

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'बी' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH, MUMBAI

श्री राजेंद्र, लेखा सदस्य एवं श्री शक्तिजीत दे, न्यायिक सदस्य के समक्ष

BEFORE SHRI RAJENDRA, ACCOUNTANT MEMBER AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER

आयकर अपील सं. / ITA no.7582/Mum./2014

(निर्धारण वर्ष / Assessment Year : 2009-10)

Shri Manohar H. Kakwani
M/s. K. Mahesh Kumar
B. Baghubhai Chambers
N.N. Street, Masjid Bunder
Mumbai 400 009
PAN – AABPK3395H

..... अपीलार्थी /
Appellant

v/s

Income Tax Officer
Ward-13(3)(1), Aayakar Bhawan
101, M.K. Road, Mumbai 400 020

..... प्रत्यर्थी /
Respondent

निर्धारिती की ओर से / Assessee by : Shri K.R. Lakshminarayanan

राजस्व की ओर से / Revenue by : Dr. Santosh Mankoskar

सुनवाई की तारीख /
Date of Hearing – 23.09.2015

आदेश घोषणा की तारीख /
Date of Order – 09.10.2015

आदेश / ORDER

शक्तिजीत दे, न्यायिक सदस्य के द्वारा /
PER SAKTIJIT DEY, J.M.

This is an appeal filed by the assessee against the order dated
31st October 2014, passed by the learned Commissioner (Appeals)-24,

Mumbai, for the assessment year 2009–10. The assessee has raised ten grounds of appeal.

2. Grounds no.1 and 10, being general, do not require any specific adjudication. Hence, these grounds are dismissed.

3. In grounds no.2, 3 and 4, the assessee has raised the common issue of disallowance of exemption claimed on amount received from developer towards transfer of development rights (in short "TDR").

4. Briefly the facts relating to this issue are, the assessee an individual, filed his return of income for the assessment year under consideration on 30th September 2009, declaring total income of ₹ 15,23,090. During the assessment proceedings, the Assessing Officer, while verifying the return of income filed by the assessee, noticed that the assessee has claimed exemption of the amount received by him on account of transfer of development rights which amounts to ₹ 2.97 crores. Being of the opinion that the amount received by the assessee attracts long term capital gain, the Assessing Officer issued a show cause notice requiring the assessee to explain why he has not offered capital gain on amount received towards TDR. As stated by the Assessing Officer in the assessment order, in reply to the show cause notice, the assessee made his submissions on 4th November 2011,

offering an amount of ₹,2,32,56,607, as long term capital gain after claiming exemption under section 54EC of the Act. The Assessing Officer completed the assessment by computing long term capital gain on sale of TDR at ₹ 2,32,56,607.

5. Being aggrieved of such computation of long term capital gain, the assessee preferred appeal before the first appellate authority. The assessee, before the learned Commissioner (Appeals), again claimed exemption from capital gain on the amount received on sale of TDR. It was the submissions of the assessee that as there is no cost of acquisition of the TDR, capital gain cannot be computed. The learned Commissioner (Appeals), after perusing the development agreement and other related facts, observed that before the Assessing Officer the assessee has himself given a computation of long term capital gain adopting the cost of acquisition of land holding rights at ₹ 17,43,393, which has been accepted by the Assessing Officer. The learned Commissioner (Appeals), therefore, held that since there is a cost of acquisition of lease hold rights to the assessee, the claim that capital gain cannot be computed in the absence of cost of acquisition is not acceptable. In this context, he relied upon the decision of the Tribunal, Mumbai Bench, in Chiranjeev Lal Khanna v/s ITO, [2011] 132 ITD 474 (Mum.). Having held so, the learned Commissioner (Appeals)

proceeded to enhance the assessment by estimating the market value of the flats received by the assessee as well as restricting exemption under section 54 of the Act. Against this order of the learned Commissioner (Appeals), the assessee preferred appeal before the Tribunal. The Tribunal, vide order dated 11th August 2014, set aside the order of the learned Commissioner (Appeals) with a direction to decide the matter afresh. In pursuance of such direction of the Tribunal, the impugned order has been passed by the learned Commissioner (Appeals) more or less adopting the findings of his predecessor-in-office on this issue.

6. The learned Counsel for the assessee, reiterating the stand taken before the Departmental authorities, submitted before us that the assessee has retained for himself FSI admeasuring 5,580 sq.ft. which was to be utilised in construction of 3½ residential flat in the new building which the developer constructed and handed over to the assessee for construction cost of ₹ 80 lakhs adjusted against the compensation. It was submitted, as the assessee has not transferred any property to the developer, there cannot be any capital gain. He submitted transfer of TDR rights cannot be subjected to long term capital gain as there is no cost of acquisition for such rights. In this context, he relied upon the decision of the Hon'ble Jurisdictional High

Court in CIT v/s Sambhaji Nagar Co-operative Housing Society Ltd., ITA no.1356/2012, judgment dated 11th December 2014. He also relied upon a number of decision of the Tribunal as submitted in case law compilation. Thus, it was submitted by the learned Counsel for the assessee when there is no cost of acquisition to the TDR obtained by the assessee under the Development Control Rules, 1991, capital gain cannot be computed. The learned Counsel for the assessee also relied upon another decision of the Hon'ble Jurisdictional High Court in CIT v/s Land Breez Co-operative Housing Society Ltd., in ITA no.334 of 2013, dated 11.03.2015, expressing similar view. As far as reliance placed by the learned Commissioner (Appeals) on the decision of the Tribunal, Mumbai Bench, in Chiranjilal Khanna (supra), the learned counsel submitted that the appeal preferred by the assessee in that case has been admitted by the Hon'ble Jurisdictional High Court and still pending adjudication.

7. The learned Departmental Representative, on the other hand, relying upon the findings of the learned Commissioner (Appeals), submitted before us that the assessee having himself shown cost of acquisition in the computation of long term capital gain submitted in the course of assessment proceedings his claim that there is no cost of

acquisition cannot be accepted. He, therefore, submitted that the claim of exemption by the assessee is without any basis.

8. In the rejoinder, the learned Counsel for the assessee submitted that the assessee never voluntarily computed long term capital gain on the compensation received on sale of TDR. Only when compelled by the Assessing Officer, as an alternative argument, the assessee has submitted computation of long term capital gain showing cost of acquisition on the lease hold rights but that cannot be considered as cost of acquisition of TDR.

9. We have considered the submissions of the parties, perused the orders of the Revenue authorities and the material available on record. As could be seen from the impugned order of the learned Commissioner (Appeals), he has decided the issue merely adopting the finding of his predecessor in the earlier order. It is the reasoning of the learned Commissioner (Appeals) that since the assessee himself has shown cost of acquisition in the computation of long term capital gain submitted before the Assessing Officer, his claim that there is no cost of acquisition cannot be accepted. However, as could be seen, the assessee from the very beginning is claiming the compensation received on sale of TDR rights to be exempt from taxation. Only as an alternative argument, the assessee has submitted a computation of

long term capital gain at the instance of the Assessing Officer. In our view, that cannot be construed to be an admission by the assessee of cost of acquisition on sale of TDR. There is no dispute to the fact that the TDR rights accrued to the assessee under the Development Control Rules, 1991. It is further evident, instead of utilising the TDR rights himself, the assessee decided to transfer such rights to the developer for construction. However, there is no two opinion with regard to the fact that as far as the acquisition of development rights under Development Control Rules, 1991, is concerned, there is no cost to the assessee. Therefore, the issue to be decided is whether capital gain can be computed in respect of capital asset which has no cost of acquisition. The Hon'ble Jurisdictional High Court in Sambhaji Nagar Co-operative Housing Society Ltd. (supra) while considering identical nature of dispute relating to computation of capital gain on sale of TDR rights acquired under Development Control Rules, 1991, after considering the decision of the Hon'ble Supreme Court in a case referred to therein held as under:-

"11) Thus, the conclusion of the Hon'ble Supreme Court is that an asset which is capable of acquisition at a cost would be included within the provisions pertaining to the head "Capital gains" as opposed to assets in the acquisition of which no cost at all can be conceived. In the present case as well, the situation was that the FSI/TDR was generated by the plot itself. There was no cost of acquisition, which has been determined and on the basis of which the Assessing Officer could have proceeded to

levy and assess the gains derived as capital gains. It may be that subsection (2) of section 55 clause (a) having been amended, there is a stipulation with regard to the tenancy rights. However, even in the case of tenancy right, the view taken by the Hon'ble Supreme Court, after the provision was substituted w.e.f. 1st April, 1995, is as above. The further argument is that the tenancy rights now can be brought within the tax net and in the present case the asset or the benefit is attached to the property. It is capable of being transferred. All this may be true but as the Hon'ble Supreme Court holds it must be capable of being acquired at a cost or that has to be ascertainable. In the present case, additional FSI/TDR is generated by change in the D. C. Rules. A specific insertion would therefore be necessary so as to ascertain its cost for computing the capital gains. Therefore, the Tribunal was in no error in concluding that the TDR which was generated by the plot/property/land and came to be transferred under a document in favour of the purchaser would not result in the gains being assessed to capital gains. The factual backdrop is noted by the Tribunal in para 3 and thereafter the rival contentions. The Tribunal concluded and relying upon its order passed in two other cases that what the Assessee sold was TDR received as additional FSI as per the D. C. Regulations. It was not a case of sale of development rights already embedded in the land acquired and owned by the Assessee. The Tribunal's conclusion and further to be found in para 11 is based on its view taken in the case of New Shailaja Cooperative Housing Society Ltd. The Tribunal has reproduced that conclusion. The Tribunal's conclusion arrived at in the case of New Shailaja Cooperative Housing Society Ltd., is based on the Hon'ble Supreme Court's decision in the case of B. C. Srinivasa Shetty (supra). The Tribunal concluded that the Assessee had not incurred any cost of acquisition in respect of the right which emanated from 1991 Rules, making the Assessee eligible to additional FSI. The land and building earlier in the possession of the Assessee continued to remain with it. Even after the transfer of the right or the additional FSI, the position did not undergo any change. The Revenue could not point out any particular asset as specified in subsection (2) of section 55. The conclusion of the Tribunal is imminently possible and in the given facts. That is also possible in the light of the legal position as noted by language of section 55(2) and the Judgment of the Hon'ble Supreme Court, which is in the field."

Thus, on a careful reading of the aforesaid binding precedent of the Hon'ble Jurisdictional High Court, it is clear that in the absence of cost of acquisition of TDR rights, amount received on sale of such TDR rights cannot be subjected to long term capital gain as the computation provisions contained under section 48 of the Act, cannot be worked out. The Hon'ble Jurisdictional High Court again in Land Breeze Co-operative Housing Society Ltd. (supra), following its own decision in Sambhaji Nagar Co-operative Housing Society Ltd. (supra) dismissed the Departmental appeal expressing same view. Respectfully following the aforesaid binding precedent of the Hon'ble Jurisdictional High Court, we hold that the amount received by the assessee towards compensation on sale of TDR cannot be subjected to long term capital gain as there is no cost of acquisition to the assessee for acquiring such rights. Accordingly, accepting the assessee's claim, we allow the grounds raised by the assessee.

10. As in the preceding paragraph, we have held that compensation received on account of sale of TDR rights is not taxable, the other issues raised by the assessee relating to claim of exemption under section 54 of the Act and enhancement of compensation of ₹ 7,86,99,310, have become redundant and not required to be adjudicated upon.

11. In the result, assessee's appeal stands partly allowed.

Order pronounced in the open Court on 09.10.2015

Sd/-
राजेंद्र
लेखा सदस्य
RAJENDRA
ACCOUNTANT MEMBER

Sd/-
शक्तिजीत दे
न्यायिक सदस्य
SAKTIJIT DEY
JUDICIAL MEMBER

मुंबई MUMBAI, दिनांक DATED: 09.10.2015

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

- (1) निर्धारिती / The Assessee;
- (2) राजस्व / The Revenue;
- (3) आयकर आयुक्त(अपील) / The CIT(A);
- (4) आयकर आयुक्त / The CIT, Mumbai City concerned;
- (5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
- (6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy
आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury
वरिष्ठ निजी सचिव / Sr. Private Secretary

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