

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,जी,मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI**

**Before Shri Saktijit Dey, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.1560/Mum/2011
Assessment Year: 2006-07**

M/s Mahesh J. Jhaveri, 401/02 Purna Urvi NS RD 2, Swastik Society, Vile Parle(W) Mumbai -400056	<u>बनाम/</u> Vs.	ITO 21(1)(3) Mumbai
(Assessee)		(Revenue)
P.A. No.AAEPJ8678F		

निर्धारिती की ओर से / Assessee by	Shri Ketan Panchmia (AR)
राजस्व की ओर से / Revenue by	Shri Satyajit Mandal (DR)

सुनवाई की तारीख / Date of Hearing :	29/10/2015
आदेश की तारीख /Date of Order:	30/11/2015

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals)-32, Mumbai {(in short Ld. CIT(A)} dated 29.12.2010 for the assessment year 2006-07, decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) of the Act, on the following grounds of appeal:

“1. CIT(A) erred in confirming action of treating compensation Rs.5,74,000/- received as Income from other sources.

2. He failed to appreciate that the said receipt was received for displacement and convenience in shifting from existing residence, the same can only be treated as capital Receipts and cannot be treated as Income.

3. The appellant prays that the addition of Rs.5,74,000/- be deleted.

Without prejudice to above

4. The appellant prays that the receipt of Rs.5,74,000/- is on account of Capital assets, same can be charged to Capital Gains tax only.

5. The appellant prays that the receipt of Rs.5,74,000/- be charged to tax as Long Term Capital gain tax, as held by CIT(A) in case of part of the receipts.

6. The appellant craves leave to add to, amend or alter any of the grounds of appeal before or at the time of hearing.”

2. During the course of hearing, Shri Ketan Panchmia Authorised Representative (Ld Counsel) on behalf of the assessee and Shri Satyajit Mandal Departmental Representative (Ld DR) on behalf of the Revenue, argued the case.

3. The solitary ground raised by the assessee in this appeal is with regard to the action of AO partly confirmed by the Ld. CIT(A) by treating the capital receipt as income of the assessee for an amount of Rs.5,74,000/-.

3.1 The brief facts are that the assessee was tenant in the building called “Ashirwad” since many years. During the F.Y. 2005-06, landlord of this property entered into an agreement with the developer for re-development of this property.

Accordingly the assessee, landlord and the developer entered into an agreement dated 28.10.2005, in terms of which, the assessee tenant surrendered his property (flat) and in lieu of the same, he got a new flat on the same place in the new building along with following payments:-

Rs.2,94,000/- as payment for short area given

Rs.3,00,000/- towards cash

Rs.2,74,000/- towards transit accommodation.

3.2. The assessee claimed all the above said receipts as exempt being capital receipt, whereas the AO added all these receipts as income of the assessee under the head income from other sources. In the appeal before the Ld. CIT(A), relief was given with respect to sum of Rs.2,94,000/- but remaining two amounts aggregating to Rs.5,74,000/- were treated as taxable under the head income from other sources, confirming the action of Ld. AO partly.

3.3. Being aggrieved, the assessee has approached the Tribunal and contended that the aforesaid amount is capital receipt and therefore, not taxable under the Income Tax Act, and in his support he has argued that the issue is covered with the judgment of Coordinate Bench in following two cases:

(i)Kushal K. Bangia ITA No.2349/Mum/2011

(ii)Mrs. Kiranben S. Shah ITA No.7209/Mum/2010

3.4 On the other hand, Ld. DR has relied upon the orders of the lower authorities.

3.5. We have gone through the submissions made by both the sides as well as judgments of the coordinate bench relied upon before us. It is noted that the issue has already been resolved in the judgment relied upon by Ld. Counsel. For the sake of ready reference, we have reproduced relevant Para from the judgment of Bombay Bench of ITAT in the case of Kushal K. Bangia (Supra):

“In our considered view, it is only elementary that the connotation of income howsoever wide and exhaustive, take into account only such capital receipts are specifically taxable under the provisions of the Income tax Act. Section 2(24)(vi) provides that income includes “any capital gains chargeable under section 45”, and, thus, it is clear that a capital receipt simplicitor cannot be taken as income. Hon’ble Supreme Court in the case of Padmraje R. Kardambande vs CIT (195 ITR 877) has observed that “..,, we hold that the amounts received by the assessee during the financial years in question have to be regarded as capital receipts, and, therefore,(emphasis supplied by us), are not income within meaning of section 2(24) of the Income tax Act...” This clearly implies, as is the settled legal position in our understanding, that a capital receipt in principle is outside the scope of income chargeable to tax and a receipt cannot be taxed as income unless it is in the nature of revenue receipt or is brought within the ambit

of income by way of a specific provision in the Act. No matter how wide be the scope of income u/s.2(24) it cannot obliterate the distinction between capital receipt and revenue receipt. It is not even the case of the Assessing Officer that the compensation received by the assessee is in the revenue field, and rightly so because the residential flat owned by the assessee in society building is certainly a capital asset in the hands of the assessee and compensation is preferable to the same. As held by Hon'ble Supreme Court, in the case of Dr. George Thomas K vs CIT(156 ITR 412), "the burden is on the revenue to establish that the receipt is of revenue nature" though "once the receipts found to be of revenue character, whether it comes under exemption or not, it is for the assessee to establish". The only defence put up by learned Departmental Representative is that cash compensation received by the assessee is nothing but his share in profits earned by the developer which are essentially revenue items in nature. This argument however proceeds on the fallacy that the nature of payment in the hands of payer also ends up determining its nature in the hands of the recipient. As observed by Hon'ble Supreme Court in the case of CIT vs. Kamal Behari Lal Singha (82 ITR 460), "it is now well settled that, in order to find out whether it is a capital receipt or revenue receipt, one has to see what it is in the hands of the receiver and not what it is in the hands of the payer". The consideration for which the amount has been paid by the developer are, therefore, not really

relevant in determining the nature of receipt in the hands of the assessee. In view of these discussion, in our considered view, the receipt of Rs.11,75,000 by the assessee cannot be said to be of revenue nature, and, accordingly, the same is outside the ambit of income under section 2(24) of the Act. However, in our considered opinion and as learned counsel for the assessee fairly agrees, the impugned receipt ends up reducing the cost of acquisition of the asset, i.e. flat, and, therefore, the same will be taken into account as such, as and when occasion arises for computing capital gains in respect of the said asset. Subject to these observations, grievance of the assessee is upheld.”

3.6. Similar view was taken in another judgment in the case of Mrs. Kiranben S. Shah, the relevant portion is reproduced below:

“I have noticed that it is not even Assessing Officer’s case that the receipt of compensation is a revenue receipt in nature, as it has been taxed as a capital gain. However, it is necessary to appreciate that, as defined u/s.2(24)(vi), only such capital gains can be treated as income as are “chargeable under section 45”. In terms of the provisions of section 45, only such capital gains as arise on transfer of a capital asset can be deemed to be income of the previous year in which transfer takes place. The compensation paid in the present case does not refer to any transfer or surrender of rights but is for inconvenience

and hardship caused to the assessee due to construction activity in the building. Such a compensation, in my considered view, cannot be treated as compensation for a right or asset, and is therefore, not in the nature of compensation which can be taxed under section 45. Learned Departmental Representative has merely placed her reliance on the orders of the authorities below and did not specifically point out the asset which is transferred in consideration of this compensation. I have also noticed that so far right of usage of additional floor space index is concerned, it has been separately paid for, and I have no reasons to come to the conclusion that compensation for hardship and inconvenience paid to the assessee is merely a garb of paying compensation for use of additional floor space index. In view of these discussions, as also bearing in mind entirety of the case, I uphold the grievance of the assessee.

6. For the reasons set out above, I direct the Assessing Officer to delete the impugned addition of Rs.1,55,000. The assessee gets the relief accordingly.”

3.7. Thus, respectfully following these judgments, we hold that the impugned amount is not taxable as income in the hands of the assessee. Further, it was also held in the above said judgment, the impugned amount of receipt should be reduced from the cost of acquisition. Relevant observations are reproduced:

“.....ends up reducing the cost of acquisition of the asset, i.e. flat, and, therefore, the same will be taken into account as such, as and when occasion arises for computing capital gains in respect of the said asset.”

The AO is directed to reduce the cost of acquisition. Subject to these observations the impugned addition is deleted and grounds raised by the assessee are allowed.

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

Order pronounced in the open court on 30th November, 2015.

Sd/-
(Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :30/11/2015

Patel, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai