

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH: MUMBAI**

**BEFORE SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER
AND SHRI R.S. PADVEKAR, JUDICIAL MEMBER**

ITA No.5803/Mum/2009

(Assessment year: 2006-07)

Income-tax Officer -2(2)-4,
Room No.542, 5th Floor,
Aayakar Bhavan,
M.K. Road,,
Mumbai -400 020

..... Appellant

Vs

Shri Prem Rattan Gupta,
Calicut House, 1st Floor,
M P Shetty Marg, Tamarind Lane,
Fort,
Mumbai -400 001

..... Respondent

PAN: **AABPG 2531 P**

Appellant by: Shri Manish Kanojia

Respondent by: Shri B.V. Jhaveri

Date of Hearing: 13.02.2012

Date of Pronouncement: 28.03.2012

ORDER

PER R.S. PADVEKAR, JM:

In this appeal the revenue has challenged the impugned order of the Ld. CIT (A)-2, Mumbai dated 27.08.2009 for the A.Y. 2006-07. The revenue has taken the following grounds:

“1 On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in ignoring the Fair Market Value of the area of the plot sold by the assessee (as a co-sharer), as adopted by Stamp Valuation Authority which is contrary to the provision of section 50 C of the I.T. Act.

“2. On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in adopting the prorata basis for determining the Fair Market Value in respect of 134 sq. ms of plot ignoring the fact that Fair Market Value had been

determined by Stamp Valuation Authority on the plot / land sold by the assessee.

“3. *On the facts and in the circumstances of the case and in law, the learned CIT (A) ought to have noted that as per the section 50C(1) the stamp duty valuation is to be adopted as the Fair Market Value, unless the assessee makes claim u/s.50C(2) before the AO during the assessment proceedings, which has not been preferred before the A.O. in the instant case.*

“4. *For these and other grounds that may be urged at the time of hearing, the decision of the CIT (A) may be set aside and that of the Assessing Officer be restored.*”

2. The issue in controversy is whether the sale of the plot of the land attract the provision of sec.50C of the Act for the purpose of computing the capital gain u/s.48.

3. The facts which revealed from the record are as under. The assessee is an individual who was the owner with one-half of the share in the plot of land situated at Panchpakhadi, Thane (West). The assessee sold the said property for total consideration of ₹ 20 lakhs and accordingly as the assessee had ½ share the assessee declared ₹ 10 lakhs as sale consideration. The assessee declared the capital loss in respect of the sale of the said plot of land of ₹ 2,56,476/-, after claiming Index Cost of Acquisition. It was noticed by the A.O. that as per the agreement the fair market value of the land for the purpose of payment of the stamp duty was adopted at ₹ 1,19,72,064/- as against the sale consideration of ₹ 20 lakhs declared by the assessee. The A.O. sought the explanation of the assessee why the valuation as per sec.50C should not be adopted as a sale consideration. The assessee filed the reply. The assessee claimed that the total area of the plot was 2242 sq. meter out of that 2110 Sq. meters was acquired by PWD as well as Thane Municipal Corporation for the Eastern Express

Highway as well as 15 meter widening road. Moreover, 1340 Sq. meters was sold to one Mr. Thakkar and assessee's own $\frac{1}{2}$ shares remained to 67 sq. meter. The assessee contended that the purchaser of the land was required to pay the stamp duty on the entire area of plot of land. But so far as assessee is concerned, the assessee could get high price only for 67 sq. meter towards his half share as said plot is on prime location. The A.O. examined the agreement to sale and part of which is reproduced in assessment order. As per the agreement to sale, the assessee has given Development Rights to the Developer excluding the area acquired for Eastern Express Highway. As per agreement it was agreed that the developer would be entitled to the benefit in the nature of DRC arising out of land acquired for 15 meter widening of service road by the Thane Municipal Corporation road out of the said plot which was to extent of 950 sq. meter. The A.O. was of the opinion that that the plot which was sold by the assessee was having the benefit of TDR and additional FSI and due to that the assessee could get the good market price. The A.O. applied sec.50C and adopted the sale consideration of ₹ 1,19,72,064/- which was valuation adopted for the purpose of payment of the stamp duty when the Development Agreement was registered on 20th July, 2005. The assessee challenged the action of the A.O. before the Ld. CIT (A). The Ld. CIT (A) following the decision of the Tribunal in the case of Shakti Insulated Wires (P) Ltd. vs. ITO in ITA 3710/Mum/2007 dated 27.04.2009, allowed assessee's contention. He further observed that the assessee has transferred land admeasuring 134 meters only and he held that pro-rata consideration should be ₹ 7,14,910/- as against total consideration of ₹ 20 lakhs. In sum and substance, he held that, in fact, consideration declared by the assessee is more and he directed the A.O. to delete the addition. Now, the revenue is in appeal before us.

4. We have heard the parties and perused the records. We find that as per the agreement for development the assessee has transferred 2244.18 meters of land excluding the area acquired for Easter Express Highway. The copy of the Development Agreement is

placed at page nos.15 to 24 of the compilation. The contention of the assessee is that 860 sq. meter was acquired by the Government for the Easter Express Highway and 950 sq. meters were acquired for 15 meter wide Service road and 300 sq. meters were acquired for old Agra Road, hence, total acquisition of the land worked out to 2110 sq. meters. As per the revenue record i.e. 7 x 12 abstract, the land is shown at 2244.18 sq. meters (Page no.28 of the paper book). As per Mutation Entry document, page no.31 of the paper book, it appears that land is acquired for the Easter Express High Way but the effect is not given in the 7 x 12 Abstract. As per the document at Sr. No.32 & 33 i.e. Registrar of Modification, we find that land is also acquired for the service road and old Agra Road. It is true in the Development Agreement the entire area of the plot is shown in place of the net area remained with the assessee after acquisition and partly sold. Moreover, we find that the assessee has given the right of the additional FSI/TDR which the assessee was otherwise entitled to get from the local body / Government for the acquisition of the land if the assessee has not taken any consideration. So far as issue of the TDR is concerned, the value of the TDR cannot be the subject matter of sec. 50C and admittedly, the assessee gets additional FSI / TDR only after the acquisition of the land. As per the Land Acquisition Act once the notification is issued then assessee loses the title of the land or property. Ultimately, what has to be considered is the net area available with assessee for transferring to the Developer.

5. The Ld. D.R. relied on the decision of the Hon'ble High Court of Bombay in the case of Chedda Housing Development vs. Babijan Shekh Farid - 2007 (3) MLJ 402 (Bom) in which their Lordships have interpreted the definition of 'immovable property' under General Clauses Act, 1897. In our humble opinion, the term 'immovable property' has a very wide meaning than the words 'land and building'. Sec.50C refers to land and building and not to immovable property as whole. Hence, the reliance placed by the Ld. D.R. on the decision of the Hon'ble jurisdictional High Court in case of Chedda Housing Corporation (supra) is not helpful to the revenue.

6. In this case, the matter was not referred by the A.O. to the DVO. We, therefore, set aside the order of the Ld. CIT (A) and restore the issue of valuation to the file of the A.O. with the direction to refer the same to the DVO in the light of our above observations. The DVO should only consider net of land transfer to Developer by the assessee after considering acquisition made by the Govt as well as Thane Municipal Corporation as discussed hereinabove and also to exclude the value of TDR or additional FSI included in the consideration shown in the Development Agreement. Needless to say the A.O. should give reasonable opportunity of being heard to the assessee.

7. In the result, revenue's appeal is allowed for the statistical purposes.

Order pronounced in the open court on this day of 28th March, 2012.

Sd/-
(J. SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Sd/-
(R.S. PADVEKAR)
JUDICIAL MEMBER

Mumbai, Date: 28th March, 2012

Copy to:-

- 1) The Appellant.
- 2) The Respondent.
- 3) The CIT (A)-II, Mumbai.
- 4) The CIT -2, Mumbai.
- 5) The D.R. "C" Bench, Mumbai.

By Order

// True Copy //

Asstt. Registrar
I.T.A.T., Mumbai

*Chavan