

IN THE INCOME TAX APPELLATE TRIBUNAL“SMC” BENCH,
MUMBAI
BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

I.T.A. No.6914/M/2017
(Assessment Year: 2009-10)

Smt. Jessie Juliet Pereira 1-104, Jade Gardens, M.I.G. Colony, Gandhi Nagar, Bandra (E) Mumbai-400051.	Vs.	ITO 23(2)(1) Mumbai C-10, 7 th Floor, Praytakshkar Bhavan, Bandra Kurla Complex Bandra (E) Mumbai-400051.
स्थायीलेखासं . / जी आइ आर सं . / PAN/GIR No. : APGPP4204C		
(Appellant)	..	(Respondent)

Assessee by:	Shri Subhash Chhajed & S. Balasubramanian (AR)
Department by:	Ms. N. Hemalatha(DR)

Date of Hearing: 08.03.2018
Date of Pronouncement: 04.06.2018

ORDER

PER AMARJIT SINGH, JM:

The present appeal has been filed by the assessee against the order dated 07.09.2017 passed by the Commissioner of Income Tax (Appeals)-33, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the assessment year 2009-10.

2. The assessee has raised the following grounds: -

1. On the facts and circumstances of the case and In law the learned CIT Appeals -33 erred in holding that the income of Rs.40,75,302/- is required to be assessed as Long Term Capital

Gain on transfer of the old flat surrendered to the developer to get a new flat in exchange on account of redevelopment of the society. The appellant therefore prays that the amount of Rs.40,75,302/- received by the appellant towards the corpus money/hardship allowance on redevelopment of society be assessed as capital receipt not liable to tax,

2. On the facts and circumstances of the case and In law the learned CIT (A) failed to appreciate that the sum of Rs.40,75,302/- was received by the appellant towards the corpus money/hardship allowance on redevelopment of society as per the terms of tripartite development agreement between the society, individual members and the developer.

The appellant therefore prays that the amount of Rs. 40,75,302/- received by the appellant towards the corpus money/hardship allowance on redevelopment of society be assessed as capital receipt not liable to tax.

3. On the facts and circumstances of the case and in law the learned CIT(A) erred in holding that the right of redevelopment granted to the developer along with the transfer of old flat and the land beneath it along with the associated FSI has a transferable value since the appellant has received a cash consideration of Rs. 40,75,302/- in addition to a new flat in exchange.

4. On the facts and circumstances of the case and In law the learned CIT(A) erred in treating the surrender of old flat to the builder for redevelopment as "TRANSFER" under section 2(47) of the IT Act .

5. Without prejudice to the above, the Hon. CIT(Appeals) ought to have appreciated that the Appellant has purchased a new house at Dahishar for Rs.21,68,180/- out of the capital gains of Rs.31,68,313/- and hence the proportionate deduction u/s 54 ought to have been granted by the Hon. CIT (Appeals,)

6. The appellant craves leave to amend, alter or delete or add to ail or any of the above grounds of appeal or furnish fresh grounds of appeal and make the detailed submissions on each of the grounds on or before the final hearing of Appeal,"

3. The brief facts of the case are that the notice u/s 148 of the Act dated 30.03.2016 was issued and served upon the assessee for reopening his case on the reasons mentioned below.: -

“Information is received from the ITO-23(2)(3), Mumbai vide his letter dated 24.02.2016 that during the course of assessment proceedings in the case of middle income Group III Co-Op Housing Society Ltd., for the A.Y. 2009-10 (PAN: AABAM0452G), it is noticed that the said society had entered into a Development Agreement with M/s. Suyog Happy Homes on 30.04.2008 and members of the society have received payments from the said developer.

As per the details received from M/s. Suyog Happy Homes, the above mentioned assessee has received Rs.40,75,302/- from M/s. Suyog Happy Homes. On verification of the ITD system, it appears that the assessee has not filed the return of income for the A.Y.2009-10.

In view of the above facts, I have reason to believe that income to the tune of Rs.40,75,302/- chargeable to tax has escaped assessment within the meaning of explanation 2(b) of section 147 of the I.T. Act, 1961, which requires to be now brought for taxation by invoking the provisions of section 147 of the I.T. Act, 1961.

As per the proviso to sec. 151(1) of the I.T. Act, 1961, a permission of the Pr. CIT-tax-23, Mumbai, is hereby sought to reopen the case of the assessee for A.Y. 2009-10 by issued of noticed u/s 148 of the I.T. Act, 1961.”

4. Thereafter, the statutory notices u/s 143(2) and 142(1) of the Act were issued and served upon the assessee. The assessee filed his return of income declaring total income to the tune of Rs.1,94,290/-. In brief, the assessee was the member of the MIG III Co-operative Housing Society. The society was the owner of property consisting of 9 buildings with 80 members. The society entered into the agreement for the development of the property and for this purpose the society awarded the contract to M/s. Suyog Happy vide agreement dated 30.04.2008. According to the said agreement, the developer shall

develop the property in such a manner that each member of the society shall receive a new flat in exchange of surrender of old flats depending upon the size of the old flat along with interest in the additional FSI allotted by MHADA. The property and the additional FSI would be with the name of the society. As per the agreement all the expenses, costs and charges for the proposed project of re-development of the said property including for purchase of additional FSI from MHADA etc. shall be borne by the Developers alone and the society and members shall not be liable to pay or contribute any amount towards the same. The developer as per the agreement will pay the society being lawful owner of the property and the members an aggregate monetary consideration of Rs.39,10,00,000/-. The said amount of Rs.39.10 crores will be distributed among the members of the society being shareholders depending upon the size of their old flat. The assessee was one of the member of the society by virtue of shareholder. During the year under consideration, the assessee received an amount of Rs.40,75,302/- being consideration for surrender of his old flat along with his interest in the additional FSI allotted by MHADA etc. The developer issued the cheque in the name of the individual members which were handed over to the society and in turn, the society diverted the same at source to the members/shareholders. Thus, the said amount of Rs.39.10 crores never routed through the books of accounts of the society though these cheques were in the custody of the society before handing over

to the individual members being shareholder. The said activity was treated as commercial activity and the receipt of the amount of Rs.40,75,302/- was considered as revenue receipt by AO and accordingly taxed. Aggrieved by the order, the assessee filed an appeal before the CIT(A) and the CIT(A) treated the said receipt as long term capital gain. The assessee further contested the matter before us by filing the present appeal.

ISSUE NOS. 1 to 6:-

5. Under the issue nos. 1 to 4 the assessee has contested the issues on the ground of that the assessee received an amount of Rs.40,75,302/- which is a corpus money, therefore, the same is not taxable in accordance with law. However at the time of argument, the assessee did not contest the same and argued that the CIT(A) has treated the receipt of Rs.40,75,302/- as capital gain and the assessee has also acquired new flat, therefore, the benefit u/s 54 of the Act is required to be given. The Assessing Officer treated the receipt as income from other sources whereas the CIT(A) has treated the said receipt as long term capital gain. It is not in dispute that the assessee has also acquired a new flat in lieu of his old flat. The receipt to the tune of Rs.40,75,302/- has been treated as long term capital gain. Undoubtedly, the claim u/s 54 of the Act was not raised earlier before the revenue. Anyhow, when the receipt to the tune of Rs.40,75,302/- has been treated as long term capital gain, therefore, in the said

circumstances, the claim u/s 54 of the Act is also liable to be considered in accordance with law. Accordingly, we decided issue nos. 1 to 4 against the assessee and remand the alternate ground raised in ground nos. 5 & 6 before the AO for consideration in view of the provision u/s 54 of the Act in accordance with law after giving an opportunity of being heard to the assessee. Accordingly, the issue nos. 5 & 6 is hereby allowed.

6. In result, appeal filed by the assessee is hereby ordered to be dismissed.

Order pronounced in the open court on 04.06.2018.

Sd/-

(R. C. SHARMA)

लेखासदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 04.06.2018.

Sd/-

(AMARJIT SINGH)

न्यायिकसदस्य/JUDICIAL MEMBER

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आदेशकीप्रतिलिपिअप्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त (अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार

(Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai