisition, but also to tax the gains arising on transfer of a capital asset, inter alia, acquired by an assessee under a gift or will as provided under section 49 of the Act where the assessee is deemed to have incurred the cost of acquisition. Therefore, if the object of the Legislature is to tax the gains arising on transfer of a capital acquired under a gift or will by including the period for which the said asset was held by the previous owner in determining the period for which the said asset was held by the assessee, then that object cannot be defeated by excluding the period for which the said asset was held by the previous owner while determining the indexed cost of acquisition of that asset to assessee. In other words, in the absence of any indication in clause (iii) of the Explanation to section 48 of the Act that the words "asset was held by the assessee" has to be construed differently, the said words should be construed in accordance with the object of the statute, that is, in the manner set out in Explanation 1(i)(b) to section 2(42A) of the Act.

21 *To accept the contention of the Revenue that the words used in clause (iii) of the Explanation to section 48 of the Act has to be read by ignoring the provisions contained in section 2 of the Act runs counter to the entire scheme of the Act. Section 2 of the Act expressly provides that unless the context otherwise requires, the provisions of the Act have to be construed as provided under section 2 of the Act. In section 48 of the Act, the expression "asset held by the assessee" is not defined and, therefore, in the absence of any intention to the contrary the expression "asset held by the assessee" in clause (iii) of the Explanation to section 48 of the Act has to be construed in consonance with the meaning given in section 2(42A) of the Act. If the meaning given in section 2(42A) is not adopted in construing the words used in section 48 of the Ac, then the gains arising on transfer of a capital asset acquired under a gift or will be outside the purview of the capital asset acquired under a gift or will be outside the purview of the capital gains tax which is not intended by the Legislature. Therefore, the argument of the Revenue which runs counter to the legislative intent cannot be accepted.*

22 *Apart from the above, section 55(1)(b)(2)(ii) of the Act provides that where the capital asset became the property of the assessee by any of the modes specified under section 49(1)*

of the Act, not only the cost of improvement incurred by the assessee but also the cost of improvement incurred by the previous owner shall be deducted from the total consideration received by the assessee while computing the capital gains under section 48 of the Act. The question of deducting the cost of improvement incurred by the previous owner in the case of an assessee covered under section 49(1) of the Act would arise only if the period for which the asset was held by the previous owner is included in determining the period for which the asset was held by the assessee. Therefore, it is reasonable to hold that in the case of an assessee covered under section 49(1) of the Act, the capital gains liability has to be computed by considering that the assessee held the said asset from the date it was held by the previous owner and the same analogy has also to be applied in determining the indexed cost of acquisition.

The object of giving relief to an assessee by allowing **23**
indexation is with a view to offset the effect of inflation. As per CBDT Circular No. 636, dated August 31, 1992 (see [1992] 198 ITR (St.)1) a fair method of allowing relief by way of indexation is to link it to the period of holding the asset. The said circular further provides that the cost of acquisition and the cost of improvement have to be inflated to arrive at the indexed cost of acquisition and the indexed cost of improvement and then deduct the same from the sale consideration to arrive at the long-term capital gains. If indexation is linked to the period of holding the asset and in the case of an assessee covered under section 49(1) of the Act, the period of holding the asset has to be determined by including the period for which the said asset was held by the previous owner, then obviously in arriving at the indexation, the first year in which the said asset was held by the previous owner would be the first year for which the said asset was held by the assessee.

Since the assessee, in the present case, is held **24**
liable for long-term capital gains tax by treating the period for which the capital asset in question was held by the previous owner as the period for which the said asset was held by the assessee, the indexed cost of acquisition has also to be determined on the very same basis.

In the result, we hold that the Income-tax Appellate **25**
Tribunal was justified in holding that while computing the capital gains arising on transfer of a capital asset acquired by the assessee under a gift, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset."

13. Therefore, the cost of acquisition of the said property in the hands of seller is deemed to be the cost for which the said property was acquired by late Mrs. Dolly Jehangir Gazdar and the period of holding of late Mrs. Dolly Jehangir Gazdar, Mrs. Rhoda Rustom Framjee and Mr. Rustom Framjee are also to be included in the period of holding of seller for ascertaining the period for which the property was held by the seller. Based on the Scheme of the Act, as provided in Section 49(1)(ii), clauses (29A) and (42A) of Section 2 and Section 55(2)(b)(ii) of the Act, indexation of the cost of acquisition under the second proviso to Section 48 should be available from the financial year 1981-1982. Therefore, on this ground alone, we will have to grant prayer clause (a) as quoted earlier.

14. As regards prayer clause (b) quoted earlier i.e., refund of excess tax paid, an affidavit in rejoinder has been filed by petitioner through one Rohan J. Mehta, affirmed on 13th December 2017 to which is annexed a copy of Form 26AS of seller, a copy of the computation of income of seller for Assessment Year 2011-12 and a copy of an assessment order dated 24th February, 2014 in the case of seller for Assessment Year 2011-12 along with notice of demand and computation form.

15. From the documents annexed to the rejoinder, it appears that seller has taken the indexed cost of acquisition at Rs.2,46,15,367/- for the said property and accordingly determined the capital gains at Rs.53,84,633/- (Consideration of *Rs.3,00,00,000 – Rs.2,46,15,367*). He has not offered to tax any capital gains as he has invested Rs.1,00,00,000/- in investments covered by Section 54EC of the Act. Seller has also not claimed any credit in respect of the TDS of Rs.28,74,100/- paid by petitioner. In his computation of income, the seller has claimed TDS credit of Rs.31,787/- only, which relates to tax deducted in respect of interest earned by him from bank.

16. From the assessment order annexed to the affidavit in rejoinder, it does appear that the Revenue had selected the return of the seller for scrutiny and an assessment order dated 24th February 2014 under Section 143(3) of the Act has been passed. In the said order, department has accepted the capital gains at Rs.3,85,613/-, and in the absence of any claim of TDS of Rs.28,74,100/-, has not allowed any credit or refund of the same. In fact, the department has raised the demand of Rs.91,360/-as seller's tax along with interest under Section 234B of the Act. There is no sur-rejoinder filed by department to this affidavit in rejoinder, denying any of the averments in the affidavit though more than four years have passed since rejoinder was filed in the Court on 15th December, 2017 when time was granted on that date to respondents to consider the affidavit in rejoinder.

17. At the same time, it is not clear whether the seller has paid the tax amount of Rs.91,360/- demanded from him pursuant to the assessment order dated 24th February, 2014.

18. At this point of time, we would, therefore, permit the department to retain this amount (Rs.91,360/-) and return the balance out of Rs.28,74,100/-. The department will also refund the proportionate interest of Rs.43,112/- after recalculating, by taking capital gains that should have been deposited at Rs.3,85,613/- and not Rs.1,39,51,463/-.

19. The next point which has to be given attention to is the interest on refund and the date from which the interest has to be paid. A similar point has been considered by the Apex Court in **Union of India Vs. Tata Chemicals Limited**[4], where paragraph 39 reads as under:-

> "*39. In the present case, it is not in doubt that the payment of tax made by resident/ depositor is in excess and the department chooses to refund the excess payment of tax to the depositor. We have held the interest requires to be paid on such refunds. The catechize is from what date interest is payable,*

4 **[2014] 363 ITR 658 (SC)**

> *since the present case does not fall either under clause (a) or (b) of Section 244A of the Act. In the absence of an express provision as contained in clause (a), it cannot be said that the interest is payable from the 1st of April of the assessment year. Simultaneously, since the said payment is not made pursuant to a notice issued under Section 156 of the Act, Explanation to clause (b) has no application. In such cases, as the opening words of clause (b) specifically referred to "as in any other case", the interest is payable from the date of payment of tax. The sequel of our discussion is the resident/deductor is entitled not only the refund of tax deposited under Section 195(2) of the Act, but has to be refunded with interest from the date of payment of such tax.*"

20. Therefore, interest shall be paid at the rate prescribed under Section 244A(1)(b) for the period from the date of payment of tax, i.e., 7th January, 2011.

21. Petition disposed accordingly.

(N. J. JAMADAR, J.) **(K. R. SHRIRAM, J.)**

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