

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

Before Shri Mahavir Singh, Judicial Member
& Shri Rajesh Kumar, Accountant Member

ITA No.5038/Mum/2010
Assessment Year : 2007-08

ITO Ward 21(1)(1), Mumbai	Vs.	Shri Bharat Raojibhai Patel 34, Ram Niwas Valabhnagar Society, N S Road No.3, JVPD, Vile Parle (W), Mumbai- 400 056
(Appellant)		PAN AABPP3141Q Respondent)

Appellant By : Smt Bharati Singh
Respondent By : Shri Sanjay R Parikh

Date of Hearing :23.05.2016

Date of Pronouncement : 31.05.2016

ORDER

Per Mahavir Singh, Judicial Member

This appeal by revenuee is arising out of the order of the CIT(A) – 32, Mumbai, in appeal No.CIT(A)-32/21(1)(1)/IT-261/09-10 dated 31.03.2010. The assessment was framed by the ITO 21(1)(1), Mumbai, for A.Y. 2007-08 vide his order dated 20.11.2009 u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The two interconnected issues raised by the revenue are as under:

i) Whether consideration received as a result of transfer of land and building in term of development agreement constitutes Long term capital gain or income from other sources in the given facts and circumstances of the case?

ii) Whether the CIT(A) has erred in not considering stamp duty valuation u/s 50C of the Act for the purpose of computing Long Term Capital Gains for development agreement.

For these two issues, the revenue has raised the following two grounds:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in giving finding that Sec. 50C is applicable only in case of transfer of land and building without considering the fact that in the instant case, the development right could not be executed without transfer of land and building.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering the stamp duty valuation of the development agreement of Rs.2,31,41,000/- and Rs.34,36,000/- while considering total sale consideration u/s. 50C of the Act."

3. Briefly stated facts are that the assessee is a co-owner with his brother of a property i.e. land and building at plot no.34, Ram Niwas, Vallabh Nagar Society, N.S.Road No.3, Vile Parle (W), Mumbai – 400056. During the year under consideration, the assessee along with his brother executed an agreement of sale-cum-development of the said property dated 01.12.2006 with a builder viz. M/s. M L Builders for the following consideration:

- a. Two flats of 4000 sq. Ft. Carpet area each
- b. Car parking space
- c. Consideration in cash amounting to Rs.3 crores (Rs.1.75 crores each)

Another condition placed was that as per plans approved by the Municipal Corporation, the developer in case reduces the area then he has to pay further sum of Rs.11.20 lacs to the assessee. The assessee was finally given carpet area of 3776.22 sq.ft. and also further sum of Rs.11.20 lacs as per sub-agreement dated 19.03.2007. The assessee worked out the capital gain on transaction of sale cum development of the plot as under:

Sale of Development Right		Rs.
a) Amount recd in cash	18620000	
b) Flat of 3776.22 sq ft carpet area (construction cost)	9062928	
		27682928
Less : Selling Exp		<u>262080</u>
Net Sales Proceeds		27420848

<u>Cost</u>	Cost	Indexed Cost	
Land valued as on 1981	1274000	6612060	
Building			
1 st Bldg 1985	953308	3958135	
2 nd Bldg 1998	834974	1309219	
98-99	188695	279011	
99-2000	<u>1854832</u>	<u>2474699</u>	
Total Land & Bldg Cost	5105809	14633123	
Less: 50% Share of cost		7316562	<u>7316562</u>
Capital gain			20104286

Less: Exemption u/s 54 Value of Flat Recd	9062928	
Less: Exemption u/s. 54 EC Investment in REC Bonds	5000000	
Less: Exemption u/s. 54 Capital Gain Scheme	<u>6000000</u>	<u>20062928</u>
Taxable Long Term Gain on sale of House Property (co-owned)		41358

The AO during the course of assessment proceedings went through the recitals of the development agreement, which are reproduced in the same and noted that there is no transfer of rights, title and interest in the plot and the income arising from sale of development rights is to be treated as income from other sources and not as Long term capital gains as declared by the

assessee. The AO finally treated the entire sum of Rs.1.71 lacs as income from other sources by observing in para 7 as under:

"In view of the above, the entire amount of Rs.3,50,00,000/- (assessee's share being 50% the amount of Rs.1,75,00,000) is treated as income from other sources. Further, due to the difference in the carpet area as agreed upon in the above said agreement of giving 4000 sq. ft. (each) to the co-owners, the aggregate area of the 3rd & 4th floors is 3776.22 st. ft only. Due to the difference area of 224 sq.ft., carpet are for both the 3rd & 4th floors the developer has made a separate agreement and by this agreement the developer has paid an additional amount of Rs.11,20,000/- to the second owner i.e., the assessee. The total monetary consideration received by the assessee is worked out at Rs.1,86,20,000/- as per assessee's computation of long term capital gain. Besides the monetary benefit, the assessee is also receiving the flats of 3776.22 sq.ft (carpet) area i.e., the construction cost and the assessee has adopted the value at Rs.90,62,928/-. The total benefit received by way of development agreements is worked out to Rs.2,76,82,928/-"

4. Further, the AO also noted that as per stamp duty valuation the rates /market valuation of the property is at 4,62,82,000/- as against the value declared by the assessee at Rs.3,50,00,000/- vide first agreement dated 1.12.2006 and further in second agreement the value adopted is Rs.34,36,000/- as against 11,20,000/- offered by the assessee. Accordingly, the AO verified the factual details and further recomputed the total sale consideration of development rights at Rs.3,56,39,928/- and entire consideration was treated as income from other sources. The AO also disallowed the claim of exemptions u/s. 54 and 54EC of the Act. Aggrieved, the assessee preferred appeal before the CIT(A), who following the decision of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia 260 ITR 491 (Bom) allowed the claim of the assessee and treated the sale of property by way of development rights as capital asset u/s. 2(14) of the Act.

5. As regards the application of the provisions of section 50C for adopting the stamp duty valuation, the CIT(A) held that the consideration received at Rs.2,76,82,928/- is higher than the stamp authority valuation and accordingly deleted the directions of the AO. The CIT(A) also observed that the provisions of section 50C is applicable only in the case of transfer of land or land and

building and not to other capital asset such as development rights associated with the land. In view of these facts, the CIT(A) allowed the claim of the assessee. Aggrieved against the order of CIT(A) on both the counts the revenue is in appeal before the Tribunal. Before us the learned senior DR relied on the order of the AO.

6. On the other hand, the learned counsel for the assessee drew our attention to clause 44 of the development agreement given at page 207 of the assessee's paper-book, whereby the following is mentioned:

"44. The parties hereto agree, record and confirm that no transfer of the said property or any part thereof is effected or intended to be effected in favour of Developers as contemplated under section 53A of the Transfer of Property Act."

The learned counsel for the assessee also referred to page 78 of the paper-book wherein, the owners have agreed to grant development rights only by virtue of the development agreement dated 01.12.2006. He drew our attention to clause 13 at page 78. The learned counsel for the assessee also stated that the monetary consideration was not more than 3.50 crores and for this also he referred to clause 4 of the development agreement at page 80 of the assessee's paper-book, which reads as under:

"4. In consideration of the Owners granting to the Developers, the right of development of the said property as stipulated hereinabove, the Developers shall pay to the Owners a monetary consideration of Rs.3,50,00,000/- (Rupees Three Crores Fifty Lacs Only) in the manner following:-

- a) Rs.3,00,00,000 (Rupees Three Crores only) immediately on the execution of this Agreement (the receipt whereof the Owners do hereby admit and acknowledge) to be shared equally by the Owners*
- b) Rs.50,00,000/- (Rupees Fifty Lacs only) to be shared equally by the Owners, being the balance monies, within seven days from the date of sanction of the plans by the Municipal Corporation of Greater Mumbai and the IOD being granted in respect thereof and simultaneously against the Owners vacating the said property and handing over the same to the Developers for the purpose of development."*

7. The learned counsel for the assessee also explained the fact that in lieu of these development agreements the assessee was to be allotted accommodation of 8000 sq.ft. carpet area (to both the co-owners) and car

parking space in the stilt. As regards the increase in consideration the learned counsel for the assessee referred to clause 8 of the development agreement wherein they agreed that developer shall pay a lump sum agreed amount of Rs.5000 per sq. ft. carpet area for any shortfall in the area to be allotted to the owners.

8. In view of these facts and circumstances, the learned counsel for the assessee argued that the development right is a property by itself which will fall in the expression "capital asset" as defined under section 2(14) of the Act. It was explained by the learned counsel that the term property as stated in the definition of capital asset u/s. 2(14) does not merely mean physical property but also includes rights, title or interest in it and that ownership of land carries with it right attached to it, of which right to development is the most important right. The learned counsel for the assessee relied on the decision of the Hon'ble Bombay High Court in the case of Bertha T Almeida vs. ITO [2015] 53 taxmann.com 522 (Bom). He also relied on the decision of Bombay High Court in the case of CIT vs. Sambhaji Nagar Co-op Hsg. Society Ltd. [2015] 370 ITR 325 (Bom) and also on the decision of the Hon'ble Karnataka High Court in the case of CIT vs. Dinesh D Ranka [2016] 380 ITR 440 (Kar). In view of these decisions, the learned counsel for the assessee stated that transfer of property under development agreement is a capital asset and this is supported by the propositions cited supra.

9. In respect to the other issue of not considering the stamp duty valuation value adopted by AO for development agreement u/s. 50(c) of the Act. Ld. Sr. DR argued that if the entire consideration is treated as long term capital gains, even then, the provisions of section 50C of the Act to the consideration receipt for sale of development rights vide development agreement.

10. We have heard the rival contentions and gone through the facts and circumstances of the case. We find from the development agreement dated

01/12/2006 entered into by the assessee, in which as per clause 2, the assessee has transferred all rights to developers to construct new building on the plot of land of the assessee by demolishing the existing bungalow i.e. the residence of the assessee and his brother. For the sake of clarity, clause 2 of the development agreement is reproduced below:-

"The owners hereby agree at the costs of the developers to grant to the Developers and the development rights as contained here in only for the purpose of the said property being plot No. 34 admeasuring about 1016 square yards equivalent to 849.50 square meters and admeasuring 825.50 sq. Mtrs. Or thereabouts as per City survey Records bearing Survey No. 287 (part) and bearing corresponding C.T.S. No. 203 of Vile Parle (West), Taluka Andheri, situate at N.S. road No. 3 within the registration sub-District of Andheri, District Mumbai Suburban, within Greater Mumbai, in the J.V.P.D. scheme, Vile Parle west, Mumbai 400 056 in the estate of Vallabh Nagar Co-operative Housing Society Ltd. And more particularly described in the Schedule hereunder written by demolishing the existing building and constructing thereon a new residential building at the Developers' costs by utilising thereon the entire FSI and TDR as may be presently available and strictly as per the plans that may be approved by the Municipal Corporation of Greater Mumbai (the Corporation) and the IOD which may be granted."

We find that the assessee has filed final FSI calculation in respect to above property. As per the above stated agreement and calculation, the assessee has not only sold his right to load TDR on plot but also his existing FSI on the plot. By virtue of the above stated agreement the assessee has sold all his rights attached to the plot of land i.e. basic FSI and right to load TDR on the plot of land. In the given facts, now we have to ascertain whether development right includes the expression "Capital Asset" as defined u/s. 2(14) of the Act. We are of the view that development right in a property is also a property by itself and would be included in the expression "Capital Asset". The term "Property" as stated in the definition of "Capital Asset" u/s. 2(14) does not merely mean physical property but also includes rights, title or interest in it and that ownership of land carried with it bundle of rights attached to it, of which the right of development is most important one.

11. Learned Counsel for the assessee relied on the decision of Hon'ble Karnataka High Court in the case of CIT and others Vs. Dinesh D. Ranka (2016) 380 ITR 440 (Kar), where in Hon'ble High Court has considered the

issue of surrender of floor area ratio rights in land and held that this is transfer of capital rights in relation to capital assets as defined u/s. 2(14) r.w.s. 2(47) of the Act. Hon'ble High Court has considered the section 2(47) of the Act and held that the term "transfer" in relation to the "capital asset" has been defined to include the sale, exchange or relinquishment of rights in a capital asset. A "capital asset" means property of any kind held by an assessee whether or not connected with his business or profession but does not include what is defined under sub-clause (i) and (ii) of section 2(14), namely the definition clause of capital asset. The words employed in sub-clause (i) are "sale", "exchange", or "relinquishment" and under sub-clause (ii) the words employed are "extinguishment of any rights therein". The definition is an inclusive definition. The expression must be read widely and not narrowly. It denotes extension and cannot be treated as restricted. Transactions where under the rights to exclusive possession and enjoyment stood transferred, even subject to right to reversion in favour of the transferor would be covered by this section.

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. The assessee has given complete working of consideration receipt as per development agreement which reads as under:-

Particulars	Amount (in Rs.)	Remark
By Cheque	1,75,00,000	Appellant 50% share
By Cheque	11,20,000	Compensation for shortfall in free area.
Construction cost of free residential area	90,62,928	Construction cost as per developers letter attached (Annexure 4)
Total	2,76,82,928	

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. Accordingly, no tinkering can be made to the value disclosed in the development agreement. Accordingly we affirm the order of CIT(A) on this issue and this issue of Revenue's appeal is dismissed.

14. In the result, appeal of Revenue is dismissed

Order pronounced in the open court on this day of 31st May 2016.

Sd/-

(Rajesh Kumar)

ACCOUNTANT MEMBER

Mumbai, Dated :31st May, 2016.

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT
5. The DR, 'B' Bench, ITAT, Mumbai

Sd/-

(Mahavir Singh)

JUDICIAL MEMBER

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai