

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

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.4838/M/2017
Assessment Year: 2010-11**

Income Tax Officer 25(2)(3), Mumbai	Vs.	Mr. Deepak Talakshi Shah, Plot No.43, Flat No.16, Bhanukunj, West Wing Road Side, Vile Parle (W), Mumbai – 400 056 PAN: AAFPS4472H
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Satish Modi, A.R.
Revenue by : Shri D.G. Pansari, D.R.

Date of Hearing : 12.06.2019
Date of Pronouncement : 25.06.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 29.04.2013 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The issue raised in ground No.1 of appeal is against the deletion of addition by Ld. CIT(A) as made by the AO on account of capital gain on sale of TDR development rights without appreciating the fact that the assessee's rights have been extinguished by sale of said TDR/FSI and thus fall within the ambit of capital asset under section 2(14) of the Act.

3. The facts in brief are that during, the year assessee has sold TDR/FSI development rights for Rs.2.50 crore which was claimed as exempt from income tax. According to the AO the transfer of development rights clearly attracts the capital gain tax as it is a transfer of capital asset. Accordingly, the AO determined the market value of the TDR/FSI rights at Rs.5,74,23,000/- as per stamp authority valuation as against Rs.5,00,00,000/- declared by the receipt from sale of TDR and accordingly determined the capital gain in the hands of the assessee at Rs.2,87,11,500/-.

4. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after taking into consideration the contentions and submissions of the assessee by holding that the assessee has allowed the builder to load the FSI/TDR on the plot and thereby has not made any sale of land and building. The Ld. CIT(A) has held that the assessee has permitted the builder to exploit the FSI/TDR and construct the new building for which the assessee has invested Rs.2.5 crore. The Ld. CIT(A) further held that as the TDR rights have arisen only due to amendment of DC Regulations 1991 and therefore there is no cost of acquisition and no capital gain would be attracted. The Ld. CIT(A) also held that since there is no sale of land and building and therefore the provisions of section 50C of the Act were also wrongly invoked by the AO. The Ld CIT(A) deleted the addition made by the AO on account of capital gain resulting from sale of TDS/FSI rights by holding that the same is not chargeable to capital gain tax.

5. At the outset, the Ld. Counsel of the assessee submitted before the Bench that the case of the assessee is squarely covered by the decision of the Hon'ble Bombay High Court in the case of CIT vs. Sambhaji Nagar Co-op. Hsg. Society Ltd. (2015) 370 ITR 325 (Bom.) wherein it has been specifically held that as there is no cost of acquisition incurred of TDR/FSI as these are generated by the plot itself and therefore any receipt on account of sale of TDR/FSI would not result in capital gain assessable to tax. The Ld. A.R. therefore prayed that the appeal of the Revenue may kindly be dismissed as the Ld. CIT(A) has passed the order after following the order of jurisdictional High Court. The relevant portion of the said order has been reproduced below:

“Held, dismissing the appeal, that in the case of the assessee the floor space index/transferable development right was generated by the plot itself. There was no cost of acquisition, which had been determined and on the basis of which the Assessing Officer could have proceeded to levy and assess the gains derived as capital gains. Additional floor space index/transferable development right was generated by change in the Development Control Rules, 1991. A specific insertion would, therefore, be necessary so as to ascertain its cost for computing the capital gains. Therefore, the transferable development right which was generated by the property and was transferred under a document in favour of the purchaser would not result in the gains being assessed to capital gains. The Tribunal concluded that what the assessee sold was transferable development right received as additional floor space index as per the 1991 Rules. It was not a case of sale of development rights already embedded in the land acquired and owned by the assessee. The Tribunal found that the assessee had not incurred any cost of acquisition in respect of the right which emanated from the 1991 Rules making the assessee eligible for additional floor space index. The land and the building earlier in the possession of the assessee continued to remain with it. Even after the transfer of the right or the additional floor space index, the position did not undergo any change. The Revenue could not point out any particular asset as specified in sub-section (2) of section 55. The conclusion of the Tribunal was imminently possible on the facts and in the light of the legal position as noted by the language of section 55(2).”

6. The Ld. D.R., on the other hand, relied on the order of AO by submitting that the FSI/TDR falls within the definition of capital asset as defined under section 2(14) of the Act and

therefore liable for capital gain under the provisions of section 45 of the Act.

7. After hearing both the parties and perusing the material on record including the decision of the Hon'ble Bombay High Court in the case of CIT vs. Sambhaji Nagar Co-op. Hsg. Society Ltd. (supra), we observe that the Hon'ble Bombay High Court has held that in case of sale of FSI/TDR rights by the assessee to the developers which have accrued in favour of the assessee following promulgation of Development Control Rules for Greater Mumbai, 1991 and the said developmental right were generated by the plot itself and there is no cost of acquisition and therefore not liable for any capital gain tax. In the present case, the facts are similar to the facts in the case as discussed hereinabove wherein the Hon'ble Bombay High Court has held that no capital gain tax is attracted in the case of sale of FSI/TDR, we therefore, respectfully following the same uphold the order of Ld. CIT(A) by dismissing the appeal of the Revenue.

Order pronounced in the open court on 25.06.2019.

**Sd/-
(C.N. Prasad)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 25.06.2019.

* 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.