

IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH 'E' BENCH

**BEFORE SHRI B.R.MITTAL(JUDICIAL MEMBER) AND
SHRI RAJENDRA (ACCOUNTANT MEMBER)**

ITA No.2517 & 2518/Mum/2011
Assessment Years: 2006-07 & 2007-08

Shantikumar D Majithia, Bld No.2, 5 th floor, Plot No.68, Shantikutir, Opp. Andheri Firebrigade, S.V.Road, Andheri(W), Mumbai-58 PA No.AABPM 4432 J	Vs.	DCIT, Cent. Circle-44, Mumbai.
(Appellant)		(Respondent)

ITA No.3232 & 3234 /Mum/2011
Assessment Years: 2006-07 & 2007-08

DCIT, Cent. Circle-44, Mumbai.	Vs.	Shantikumar D Majithia, Bld No.2, 5 th floor, Plot No.68, Shantikutir, Opp. Andheri Firebrigade, S.V.Road, Andheri(W), Mumbai-58 PA No.AABPM 4432 J
(Appellant)		(Respondent)

ITA No.2520/Mum/2011
Assessment Year: 2006-07

Smt. Sobhana Majithia, Bld No.2, 5 th floor, Plot No.68, Shantikutir, Opp. Andheri Firebrigade, S.V.Road, Andheri(W), Mumbai-58 PA No.ADMPPM 7636 B	Vs.	DCIT, Cent. Circle-44, Mumbai.
(Appellant)		(Respondent)

ITA No.3160/Mum/2011
Assessment Year: 2006-07

DCIT, Cent. Circle-44, Mumbai	Vs.	Smt. Sobhana Majithia, Bld No.2, 5 th floor, Plot No.68, Shantikutir, Opp. Andheri Firebrigade, S.V.Road, Andheri(W), Mumbai-58 PA No.ADMPPM 7636 B
(Appellant)		(Respondent)

Assessee by : Shri Vijay Mehta
Revenue by: Shri Girija Dayal

Date of hearing: 15.10.2012
Date of pronouncement: 19.10.2012

ORDER

Per Bench:

The assessee viz; Shri Shantikumar D.Majithia and department have filed cross appeals for assessment years 2006-07 and 2007-08 against common order of Id CIT(A) dated 31.1.2011 and assessee viz; Mrs Shobhana Majithia and department have filed cross appeals for assessment year 2006-07 against order of Id CIT(A) dated 31.01.2011.

2. Since grounds taken in these appeals are common on similar facts, we heard these appeals together and dispose off the same by this common order for the sake of brevity and convenience.

3. Since grounds are common in all these appeals, we take up appeals for the assessment year 2006-07 being I.T.A. No.2517/M/2011 filed by assessee Shri Shanti Kumar D.Majithia and appeal filed by department being I.T.A. No. 3232/M/2011 for our consideration.

4. Grounds raised by assessee are as under:

"1. The Id CIT(A) has erred in law and facts in passing the order u/s.250 of the Act.

2. On the facts and in the circumstances of the case and in law, Id CIT(A) has grossly erred in issuing notice for enhancement of the appeal filed. Consequently, the appellate order passed by Id CIT(A) is bad in law and void ab initio.

3. On the facts and in the circumstances of the case and in law, Id CIT(A) has grossly erred in holding that occupancy rights received by the appellant is benefit u/s.2(24)(iv) of the I.T.Act, 1961.

4. On the facts and in the circumstances of the case and in law, Id CIT(A) has grossly erred in determining the value of benefit u/s.2(24)(iv) of the I.T.Act, 1961 at Rs.16,44,000/-.

5. Grounds raised by department are as under:

"1. On the facts and in the circumstances of the case and in law, the Ld CIT(A) was not justified in deleting the addition of Rs. 93,95,460/- made u/s 2(22)(a) of the I T Act ignoring that the benefit received by the assessee on account of occupancy rights of the premises allotted to it by the company in substance amounted to distribution of its accumulated profits.

2. On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in holding that capital gain tax & gift tax were not applicable to the present case without giving a proper opportunity to the Assessing Officer to be heard on this finding, which did not arise from the grounds of appeal."

6. In both the appeals i.e. appeal filed by assessee as well as department, grounds are inter-linked and, accordingly, same are being dealt with together.

7. The relevant facts giving rise to these appeals are stated by Assessing Officer in para 6 of the assessment order which are as under:

"6. M/s. Hatane Premises Pvt. Ltd. a family owned company purchased a property called Joshi Estates, around 1992 at S.V.Road, Vile Parle, Mumbai. The object of the company was to carry on the business of builders and developers. Accordingly, it constructed three buildings, two of which were residential and one was shopping cum office premises. One building was given away to the landlord of Joshi Estates as a part of the purchase deal, one building of six floors with one flat on each floor given to the shareholder family members and the shopping cum office premises was partly given to shareholder family members and the balance claimed to have been sold to a company called Dev Housing and Land Development. The company issued letters to the shareholders stating that their request for occupancy rights of various flats has been accepted against their block of shares and that they would have to pay interest free refundable deposit and further informed them that the municipal taxes would be payable by them and they would be entitled to transfer the occupancy rights of the flat concerned, by way of sale and create third party rights and give possession to the transferee subject to the transferee depositing the required amount of interest free deposits. During the period 1992 to 2003/2004 i.e by the time, the project was completed, the real estate prices went through the roof. If the company was to sell its entire stock in trade, it would result into huge profits and taxes payable would be very high. Accordingly, to avoid the payment of taxes, the company distributed the stock in trade amongst its shareholders. The said distribution has been done in A.Y.2006-07 and A.Y. 2007-08. On being questioned, as to why the said distribution should not be considered as dividend as per the provisions of section 2(22)(a) of the IT Act which reads as follows:

"Dividend includes - a) any distribution by a company of accumulated profits, whether capitalized or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company."

In reply, the assessee vide its letter dated 26.12.2008 stated that the occupancy rights were given to its shareholders in the year ending 31.3.2002 and the company had no accumulated profits on that date. The assessee further stated that the first profit was earned by the company in the year ended 31.3.2005 when it sold its properties for the first time. The letters granting occupancy rights to the assessee of two flats admeasuring carpet area of 685 square feet each on the first and second floor, Shanti Kutir are attached to this order as annexure 'A' and 'B'. These letters confirm that the flats were given by the company on 25th March, 2006 and not before 31.3.2002 as claimed by the assessee. The falsehood of the assessee stands nailed. As per the balance sheets of the company, it had an accumulated profit of 1 98,46,433/- as on 31 .3.2005 and Rs. 1,95,23,739/- as on 31 .3.2006. It is important to note here that in terms of section 2(22)(a), the value of the unsold stock is also accumulated profits as the words used are "whether capitalized or not ". In fact, to circumvent the said part of section 2(22)(a), the assessee has wrongly declared stock in trade as fixed assets of Rs. 4,01,00,707/- and Rs. 5,26,00,007/- as on 31.3.2005 and 31.3.2006. This subterfuge has led to an absurd situation where both the parties i.e. company as well as shareholder claim to be the 'de lure' owner of the same flats while the flat owner being in possession is the 'de facto and de lure' owner both."

8. On the basis of above, AO has stated that the provisions of section 2(22)(a) are squarely applicable to the assessee's case and the value of the flats received by him are nothing but dividend given in the form of 'assets by the company', M/s. Hatane Premises Pvt Ltd (HPPL). AO considered the market value of the property as per stamp duty reckoner at Rs. 93,95, 460/- and added to the income of assessee as deemed dividend as per section u/s.2(22)(a) of the Income tax Act, 1961.

9. Being aggrieved, assessee filed appeal before the first appellate authority.

10. On behalf of assessee, it was contended that assessee is a shareholder of HPPL. The shares in the said company, ie HPPL had attached with right to occupy certain portions of the property constructed on a plot of land owned by it. A shareholder who holds a certain block of shares; could on payment of interest free refundable deposit to HPPL to be permitted to occupy a part of the said building. The said interest free refundable deposit was given by a shareholder towards the proportionate cost of land and cost of construction/development. The said occupancy rights were first granted by HPPL to its shareholders in the year ended 31.3.2002 and subsequently rights were merely amended from time to time. Each time when rights were so amended, a shareholder whose rights were reduced in any manner, was compensated. The said occupancy rights were as such transferable but only with the consent of HPPL. It was

contended that HPPL had no accumulated profits in the year ended 31.3.2002 when the occupancy rights were attached to some of the shareholding. The first profit earned by said HPPL was only in the year ended 31.3.2005. The assessee in the year ended 31.3.2006, contributed a sum of money towards interest free refundable deposits and it secured an allotment of occupancy rights in respect of premises No.101 and 201 in the said building. On behalf of assessee, it was contended that AO did not appreciate submissions made by assessee that there was no distribution by HPPL since the asset continued to belong to HPPL and also that the shareholders had contributed towards the allotment of the Occupancy Rights and further that on the date when occupancy rights were allotted to shareholders as a whole HPPL had no accumulated profits. On behalf of assessee, it was also contended that the shareholders were given occupancy rights by the resolution of the Board of HPPL in the meeting held on 15.3.2002. Since HPPL did not have any accumulative profits, assessee got occupancy rights subject to the payment of interest free refundable deposit. Hence, it cannot be considered as deemed dividend.

11. Ld CIT(A) has stated that Article -5 gives the rights of use and occupation of allotted premises to the shareholders. This right shall be exclusive and subject to placing with HPPL interest free refundable security deposit of the amount as determined by the Board of company i.e. HPPL for the proportionate cost of land, other costs, and expenses related to the land cost, cost of construction and development of the building or buildings to be constructed by HPPL for the allotted premises per sq. ft of carpet areas of the allotted premises. Ld CIT(A) after considering provisions of section 2(22)(a) of the Act has stated that AO has considered letter dated 25.3.2006 regarding occupancy rights given to the shareholders on that date as distribution to apply provisions of section 2(22)(a) of the Act. Therefore, AO has considered the deemed dividend u/s.2(22)(a) of the Act in A.Y. 2006-07. Ld CIT(A) has stated that interest free refundable deposits were received by HPPL against the allocation of occupancy rights and therefore, the resolution for the allocation of occupancy right is meaningless till the payment for occupancy rights is made substantially. Ld CIT(A) has stated that more than 51% payment has been made and, therefore, it can be said that substantial payment has been made in the period relevant to assessment year 2006-07. Therefore, AO has chosen the correct assessment year for making the addition. However, Ld CIT(A) has further stated that HPPL retained the ownership of the assets with itself.

The occupancy rights of the flats which formed the part of the assets were given to the shareholders against payment of 'interest free refundable deposit' only and it cannot be said that there was distribution of assets either in part or fully. That the shareholders never could transfer the flat in their own name and had to surrender it back to the company and in lieu thereof to receive back the refundable deposit. Ld CIT(A) has stated that the addition made by AO u/s.2(22)(a) of the Act cannot be sustained.

12. However, Id CIT(A) has held that assessee had received benefit/perquisite u/s.2(24)(iv) of the Act on account of obtaining occupancy rights in the building. Ld CIT(A) has proceeded to quantify the benefit and has stated that when the assessee surrendered the occupancy rights in respect of the part of allotted premises, the compensation of Rs.1000 per sq. ft was paid by HPPL. Therefore, assessee has received the value of benefit from the premises @ Rs.1000 per sq. ft of the area of the occupancy rights that remains with the assessee. Ld CIT(A) has stated that assessee is having remaining area of 3418 sq. ft out of which 1644 sq. ft has been allotted in assessment year 2006-07 and the balance area 1774 sq. ft has been allotted in assessment year 2007-08. Therefore, Id CIT(A) determined the value of benefit u/s.2(24)(iv) of the Act at Rs.16,44,000/- for assessment year 2006-07 and of Rs.17,74,000/- for assessment year 2007-08 and added to the total income of assessee for the respective assessment years. Hence, these cross appeals by assessee as well as by department on the ground as mentioned hereinabove in paras 4 & 5.

13. On behalf of assessee, it was contended that assessee received occupancy rights in the building of HPPL by virtue of being a shareholder and as per the resolution passed in the meeting of the Board of Directors held on 10.1.2002, copy placed at pages 1-8 of PB. He submitted that the said occupancy rights were modified from time to time. Ld A.R. referred pages 40 & 41 of PB, which is copy of letter dated 13.5.2004 by HPPL granting additional occupancy rights to the assessee subject to payment of interest free refundable deposit of Rs.18,00,000 per flat and also against holding of block of 80,000 equity shares per flat. He submitted that letter dated 25.3.2006 by HPPL to the assessee, copy placed at page 43 of PB only confirmed the right of the assessee to occupy the said flat. He submitted that there was dispute in respect of flat No.101 and 201 in Building No.2, which has been allotted to the assessee and same was resolved in assessment year 2006-07 and, therefore, said letter dated 25.3.2006 was addressed to

the assessee. He submitted that AO without going into the facts of that letter granting occupancy rights to the assessee on 25.3.2006. has adopted the market value of the property as per Stamp Duty Reckoner for the assessment year 2006-07 and added the same u/s.2(22)(a) of the Act. Ld A.R. submitted that said occupancy right was given to the assessee as a shareholder with refundable interest free security deposit with a right to sell. The said right given to the assessee is perpetual as assessee has a right to sell the occupancy rights in the premises to a third party and, accordingly, it could be considered a release of assets by HPPL to the assessee. Ld A.R. submitted that Id CIT(A) is not justified to apply provisions of section 2(24)(iv) of the Act considering occupancy right as value of perquisite/benefit provided by HPPL to the assessee as shareholder. He submitted that if the right is given in perpetuity, it does not fall in section 2(24)(iv) of the Act as it tantamounts to release of assets. He submitted that the order of Id CIT(A) to consider occupancy rights as amenities u/s.2(24)(iv) is not valid and the same should be set aside.⁸⁹

14. On the other hand, Id D.R. submitted that AO is justified to consider the occupancy rights as deemed dividend u/s.2(22)(a) of the Act because assessee has got occupancy rights as if the assessee became owner of the said part of the building with a small amount of security deposit. Ld D.R. by placing reliance on letter dated 25.3.2006 placed at page 43 of PB, submitted that occupancy right has been given to the assessee in assessment year 2006-07 and, therefore, AO has rightly treated the value of occupancy right as deemed dividend u/s.2(22)(a) of the Act.

15. Ld A.R. in his rejoinder, submitted that if the said occupancy right is deemed dividend, it cannot be taxed in assessment year 2006-07 as the right was given in assessment year 2003-04 and, there is no distribution of assets in assessment year 2006-07. Ld A.R. further submitted that if it is considered as deemed dividend, said amount cannot be taxed in view of provisions of section 10(34) of the Act as the dividend is not taxable in the hands of shareholder in A.Y. 2006-07. Ld A.R further submitted that without prejudice to above submission, if the addition is to be made as deemed dividend, it should be limited to proportionate to share holding of the assessee in the maximum accumulated profit of HPPL.

16. We have considered submissions of Id representatives of parties and orders of authorities below.

17. We observe that assessee is a shareholder of HPPL, which is a closely held company. It is relevant to state that its earlier name was Majithia and Mehta Construction Private Limited (MMCPL), which was incorporated on 30.3.1992 to carry on real estate business with Jitendra Navneetlal Mehta, Ila Jitendra Mehta and Sonal Sudhir Majithia as shareholders. This family owned company had purchased a land at Andheri (W) and had given occupancy rights to its shareholders based on the number of shares held by them. Ld CIT(A) has stated that HPPL declared the said assets as fixed assets and distributed the same amongst shareholders to avoid tax on sale of assets. AO found that letters granting occupancy rights were given by HPPL to its shareholders on 25.3.2006 and therefore, it is covered by A.Y. 2006-07 and A.Y. 2007-08 and whereas assessee contended that occupancy rights were given to the shareholders for the year ending on 31.3.2002 and if the provisions of section 2(22)(a) are applied, no addition could be made as deemed dividend because HPPL did not have any accumulated profits as on 31.3.2002. However, AO, as mentioned hereinabove, held that assessee by its letter dated 25.3.2006 has been granted occupancy rights to its shareholders and adopted market value of the property as per Stamp Duty Reckoner and added the same u/s.2(22)(a) of the Act. Ld CIT(A) has also agreed with the findings of AO that occupancy right was given by HPPL to its shareholders in the assessment years 2006-07 and 2007-08.

18. At the time of hearing, our attention was drawn to the said letter dated 25.3.2006 placed at page 43 of PB. We on perusal of the said letter agree with the findings of authorities below that occupancy rights of the premises were given to the assessee in the assessment year 2006-07 as said letter addressed to the assessee categorically states that he has to pay interest free refundable deposit amount of Rs.18 lakhs towards the proportionate land, construction and development cost. It is further stated therein that assessee is liable to pay municipal taxes and other outgoings in respect of flat for the occupancy right is given to the assessee every month. The municipal taxes are also to be paid by the assessee. We observe that it is also stated in the said letter that assessee is entitled to transfer the occupancy rights of the concerned flat by way of sale and transfer of block of shares and create third party rights subject to

transferee depositing with HPPL the required amount of interest free security deposit and assessee shall also be entitled to give possession of the said flats to any transferee and HPPL have no objection for the same. It is evident that assessee has got the occupancy right of the premises by way of letter dt.25.3.2006. Hence, the authorities below have rightly held that said occupancy right is given to the assessee in A.Y. 2006-07 and not in earlier assessment years.

19. Now question arises as to whether grant of said occupancy right could be considered as deemed dividend u/s.2(22)(a) of the Act as considered by the AO or it is to be considered perquisite/benefits given by HPPL to its shareholders and as such is to be assessed u/s.2(24)(iv) of the Act or it is to be considered neither deemed dividend nor perquisite to the assessee.

20. As per grounds of appeal taken by assessee as well as by department, it is observed that assessee has disputed in its ground of appeal the findings of Id CIT(A) to hold that occupancy rights received by the assessee is benefit u/s.2(24)(iv) of the I.T.Act, 1961 at Rs.16,44,000 for assessment year under consideration i.e. A.Y. 2006-07 and Rs.17,74,000 for subsequent assessment year i.e. A.Y. 2007-08. On the other hand, department has also disputed the said order of Id CIT(A) not to accept the findings of AO that the addition is to be made in respect of occupancy rights as deemed dividend u/s.2(22)(a) of the Act. Therefore, it is evident that both parties have disputed the order of Id CIT(A) to consider the grant of occupancy rights by HPPL to its shareholders, assessee herein as perquisite/benefit u/s.2(24)(iv) of the Act.

21. On consideration of submissions of Id representatives of parties and the contents of letter dated 25.3.2006, as mentioned hereinabove, copy placed at page 43 of PB, we observe that assessee has received occupancy rights in the premises on perpetual basis and in lieu of which, assessee to hold shares in HPPL and also to give interest free refundable deposit of Rs.18 lakhs towards proportionate land cost and development cost. Assessee is also entitled to transfer the occupancy rights by way of sale and transfer of block of assets and create third party rights subject to transferee deposit the required amount of interest free refundable security deposit and assessee thereafter to give possession to the transferee. Therefore, we are of the considered view that Id CIT(A) is not justified to hold that it is perquisite benefit given by HPPL to its

shareholder and not the transfer of occupancy rights to its shareholders. Hence, we agree with Id A.R. that provisions of section 2(24)(iv) of the Act does not apply to grant of occupancy rights by HPPL to the shareholder, i.e. assessee herein, on the facts of the case before us.

22. Now coming to question as to whether said grant of occupancy rights could be treated as deemed dividend u/s.2(22)(a) of the Act in the assessment year under consideration.

23. We observe that assessee has got the occupancy right in perpetuity as assessee can transfer his occupancy rights of the premises under consideration by way of sale to a third party subject to condition that transferee is to deposit the required amount of interest free security deposit with HPPL. It is observed that the consideration to be received by the assessee on transfer of his occupancy right is not to be refunded to HPPL. It is also observed that HPPL will have no objection for creating third party rights in the occupancy right given to assessee. Further, during the course of hearing, Id A.R. also submitted that HPPL has given occupancy rights in the premises to the assessee perpetually and, therefore, it is to be considered release of assets by HPPL. Id D.R. also in his submission submitted that assessee has got in guise of occupancy rights full ownership with small amount of security deposit and, therefore, it is to be considered as deemed dividend u/s.2(22)(a) of the Act. Section 2(22)(a) also provides that any distribution by a company of accumulated profits, whether capitalized or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets, it is a deemed dividend. Considering above submissions of Id representatives of parties and the contents of letter dated 25.3.2006, we are of the considered view that AO has rightly held that the value of flats received are nothing but dividend given in the form of assets by HPPL. Hence, we uphold the order of AO that said occupancy right of the premises allotted by HPPL to assessee amounts to deemed dividend u/s.2(22)(a) of the Act.

24. Now the question arises as to whether said deemed dividend should be assessed in the assessment year under consideration i.e. A.Y. 2006-07 or is to be considered to be assessed in assessment year 2003-04 as contended by Id authorized representative. On the basis of facts considered in the light of letter dated 25.3.2006, wherein, it is

stated that assessee has agreed to give occupancy rights of the first floor of residential building bearing No.2, inter alia, on payment of interest free refundable deposit amount of Rs.18,00,000/- and admittedly assessee has paid 51% of the said amount in the assessment year under consideration, we hold the action of AO to consider the market value of the said occupancy rights as deemed dividend in the assessment year 2006-07 is in order and no interference is called for. However, the issue as to whether said deemed dividend could be taxed in assessment year under consideration or not will be considered by the AO as per provisions of law at the time of giving effect to our above order.

25. In view of above, grounds taken by assessee as well as department are allowed by confirming the action of AO and reversing the order of Id CIT(A) for assessment year 2006-07.

26. Now we take up cross appeals in the case of Shantikumar D Majithia for assessment year 2007-08 and cross appeals in the case of Smt Sobhana Majithia for assessment year 2006-07.

27. At the time of hearing, it was submitted that the facts and issue involved in all these appeals are identical to assessment year 2006-07 in the case of assessee Shantikumar D Majithia and whatever decision is taken in those appeals will apply mutatis mutandis to cross appeals for assessment year 2007-08 in the case of Shantikumar D Majithia and cross appeals in the case Sobhana Majithia for assessment year 2006-07.

28. In view of above submissions of Id representatives of parties and for the reasons given by us in cross appeals in the case of Shantikumar D Majithia for assessment year 2006-07 in paras 16 to 25, we confirm the action of AO and reverse the order of Id CIT(A) for assessment year 2007-08 in the case of shantikumar D Majithia and cross appeals for assessment year 2006-07 in the case of Sobhana Majithia by allowing grounds of appeal taken by assessee and department.

29. In the result, cross appeals filed in the case of assessee Shantikumar D Majithia for assessment years 2006-07 and 2007-08 and cross appeals filed in the case of Sobhana Majithia for assessment year 2006-07 are allowed.

Pronounced in the open court on 19th October, 2012

Sd/- (RAJENDRA) Accountant Member	Sd/- (B.R. MITTAL) Judicial Member
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Mumbai, Dated 19th October, 2012
Parida

Copy to:

1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals), 3, Mumbai
4. Commissioner of Income Tax, Cent-1, Mumbai
5. Departmental Representative, Bench 'E' Mumbai

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BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI