

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

I.T.A. No.1224/Bang/2019
Assessment Year : 2014-15

Smt. Sowmya Sathyan, #433, Vishwa Manava, Double Road, Kuvempunagar, Mysuru-570 023. [PAN:AKQPS 9870C]	Vs.	The Income Tax Officer, Ward-1(4), Mysuru.
(Assessee-Appellant)		(Revenue-Respondent)

Assessee by	Shri V. Srinivasan, Adv.
Revenue by	Shri Sumer Singh, Addl. CIT(DR)

Date of hearing	02/11/2020
Date of pronouncement	02/11/2020

ORDER

Per CHANDRA POOJARI, AM

This appeal filed by the assessee is directed against the order of the CIT(A), Mysuru dated 29/03/2019. The relevant assessment year is 2014-15.

2. The assessee has raised the following grounds of appeal:

1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The CIT(A) is not justified in upholding the addition of Rs.4,02,00,000/- as deemed consideration liable for tax in terms of the provisions of section 56(2)(vii)(b) of the Act in respect of the acquisition of Transferable Development Rights (TDR) for short) on the erroneous basis that the TDR acquired by the appellant was "immovable property" and that the stamp value adopted by the Sub-Registrar should be taken into consideration for evaluating the consideration paid by the appellant under the facts and in the circumstances of the appellant's case.

3. The CIT(A) failed to appreciate that "property" as defined in explanation (d) to sub-section 56(2)(vii) of the Act included immovable property under sub-clause(i) to mean capital assets "being land or building or both" and TDR acquired by the appellant could not be regarded as either land or building for nature of TDR allowed the appellant the right to additional Floor Square Index (FSI for short) and hence, the same was outside the scope of section 56(2)(vii)(b) invoked by the Assessing Officer for making the impugned addition under the facts and in the circumstances of the appellant's case.

4. The CIT(A) ought to have appreciated that the value of TDR estimated by the Sub-Registrar on the transfer of the TDR under the provisions of the Karnataka Stamp Act, cannot be adopted as consideration under the provisions of Income Tax Act, especially when explanation (f) of section 56(2)(vii) contemplates the adoption of the stamp value in respect of immovable property and not for rights in the nature of TDR under the facts and in the circumstances of the appellant's case.

5. Without prejudice to the above, the CIT(A) ought to have appreciated that the TDR acquired by the appellant was not in the nature of a capital asset as it was being held as a business asset and depicted in the financial statement and consequently, the provisions of section 56(2)(vii)(b) of the Act, has no application under the facts and in the circumstances of the appellant's case.

6. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies herself liable to be charged to interest u/s. 234-A and 234-B of the Act, which under the facts and in the circumstances of the appellant's case and the levy deserves to be cancelled.

7. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered and the appellant may be awarded costs

in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

3. The facts of the case are that the assessee is an individual. During the financial year relevant to the assessment year under consideration the assessee made an investment of Rs.1.32 crores as purchase of Transferable Development Rights (TDR). During the said financial year the Government of Karnataka (BBMP) acquired land belonging to Sri David Raj C. alias David C. measuring 35.41 guntas or 3583.36 sq. meter property bearing Sy. No. 59/2, Nagavara Village, Kasaba hobli, Bengaluru North Taluk, Bengaluru (Schedule A) under the provision of section 14B of lands without payment of any compensation as per the Notification No. UDO/154/BEM RUPRA/2004, dated 18.01.2005 for road widening or for any other public purpose like park, any ground or other civil amenities. On relinquishment of lands, the BBMP issued a TDR certificate dated 20.2.2014 to the land owner, being credit for construction rights entitling him to utilize rights equal to 1.5 times measuring 5375.04 sq. mt. (5786.93 sq. ft.) as per certificate No. 003048 Folio No. 102 in Zonic Ring III on 20.02.2014 (Schedule B). The TDR owner sold a portion of his rights of schedule property Bon 20.02.2014 for a consideration of Rs.1.14 crores being the credit for construction right measuring 4645.113 sq. mts. (50,000 sq. ft.) (schedule property C).

3.1 As per the deed of conveyance dated 20.02.2014, assessee paid a consideration of Rs.1.14 crores for receipt of rights and paid the stamp duty of Rs.5,84,000/- and registration fees at Rs.5,17,000/- as per the guidance value of the property fixed by Government of Karnataka at Rs.5.16 crores as per the conveyance deed dated 20.02.2014 which implied that the stamp duty value was paid for the guidance value fixed by the Sub-Registrar, Bengaluru which is Rs.5.16 crores. The assessee had paid an amount of Rs. 1.14 crores as sale consideration for the TDR for transfer of 50,000 sq. fts. at Rs.224/- per sq. ft. as against Rs.1032/- fixed by sub-registrar. The amount of Rs.1.14 crores was paid considering the TDR as transfer of land, i.e. rights in lands.

3.2 As per the AIR information available with the department, and as per the deed of conveyance dated 20.02.2014, the transaction value of the property was Rs.5.16 crores for which assessee had paid the stamp duty value as against the claim of value of property at Rs.1.12 crores. When confronted, the assessee furnished a written submission along with a letter from sub-registrar, Bengaluru who informed that the amount shown in AIR at Rs.5,16,52,893/- is the market value of the property for which stamp duty value of Rs.5,94,000/- and registration fee at Rs.5,17,000/- was collected which clearly indicated the value of the property/rights was at Rs.5,16,52,893/- fixed by government of Karnataka considering the immovable property as land. Accordingly, the Assessing Officer treated the amount of Rs.4.02 crores as deemed consideration and liable for

taxation as per the provision of section 56(2)(vii)(b) as income from other sources in the hands of the buyer-assessee.

4. On appeal, the CIT(A) observed that the Transferable Development Rights (TDR) is a method for controlling land use to complement land-use conservation. According to the CIT(A) the TDR process can be considered as a tool for controlling urban spread by considering development. The CIT(A) observed that TDR is a legal mechanism offered in some local government jurisdictions as a form of development control. It was observed that TDR is also a way to avail institutional taking issues caused by rezoning areas which would otherwise eliminate a significant amount of value from the party. The procedure offers landowners financial incentives or bonuses for the conservation and maintenance of the environment, heritage or agricultural values of their land. According to the CIT(A), TDR is based on the concept that with land ownership comes the right of use of land or land development and these land-based development rights can in some jurisdictions be used, unused, sold or otherwise transferred by the owner of a parcel. According to the CIT(A), the question which arises is whether the TDRs are to be equated with lease hold rights attached to land or not. After perusal of the case laws relied on by the assessee in support of her contention that the provisions of sec 50C are not applicable to any rights attached to land and building, the CIT(A) observed that the said decisions were in relation with the lease hold rights and none of the decisions are squarely applicable to the

assessee's case. Further, regarding the contention of the assessee that the TDR is not the capital asset for the reason that it has been shown in the balance sheet for A.Y. 2017-18 in which the stock in trade was shown as Rs.6,04,44,432/ and it included development rights also along with cost of lands, the CIT(A) found that the assessee had not filed the balance sheet of the relevant assessment year and balance sheet had shown no breakup of cost of land and the TDRs. The CIT(A) concluded that the TDRs are nothing but transferable on sale of same within the meaning of provisions of Transfer of Property Act and TDRs being the capital asset, the same would result in invoking the provisions of section 50C and accordingly, dismissed this ground of appeal of the assessee.

5. Against this, the assessee has filed this appeal before us. The Ld. AR referred to section 56(2)(vii)(b) of the I.T. Act which reads as follows:

- (a).....
- (b) any immovable property
 - (i) without consideration, the stamp duty values of which exceeds fifty thousand rupees, the stamp value of such property;
 - (ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration;
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Further Explanation to the above section reads as follows:

- (a).....
- (b).....
- (c).....
- (d) 'property' means the following capital asset of the assessee, namely:

- (i) Immovable property being land or building or both;
- (ii) Shares and securities;
- (iii) Jewellery;
- (iv) Archeological collection;
- (v) Drawings;
- (vi) Paintings;
- (vii) Sculptures;
- (viii) Any work of art;
- (ix) Bullion;

Thus, according to the Ld. AR in the above definition of immovable property what is included is only land or building or both and does not include Transferable Development Rights (TDRs). The Ld. AR submitted that when there is a specific meaning provided in the section itself, there is no scope to import any other meaning from any other enactment, or any where else and this would amount to an exercise of jurisdiction which is not provided in Law and hence, invoking of the section being improper needs to be set right by allowance of the appeal.

5.1 The Ld. AR drew our attention to section 50C of the I.T. Act which is applicable only to land or building or to both but not to any other thing like TDRs. Accordingly, he submitted that invoking of the provisions of section 50C also is not permissible in law and this would make the cancellation of the same.

5.2 The Ld. AR submitted that section 50C of the I.T. Act provides a legal (deeming provision) and any legal provision for a particular purpose operates only for the purpose for which it is created and will not operate beyond the purpose for which it is created. The Ld. AR submitted that this deeming provision

extends only to a capital asset which is 'land or building or both' and there is well recognized and a clear distinction between the 'land or building or both' and the right to the same or any other right. The Ld. AR submitted that this deeming provision does not extend beyond the capital asset as indicated above. Hence, it was submitted that section 50C does not apply to development rights or any other rights.

The Ld. AR submitted that the assessee is carrying on the business of estate development and the TDRs were purchased for the same. It was submitted that in respect of the income assessable under the head 'income from business', the provisions of section 56 are not applicable. Hence, the Ld. AR prayed for the cancellation of the assessment to the extent to which relates to section 56 of the I.T. Act.

5.3 The Ld. AR relied on the following case laws:

1. CIT vs.Thiruvengadam Investments P. Ltd. (320 ITR 343) (Mad.).
2. Atul G Puranik vs. ITO (11 ITR (Trib.) 120 (Mum.).
3. Shri Prem Rattan Gupta in ITA No. 5803/Mum/2009 dated 28/03/2012 (Mum.)
4. M/s. KANCAST Pvt. Ltd. vs. ITO in ITA No.1265/PN/2011 dated 19/01/2015 (Pune)
5. Shri Farid Gulmohammed vs. ITO in ITA No.5136/Mum/2014 dated 16/03/2015 (Mum. Trib.)
6. Shri Satendra Koushik in ITA No.392/JP/2019 dated 23/04/2019 (Jaipur Trib.).
7. Shavo Norgen Pvt. Ltd. vs. DCIT (58 SOT 23) (Mum. Trib.)

5.4 The Ld. AR submitted that the above decisions were rendered in the context of lease hold rights and the authorities had clearly held that Land is different and

any rights attributed to land is different. Similarly, building is different and any rights attributed to building is different. According to the Ld. AR, they are all together independent and separate. Thus, it was submitted that point of law applies with equal force to developmental rights and the fact that the rights are saleable do not make any difference as any rights whether it is leasehold rights, developmental rights are also saleable. Thus, the Ld. AR submitted that there was no for bringing into application of section 50C in the case of developmental rights.

5.5 Further, the Ld. AR drew our attention to the provisions of section 269UA(2)(d) of the I.T. Act which reads as follows:

(2) in relation to any immovable property in respect of which an agreement for transfer is made, being immovable property of the nature referred to in sub-clause(ii) of clause (d), means,

(i) in a case where the consideration for the transfer consists of a sum of money only, such sum;

(ii) in a case where the consideration for the transfer consists of a thing or things only, the price that such thing or things would ordinarily fetch on sale in the open market on the date on which the agreement for transfer is made.

(iii) in a case where the consideration for the transfer consists of a thing or things and a sum of money, the aggregate of the price that such thing or things would ordinarily fetch on sale in the open market on the date on which the agreement for transfer is made, and such sum,

and where the whole or any part of the consideration for such transfer is payable on any date or dates falling after the date of such agreement for transfer, the value of the consideration payable after such date shall be deemed to be the discounted value of such consideration, as on the date of such agreement for transfer determined by adopting such rate of interest as may be prescribed in this behalf;

(d) "immovable property means

i) any land or any building or part of a building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also.

Explanation – For the purposes of this sub-clause, "land, building, part of a building, machinery plant, furniture, fittings or other things" include any rights therein;

ii) any rights in or with respect to any land or any building or a part of a building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed, accruing or arising from any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building;

5.6 The Ld. AR submitted that the provisions of section 56(2)(vii)(b) of the I.T. Act are not applicable to the facts of the present case. The Ld. AR submitted that the provisions of section 56(2)(vii)(b) of the I.T. Act will have application to the property which is in the nature of capital asset and it will not be applicable to the transfer of development rights (TDR). According to the Ld. AR, the said provision is applicable only to landed building which is tangible immovable property and TDR not being a tangible

asset, it cannot be considered as capital asset u/s. 56(2)(vii)(b) of the I.T. Act.

6. The Ld DR on the other hand submitted that transfer of development rights is transfer of capital asset and the provisions of section 269UA(2)(d) of the I.T. Act is not relevant to the facts of the present case. According to him section 56(2)(vii)(b) of the I.T. Act is applicable. The Ld. DR relied on the order of the lower authorities.

7. We have heard the rival submissions and perused the material available on record. We shall deal with the scope of section 50C of the I.T. Act. A perusal of section 50C shows that section 50C shall be applicable where the consideration received as a result of transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of State Government. Thus, it is noted that the term 'capital asset' mentioned in the section specifically refers and confines its meaning to 'land or building or both'. Thus, scope of section 50C is restricted by the legislature itself to these two types of capital assets only.

7.1 In the present case before us, the capital asset transferred by the assessee was 'Development Rights in the land' and not the 'Land' itself. If we go through similar provisions of the Act, we find that the legislature has used this expression consciously and carefully and keeping in view its need and objective of legislating

section 50C. For example, in section 269A, the expression 'immovable property' has been defined as under:

"Immovable property" means-

(i) any land or any building or part of a building, and includes, where any land or any building or part of a building is transferred together with any machinery, plant, furniture, fittings or other thing which machinery, plant furniture, fittings or other things also.

Explanation- for the purposes of this [sub-clause], land building part of a building, machinery, plant, furniture, fittings and other things include any rights therein;

(ii) any rights of the nature referred to in clause (b) of sub-section (1) of section 269AB.....

7.2 Similarly, in section 269UA also identical definition has been given. In these cases, 'rights' in 'land & building' have been specifically included as per requirement of these sections. In other words, term 'land & building' and 'rights therein' have been clearly understood and treated as independent from each other. Thus, the perusal of the definitions given in these sections when compared with section 50C shows that legislature was conscious about the proper expression to be used as per its intention, scope, object and purpose of the section 50C, wherein it has been expressly mentioned that capital asset should be 'land or building or both'. It has not been mentioned that any type of 'rights' shall also be included in the definition of capital assets to be transferred by an assessee.

7.3 The provisions of section 50C are deeming provisions. It is settled law and well accepted rule of interpretation that deeming provisions are to be construed strictly. Thus, while interpreting deeming provisions neither any words can be added nor deleted from language used expressly. We should apply the 'Rule of strict Interpretation' as well as 'Rule of Literal Construction' while understanding the meaning and scope of deeming provisions. In our opinion, under the given facts and circumstances, Ld. Counsel has rightly contended that since the impugned capital asset transferred by the assessee upon which long term capital gain has been computed by the AO is on account of transfer of Development Rights in the land of the assessee. The land itself has not been transferred by the assessee. Thus, in our opinion provisions of section 50C have been wrongly applied upon the impugned transaction. Thus, we reverse the action of lower authorities in applying the provisions of section 50C and in substituting any value other than the amount of actual sales consideration received by the assessee. It is also noted by us that for the assessment year under consideration there is no other provisions on the statute which permit the AO to substitute any other value with the full amount of consideration actually received by the assessee, while computing income under the head of capital gains. Under these circumstances, this ground of the assessee is allowed.

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

Order pronounced in the open Court on this 02.12.2020.

Sd/-
(N.V. VASUDEVAN)
VICE PRESIDENT

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Bengaluru

Dated: 02.12.2020

GJ

Copy to:

1. Smt. Sowmya Sathyan, #433, Vishwa Manava, Double Road, Kuvempunagar, Mysuru-570 023.
2. The Income Tax Officer, Ward-1(4), Mysuru
3. The Commissioner of Income-tax(Appeals), Mysuru.
4. The Pr. Commissioner of Income-tax, Mysuru.
5. D.R., I.T.A.T., Bangalore Bench, Bengaluru.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Bangalore