

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

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT
MEMBER**

&

SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

ITA No. 3462/Mum/2023

(A.Y. 2016-17)

Dhan Bahadur Gagan Chand D-2201, Sheth Avalon, Next to Jupiter Hospital, Thane-400606	Vs.	Commissioner of Income- tax Appeals, NFAC, Delhi North Block, National Faceless Assessment Centre, New Delhi-110001
Appellant		Respondent
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No: ACXPC0068K		

Appellant by :	Shri. Bhadresh Doshi
Respondent by :	Smt. Mahita Nair

Date of Hearing	16.04.2024
Date of Pronouncement	02.05.2024

आदेश / ORDER

PER SUNIL KUMAR SINGH (JM) :-

1. This appeal has been preferred against the impugned order dated 02.08.2023 passed u/s 250 of the Income-tax Act, 1961 [hereinafter referred as "Act"] by the Ld. Commissioner of Income-tax (Appeals)/NFAC in appeal No. 1/10402/2018-19, wherein the Ld. CIT(A) has confirmed the addition of ₹ 1,45,60,000/- as capital gain

in the appellant's total income added by AO vide assessment order dated 28.12.2018.

2. The brief facts leading to this appeal state that the assessee filed his return of income for A.Y. 2016-17 on 29.07.2016 declaring his total income as ₹26,33,430/-. The case of the assessee was selected for scrutiny under CASS. In response to the statutory notices, the assessee submitted before Assessing Officer [AO] that he entered into development agreement with M/s. Indo Asian Buildcon Pvt. Ltd. [hereinafter referred to as the "company"] on 23.03.2016 with respect to the land (Gut No. 274) at Dhakne as plot Nos. 1 to 39, admeasuring 14,000 Sq.mtr & delivered possession for development and construction over the land for the consideration (compensation) of ₹2,51,000/-. The said land was earlier purchased by the appellant assessee vide purchase agreement dated 29.11.2013 for the consideration of ₹20,00,000/- (AO has shown as 21,00,000/-). The AO found that the government valuation/stamp duty valuation was stated to be ₹1,66,60,000/- and stamp duty of ₹ 5,00,000/- along with registration fee of ₹30,000/- was paid for this transaction by the appellant assessee, hence, added short-term capital gain of ₹1,45,60,000/- in his total income for the relevant AY 2016-17. On being aggrieved by the impugned order, the assessee preferred an

appeal before the Ld. CIT(A). The Ld. CIT(A), vide order dated 02.08.2023, confirmed the aforesaid additions made under the assessment order, hence this appeal.

3. The main grounds under appeal read as under:

“1. In the facts and circumstances of the case and in law, Ld. CIT - (A) has erred in confirming the addition of Rs. 1,45,60,000/- treating the same as capital gain arising on transfer of land to the company under Section 50C of the Act without appreciating the facts that the land on which capital gain arise was purchased on behalf of the company Indo Asian Buildcon Pvt Ltd. Hence, treating the transfer as capital gain and thereby making addition of Rs.1,45,60,000/- under section 50C of the Act is unjustified and the same maybe deleted.

2. In the facts and circumstances the Id. CIT(A) has passed an order without considering the justification provided to them through submissions.”

Additional Grounds:

During the course of argument appellant assessee submitted following additional ground of appeal:

“2. On the facts and circumstances of the case and in law, without prejudice, it may please be held that the provisions of Section 50C are not applicable to the facts of the case and the short-term capital gains arising should be computed only with regard to the actual consideration received.”

4. Pursuant to the notice, the Ld. Departmental Representative [DR] appeared and presented herself for final hearing of appeal.

5. We have perused the material available on record and heard Ld. representatives for both the parties.

6. With reference to the aforestated grounds, the main points for consideration under appeal are as under:

- I. Whether the appellant assessee purchased the said land on behalf of the company?
- II. Whether short term capital gain arising out of such transfer of land, be computed only with regard to the actual consideration received by the assessee and section 50C of the Act is not applicable?

7. Firstly, we shall examine as to whether the appellant assessee purchased the said land on behalf of the company?

8. The Ld. Representative for the appellant has argued that he is director of the company submitting that the land, at which the capital gain arose, was purchased by the appellant assessee on behalf of the company. Entire consideration at the time of purchase of the said land was paid by the company itself. A 'development agreement' was executed on 23.03.2016 between appellant assessee and the company. According to the terms of the agreement, the possession of the land was handed over to the company for development and construction work etc.. The capital gain could not have been added in the total income of the appellant for the relevant AY. Further submitted that section 50C of the Act is not applicable in the facts of the present

case. Prayed to delete the addition of capital gain from the income of the appellant assessee for the relevant A.Y. 2016-17 and to set aside the impugned order.

8.1 Ld. Representative for the appellant assessee has referred consolidated order dated 16.09.2016 passed by ITAT, Mumbai in ITA No. 5330/Mum/2009 & ITA No. 5331/Mum/2009, Voltas Ltd. Mumbai V. ITO WD 7(3)(4), Mumbai & ITA 5320/Mum/2009, ITO WD 7(3)(4) Mumbai V. Voltas Ltd. Mumbai. The relevant Para 3.11 reads as under:

3.11“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 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 has been wrongly applied upon the impugned transaction.....”

8.2 The appellant assessee has further cited order dated 12.02.2018 passed by the division bench of the Hon'ble Panjab & Haryana High Court in ITA No. 387 of 2015 in PCIT-Rohtak v. Ram Kumar Duhan, wherein Hon'ble High Court, in Para 8, held as under:

“8. Copies of the return for the assessment year 2009-10 and 2010- 11 showed that the agricultural income was declared. As per the Maharashtra State laws, agricultural land can be acquired only

by farmers. The transfer was without consideration as per Frokt khat. The stamp duty and registration fee was paid by the Company. The land in the name of the assessee and Shri Niwas Thakur was shown in the audited balance sheet of the Company. Shri Niwas Thakur filed an affidavit dated 01.10.2010 to the effect that transfer of land was without consideration and for administrative reasons. MOU was entered between the Company and its Directors that the land bought in the name of the Directors shall be the sole property of the Company. The sale deed dated 16.10.2010, vide which the land under consideration was sold to M/s Oracle Realty Developers, showed that the consideration is to be paid to the Company. Even the AO in its remand report admitted that the sale proceeds were received by the Company. The bank statement of the Company fortified the said fact. The assessment of the Company was framed vide order dated 08.11.2011 under Section 143 (3) of the Act. On analysing the above mentioned evidence and fact, the addition was deleted.”

9. The Ld. DR has argued that the appellant assessee has purchased the said land on 19.11.2013 on his own name and has entered into said ‘development agreement’ with the company on 23.03.2016. The land was handed over to the company along with the possession along with all rights in the land for the consideration of Rs. 2,51,000/- vide cheque No. 9062 of Kotak Mahindra Bank. There is no MOU between the assessee and the company to infer that the said land was purchased by the assessee on behalf of the company. The consideration was far less than the government valuation of Rs. 1,66,60,000/-. AO has rightly applied section 50C of the Act. Ld. DR

has requested to confirm the order of the Ld. CIT(A) and to dismiss the appeal.

9.1 The Ld. DR has referred order dated 27.07.2016 passed by the Mumbai bench of this Tribunal in ITA No. 5075/Mum/2010 the ACIT 25(3) Mumbai v. M/s Dattani Development Kandivali(W), Mumbai, wherein the Ld. Tribunal has held in relevant Para 10 of its order as under:

“10.....Thus, the land which was sold during the previous year by the assessee, thus keeping in view our above discussions in the light of facts and circumstances of the case, was a capital asset within the provisions of Section 2(14) of the Act and the valuation of the land as per stamp duty valuation authorities as per section 50C of the Act was rightly adopted by the AO as full value of consideration.....,

9.2 The Ld. DR has also referred order dated 31.05.2016 passed by the Mumbai bench of this Tribunal in ITA No. 5038/Mum/2010 the Income-tax Officer, Ward 21(1)(1), Mumbai v. Bharat Raojibhai Patel, wherein the Ld. Tribunal has held as under:

“12. In view of the above proposition of law and the facts of the case, we are of the view that in the present case what was transferred by the assessee was development rights in respect of the property. On the plot of land owned by the assessee in co-ownership, which was subject matter of development agreement, certain area of construction was permissible, which was the normal FSI permissible as per the development control rules of the state. Besides the above, the plot of land owned by assessee and

carried out additional construction, over and above the permissible FSI, can be made as the plot of land, which was capable of receiving TDR. TDR could be obtained by the developer and could be loaded on the normal FSI construction permissible as per the development control rules. The right to construct building on the said plot of land by consuming FSI and the right as a receiving plot owner to load TDR over and above normal FSI, are rights which accrue to the assessee by virtue of development control regulation of the state government. These are rights over property, which are capital in nature and comes within the definition of capital asset u/s. 2(14) of the Act. The consideration received by the assessee is for transfer of rights over such capital asset for the reason that the 3rd party purchaser has no interest over the land is not relevant. The permission to load the TDR on permissible FSI allowed by the owner is by itself a transfer of right in immovable property and therefore, clearly falls within the provision of section 45 of the Act. Therefore, we are of the considered view that in the present case before us, the sale of development rights is to be taxable as long term capital gain and not as income from other sources as held by AO. The consequential deductions/exemptions u/s. 54 of the Act etc. will be allowed to the assessee. We direct the AO accordingly. This issue of Revenue's appeal is dismissed.

13. As regards to the second issue regarding adoption of market value as per the provisions of section 50C of the Act, we are of the view that in the present case assessee received consideration in two-folds i.e partly cash and partly in kind i.e. by way of property in the shape of flats in the re-developed property. Such transactions are thus a combination of sale and exchange.We find that as per development agreement the market value of assessee's share is Rs. 2,31,41,000/- Further, assessee has received the sum of Rs.

11.20 lacs due to fall in free area committed by the developer i.e committed area of 4,000 sq. Ft. as against the same received area is only 3776 sq. Ft. The assessee has computed market value as per agreement at Rs. 34.36 lacs which is the total area of 3776 sq. Ft. as attached in the agreement. Accordingly, the market value of 224 sq. Ft. is Rs. 2,03,830/- only. In view of the above, we are of the view that the value declared in agreement (including all transaction) will be higher than the stamp duty valuation”

10. The main foundation of the argument of the assessee in the instance case is that he was the director of the said company and the said land was purchased by him through registered deed dated 29.11.2013. A perusal of this deed shows that the said land was purchased from about 10 persons on the name of the appellant assessee as sole vendee for the consideration of Rs. 20,00,000/- (AO has shown Rs. 21,00,000/-). According to Para 4 of the registered deed, it transpires that the consideration was paid by the company through different cheques to the different vendors to the extent of their shares in the respective piece of land but does not contain any citation in the deed that the said land was purchased on behalf of the company only

11. The English translation copy of registered development agreement dated 23.03.2016, written in Marathi language, shows that this document is titled at its top as “To Develop Property to sell

purpose Agreement”. Appellant assessee has been described as owner and in possession over the said land and after converting the land in question from agricultural to non-agricultural purposes, vide concerned SDM’s order BD/land purpose/NAP/LR -03/16, dated 08.03.2016, appellant assessee executed the said agreement in favour of the company by the delivery of possession along with rights of construction in order to prepare plots with intent to sell to third party purchasers. It is mentioned in Para 16 of the agreement that the second party (appellant) handed over the said property to the first party (company) with title clearance. Para 3 of aforesaid agreement further states that the appellant owner also executed power of attorney with irrevocable rights in favour of the company on the same date i.e on 23.03.2016 itself. However, no such power of attorney is on record. The perusal of the entire contents of the aforesaid development agreement shows that it contains all ingredients of a sale. Needless to say in such a crystal clear situation, doctrine of part performance of a contract was foreign to the facts of the present case as it could be used only as a shield and not as a sword as provided u/s 53A of the TP Act.

12. None of the aforesaid two documents speak as to whether the appellant assessee was authorized by the said company to purchase

the said land on behalf of the company. The account books of the company merely indicate the name of the appellant along with 4 others with different amount as long term borrowings at its pars 2.3 and do not clarify the above fact in specific terms. Undisputedly, the Maharashtra State Laws, agricultural land could be acquired only by farmers. The appellant assessee purchased the said land as a farmer on 23.03.2016. The appellant could not show any memo of understanding with the company so as to infer that he purchased the said land on behalf of the company. The facts of the referred cases of this Tribunal in Voltas and the facts order of Punjab and Haryana High Court in Ram Kumar Duhan, *ibid*, are not identical to the facts of the instant case. The first point is accordingly decided in negative against the appellant assessee.

13. On the second point of consideration, the applicability of section 50C of the Act has to be examined. The relevant part of the section reads as under:

“50C.(1) *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 a [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.

.....”

14. The consideration (compensation) of Rs. 2,51,000/-, shown in the development agreement dated 23.03.2016, is apparently, far less than the value of Rs. 1,66,60,000/- as endorsed on the face of agreement, which is assessed by the state valuation authority. The facts of M/s Dattan Development and Bharat Raojibhai Patel were decided by the coordinate benches of this tribunal, are similar to the facts of the instant appeal. The short term capital gain cannot, therefore, be computed on the basis of actual consideration which is too less than the value, assessed by the state valuation authority. The AO has, thus, rightly determined the short term capital gain for the relevant AY 2016-17 as Rs. 1,45,60,000/- exclusive of stamp duty of Rs. 5,00,000/- and registration fee of Rs. 30,000/-, which has been arrived at for the purpose of section 48 of the Act in accordance with the aforequoted section 50C(1) of the Act. Hence, section 50C of the Act is clearly applicable in the facts of the instant case. The second point is thus decided in negative against the appellant assessee.

15. In view of the above, we do not find any error of fact or law in the impugned order passed by the Ld. CIT(A) in confirming the addition of Rs. 1,45,60,000/- as short-term capital gain, arising out of the

transfer of non-agricultural land by the appellant assessee. The impugned order dated 02.08.2023 is accordingly confirmed. The appeal is liable to be dismissed.

16. In the result, the appeal filed by the assessee is dismissed.

Order Pronounced in open court on 02.05.2024

Sd/-

(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Place: Mumbai

Date 02.05.2024

ANIKET SINGH RAJPUT/STENO

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 DR, ITAT,
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