

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI ABY T. VARKEY, JM AND SHRI PRASHANT MAHARISHI, AM

आयकर अपील सं/ I.T.A. No.2434/Mum/2023
(निर्धारण वर्ष / Assessment Year: 2011-12)

Ashwin Vardhichand Shah Ground Floor, Shop NO.176/80 Kika Street, Gulalwadi, Mumbai- 400004.	बनाम / Vs.	National Faceless Assessment Centre (NFAC) ITO-15(1)(4) Matru Mandir, Mumbai.
स्थायी लेखा सं. /जीआइआर सं. /PAN/GIR No. : AAFPS1034D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Vimal Punmiya	
Revenue by:	Shri Manoj Kumar Sinha (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 19/10/2023
घोषणा की तारीख /Date of Pronouncement: 12/12/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)/(NFAC), Delhi dated 26.06.2023 for the assessment year 2011-12.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the capital gain of Rs.71,07,480/- u/s 50C of the Income Tax Act, 1961 (hereinafter "the Act").

3. Brief facts are that the assessee filed his return of income declaring total income of Rs.1,95,308/- on 04.07.2011 which was processed u/s 143(1) of the Act. Later, the case of the assessee was selected for scrutiny under CASS. According to the AO, the assessee is an individual having business income from proprietorship concern namely M/s. Hi Tech Business Centre, income from other sources,



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Short Term Capital Gain (STCG) on sale of shares. According to the AO [from perusal of the ITD details] he came to know that assessee is co-owner of tenancy rights; and in this year, assessee had entered into a tenancy agreement of two flats/building, which had a market value of Rs.31,60,080/- and Rs.39,47,400/- (total Rs.71,07,480/-). Further, according to him, as per AIR information, he noted that the assessee had entered into sale of property which was jointly owned by him with three others on 17.01.2011 for a consideration of Rs.39,47,400/- and Rs.31,60,080/- respectively. So, he issued show cause notice to the assessee as to why the same should not be treated as capital gain, since the Registrar has collected 'Registration Fee' and stamp duty on it. Pursuant thereto, the assessee replied that the documents registered were not sale agreement as alleged by AO, but tenancy agreement and pointed out that the AIR information depicting the transaction as "*sale of immovable property*" at Rs.30 Lakhs or more is incorrect; and the document in question which has been registered with Joint Sub-Registrar, Bombay City was tenancy agreement; and pointed out that agreement described assessee as *landlord* and the other party to the agreement as *tenant*; and pointed out that the agreement is not between buyer and seller which is necessary for sale agreement. Accordingly, the assessee asserted that the document in question was for giving the premises on rent and not for sale; And therefore, according to assessee the description given in the AIR statement being incorrect should not be the basis for taking any view which is adverse against the assessee. And also, pointed out that since no sale took place, question of capital gain arising from such a transaction doesn't arise. However, the AO



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did not accept the contention of the assessee. According to him, the transaction entered into with two parties i.e. Chunilal Velaji Prajapati & Tegaram Navaji Prajapati are nothing but surrendering of rights in the properties to Shri Chunilal Velaji Prajapati and Shri Tejaram Navaji Prajapati through a registered agreement for tenancy in respect of Second floor/Third floor (approximately 600 sq.ft) for very nominal rent. And according to AO, the transaction is a colourable device to avoid taxation. And therefore he was of the opinion that the entire transaction needs to be treated as transfer in the hands of the assessee and he computed the Long Term Capital Gain (LTCG) from the transaction by applying deeming provision of section 50C of the Act. And according to AO, since the stamp duty value was of Rs.71,07,480/- and original cost is Rs.Nil, he determined the LTCG from both the properties at Rs71,07,480/- by holding as under: -

“8. The assessee’s submission is not acceptable as the same is nothing but the assessee has surrendered his rights in the properties to Shri Chunilal Velaji Prajapati and Shri Tejaram Navaji Prajapati through a Registered Agreement for Tenancy of Second Floor/Third Floor for petty rent for the said property located in Kika Street, Mumbai-4 which comprising of 3 rooms, a passage, a bathroom a W.C admeasuring in the aggregate approximately 600 sq.ft. on each floor Perusal of agreement shown that it does not mention the period of tenancy but only specify the starting date of tenancy. Hence, It is held that the said transaction is a colourable device to avoid the taxation. Reliance is placed on the Supreme Court Judgement ie: the case of Mc. Dowell & Co. vs. CIT 154 ITR 148, wherein it is



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observed that the tax planning may be legitimate provided it is within the frame of law colourable devise cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods. Hence, the entire transaction is treated as transfer in the hands of the assessee and Long Term Capital Gain is worked out as per the provisions of section SOC of the Income-tax Act, 1961. Taking Stamp Duty value Rs.71,07,480/- as sale consideration for both floors and original cost at Nil, Rs.71,07,480/- is taxed as Long Term Capital Gain and added to the total income.”

4. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A)/NFAC which was pleased to confirm the action of the AO by holding as under: -

“Al. Summarizing the whole argument it can be held that money paid to the taxpayer for regularizing the Tenancy Agreement with TilokChand D Shah and Dinesh Metal Industries is to be treated as income in the hands of the taxpayer in the nature of tenancy Rights. The cost of acquisition is nil. And the entire amount is to be taxed under Capital gains. The total amount to be taxed as Capital gains is Rs 71,07,480. This amount is paid by Dinesh metal Industries. This is not a case of adverse possession. The executors/trustees had to be paid since the 2nd and 3rd floor properties were given on rent to Dinesh metal Industries and to TilokChand D Shah respectively and for regularizing the tenancy an agreement was entered into, this amount of Rs 71,07,480 was paid.



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V1.2 It is not a case of sale. The Estate of land ford i.e Jasumathi V Shah had given notice for vacating the said premises to TilokChand and Dinesh Metal Industries since they were not using the premises for their own use but illegally given away by way of sub tenancy. They were also not paying the rent to the landlord. In the month of Oct 2010 a settlement was finally arrived at and the tenancy of these two persons were recognized by entering into agreement of tenancy. The decision in the case of P.N. Amersey-HUF vrs. ITO [2012] 20 taxmann.com 704 (Mum.), the Tribunal has summarized the legal position correctly “Where assessee was having substantial rights in property as tenant (sub-tenant) and it was not merely a licence holder, amount received on surrender of such tenancy/sub. tenancy rights would be taxable as capital gains.” Considering the facts of the case the assessing officer's decision of taxing transfer of Tenancy Rights for a consideration of Rs 71,07,480 is upheld.”

5. Aggrieved, the assessee is before us.
6. We have heard both the parties and perused the records. The assessee along with four (4) brothers had entered into an agreement of tenancy on 15.12.2010 with Shri Chunilal Velaji Prajapati and Shri Tejaram Navaji Prajapati. As per the terms of agreement placed at page no. 32 to 49 of PB in the case of Shri Chunilal; and terms of agreement placed at page no. 52 to 69 of PB with Shri Tejaram, it is noted that the assessee along with his brothers named collectively as the “landlords” had given on rent, second & third floor of the building (*Property in question*) at Kika Street, Mumbai; and as per agreement,



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Shri Chunilal have to pay Rs.500/- and Shri Tejaram had to pay Rs.700/- to the land-lords. This agreement (tenancy agreement) has been registered before Registrar. And as per the AIR information, the market value of the property registered by Registrar was at Rs.31,60,080/- and Rs.39,47,400/- on which stamp duty paid was to the tune of Rs.360 + 360/-, registration fee of Rs.30,000/- + Rs.30,000/- and tax value of Rs.1,97,500/- and Rs.1,58,500/- was remitted in the Government Account. Taking note of the aforesaid transaction/AIR information, the AO was of the opinion that the assessee had surrendered his rights in the properties to Shri Chunilal Velaji Prajapati and Shri Tejaram Navaji Prajapati respectively and offered stamp duty value of Rs.71,07,480/- as sale consideration for both floors and calculated the Long Term Capital Gain (LTCG) at Rs.71,07,480/-. The Ld. CIT(A) confirmed the action of the AO by holding that *“money paid to the tax-payers for regularizing the tenancy agreement with Mr. TilokChand D Shah and Dinesh Metal Industries is to be treated as income in the hands of the tax-payers in the nature of the tenancy rights”*. According to him, the cost of acquisition is nil, the excess amount need to be taxed as capital gain. According to the Ld. CIT(A), the assessee/executors/trustees had to be paid consideration by Shri Chunilal & Shri Tejaram for regularizing the tenancy, since the 2nd and 3rd floor properties were given on rent by assessee to M/s. Dinesh Metal Industries and to Shri TilokChand D Shah respectively, and they in-turn gave the property to Shri Chunnilal and Shri Tejaram, (*without the consent of land-lords*); and vide agreement executed in the relevant year (AY. 2011-12), the assessee



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had entered into an agreement with Shri Chunnilal and Shri Tejaram for regularizing the tenancy and pursuant to that stamp-duty of two properties (Rs.71,07,480/-) had to be remitted for registration of the agreement. According to the Ld. CIT(A), the Estate of land-lord i.e. Late Jasumathi V Shah (*mother of assessee*) had given notice for vacating the said premises to the original tenants i.e. TilokChand D Shah and Dinesh Metal Industries who had illegally given away the said properties by way of sub-tenancy, to Shri Chunilal and Tejaram. According to the Ld. CIT(A), since both these sub-tenants were not paying rent to the land-lord, a settlement was finally arrived at in the month of Oct, 2010 and the tenancy of these two persons were recognized by entering into agreement of tenancy by the land-lord [*assessee being one among the four (4) co-owner brother*]. Therefore, according to Ld. CIT(A), the AO rightly taxed the transfer of tenancy right and dismissed the appeal of assessee.

7. According to assessee, the registered documents in question was evidencing only '*tenancy agreement*' terms of which was in accordance to Maharashtra Rent Control Act, 1999 (hereinafter "the MRCA 1999) and the tenancy was governed by MRCA Act, 1999. According to assessee, the AIR information was triggered since assessee registered the tenancy agreement of two floors of property in question to Shri Chunilal & Shri Tejaram as per the MRCA 1999, which makes it compulsory on the part of land-lord to register the tenancy/rent agreement as per Registration Act, 1908. And any failure on the part of the land-lord not to register the tenancy would invite



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imprisonment up to 3 months as per section 55 of MRC Act, 1999. Drawing our attention to the tenancy agreement placed at page 32 to 49 PB with Shri Chunilal and page no. 52 to 69 of PB with Shri Tejaram, the Ld. AR submitted that as per the terms of the agreement it can be seen that ownership of the two floors/property in question has not been transferred to Shri Chunilal or Shri Tejaram. According to the Ld. AR, it can be seen that they were only tenants and didn't enjoy the power to sell or mortgage or sub-lease the property (without permission of land-lords). And both the tenancy agreement has incorporated the provision of MRC Act, 1999 which permits the assessee to evict the tenant for failure to pay the rent as per section 15 of MRC Act, 1999. Moreover, according to Ld. AR, there was no consideration passed between land-lord and tenant. Apart from the aforesaid facts and despite assessee pointing out the aforesaid facts, there was no enquiry on the part of AO/Ld. CIT(A) to verify from the tenants (Shri Chunilal or Shri Tejaram) as to whether there was any transaction of the nature of transfer as contemplated u/s 2(47) of the Act. According to Ld. AR without any material to show that tenancy agreement entered into between assessee [who was one of the four owner of the properties (two flats)] and the two persons, were in the nature of transfer, AO/Ld CIT(A) erred in holding that the agreement was sham or colourable device to avoid tax. Therefore, it was urged that the action of AO/Ld. CIT(A) to bring in deeming section 50C of the Act to tax the transaction is erroneous. The Ld. AR cited the following decisions in support of his aforesaid contention, which are as under: -



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(1) Atul G. Puranik v ITO (ITAT Mumbai) (2011) 11 taxmann.com 92

Section 50C of the Act applies only to a capital asset, 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 section 50C of the Act cannot be invoked. 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 of the Act, which is a deeming provision, the fiction created in this section cannot be extended to any asset other than those specifically provided therein.

(2) ACIT v M/s. Munsons Textiles (ITAT Mumbai)

Only for the limited purpose of computation of capital gain in respect of sale of land and building, stamp duty value has to be substituted for sale consideration in view of specific provisions of section 50C of the Act. Therefore, provisions of section 50C of the Act cannot be applied in case of transfer of tenancy rights in respect of land or building or both.

(3) DCIT v Tejinder Singh (2012) 19 taxmann.com 4/50 SOT 391

The Tribunal held that the phrase 'land or buildings or both' will not include rights in land or building or both such as tenancy rights.

(4) Kishori Sharad Gaitonde v ITO (ITAT Mumbai) ITA No.1561/M/09

In case of Kishori Sharad Gaitonde v ITO (ITAT Mumbai) ITA No. 1561/M/09 take a same view that section 50C of the Act not applied on tenancy right.

Observation of Tribunal is as follows:



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Section 50C of the Act does not apply to “rights” in land and building like tenancy rights

The assessee, a tenant in a flat, sold tenancy rights for Rs.30 Lakhs and offered long-term capital gains on the basis that the said sum was the consideration. The AO took the view that as the market value adopted the Sub-Registrar was Rs.33,11,200/- the said market value had to be adopted as the consideration u/s 50C of the Act. This was confirmed by the Ld. CIT(A). On appeal by the Ld. Assessee, held allowing the appeal;

(i) Section 50C of the Act is a deeming provision and incorporates a legal fiction that if the consideration received on transfer of land or building is less than the stamp duty value, the said stamp duty value shall be deemed to be the full value of consideration for purposes of computing capital gains;

(ii) It is trite law that a legal fiction cannot extend beyond the purpose for which it is enacted. As long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent is impermissible. The statute has to be interpreted on the basis of the language used. No words can be added and only the language used can be considered so to ascertain the proper meaning and intent of the legislation. (Las on interpretation discussed in detail);

(iii) Section 50C of the Act does not apply to all capital assets but only to “land or building”. A tenancy right is not “land or building” (It is “rights” in building). Consequently, section 50C of the Act has no application and the capital gains have to be computed on the basis of the actual consideration and not the stamp duty value.

8. In the light of the aforesaid discussion, we find that there is no material on record to find that the registered agreement between parties be treated as sale/transfer of properties in question. Assessee is



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one of four (4) co-owners of two flats and from the averments of the registered tenancy agreement, the Ld. DR could not show that title of the property has been passed on to the tenant;(Shri Chunnilal or Shri Tejaram). From the terms of the agreement between the assessee who was one of the four (4) owners of the facts in question, we find it is a tenancy agreement and the terms of the agreement shows that provisions of MRC Act, 1999 are incorporated and therefore applies to the agreement between parties. Moreover, there was no evidence of any consideration being passed between the assessee and Shri Chunnilal and Shri Tejaram. The agreement between parties was for giving the flats in question on rent. Thus, the Ld. CIT(A) erred to upholding the action of the AO who erroneously treated the transaction of tenancy/rental agreement to be that of transfer of property without any material to hold otherwise. Therefore, in the facts and circumstances of the case in hand, we are inclined to delete the addition made by AO, that also by applying section 50C of the Act, which deeming provision in no case is applicable to the facts of the case.

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

Order pronounced in the open court on this 12/12/2023.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 12/12/2023.
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 / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai