

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES “ D ”, MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No. 7330/Mum/2016
Assessment Year : 2008-09

Shri Devraj PKYN Iyer Sharma, 601, Mahesh Kutir, 14 th Road, Chembur, MUMBAI [PAN : BFEPS4433K]	Vs.	ITO-27(1)(4), MUMBAI
(Appellant)		(Respondent)

Appellant By : Shri Nishant Thakkar,
Respondent By : Shri D.G. Pansari, Sr.AR-CIT

Date of Hearing : 05-03-2019	Date of Pronouncement : 05-03-2019
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ORDER

Per B.R. Baskaran, Accountant Member:

The assessee has filed this appeal challenging the order dated 30-09-2016 passed by Ld. Commissioner of Income Tax (Appeals)-25, Mumbai and it relates to the AY. 2008-09. The assessee is aggrieved by the decision of Ld. CIT(A) in

confirming the assessment of long term capital gain of Rs.144.60 lakhs in the year under consideration.

2. The facts relating to the issue are stated in brief. The assessee is a owner of property called “Mahesh Kutir” in Chembur, which was purchased by him in the year 1999. The building was having two storeys. Consequent to the amendment of D.C regulations, the additional construction became permissible on the above said land on purchase of TDR from the market. Accordingly, the assessee entered into a development agreement on 27-07-2002 and also a supplementary agreement on 11-08-2002 with M/s U.S.Magnet Pvt Ltd. As per the above said agreements, the assessee was entitled to receive a sum of Rs.49.50 lakhs in cash and two flats that are going to be constructed.

3. The AO noticed that the assessee has received allotment letters towards allotment of two flats, viz., Flat No.601 & 602, on 15-04-2007. The AO took the view that the assessee has received the above flats in exchange of property owned by him and hence the transaction resulting in capital gain has taken place on 15-04-2007 relevant to AY 2008-09. Since the

assessee did not furnish any details before the AO, the assessing officer assessed the value of both flats amounting to Rs.146.60 lakhs as Long term capital gains. The assessment order came to be passed u/s 144 r.w.s. 147 of the Act.

4. Before Ld CIT(A), the assessee challenged the assessment order by raising various alternative contentions. It was contended that

(a) the liability to capital gains does not arise in AY 2008-09, as the development agreement was entered in the year 2002. In this regard, the assessee relied upon the decision rendered by Hon'ble Bombay High Court in the case of Chaturbhuj Dwarakadas vs. CIT (260 ITR 491).

(b) the right to additional FSI obtained by the assessee was due to amended D.C regulations, for which no "cost" can be attributed. Hence transfer of FSI rights to the developer is not assessable to capital gains.

(c) the assessee shall be eligible for deduction u/s 54/54F of the Act, since the assessee has acquired new

flats against the development rights granted to the developer.

(d) it is possible to take a stand that the developer has acted as a contractor only, in which case, there is no transfer at all.

5. The Ld CIT(A), however, affirmed the order passed by the AO. The Ld CIT(A), by taking support of various case laws, held that

(a) the development rights are capital asset

(b) transfer of development right involves “transfer” within the scope of Income tax Act.

The Ld. CIT(A) further held that, under the development/supplementary agreement, there was only “promise of allotment” of the flats in the new building. He held that the flats were actually allotted to the assessee only on 15-04-2007 and hence the assessing officer was right in assessing the capital gains in AY 2008-09. The assessee is aggrieved.

6. The submission of the Ld AR is that the assessee has received the part consideration as per the development agreement and has handed over the possession of the property in the year 2002. Accordingly, by placing reliance on the decision rendered by Hon'ble jurisdictional Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia vs. CIT (2003)(260 ITR 491), the A.R submitted that the capital gains liability, if any, shall arise only in AY 2003-04 and not in AY 2008-09. He submitted that the above said decision was again followed by the Hon'ble Bombay High Court in the case of Dr. Arvind S Phake (2018)(401 ITR 96). He further submitted that the occupation certificate of the building has been received on 28-09-2006 itself. Adverting to the copy of electricity bill placed at page 44 of the paper book, the Ld A.R submitted that the assessee has paid electricity bills way back in December, 2005 itself, meaning thereby, he has taken possession of the flats much prior to that date. Accordingly the Ld A.R submitted that the view of the AO itself is accepted as correct for a moment, even then the capital gains cannot be assessed in AY 2008-09. He submitted that the allotment letter issued by the developer was only a formality and hence

the same cannot be taken as the basis for assessing the capital gains in AY 2008-09. Accordingly, the Ld A.R submitted that the capital gains, if any, cannot be assessed in AY 2008-09 at all.

7. On the contrary, the Ld D.R placed his reliance on the order passed by Ld CIT(A).

8. We heard the parties and perused the record. The undisputed fact remains that the assessee has entered into development agreements in the year 2002. As per the supplementary agreement, the assessee was to receive Rs.49.50 lakhs and two flats from the developer. Hence the flats received by the assessee are only a part of total sale consideration receivable by the assessee as per the development agreement. There cannot be any dispute that the capital gains liability shall arise upon completion of “transfer” of Capital asset. Hence the assessee cannot postpone the capital gains tax liability on account of delay in receipt of sale consideration and on the very same criteria, the AO cannot bring capital gains to taxation in the year of receipt of part of sale consideration. Accordingly we are of the view that the tax

authorities are not justified in placing reliance on the allotment letter given by the developer to the assessee.

9. As per the decision rendered by Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (supra), the liability to capital gains tax shall arise upon entering development agreement, if the assessee has handed over the possession of property and received part consideration. The copy of occupancy certificate dated 28-09-2006 placed at page 38 of the paper book would show that the assessee had handed over the possession as per the development agreement and the construction itself has been completed in the year 2006. All these events have taken place much prior to the financial year relevant to AY 2008-09. The assessee has also placed copies of electricity bills to show that he has taken possession of flats in the year 2005 itself. These facts would show that the capital gains liability cannot, in any case, would arise in AY 2008-09.

10. In view of the above facts, we are of the view that the capital gains, if any, arising on account of development agreement is not assessable in assessment year 2008-09.

Accordingly we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the capital gains in AY 2008-09.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 5th day of March, 2019

Sd/-
(RAVISH SOOD)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 5th March, 2019

TNMM

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai
4. आयकर आयुक्त / CIT, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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