

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI GAGAN GOYAL, AM

आयकर अपील सं/ I.T.A. No.4470/Mum/2017

(निर्धारण वर्ष / Assessment Years: 2007-08)

Mr. Ivor B. D’Mello (Legal Heir of Late Ettie B. D’Mello) Plot No.349, Avinash Park, TPS 3, 33 rd Road, Bandra (W), Mumbai-400050.	बनाम/ Vs.	ITO-19(3)(1) Aayakar Bhavan, M. K. Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPD0058N		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Vipul B. Joshi
Revenue by:	Shri Sanyam Joshi

सुनवाई की तारीख / Date of Hearing: 03/06/2022

घोषणा की तारीख /Date of Pronouncement: 10/06/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee (legal heir of late Ettie B. D’Mello) against the order of the Ld. Commissioner of Income Tax(A)-32, Mumbai dated 28.02.2017 for the assessment year 2007-08.

2. The ground no. 1 of the assessee is against the action of the Ld. CIT(A) confirming the action of the AO invoking Section 50C of the Income Tax Act, 1961 (hereinafter “the Act”).

3. Brief facts of the case as noted by the AO is that the assessee had filed return of income declaring total income of Rs.2,97,560/- on 25.03.2008. Later, the case of the assessee was selected for scrutiny. The AO noted that the assessee had declared income from house property and other sources. He also noted from perusal of the computation of income that the assessee during the relevant year had



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sold development right of one property [hereinafter for easy understanding referred to as Plot-A] for consideration of Rs.10 Lakhs and sold another property (hereinafter Plot B) for Rs. 5 Lakhs + two flats). The AO notes that the total consideration for two plots were to the tune of Rs.15,00,000/-. According to the AO, the assessee had stated that since the entire sale consideration was invested in the bonds issued by REC, the long term capital gain was exempt u/s 54EC of the Income Tax Act, 1961 (hereinafter “the Act”). Further, the AO notes that the assessee [Ettie B. D. Mello] expired on 24.07.2009 (copy of death certificate acknowledged by the AO). So the legal heir was brought on record by the AO. The AO, thereafter, looked into the claim of the assessee regarding consideration received for transfer of development right regarding Plot-A by perusing the copy of agreement for transfer of development right; and the sale deed of property (Plot-B). After perusal of the agreement in respect of Plot A, according to the AO, the assessee had only shown consideration of Rs.10 Lakhs whereas the Stamp Valuation Duty (SVD) was to the tune of Rs.1,97,74,000/- and according to him the agreement for transfer of development rights is nothing but conveyance of the immovable property, therefore, Section 50C of the Act is attracted. And therefore, he adopted the value of Rs.1,97,74,000/- as consideration in respect of the Plot A, in place of assessee’s claim that section 50C of the Act was not attracted since, it was a development agreement and not sale of Plot-A.



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4. Coming to the Plot- B, though the assessee had claimed that the assessee received as sale consideration Rs.5,00,000/- only as well as two flats (350 sq.ft) and brought to the notice of the AO that the Stamp Duty Valuation as per the authority concerned was only Rs. zero (0), it was not acceptable by the AO who wondered as to how the stamp duty value can be zero (0) for Plot-B; and therefore he referred the matter of valuation of Plot-B to District Valuation Officer (DVO) who was of the opinion that the property would value to the tune of Rs.75,29,236/-. Therefore, the AO worked out the Long Term Capital Gain in respect of plot-B at Rs.28,55,072/- and made an addition on account of capital gains from the transfer of development rights (according to the AO conveyance) at Rs.1,97,74,000/- and total LTCG at Rs.2,26,29,072/- and after reducing the u/s 54EC claim of Rs.15 Lakhs, the AO computed the capital gains from the two plots A & B at Rs.2,11,29,072/-.

5. Aggrieved by the aforesaid decision of the AO, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

6. We have heard both the parties and perused the record. At the outset, certain peculiar facts were brought to our notice about this case. First of all, we note that this issues are pertaining to A.Y.2007-08 and that both Plot-A & B were encroached by slum dwellers and in their adverse possession for more than sixty (60) years and till date, they continue to be in illegal occupation of Plot-A & B, and so nothing has happened on ground with respect to both the properties other than the



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agreement/sale deed. Further, we note in respect of the transfer of development right of Plot-A is concerned, it is as per the agreement dated 21.07.2006 for Plot A [CTS No.231, 231/1, 232, 233, 235 & 239 (refer page at 1 to 48 of the P.B)] which is titled as "Development Agreement" (refer page no. 4 of the P.B) and the Ld. AR of the assessee Shri Vipul B. Joshi brought to our notice that only one (1) percentage of the stamp duty was paid, since it was a transfer of development rights and the AO erred in treating it as conveyance deed/sale deed. According to the Ld. AR, since the basis of the AO to have adopted the circle rate/SDV is therefore per-se erroneous because the Hon'ble High Court has held that Section 50C of the Act is not attracted when it was a case of transfer of "Development Rights". Even though, the Ld. DR brought to our notice that certain clauses of the agreement especially clause-8, clause-11 and clause-17 shows that the assessee had to forgo certain rights in respect of the property in certain circumstances, we do not agree with the contention that the said agreement to transfer development rights can be construed to be conveyance deed because the agreement dated 21.07.2006 which is placed from page 1 to 48 has to be read as a whole and what has been transferred to the *developer* is only the *development rights* in Plot-A and clauses pointed out by the Ld. DR/AO cannot be read in isolation and at any rate doesn't convey the title of the property/Plot-A to the developer. So we hold that AO/CIT(A) erred in construing that agreement for transfer of development rights as sale/conveyance deed.

7. Be that as it may, as noted both plot A & B are inhabited by slum dwellers. It is quite impossible to vacate them due to illegal



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encroachment by the slum dwellers. We note that even though the agreements are dated 21.07.2006 and as on date i.e. 03.06.2022 (when the matter was heard by us), the properties in question are still in the hands of the illegal-encroachers/slum dwellers and the developers could not get possession/physical possession of the property for developing the same as per the agreement dated 21.07.2006. We also note that the AO could not bring any evidences on record to show that the assessee had sold the property (Plot A) to the developers as held by him. Therefore, the AO erred in relying on few clauses from the development agreement to hold that it was conveyance deed cannot be countenanced. According to us, without any material to say otherwise, the AO could not have changed the understanding and agreement between the parties which was giving only right to the developer to develop Plot-A and not sale. Therefore, we note that the transaction in question regarding plot A was only transfer of development rights and therefore Section 50C of the Act is not attracted as held by the Hon'ble Bombay High Court in the case of CIT Vs. Greenfield Hotels & Estate (P.) Ltd. (2017) 389 ITR 68 (Bom).

“1. Smt. Kishori Sharad Gaitonde v. ITO — {I.T.A. No. 1561/M /09; Order dated 27.11.2009}.

Tribunal held that ‘It is a trite law that the legal fiction cannot be extended beyond the purpose for which it is enacted. Section 50C embodies the legal fiction by which the value assessed by the stamp duty authorities is considered as full value of consideration for the property transferred. It does not go beyond the cases in _ which the subject transferred property has not become the subject - matter of the provisions of section 50C. By no stretch of imagination, the legal fiction confined to restricted operation can be widened to include within its sweep all the cases where ‘such property’ is not covered.’



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Tribunal further held that in the case under consideration, there is transfer of tenancy right. Though tenancy right is a capital asset but it is not a capital asset, being land or building or both. Therefore, section 50C is not applicable to the facts of the case under consideration.

2. M/s Shakti Insulated Wires Pvt Ltd. vs. ITO [LT.A. No 3710/Mum/2007; Order dated 27.4.2009]

50C being a deeming provision, cannot be extended to land development rights

3. ITO vs Krishnakumar R. Agarwal [I.T.A. No. 1756/M/2010; AY: 2006-07; order dated 14.7.2010]

50C being a deeming provision, cannot be extended to development rights including sale of FSI. Relied on the decision of the Mumbai Tribunal in the case of M/s Shakti Insulated Wires Pvt Ltd. vs. ITO - I.T.A. No 3710/Mum/2007.

4. Atul G. Puranik v/s. ITO — [(2011) 11 ITR (T) 120 (Mum)]

{Leasehold rights for 60 years}

“11.4 In view of the afore noted judgments rendered by the Hon'ble Apex Court and that of the Hon'ble jurisdictional High Court, it is clear that a deeming provision can be applied only in respect of the situation specifically given and hence cannot go beyond the explicit mandate of the section. Turning to sec. 50C, it is seen that the deeming fiction of substituting adopted or assessed or assessable value by the stamp valuation authority as full value of consideration is applicable only in respect of “land or building or both. If the capital asset under transfer cannot be described as ‘land or building or both’, then sec. 50C will cease to apply. From the facts of this case narrated above, it is seen that the assessee was allotted lease right in the Plot for a period of sixty years, which right was further assigned to Ws. Pathik Construction in the year in question. It is axiomatic that” the lease right in a plot of land are neither ‘land or building or both’ as such nor can be included within the scope of ‘land or building or both? The distinction between a capital asset being ‘land or building or both’ and any ‘right in land or building or both’ is well recognized under the I.T. Act. Sec. 54D deals with certain - cases in which capital gain on compulsory acquisition of land and building is charged. Sub-sec.(1) of sec. 54D opens with : “Subject to the provisions of subsection (2), where the capital gain arises from the transfer by way of compulsory acquisition under any law of a capital asset, being land or building or any right in - land or building, forming part of an industrial undertaking.....”. It is palpable from sec. 54D that ‘land or building’ is distinct from ‘any right in land or building’. Similar position prevails under the W.T. Act, 1957 also. Section 5(1) at the material time provided for exemption in respect of certain assets. Clause ~ (xxxii) of



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sec. 5(1) provided that. “the value, as determined in the prescribed manner, of the interest of the assessee in the assets (not being any land or building or any rights in land or building or any asset referred to in any other clauses of this sub-section) forming part of an industrial undertaking” shall be exempt from - tax. Here also it is worth noting that a distinction has-been drawn between ‘land or building’ on one hand and or any rights in land or building’ on the other. Considering the fact that we are dealing with special provision for full value of consideration in certain cases u/s.50C, which is a deeming provision, the fiction - created, in. this section cannot be extended to any asset other than those specifically provided therein. As sec. 50C applies only to a capital asst, being land or building or both, it cannot be made applicable to lease rights in a land. As the assessee transferred lease right for sixty years in the Plot and not land itself, the provisions of sec. 50C cannot be invoked. We, therefore, hold that the full value of consideration in the instant case be taken as Rs.2.50 crores.”

5. VoltAs Ltd. Vs. ITO (2016) 161 ITD 199 (Mumbai-Trib)
(Para 3.8 to 3.11)

Provisions of Section 50C could not be applied to transfer of development rights of the land owned by assessee.

6. CIT Vs. Greenfield Hotels & Estates (P.) Ltd. – [(2017) 389 ITR 68 (Bom)]

Section 50C will not be applicable while computing capital gains on transfer of leasehold rights in land and buildings. ”

8. Therefore in the light of the aforesaid facts and peculiar facts discussed and taking into consideration the ratio laid by the judicial precedent (supra), we are inclined to hold that the agreement regarding Plot-A was only transferring of development rights and therefore both the lower authorities erred in making addition u/s 50C of the Act and therefore we allow the appeal of the assessee and direct deletion of the additions made on this ground.

9. Coming to the Plot-B is concerned, we note that the assessee had sold the said property to the same developer M/s. Pratiksha Real Estate P. Ltd. The contract of sale deed is found placed at page 49 to



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102 of the P.B. There is no dispute that only sale consideration shown for the property is to the tune of Rs.5 Lakhs + two flats of 350 sq.ft each. However, the AO disputed the Stamp Duty Valuation of the property because it was shown as zero (0) only. The AO wondered as to how the Stamp Valuation can be only zero (0) for Plot B and therefore he referred to the DVO, who had valued the property at Rs.75,29,236/-. And based on that that the AO has made computation of LTCG addition (supra) which action of the AO has been confirmed by the Ld. CIT(A). However, we do not countenance such an action of the authorities below, for the simple reason that since the property under in question i.e. Plot-B was also encroached by the slum dwellers and till date i.e. between date of sale 21.07.2006 and as on date 03.06.2022, the property Plot-B is still in the hands of the illegal encroachers (slum dwellers) and the circle rate/stamp duty valuation of Plot-B is zero (0), which fact has been acknowledged in the conveyance deed by the registering authority. And even if Section 50C of the Act is attracted, the assessee has shown the sale price which is above the circle rate/SDV, the sale consideration shown by assessee has to be accepted. And Section 50C of the Act can be invoked only if the value adopted or assessed or assessable by any authority (SDV) for the purpose of payment of stamp duty is higher than the actual sale consideration, then only Section 50C of the Act can be invoked. Sub-Section (2) states also that where the assessee claims that the value adopted by the stamp valuation authority exceeds the fair market Value, as on the dates of transfer then the AO may refer the valuation of the capital asset to the DVO, which is not the case in hands. The



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term 'assessable' was inserted by Finance Act-2009 w.e.f. 01.10.2009. So in this case, the SDV is zero(0) i.e. it is not assessed or adopted by the stamp duty valuation, neither section 50C of the Act nor any reference to DVO could have taken place because assessee has not disputed it and therefore the addition made by the AO cannot be sustained and therefore we direct the deletion of the addition made on this issue also. We make it clear that this order of ours is based on peculiar facts and circumstances of the case wherein even though the owners/legal heir had been the title holders with Plot A & B could not enjoy the property at all which has devolved from their ancestors. It is noted that both properties were always in the possession of the encroaches/slum dwellers and in the light of the same, the assessee could not sell the properties to any willing buyers. The developer in this case for Plot-A could not develop the property, which he could not do even though more than 15 years have elapsed from the date of agreement as well as he could not do anything in the property at Plot-B till date. In the light of the peculiar facts and circumstances of the case and as per the discussion (supra) we allow the appeal of the assessee.

10. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the open court on this 10/06/2022.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 10/06/2022.
Vijay Pal Singh, (Sr. PS)



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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**