

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "J", MUMBAI**

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER**

**ITA No.7411/M/2012
Assessment Year: 2007-08**

Miss. Janet Fernandes, Legal Heir of Late Mr. Fernandes Jack Xavier, 2 nd Floor, Casa Maria, Gokhle Road, Dadar, Mumbai – 400 028 PAN: AAAPF 7347R	Vs.	Asst. Commissioner of Income Tax, Circle – 18(2), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Nitesh Joshi, A.R. & Shri Kishore Patel, A.R.
Revenue by : Shri Vinod Kumar, D.R.

Date of Hearing : 03.12.2015
Date of Pronouncement : 05.02.2016

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the legal heir of the deceased assessee Late Mr. Fernandes Jack Xavier against the order dated 23.02.2012 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2007-08.

2. The main issue raised through grounds of appeal is regarding the application of section 50C of the Income Tax Act in relation to sale consideration received by the assessee in lieu of transfer of development rights in his property. The claim of the assessee has been that the total consideration received was Rs.70 lakhs for redevelopment of tenanted building with residential units. The Assessing Officer (hereinafter referred to as the AO), however, applying section 50C of the Act substituted the value of sale

consideration at Rs.1,11,25,500/- as determined by the Stamp Duty Authorities. In the revised grounds of appeal, it has been agitated that the provisions of section 50C do not apply to sale of development rights/FSI and further that no capital gain was chargeable to tax in lieu of the constructed area/residential house received by the assessee and thereby entitlement of the assessee of the concession available under section 54 of the Act. The assessee further, vide additional ground of appeal, has pleaded that as there was no cost of acquisition of the additional FSI transferred by the assessee, hence in the light of the decision of the Hon'ble Supreme Court in the case of "CIT vs. B.C. Srinivasa Shetty (1981) 128 ITR 294 and further in view of the decision of the Hon'ble Bombay High Court in the case of "CIT vs. Sambhaji Nagar Co-op Hsg. Society Ltd." in ITA No.1356 of 2012, no capital gains tax is chargeable in that respect.

3. The brief facts of the case are that the original assessee Late Mr. Fernandes Jack Xavier had given a building for development to a builder on 18.01.07. The property was given to the builder along with the area that was occupied by 10 tenants. Against old area of 1100 sq.ft. surrendered, the assessee had been allotted joint flats of total area of 750 sq.ft. In the return of income filed by the assessee, the sale consideration had been considered at Rs.70 lakhs and LTGG of Rs.61,69600/- had been offered for taxation. The acquisition cost of Rs.8,30,400/- had been reduced after indexation. No exemption had been claimed. The AO observed that the assessee had not considered the Fair Market Value of the property as determined by stamp duty authorities for disclosing the sale consideration. This value according to AO amounted to Rs.1,11,25,500/- as required under section 50C. The AO calculated capital gains on that basis and brought to tax the differential capital gain of Rs.61,69,600/-.

4. In appeal, the Ld. CIT(A) upheld the findings of the AO. He rejected the contention of the assessee that the assessee had received Rs.70 lakhs in lieu of additional FSI only which could not be subjected to the capital gains taxed in view of the fact that no cost of acquisition was received by the assessee or that the cost of acquisition was not determinable of the said FSI. He also rejected the contention of the assessee that the provisions of the section 54 were applicable as the assessee had received new residential unit in lieu of surrender of old residential unit which amounts to investments in the new residential house property. Being aggrieved, the assessee has come in appeal before us.

5. We have heard the rival contentions and have also gone through the records. At the outset, the Ld. A.R. of the assessee has brought our attention to the application and affidavit of Miss. Janet Fernandes legal heir of the original assessee late Mr. Fernandes Jack Xavier, wherein, it has been deposed that the Stamp Duty Authorities have not properly calculated the valuation/sale consideration of the property in question. Stamp Duty Authorities have wrongly included the cost of construction of the building as well as amount of rent received from tenants while calculating the valuation of the development rights/FSI transferred by the assessee. The assessee has filed representations to the competent authority in this respect and that the decision of the competent authority is awaited in this respect. It has been further contended that though originally the assessee had not claimed benefit of the provisions of section 54 of the Act, however, the assessee is entitled to the same. The Ld. A.R. in this respect has relied upon the decision of the Hon'ble Bombay High Court in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (2012) 349 ITR 336 (Bom.) wherein the Hon'ble Bombay High Court has held that a claim to which the assessee, otherwise, is entitled to, if inadvertently could not be made to the lower authorities, the same can be pressed before the appellate authorities. The Ld. A.R. has further stressed that since the value of the

property has not been correctly/arrived at by the Stamp Duty Authorities and a representation has already been submitted, the AO be directed to consider the above representation submitted by the assessee and the AO be directed to await/call upon or get clarification from the competent authority regarding the representation submitted by the assessee and apply the stamp duty value arrived at by the Stamp Duty Authorities after decision on the representation submitted by the assessee in this respect and further to consider the additional pleas raised by the assessee regarding the non attraction of capital gains tax on the transfer of additional FSI and further the benefit of section 54 being available to the assessee.

The Ld. D.R. has also fairly agreed that the entire case of the assessee requires reconsideration at the hands of the AO.

6. We, therefore, restore the issues involved in this appeal to the file of the AO for assessment afresh, after consideration of the pleas raised by the assessee, additional evidences sought to be furnished. The AO is also directed to consider the admissible claim of the assessee under section 54 of the Act. Needless to say that the AO will give proper opportunity to the assessee to present his case and would also seek the necessary details from the competent authorities, if so required, in arriving at a proper decision of the case.

7. With the above observations, the appeal of the assessee is hereby treated as allowed for statistical purposes.

Order pronounced in the open court on 05.02.2016.

Sd/-
(Ashwani Taneja)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 05.02.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.