

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'D', MUMBAI

BEFORE SHRI R.S.SYAL, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 541/Mum/2010
(Assessment Years: 2006-07)

Arif Akhatar Hussain
12 Chateau,
Marine Drive
Mumbai-400020
PAN: AAAPH8531R Appellant

V/s

Income Tax officer
12(2)(1),
Aayakar Bhavan,
Mumbai-400020 .. Respondent

ITA No. 706/Mum/2010
(Assessment Years: 2006-07)

Jaffar Akhatar Hussain
12 Chateau,
Marine Drive
Mumbai-400020
PAN: AAAPH4454R Appellant

V/s

Income Tax officer
12(2)(1),
Aayakar Bhavan,
Mumbai-400020 .. Respondent

Assessee by : Shri Amit Amlani
Revenue by : Shri Jitendra Yadav

ORDER

PER VIJAY PAL RAO, JM

These two appeals by the assessees are directed
against the two different orders of CIT(A), both dated

24.11.2009 for the assessment year 2006-07. Since issues raised in these appeals is common and the assessee are also co-sharers of the property in question, therefore, for the sake of convenience both the appeals were heard together and are being decided by this composite order.

2. Grounds of appeal taken by both the assessee are common, therefore, the ground taken by the assessee in ITA No.541/Mum/2010 is reproduced below:

“On the facts and in the circumstances of the case, the learned CIT(A) has erred in law and in facts in concluding that the provisions of section 50C of the IT Act are applicable to transfer of development rights nad thereby directing the assessing officer to adopt the valuation under section 50C of the Act, as sale consideration, for the purposes of calculating capital gain, instead of actual sale consideration offered by your appellant”

3. Brief facts of the case are that the assessee are co-owners along with other four co-owners of the inherited property in question. During the year under consideration, the assessee along with other co-owners entered into an agreement with the developer for development of the said inherited property against the consideration of Rs.63 lakhs shown in the said agreement. The assessee herein had 2/7 and 1/7th shares respectively in the said property. Accordingly, the assessee's share in the share value was admitted at Rs.18 lakhs and 9 lakhs respectively. However,

the Stamp Valuing Authority valued the property at Rs.4,73,48,000/-. The AO accordingly, issued a show cause notice to the assesseees to explain as to why the provisions of section 50C should not be invoked in their case. The Explanation offered by the assessee was not accepted by the AO, however, he accepted the prayer of the assessee to refer the property for valuation to the DVO. The AO accordingly took the sale consideration as per the valuation made by Stamp Valuation Authority. The assessee challenged the order of the AO before the CIT(A) and raised the issue of taking the stamp duty value as sale consideration for transfer of the development rights of the property. In the mean time, the report of the DVO was received and accordingly, the AO passed order dated 20.11.2009 u/s 155 r.w.s.154 of the Act based on the DVO's report whereby, the property was valued at Rs.1,81,34,749/-. Thus, the capital gain was re-worked out by the AO as per the valuation made by the DVO.

4. Before us, the learned AR of the assessee has submitted that this is not a case of transfer of land or other capital asset but it was a case of transfer of development rights of the property. Therefore, the provisions of section 50C are not applicable for taking the valuation made by the Stamp Valuing Authority as full value of sale consideration. He has further contended that the deeming provisions of

section 50C cannot be applied when there is no transfer of the property itself, but only transfer of development rights.

5. The learned AR has further submitted that the valuation by the Stamp Valuation Authority has been made for registration of development agreements and the Stamp Duty was charged as per the rate prescribed for agreement and not for any sale or transfer of the land or building or the property itself. The learned AR of the assessee has mainly contented that the assessee is still owner of the property in question. He has pointed out that in Municipal Record, the property tax is still in the name of the assessee, therefore, there is no transfer of the land or building and only developments rights were transferred. The stamp duty was paid by the developer and the assessee was not concerned about the stamp duty valuation even when the assessee realized that the stamp duty value of the property was taken as full value of the sale consideration, the time limit for filing the appeal against the stamp duty valuation was already expired. He has pointed out that even the stamp duty authority has also distinguished between the transfer of land or building and transfer of the development rights. Accordingly, only one percent stamp duty was paid on the valuation of the property. Where in the case of transferring

the property 5% of the valuation, stamp duty will have to be paid.

6. The learned AR of the assessee has further contended that since the property was occupied by the tenants and the developer took the onus of dealing with the tenants, the valuation of the property cannot be compared with the other property and accordingly, the valuation made by the Stamp Duty Valuing authority cannot be applied without taking into consideration the other factors and demerits attached with the property.

7. On the other hand, the learned DR has submitted that the assessee did not raise any objection regarding the applicability of the provisions of section 50C during the assessment proceedings. He has further submitted that the assessee themselves have offered the capital gain by admitting the transfer of the property/capital asset during the year. He has further submitted that the DVO has already considered all the relevant factors attached with the property and thereby valued the property at Rs.1,81,34,749/- as against the stamp valuing authority valued at Rs.4,73,48,000/-. He has relied upon the orders of the lower authorities.

8. After considering the rival contentions and relevant record, we find that the assessee themselves have offered the capital gain against the transfer of the property vide

development agreement which was available before the AO. The documents itself shows the sale consideration admitted by the assessee and the stamp valuation made by the Stamp Valuation Authority. The AO adopted the full value of sale consideration ;at Rs.4,73,48,000/- as valued by the Stamp Valuation Authority against the sale consideration admitted by the assessee at Rs.63,00,000/-. The assessee's share in the said property are $\frac{2}{7}$ and $\frac{1}{7}$, respectively, therefore the AO proportionately took the share of sale consideration and computed the capital gain.

9. The main contention of the learned AR is that the development rights does not amount to transfer of land or building and therefore the provisions of section 50C are not applicable. It is to be noted that the definition of transfer in the Income Tax Act, is not similar to that of definition under the Transfer of Property Act. Apart from various mode of transfers provided under the Transfer of Property Act, the Income Tax Act, also provides a definition of transfer as deemed transfer u/s 2(47)(v). The deemed transfer is applied when the condition prescribed u/s 53A of Transfer of Property Act are fulfilled Section 53A of the Transfer of Property Act does not provide the condition for transfer but it provides protection to the transferor of any immovable property by a written contract, the terms of which constitute the transfer and can be ascertained with reasonable certainty

and the transferee as part performance of the contract taken the possessions of the property and has performed or willing to perform his part of contract, then even the said contract though required to be registered has not been registered and the transfer has not been completed in the manner prescribed therefore by law, the transferor is barred from enforcing against the transferee any right in respect of the property other than the right expressly provided by the terms of the contract. Under the Income Tax Act, 1961 by inserting Clause (v) to section 2(47), the definition of the term transfer includes the transaction which fulfills the conditions provided u/s 53A of Transfer of Property Act. Thus, the provisions of Section 53A of Transfer of Property Act does not provide any transfer but it talks about the situation when the right created in favour of the transferee cannot be defeated otherwise than the terms and conditions expressly provided in the contract itself. When the assessee has received the sale consideration and handed over the possession of the property in question vide development agreement then the condition prescribed u/s 53A of the Transfer of Property Act are satisfied and accordingly, as per the provisions of section 2(47)(v) of the IT Act the transaction of transfer is completed. Accordingly, we do not find any merit or substance in the contention of the assessee. Merely because the name of the assessee still stand in the record of the municipal record does not change

the nature of transaction. Even otherwise the mutation of the property in the Property tax record of Municipal Authority does not give any title of ownership. Once, undisputedly, the assessee has handed over the possession of the property to the developer against the payment of share of sale consideration then the property is deemed to have been transferred as per the deeming provisions of section 2(47) of the IT Act. When the conditions of section 53A of Transfer of Property Act is fulfilled irrespective of the fact that it is not absolute transfer by way of execution of sale deed, the transaction is to be completed. The transfer of capital asset is completed if the certain conditions of section 53A of the Transfer of Property Act is satisfied. . Accordingly, we do not find any reason to interfere in the order of the lower authorities on this issue. As far as, demerits attached to the property are concerned, the DVO has already taken into account all aspects while making the valuation of the property. The assessee has participated in the proceedings before the DVO and accordingly, we do not find any error or illegality in the valuation made by the DVO which is much less to the valuation made by the Stamp Valuation Authority. The substantial relief has already been given by the DVO as well as by the AO while passing the consequential order as per the DVO's report. Accordingly, the appeals of the assessee are devoid of merits on this issue

10. Both the appeals of the assesseees are dismissed as indicated above.

Order pronounced in open court on 22.12.2010

Sd
(R.S.SYAL)
ACCOUNTANT MEMBER

sd
(VIJAY PAL RAO)
JUDICIAL MEMBER

Mumbai, Dated 22nd Dec, 2010
SRL:201210

copy to:

1. Appellant
2. Respondent,
3. CIT Concerned
4. CIT(A) concerned
5. DR concerned bench

BY ORDER

True copy

ASSTT. REGISTRAR, ITAT, MUMBAI