

**INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'G' BENCH, MUMBAI**

**[Coram: Pramod Kumar, Vice President
and, Kavitha Rajagopal, Judicial Member]**

ITA No.: 5795/Mum/2016
Assessment year: 2012-13

Sushiladevi R Somani

*17A, Shree Niketan, 6th floor
86, Netaji Subhash Road, Marine Drive
Mumbai 400 002 [PAN: APEPS5744L]*

..... Appellant

Vs.

**Assistant Commissioner of Income Tax
Circle 18(1), Mumbai**

.....Respondent

Appearances:

Prakash Jotwani *for the appellant*

Hoshang B Irani and Mehul Jain *for the respondent*

Date of concluding the hearing : 27/05/22
Date of pronouncing the order : 26/08/22

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged the correctness of the order dated 25th July 2016 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2012-13.

2. The short issue that we are required to adjudicate in this appeal is whether, for the purpose of computation of capital gains, the fair market value of the 225 equity shares held by the assessee in Somani & Co Pvt Ltd as on 1.4.1981, should have been taken at face value (i.e. Rs 100 each) or at the break-up value (i.e. Rs 3,833)- as certified by the approved valuer. For the records, however, the grounds of appeal taken by the assessee are reproduced as below:

Ground No. 1 : Cost of acquisition of 225 shares of Somani & Company P. Ltd.

1.a. The learned CIT(A) erred in confirming the Long Term Capital Gain at Rs. 3,85,65,708 /- instead of Rs. 3,51,20,122/-, in respect to the sale of shares of Somani & Company Pvt. Ltd.

1.b. The learned CIT(A) erred in determining the indexed cost of acquisition of 225

equity shares at Rs. 1,76,625/- instead of Rs. 67,70,036/-, by wrongly assuming the FMV as on 01-04-1981 @ Rs. 100/- per share, instead of Rs. 3,833 /- per share.

1.c. The learned CIT(A) erred in rejecting the accepted Net Asset method adopted by the Assessee for determining the FMV as on 01-04-1981 and instead adopted the value as per Rule ID of the Wealth tax (which has been omitted by the Wealth tax (Second Amendment) Rule 1989 w.e.f. 1.4.1989 and therefore cannot be applied in AY 12-13).

Without Prejudice

Ground No. 2 : Reference to Valuation Officer

The learned CIT(A) erred in not making a reference to the Departmental Valuation Officer u/s. 55A to value the shares, once she was not satisfied with the report submitted by the Assessee despite claim made by Assessee for reference.

3. The issue in appeal lies in a very narrow compass of undisputed material facts. During the relevant previous year, the assessee sold 930 equity shares held by her in Somani & Co Pvt Ltd (SCPL, in short) for a consideration of Rs 8,46,30,000, but these shares were acquired in three lots, out of which the first lot of 225 equity shares was admittedly acquired prior to 1st April 1981. While computing the capital gains on the sale of these shares, the assessee took the cost of acquisition of Rs 100 each for the SCPL equity shares acquired after 1st April 1981, but, so far as the 225 equity shares acquired prior to 1st April 1981 are concerned, the cost of acquisition was taken as fair market value as on 1st April 1981 which was stated to be Rs 3,833. This valuation was done by dividing the net fair market value of the assets of the SCPL (i.e. Rs 7,66,80,100) by the total number of equity shares (i.e. 20,000). The fair market value of the shares, as on 1st April 1981, was duly supported by the report of Shah & Shah, Government Approved Valuers, for the valuation of land held by the company- which was its most valuable asset. The Assessing Officer, however, rejected this claim on the assessee, and observed as follows:

5. The assessee's contentions are considered but cannot be acceptable for the following reasons.

1. The assessee has stated that the value of one of the major assets of the company i.e. land should be taken as the base for determining the Fair Market Value of the shares of Somani and Co. The company's balance sheet for 31st December 1980 shows assets worth Rs. 29,20,561/- out of which in the balance sheet the value of the land is seen as Rs. 10,13,776/-. Despite the same the assessee has revalued the land in 1981 and subsequently stated that the value of the land in 1981 should be the value of the shares in 1981. The assessee has completely disregarded the difference between the asset sold i.e. shares and one of the asset's owned by the company i.e. land to determine the Fair Market Value of the shares.

2. The Income Tax Act vide section 2(22B) states the following meaning of FMV:-

"fair market value", in relation to a capital asset, means-

(i) the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date; and

(ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with the rules made under this Act.

The term open market refers to a situation where price of goods and services is governed by the forces of demand and supply. The assessee has valued 225 shares at Rs. 8,62,425/- for 1981. Yet it is seen that the assessee has received 305 shares in F.Y 1985-86 and 400 shares in the F.Y 2006-07 for a price of Rs 100 each. Thus the value at which the shares were traded in subsequent years had also not changed. The assessee has purchased units of the same asset again and again for the same price. In This scenario it is difficult to accept that the value quoted by the assessee of Rs 8,62,425/- is the value of the share.

3. The market value can also be determined by comparative precedents like the value which other individuals would pay to purchase the same commodity. In the case of Balgopal Trust, whose assessment lies with the incumbent, shares of the same company i.e. Somani and Company were acquired by Vinay Somani and Shrilekha Somani for Rs 100. If the shares of the company were available to all buyers for the face value of Rs 100 then how is it possible for the assessee to claim the FMV to be Rs8,62,425/- in 1981.

4. Further, considering that the Share Market in India was not developed it is difficult to imagine that the value of unquoted shares of Somani and Company would be able to fetch any amount over and above the market value.

5. As per information received by this office in the case of Vinay Somani, Wealth tax return of 1980 was made available that stated the value of the share of Somani and Company to be Rs 105. This further strengthens the claim that the assessee has suo motu decided to artificially inflate the value of shares by arbitrarily valuing land and equating it with the value of shares instead of following the recommended method or valuation.

6. The assessee has also quoted an ITAT case law in the case of Mrs. Shashi Dhamnidharka ITA No.5314/Mum/2008. The fact and circumstances in this case are different from the case cited for the reasons clearly mentioned above.

4. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. He confirmed the stand of the Assessing Officer and observed as follows:

3.3.6. The appellant's reliance on the judgment in the case of Mrs. Shashi Dharnidharka is misplaced for the following reasons-

1) The facts of the case are different from the appellant's case as in that case the appellant followed the net asset method but in the instant case, the appellant took the value of one of the assets of the company and not the net worth.

2) With due respect to the Hon'ble ITAT, it is observed that the Hon'ble ITAT has referred the decision of Ayesha Soni but has not given any reason for not following the judgement of their own bench. It has been clearly mentioned in the Hon'ble Mumbai ITAT's judgement in the case of Ayesha Soni that even though Rule 1D has been omitted from the WT rules, it does not mean that it cannot be used for determination of the value of unquoted shares. The Hon'ble Apex court as held in the case of Bharat Hari Singhania vs CWT 207 ITR 1 that it is obligatory to follow Rule 1D of the WT rules in every case where unquoted equity shares of the company have to be valued.

3. The Hon'ble ITAT Mumbai while deciding the case of Mrs. Shashi Dharnidharka has not considered the judgement of the Hon'ble Apex Court in the case of Bharat Hari Singhania cited supra. The Hon'ble ITAT further relied on the decision of Delhi Tribunal in the case Madhu Tyagi 19 SOT 612, but facts of the present case are different from the facts of the case of Madhu Tyagi. However, the ratio given even in the case of Madhu Tyagi supports the view of the AO. In that case, the Hon'ble Delhi ITAT held that one cannot have a different approach in fixing the price of the same asset for the purpose of computing Capital Gain. In that case, the value of the asset shall be estimated to be the price which it would fetch if sold in the open market on the valuation date. The shares of M/S. Somani & Co. are sold at Rs.100 per share in 1985-86 and in 2006-07. The appellant has not brought anything on record to show that on 1.4.1981, the shares could be sold at Rs.3,883/-. When the value of the shares in 1985-86 and 2006-07 is Rs.100/- per share, there is no reason why it should be adopted at Rs.3,883/- in 1981. In fact, it is the contention of the learned counsel for the appellant that the fair market value means the price the capital asset would ordinarily fetch in the open market on the relevant dates. If the price of each share of M/s. Somani and Co. fetches Rs.100/- even in 2006-07, it is only fair that the same rate is adopted as on 1.4.1981 also. This is because there is no method prescribed in the IT Act or Rules to arrive at the FMV of unquoted shares as on 1.4.1981. In the absence of any method prescribed in the IT Act, the sew pry method prescribed in the WT Act can be adopted as has been held by the apex court in the case or Bharat Hari Singhania and other judicial decisions discussed supra. In fact, there is not much of difference between the value disclosed by Shri. Vinay Somani in the WT returns and the value adopted by the AO which is also the FMV in 1985-86 and 2006-07. Therefore, the valuation made by the AO is upheld and the addition made on account of this valuation is confirmed. This ground of appeal is dismissed.

5. The assessee is not satisfied and is in further appeal before us.
6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.
7. We find that there is no dispute that the shares were acquired before 1st April 1981 and that the assessee had the option to substitute its cost of acquisition by the fair market value as on 1st April 1981. The assessee has filed a Government Approved Valuer report evidencing its fair market value of the land held by the SCPL, and, taking into account the same, computation of the fair market value as on 1st April 1981 on the basis of the intrinsic value of the SCPL shares. The intrinsic value of shares, particularly in the case of the closely held private limited companies, is, in our considered view, a reasonable method of ascertaining the fair market value of the shares. The mere fact that the shares were issued after 1st April 1981 also at face value cannot negate its fair market value. When shares are issued by a company at face value, it does essentially imply that the market value of shares already issued does not exceed the face value of these shares; the reasoning adopted by the Assessing Officer is simply fallacious and proceeds on the unrealistic assumption that the issue price of the shares reflects their fair market value. Section 2 (22B) does define the expression "fair market value" in relation to a capital asset, as "(i) the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date; and (ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with the rules made under this Act", it does not really require an actual price at which such an asset is sold, but it would also include a hypothetical price which such a capital asset would fairly fetch in an open market. The shares of a private limited company are not sold in an open market, and, therefore, when computing such a price under section

2(22B), one has to proceed on the basis that if the shares of the private limited company are to be sold in an open market. As to what would have been a fair price for such shares, particularly in a closely held private company in which the fair market value of land is more than 90% of the entire fair market value of the net assets of the company, in our considered view, the intrinsic value of the shares on the basis of net assets divided by the total number of equity shares is most appropriate. Of course, as to what is the most appropriate method of ascertaining the fair market value of shares in a private limited company would vary from case to case, but given the fact that the most important asset held by this company, as a perusal of the valuation report read with the balance sheet- copies of which is placed before us in the paper book, is land, and the value of this asset is a dominant factor in the valuation of the entire company, the course adopted by the assessee does appeal to us. The provisions of Rule 1 D, so much relied upon by the learned CIT(A), were no longer in existence at the relevant point of time, and nothing, therefore, turns on the same, nor can these provisions, therefore, be pressed into service as of now. No doubt, the provisions of rule 1 D of the Wealth Tax Rules could, at best, be of good guidance, but that is still a step short of the legal force. In any event, if the Assessing Officer had any doubts on the correctness of valuation, it was open for him to refer the matter to the Departmental Valuation Officer, but that exercise has not been done, and the relevant financial period is more than a decade old. No other issues are raised by the authorities below with respect to the method adopted for the valuation of shares in question. In view of these discussions, and on the peculiar facts of this case, we uphold the plea of the assessee, and direct the Assessing Officer to adopt the valuation of Rs 3,833 computed by the assessee on the basis of the fair market value of the net assets. The assessee gets the relief accordingly.

8. As we have upheld the main plea of the assessee, all other issues raised by the assessee are dismissed as infructuous.

9. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 26th day of August 2022

Sd/-

Kavitha Rajagopal
(Judicial Member)

Mumbai, dated the 26th day of August, 2021

Sd/-

Pramod Kumar
(Vice President)

Copies to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai