

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

**[Coram: Pramod Kumar (Vice President)
And Amarjit Singh (Judicial Member)]**

ITA No. 3396/Mum/2017
Assessment Year: 2011-12

Mr. Neil Savio PereiraAppellant
*Flat No. 501, Palacio, 16th Road,
TPS-III, Palli Bandra (W),
Mumbai-400 050 [PAN: AAPPP3782P]*

Vs

ITO (IT)-3(3)(1)
MumbaiRespondent

Appearances by

Subhash S. Shetty *for the appellant*
V. Tripathi *for the respondent*

Date of concluding the hearing : October 26, 2020
Date of pronouncement : January 08, 2021

ORDER

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of learned CIT(A)'s order dated 28th February 2017, passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2011-12.

2. Grievances raised by the assessee appellant are as follows:-

1. The learned Commissioner of Income-Tax (Appeals) committed a gross error of law and fact in partly upholding the conclusion of the assessing officer that appellant is liable for capital gains on Rs. 12,12,584/- by invoking the provisions of section 50C of the Income Tax Act 1961.

2. *The learned Commissioner of Income-Tax (Appeals) committed a gross error of law and fact in invoking the provisions of section 50C and making the impugned addition in the case of the appellant.*

3. *The learned Commissioner of Income-Tax (Appeals) grossly erred in not appreciating that the provisions of section 50C of the Act can be invoked only when there is a transfer by the assessee of capital asset being land or building or both and not to a case of transfer of Development right as in the case of appellant.*

4. *Without prejudice to the above grounds of appeal and only in the alternate it is submitted that the learned Commissioner of Income-Tax (Appeals) grossly erred in not appreciating that the appellant not only received the cash compensation but also received flat in the re-developed property and therefore the total consideration received by the appellant will be much more than the valuation arrived at by the Stamp Authorities.*

Appellant therefore prays that the invoking of the provisions of section 50C be quashed and the consequential addition be deleted.

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before is an individual. During the course of the reopened assessment proceedings, the Assessing Officer made an addition of Rs. 28,79,250/- in the computation of capital gains, by observing as follows:-

4.1 *From the perusal of the submission of the details it is found there an agreement for transfer of Development rights between the four families who are the owners of the property and M/s. Gorwani Developers Pvt. Ltd has taken place on 02.08.2010. Shri Neil Savio Pereira is one of three members of one of the four families. The owners had granted the development rights to the developers for redeveloping structure of Katy Kunj. All these four families have received Rs. 50,00,000/- each, totalling to Rs. 2,00,00,000/- which is part of the bargain and agreement between the owners and the builders. The assessee family comprises assessee's mother, Mrs. Dorothy Pereira, his sister Rs. 50,00,000/-. And therefore, the share of stamp value of the property works out to be Rs. 28.79,250/- (Total value as per the stamp authority is Rs. 3,45,51,000/- and after dividing it among four families it comes to Rs. 86,37,750/- which is equivalent of the corresponding to Rs. 50,00,00/- which each family received by the said agreement. Since the assessee is one of the three members of his family, his share come to Rs. 28,79,250/-)*

5. *In view of the above facts, the AR of the assessee was specifically asked why not Rs. 28,37,750/- be taken as Long Term Capital Gain by invoking section 50C of the I.T Act, 1961. The assessee filed a reply on 27.03.2015, the contents of the same is here as under:-*

In response to above Show Cause, we would like to state that

(i) At this juncture, there is no transfer of Capital Assets, hence Section 50C is not applicable to us.

(ii) As you may agree, Section 50C is not applicable in such type of Transaction where there is no transfer of Capital Assets and no consideration is received for Transfer of assets and what we are getting back from the builder is a replacement area which is already owned.

(iii) Market value adopted for Stamp Duty payment purposes on the Area of Land which is to be developed with retained FSI i.e 643.80 sq.mt which is nearly 45% more than the existing area of the building i.e 445.26 sq.mt which is demolished for Redevelopment.

(iv) Without Prejudice to above further we state that, as mentioned in point No. 4 of letter submitted on 06/03/2015, there is total 16 owners, 4 tenants and 2 more additional claimants i.e, total of 22 people to be considered for sharing of Market Value of Rs. 3,45,51,000/-

5.1 The submission of the assessee is not acceptable because the assessee has not produced any document on the basis of which any variation from full value of consideration as per sec 50C can be made.

A. There is a transfer as per the provision of section 2(47) of I.T Act, 1961 and hence provisions of section 50C is attracted squarely.

B. During the course of assessment proceedings for the AY 2011-12, the assessee produced the copy of agreement for development executed on 02.08.2010 in which it is clearly mentioned at sr. no. 2 of page no.7 that the owners hereby agree to grant the development rights to be developers in respect of the said property.

C. There is a transfer of development rights between the owners of the land and the builders. The assessee has also received his share out of Rs. 2,00,00,000/-. Further, the assessee has not shown any LTCG on the capital gain arising from the transfer of development rights in the A.Y 2011-12.

6. On perusal of transfer of development rights deed, it is seen that the value of which stamp duty was charged by the valuation authority was Rs. 3,45,51,000/- being per agreement, the assessee has transferred the property in Rs. 2,00,00,000/- which is below the rate adopted by the stamp valuation authority.

7. However, the assessee chose not to offer any LTCG by ignoring the provisions of sec 50C of the I.T Act, 1961 wherein the method of determining the full value of the consideration on transfer of an immovable property is explained. The extra sec 50 (c) (1) is reproduced herewith:-

“Where the consideration received or accruing as a result of the 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 a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer”

4. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The Learned CIT(A) confirmed the action of the Assessing Officer and observed as follows:-

I have gone through the facts of the case and the submissions made by the assessee. All the five grounds of appeal relate to same issue of transfer of capital assets and accrual of capital gains and its taxability under the provisions of section 45 to 55 of the I.T.Act, 1961 and hence are taken up together. Basic issue arising from all the five grounds of appeal is whether on transfer of development rights in a plot of land in Santacruz West, Mumbai, India in lieu of a residential flat plus compensation accrues and arises or not and if so what should be the taxability of the same under the provisions of section 45 to 55 of the I.T.Act, 1961. It is therefore necessary to understand the basic issue of "transfer of development rights" within its meaning under the general provisions of law, Income Tax Act, 1961 and the terms and conditions of the contract.

Transfer of development rights in respect of a plot of land, whether freehold and/or leasehold, involves transfer of either right title and interest in the land and/or transfer of right, title and interest of enjoyment of the property, consisting of land and super structure either in existence and/or to be constructed later on by the builder/developer and/or the owner/owners themselves. Thus what happened is that the "right, title and interest" of the owners/owners stand reduced on execution of the agreement for transfer of development rights to the extent of the terms and conditions of the agreement and the purchaser/s of these rights either for themselves and/or for the persons who buy flats, bungalows, tenaments, etc which are constructed on the plot of land get either right, title and interest in the land and/or right, title and interest to enjoy the property consisting of the superstructure on the land to the extent of the superstructure acquired by them by an agreement with the builder/developer and/or owner/s of the plot of land in a two partite agreement or a tripartite agreement depending upon the facts of the case. In the present case, assessee a part owner (one sixteenth) of the land and building in property known as Katy Kunj Sanacruz West, Mumbai, India agreed to transfer his share of right title and interest in the plot of land at Santacruz , Mumbai for a consideration of one flat of carpet area 800 square feet plus compensation of Rs.50,00,000 with the builder and developer M/s Gorwani Builders, Mumbai along with other joint owners of the property and tenants on the property who agreed to different terms and conditions depending upon their legal status and area occupied/owned by them respectively. Assessee had a one third share in the property owned and occupied by him along with his mother and his sister

and thus assessee was the one third owner of the share which accrued to the assessee, his mother and his sister. Assessee along with his mother and sister as co-owners and other three joint owners of the property agreed to the terms and conditions of the transfer of development rights and registered the "transfer of development rights" with the Registrar of Stamps and the stamp duty authorities valued the property at Rs.3,45,51,000 and the stamp duty was paid by the assessee and/or the developer on their behalf and the valuation was accepted by the builder. Thus, the value of the un-retained development rights in land on plot of land in Katy Kunj, Santacruz West, Mumbai which was capable of redevelopment was valued at Rs.3,45,51,000 by the stamp duty authorities and this was accepted by the assessee and the developers and no challenge was made by way of appeal to appellate authorities. Thus the valuation of development rights has become final. And in view of the provision of section 50C of the I.T.Act, 1961, the same has to be adopted for the purposes of section 50C of the I.T.Act, 1961 for the purposes of computation of capital gains under section 45 to 55 of the I.T.Act, 1961 and its taxability determined accordingly.

Next question which comes up is what is the quantum of capital gains which arise from such transfer which should suffer taxation in the hands of the assessee who was the one third co-owner of share pertaining to himself, his mother and his sister. Assessee along with his mother and his sister received Rs.50,00,000 as compensation and this amount was invested by his mother in Rural Electrification Bonds notified for the 54EC purposes. Assessee's share in the compensation comes to Rs. 28,79,250, however if the assessee's share of investment of one third portion of investment in Rural Electrification Bonds which stand notified under section 54EC of the I.T.Act, 1961 is taken note of, assessee's share in the enhanced compensation after giving deduction for his share in the investments in bonds will come to Rs. 12,12,584, that is, Rs. 28,79,250 minus Rs. 16,66,667 and hence the correct amount taxable as long term capital gains will be Rs. 12,12,584 and not Rs.28,79,250 as done by the AO. Prima facie it appears that the AO has not given credit for one third share of Rs. 16,66,667 of value of total investments of Rs. 50,00,000 to the assessee even though the immoveable property was a co-ownership property and jointly owned by the assessee with his mother and his sister. In nutshell, it is held that the correct amount taxable as long term capital gains is Rs. 12,12,584 and not Rs.28,79,250 as held by the AO and assessee's appeal is partly allowed.

5. The assessee is not satisfied and is in further appeals before us.
6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.
7. We find that the case issue in appeal, i.e. whether is not Section 50C can be applied to the sale of development rights, is covered by a co-ordinate bench of this tribunal, in the case

of Voltas Ltd. Vs. ITO [(2016) 161 ITD 1998 (Mum)] wherein a co-ordinate bench has, *inter alia*, observed as follows:-

3.8. We have gone through the submissions of the assessee. We shall first deal with the last argument of the assessee which is directly on the scope of section 50C. The perusal of section 50C shows that the 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.

3.9. Turning back to the facts of the 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 few other 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....."

3.10. Similarly, in section 269 UA 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.

3.11. 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, ground No.1.2 of the main grounds of the assessee is allowed. Since we have allowed the grounds of the assessee on the preliminary objection itself and therefore we are not dealing with other arguments at this stage as these have been become academic in nature. Thus, supplementary ground nos. 1.5 to 1.10 and original ground nos.1.1 to 1.4 are partly allowed with our directions as given above.

8. We are in respectful agreement with the views expressed above by the co-ordinate bench. No contrary judicial precedent was cited before us. We, therefore, hold that the provisions of section 50C were not applicable on the facts of this case. The impugned additions on account of capital gains are, accordingly, deleted.

9 In the result, the appeal is allowed. It was so pronounced in the open court immediately upon conclusion of hearing of this appeal.

Sd/-
Amarjit Singh
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 08 day of January, 2021

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

By order

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