

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
AHMEDABAD "SMC" BENCH, AHMEDABAD**

**[Coram: Pramod Kumar AM]**

ITA No.1361/Ahd/2013  
Assessment Year: 2007-08

**Income Tax Officer,**  
*Ward-2, Bharuch.*

.....**Appellant**

**Vs.**

**Akshay Balakrishna Master,**  
**House No.104, Radhey Vaikunth Mega Township,**  
**Bholav, Bharuch.**  
*[PAN : AJTPM 1509 L].*

.....**Respondent**

**Appearances by**

**Rajesh Meena** *for the appellant*  
**M.K. Patel & Anil Shah** *for the respondent*

Date of concluding the hearing: *17.11.2017*  
Date of pronouncing the order: *14.02.2018*

**O R D E R**

1. This appeal, filed by the Assessing Officer, challenges correctness of leaned CIT(A)'s order dated 22<sup>nd</sup> February 2013, in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2007-08, on the following grounds :-

*"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in*

- (i) Allowing exemption u/s 54EC of the IT Act claimed by assessee to the tune of Rs.38 lacs invested beyond 6 months in contravention to provisions of section 54EC of the IT Act by considering Circular of MCGM dated 15.02.2007, ignoring the fact that the same was a consequential order, giving effect to directions of Hon'ble Bombay High Court's order dated 20.11.2006.*
- (ii) Deleting entire addition of Rs.46,34,667/- in spite of the fact that assessee has already availed benefit of cost of acquisition in preceding year, which was forming part of the impugned addition."*

2. To adjudicate on this appeal, a few material facts need to be taken note of. The assessee, as a 16.67% co-owner of property situated at City Survey No.E788, 2<sup>nd</sup> and 4<sup>th</sup> Road, Khar (W), Mumbai, had entered into a development agreement with M/s G M Developers on 14.09.2005. Under this agreement, G M Developers was to pay a consideration of Rs.4 crores

for the basic FSI in the said property, and an additional Rs.3.51 crore in case the builder was allowed further FSI on the same. This development agreement was registered on 14.09.2005, and under this agreement the assessee was to receive Rs.66,68,000/- (being 16.67% of Rs.4,00,00,000/-) during the financial year 2005-06 itself. In addition to the above, the assessee was also to get additional Rs.25,00,667/-, Rs.16,67,000/- and Rs.16,67,000/- as his share in additional consideration from the purchases within one month, two months and three months respectively from the date of TDR on FSI is permitted to be used and utilized on the said property. The matter was pending with Hon'ble Bombay High Court, and vide judgement dated 20.11.2006 which was received by the assessee on 5<sup>th</sup> January 2007, Hon'ble Bombay High Court directed the Municipal Corporation of Greater Mumbai (MCGM) to frame guidelines and regulate use of FSI keeping in view the maintenance of parks, playgrounds and amenities. Accordingly, MCGM brought out a circular, in accordance with the directions of Hon'ble Bombay High Court, on 15<sup>th</sup> February 2007. The builder was thus entitled to additional FSI, and, as a corollary thereto, the assessee was entitled to additional consideration. The assessee was paid the entire additional compensation on 12<sup>th</sup> May, 2017. On these facts the Assessing Officer declined the indexed cost of acquisition at Rs.12,81,823/- and the investment of Rs.38,00,000/- in eligible long term specified assets by observing as follows :-

*"6.3 It is observed from the submissions submitted on 15.12.2011 and 16.12.2011 that the assessee wants to convey that cost of acquisition is inclusive of cost of both basic FSI and TDR-FSI and accordingly claimed Rs.12,81,323/- as indexation benefit against the consideration on transfer of TDR on FSI and the buyer of the property was allowed to use T.D.R on F.S.I by the Hon'ble Bombay High Court. It is further observed that the assessee had received the order of Hon'ble Bombay High Court on 5<sup>th</sup> January 2007.*

*6.4 The assessee's plea that indexed cost of acquisition Rs.12,81,323/- is to be allowed against the consideration received on transfer of TDR on FSI cannot be maintainable. The cost of acquisition is well known in the year in which property was transferred. However, the additional consideration has come into picture only after verdict of Hon'ble Mumbai High Court as admitted by the assessee himself. The cost of acquisition cannot be deferred to future years though the amounts in consideration of transferring property is agreed to be received in future years or different years. It is further observed that the assessee had claimed indexed cost of acquisition of Rs.12,81,323/- during the financial year 2006-07 with a view to divide and spread the indexed cost to different years to reduce the tax liability or invest the capital gain in the Long Term Specified Asset within the ceiling limits as laid down in the provisions of Section 54EC of the Act. Accordingly, the assessee's share in cost of acquisition of the entire property and consequently cost of acquisition after indexation, if any, should have been claimed in the financial year in which property was transferred i.e. 2005-06 itself. Accordingly, the assessee was allowed to claim the cost of acquisition of Rs.10,80,383/- and consequently indexed cost of acquisition to the tune of Rs.53,26,287/- against the sale consideration received in the financial year 2005-06 while computing the Capital Gain for the Financial Year 2005-06 relevant to the A.Y. 2006-07. Therefore, the assessee's request to allow indexation for the F.Y. 2006-07 cannot be acceded to.*

6.5 It is further observed from the above submissions vide letter dated 15.12.2011 and 16.12.2011 that the assessee simply stated that he invested Rs.12,00,000/- on 21.3.2007 and Rs.38,00,000/- on 13.07.2007 and he has nothing to state any other thing regarding restriction of exemption u/s 54EC of the Act to Rs.12,00,000/- towards investment in Long Term Specified Asset.

6.5(a) Vide the letter dated NIL received on 16.12.2011 in the office of the undersigned the assessee has claimed to have received the Hon'ble Mumbai High Court's Order, permitting the buyer to use the T.D.R on F.S.I, on 5<sup>th</sup> January 2007. Accordingly, transfer of right to use T.D.R on F.S.I has taken place on 5<sup>th</sup> January 2007. Thus to be eligible to claim exemption u/s 54EC of the Act, the assessee should to have invested in Long Term Specified Asset within 6 months from 5<sup>th</sup> January 2007 which expires on 5.7.2007. It is pertinent to mention here that the assessee has received entire additional consideration against transfer of TDR on FSI by 12.05.2007. However, the assessee invested Rs.12,00,000 on 21.03.2007 and Rs.38,0,000/-on 13/07/2007. It is clear from the above that Rs.38,00,000/- on 13/07/2007 is not as per the provisions contained in Section 54EC of the Act. Therefore, the assessee's claim of exemption u/s 54EC of the Act is restricted to Rs.12,00,000/- only since the same being within the time limit as enunciated in Sec 54EC of the Act.

6.6 In view of the above facts and legal position of the case, the claim of the assessee for indexed cost of acquisition is not maintainable. Accordingly additional consideration of Rs.58,34,667/- accrued to the assessee as his share during the financial year 2006-07, as per provisions contemplated in the Section 48 of the Act, without allowing any indexed cost of acquisition and allowing deduction of Rs.12,00,000 u/s 54EC of the Act for investment made in Rural Electrification Bonds on 21/03/2007 is worked out to Rs.46,34,667/- (Rs.58,34,667 – Rs.12,00,000) as Capital Gain and accordingly taxed under the head **Long Term Capital Gain.**

3. Aggrieved, assessee carried the matter in appeal before the learned CIT(A) who reversed the action of the Assessing Officer by observing as follows :-

*“Having narrated the history of the case, in brief now I deal with the substantive ground which is pertaining to disallowance of exemption u/s 54EC. The entire issue is pertaining to the date on which additional FSI was finally allowed for the purpose of determining expiry date of 06 months restrictions provided in the provisions of Section 54 EC. It is clear from the circular issued by the MCGM that use of additional FSI was subject to the formulation of guidelines by MCGM. The order of Hon'ble Bombay High Court was not a self contained order authorizing the use of additional FSI. Instead the Hon'ble High Court directed the MCGM to frame guidelines and regulate the use of additional FSI keeping in view the maintenance of parks, playgrounds and other amenities. Accordingly, the MCGM brought out a circular in compliance to the High Court's direction on 15/02/2007. Therefore, date of transfer (the day to be reckoned with) to compute 06 months time period is 15<sup>th</sup> February. 2007 and not 05<sup>th</sup> January 2007 as mentioned by the AO because the buyer could make use of additional FSI only after 15.02.2007. Similarly the appellant could have forced the buyer to comply to the conditions of development agreement only after 15/02/2007. Phrase used in the development agreement is "if the developers are entitled to consume additional/extra FSI". The developers got entitlement vide circular dated 15/02/2007 of the MCGM. Therefore, investment made in REC Bonds i.e. Rs.12 lac on 21/03/2007 and Rs.38 lacs on 13/07/2007 fall well within the period of 6 months restriction placed u/s 54 EC.*

*In view of the above facts, addition of Rs.45,34,667/- on account of disallowance of exemption u/s 54EC is directed to be deleted.”*

4. The Assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and is in appeal before me.

5. I have heard the rival submissions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

6. I entirely agree with the learned CIT(A) that the date of transfer of additional FSI could only be the date on which MCGM had issued the circular granting additional FSI in accordance with the guidelines given by Hon'ble Bombay High Court and not the date of judgement itself. The well-reasoned conclusion arrived at by the learned CIT(A) merit being accepted. Accordingly, the date of judgement by Hon'ble Bombay High Court was not really relevant in determining the outer limit for making eligible investments under section 54EC. I see no infirmity in the stand of the learned CIT(A). I approve the same and decline to interfere in the matter. As regards the cost of acquisition issue, I do not see any discussion about the same in the CIT(A)'s order and, accordingly, there is no need to deal with the same.

7. In the result, the appeal is dismissed. Pronounced in the open Court on this 14<sup>th</sup> day of February, 2018.

Sd/-  
**Pramod Kumar**  
(Accountant Member)

**Dated: Ahmedabad, the 14<sup>th</sup> day of February, 2018.**

**PBN/\***

Copies to:                   (1)    *The appellant*                   (2)    *The respondent*  
                                  (3)    *CIT*                                       (4)    *CIT(A)*  
                                  (5)    *DR*                                       (6)    *Guard File*

*By order*

*Assistant Registrar*  
*Income Tax Appellate Tribunal*  
*Ahmedabad benches, Ahmedabad*