IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1356 OF 2012

Commissioner of Income Tax-18	**}**	**Appellant**
versus		
Sambhaji Nagar Co-op. Hsg. Society Ltd.	**}**	**Respondent**

Mr. A. R. Malhotra with Mr. N. A. Kazi for the Appellant.
Mr. Ajay Singh for the Respondent.

CORAM :- S.C.DHARMADHIKARI &
A.A.SAYED, JJ.
DATED :- DECEMBER 11, 2014

P.C. :-

This Income Tax Appeal challenges the order passed on 30th March, 2012 in Income Tax Appeal No. 431/Mum/2012. The Assessment year is 2007-08. The Income Tax Appellate Tribunal (ITAT) was dealing with the Appeal of the Respondent Assessee. That Appeal was directed against the order of the Commissioner of Income Tax (Appeals) dated 30th November, 2011, where-under, he upheld the validity of the assessment made by the Assessing Officer under section 143(3) read with section 147 of the Income Tax Act. He confirmed the addition of Rs.2,23,25,157/- made by the Assessing Officer to the total income of the Assessee under the head “long term capital gains”.

2) Mr. Malhotra appearing on behalf of the Revenue, in support of this Appeal, submits that this Appeal raises substantial question of law. That is formulated at page 7 of the Appeal paper book. Mr. Malhotra would submit that the gains are derived from the sale of Transferable Development Right (TDR) of the Co-operative Housing Society which is a property by itself. In such circumstances, the Tribunal should have sustained the order of the Commissioner and that of the Assessing Officer. That should have been sustained because the Tribunal ought to have noted that this Co-operative Housing Society planned a reconstruction of the building without involving any builder. That was in the year 1994. In the year 1995, the construction of the new building was in execution and the Society was eligible for a Floor Space Index (FSI) of 2. The construction was carried out and completed. Thereafter, FSI of 0.5 was generated by the Society's property/plot and it decided to sell it. That was sold to one Uttam Kamat under an agreement dated 1st June, 2006 for a total consideration of Rs.2,23,25,157/-. This amount has been held by the Assessing Officer to be chargeable to tax as income under the head "long term capital gains" in the hands of the Assessee in the year under Appeal. That was confirmed by the Commissioner.

3) Mr. Malhotra has invited our attention to section 54E of the Income Tax Act and submitted that the sub-section which has been invoked in this case together with the *Explanation* would denote that this was a case where the gains were derived by the Assessee. Once the gains were derived in the manner set out in this section, then, the computation thereof has been done in accordance with law. There was no necessity of interfering with the order passed and concurrently.

4) On the other hand, Mr. Singh appearing on behalf of the Assessee would submit that the Tribunal has rightly appreciated the controversy. It was identical to the two cases dealt with earlier. One in the case of *New Shilaja Co-operative Housing Society Ltd.* and another was *Shakti Insulated Wires Ltd.* The Tribunal has assigned reasons for arriving at the conclusion. That conclusion is recorded by the Tribunal in para 7 and para 9 of the order under challenge. The Tribunal has rightly understood the concept and, where there was no mechanism evolved by the Revenue so as to compute the gains, then, the order under challenge cannot be said to be erroneous, much less perverse requiring interference in our further appellate jurisdiction. The Appeal does not raise any substantial question of law and deserves to be dismissed.

5) Reliance is placed by Mr. Singh on the decision of the Hon'ble Supreme Court in the case of *Union of India vs. Cadell Weaving Mill Co. P. Ltd. and Anr. and connected Appeals* reported in **(2005) 273 ITR 3**.

6) We have heard both sides at great length and with their assistance, we have perused the order passed by the Tribunal and that of the Commissioner and the Assessing Officer. The Assessing Officer has noted the basic facts and about which there is no dispute. What has been argued before the Assessing Officer is that with the promulgation of the Development Control Rules, 1991 (DCR), the Assessee Society acquired right of putting up additional construction through TDR. Instead of utilising this right itself, the Society decided to transfer the same to a Developer for a consideration. The Society transferred a valuable right, which is capital asset under section 2(14) of the Income Tax Act. The right created by the DCR attaches to the land owned by the Society which was acquired for a value. Its title or ownership of the plot enables the Society to consume this FSI/TDR. In such circumstances, this is a transfer of capital asset held by the Society, which is chargeable to tax.

7) The Commissioner of Income Tax, in confirming this finding of the Assessing Officer, distinguished the case of *New Shailaja*

Co-operative Housing Society. In the case under consideration, the Society was eligible for FSI of 2.5. That the Society only consumed 2 FSI out of its eligible FSI and not additional FSI. It is only a sale of unconsumed FSI. This is not a case that extra FSI had accrued because of change in law. The TDR has been granted as per law existed at the time of reconstruction of the Assessee's building/property. The letter dated 17th September, 2003 was relied upon. That is how the sale consideration of TDR was taxable as long term capital gains in the hands of the Assessee.

8) The Tribunal noted this aspect and concluded that while it is true that the Assessing Officer invoked section 50C and computed these gains, but the coordinate Bench decision in the case of *New Shailaja Co-operative Housing Society Ltd,* involved similar controversy and the Tribunal concluded that the sale of TDR does not give rise to any capital gains chargeable to tax. The Tribunal's conclusion is that the situation and factually in both cases is identical. While it is true that the Revenue has not pursued the matter in the case of *New Shailaja Co-operative Housing Society Ltd.* because the report of the Registry indicates that an Appeal was brought to challenge that order but came to be dismissed for non compliance of the office objections. However, on a pertinent question as to how the computation of this sale of TDR

could be made and in terms of the legal provisions, reliance is placed on section 50C of the Income Tax Act. The other provision and which has been relied upon in this case is sub-section (2) of section 55. Both these provisions read as under:

> "**S. 50C** (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.
>
> (2) Without prejudice to the provisions of sub-section (1) where -
>
> (a) the assessee claims before any Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;
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> (b) the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court;
>
> the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-section (2), (3), (4), (5) and (6) of section 16A clause (I) of sub-section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.
>
> *Explanation (1)* For the purposes of this section "Valuation Officer" shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).
>
> *Explanation (2)* For the purposes of this section, the expression "assessable" means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purpose of the payment of stamp duty.

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub-section (2) exceeds the value adopted or assessed or assessable by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed or assessable by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer.

S. 55 (2) For the purposes of sections 48 and 49, "cost of acquisition", -

(a) in relation to a capital asset, being goodwill of a business or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours -

(i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and

(ii) in any other case not being a case falling under sub-clauses (I) to (iv) of sub-section (1) of section 49, shall be taken to be nil;

(aa) in a case where, by virtue of holding a capital asset, being a share or any other security, within the meaning of clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereafter in this clause referred to as the financial asset), the assessee-

(A) becomes entitled to subscribe to any additional financial asset; or

(B) is allotted any additional financial asset without any payment,

then, subject to the provisions of sub-clauses (I) and (ii) of clause (b) -

(i) in relation to the original financial asset, on the basis of which the assessee becomes entitled to any additional financial asset, means the amount actually paid for acquiring the original financial asset;

(ii) in relation to any right to renounce the said entitlement to subscribe to the financial asset, when such right is renounced by the assessee in favour of any person, shall be taken to be *nil* in the case of such assessee;

(iii) in relation to the financial asset, to which the assessee has subscribed on the basis of the said entitlement, means the amount actually paid by him for acquiring such asset; and

(iiia) in relation to any financial asset purchased by any person in whose favour the right to subscribe to such asset has been renounced, means the aggregate of the amount of the purchase price paid by him to the person renouncing such right and the amount paid by him to the company or institution, as the case may be, for acquiring such financial asset;

(ab) in relation to a capital asset, being equity share or share allotted to a shareholder of a recognised stock exchange in India under a scheme for demutualisation or corporatisation approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), shall be the cost of acquisition of his original membership of the exchange:

Provided that the cost of a capital asset, being trading or clearing rights of the recognised stock exchange acquired by a shareholder who has been allotted equity share or shares under such scheme of demutualisation or corporatisation, shall be deemed to be *nil;*

(b) in relation to any other capital asset -

(i) where the capital asset become the property of the assessee before the 1st day of April, 1981, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1st day of April, 1981, at the option of the assessee;

(ii) where the capital asset became the property of the assessee by any of the modes specified in sub-section (1) of section 49, and the capital asset became the property of the previous owner before the 1st day of April, 1981, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of April, 1981, at the option of the assessee;

(iii) where the capital asset became the property of the assessee on the distribution of the capital asset of a company on its liquidation and the assessee has been assessed to income tax under the head "Capital gains" in respect of that asset under section 46, means the fair market value of the asset on the date of distribution;

(iv) *****

(v) where the capital asset, being a share or a stock of a company, became the property of the assessee on -

(a) the consolidation and division of all or any of the share capital of the company into shares of larger amount*****"

9) A bare reading thereof would indicate how the legislature contemplates that income chargeable under head "capital gains" has to

be computed. The mode of computation is laid down by section 48, whereas by section 49, the cost with reference to certain modes of acquisition has been set out. For the purposes of both sections, the legislature has devised the scheme in section 55 and sub-section (2) thereof clarifies that for the purposes of sections 48 and 49, "cost of acquisition" in relation to a capital asset, being goodwill of a business or a trade mark or brand name associated with a business or a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours has to be computed. In this case, the Assessee stated that nothing of these things would cover the sale of TDR and in the absence of a specific provision, the income shall be taken to be *Nil*.

10) In the Judgment relied upon by Mr. Singh in the case of *Union of India vs. Cadell Weaving Mill Co. P. Ltd.* (supra), the argument before the Hon'ble Supreme Court was arising out of the return of income of the Assessee. The amount received by the Assessee on surrender of tenancy right, whether liable to capital gains under section 45 of the Income Tax Act, 1961 was involved in that Appeal before the Hon'ble Supreme Court. There was a lease agreement entered into in the year 1959 for 50 years, under which, the annual rent was paid by the Lessee to the Lessor. The lease would have continued till 2009.

However, during the relevant previous year i.e. in March, 1986, the Assessee surrendered tenancy rights prematurely and received a sum of 35 lacs. That sum was credited to the reserve and surplus account, which was disallowed by the Assessing Officer, holding that it was income from other source. The Assessee appealed to the Commissioner, who came to the conclusion that the Assessee was liable to pay tax on capital gains on the amount of Rs.35 lacs after deducting an amount of Rs.7 lacs as cost of acquisition. The Department and Assessee challenged the decision before the Tribunal and the Tribunal relied upon a Judgment of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax, Bangalore vs. B. C. Srinivasa Shetty* ***(1981) 128 ITR 294*** and the amendment to section 55(2) of the Income Tax Act and held that the Assessee did not incur any cost to acquire the leasehold rights and that if at all any cost had been incurred it was incapable of being ascertained. It was therefore held that since the capital gains could not be computed as envisaged in section 48 of the Income Tax Act, therefore, capital gains earned by the assessee, if any, was not exigible to tax. The Department's Appeal to the High Court was dismissed and that is how it approached the Hon'ble Supreme Court. In dealing with the rival contentions, the Hon'ble Supreme Court held as under:

"(8) In 1981 this court in CIT v. B. C. Srinivasa Shetty (1981) 128 ITR 294; (1981) 2 SCC 460 held that all transactions encompassed by section 45 must fall within the computation provisions of section 48. If the computation as provided under section 48 could not be applied to a particular transaction, it must be regarded as "never intended by section 45 to be the subject of the charge". In that case, the court was considering whether a firm was liable to pay capital gains on the sale of its goodwill to another firm. The court found that the consideration received for the sale of goodwill could not be subjected to capital gains because the cost of its acquisition was inherently incapable of being determined. Pathak J. as his Lordship then was, speaking for the court said (page 300)

> "what is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possess the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class it may, on the facts of a certain case, be acquired without the payment of money"

(9) In other words, 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. The principle propounded in B. C. Srinivasa Shetty (1981) 128 ITR 294 (SC) has been followed by several High Courts with reference to the consideration received on surrender of tenancy rights. (see among others *Bawa Shiv Charan Singh v. CIT (1984) 149 ITR 29 (Delhi); CIT v. Mangtu Ram Jaipuria (1991) 192 ITR 533 (Cal); CIT v. Joy Ice-Creams (Bangalore) P. Ltd. (1993) 201 ITR 894 (Karn); CIT v. Markapakula Agamma (1987) 165 ITR 386 (AP); CIT v. Merchandisers P. Ltd. (1990) 182 ITR 107 (Ker)*. In all these decisions the several High Courts held that if the cost of acquisition of tenancy rights cannot be determined, the consideration received by reason of surrender of such tenancy rights could not be subjected to capital gains tax.

(10) According to a circular issued by the Central Board of Direct Taxes (Circular No. 684 dated 10th June, 1994 – see (1994) 208 ITR (St.) 8 it was to meet the situation created by the decision in B. C. Srinivasa Shetty (1981) 128 ITR 294 (SC) and the subsequent decisions of the High Court that the Finance Act, 1994, amended section 55(2) to provide that the cost of acquisition of, inter alia, a tenancy right would be taken as nil. By this amendment, the judicial interpretation put on capital assets for the purposes of the provisions relating to

capital gains was met. In other words the cost of acquisition would be taken as determinable but the rate would be nil.

(11) The amendment took effect from 1st April, 1995 and accordingly applied in relation to the assessment year 1995-96 and subsequent years. But till that amendment in 1995, and therefore covering the assessment year in question, the law as perceived by the Department was that if the cost of acquisition of a capital asset could not in fact be determined, the transfer of such capital asset would not attract capital gains. The appellant now says that B. C. Srinivasa Shetty's case (1981) 182 ITR 294 (SC) would have no application because a tenancy right cannot be equated with goodwill. As far as goodwill is concerned, it is impossible to specify a date on which the acquisition may be said to have taken place. It is built up over a period of time. Diverse factors which cannot be quantified in monetary terms may go into the building of the goodwill, some tangible some intangible. It is contended that a tenancy right is not a capital asset of such a nature that the actual cost on acquisition could not be ascertained as a natural legal corollary.

(12) We agree. A tenancy right is acquired with reference to a particular date. It is also possible that it may be acquired at a cost. It is ultimately a question of fact. In A. R. Krishnamurthy v. CIT (1989) 176 ITR 417 this court held that it cannot be said conceptually that there is no cost of acquisition of grant of the lease. It held that the cost of acquisition of leasehold rights can be determined. In the present case, however, the Department's stand before the High Court was that the cost of acquisition of the tenancy was incapable of being ascertained. In view of the stand taken by the Department before the High Court, we uphold the decision of the High Court on this issue.

(13) Were it not for the inability to compute the cost of acquisition under section 48, there is, as we have said, no doubt that a monthly tenancy or leasehold right is a capital asset and that the amount of receipt on its surrender was a capital receipt. But because we have held that section 45 cannot be applied, it is not open to the Department to impose tax on such capital receipt by the assessee under any other section. This court, as early as in 1957 had, in United Commercial Bank Ltd. v. CIT (1957) 32 ITR 688 (SC), held that the heads of income provided for in the sections of the Indian Income Tax Act, 1922 are mutually exclusive and where any item of income falls specifically under one head, it has to be charged under that head and no other. In other words, income derived from different sources falling under a specific head has

to be computed for the purposes of taxation in the manner provided by the appropriate section and no other. It has been further held by this court in East India Housing and Land Development Trust Ltd. v. CIT (1961) 42 ITR 49 that if the income from a source falls within a specific head, the fact that it may indirectly be covered by another head will not make the income taxable under the latter head. (See also CIT v. Chugandas and Co. (1965) 55 ITR 17 (SC).

14) Section 14 of the Income Tax Act, 1961 as it stood at the relevant time similarly provided that "all income shall for the purposes of charge of income tax and computation of total income be classified under six heads of income," namely:-

(A) Salaries;
(B) Interest on Securities;
(C) Income from house property;
(D) Profits and gains of business or profession;
(E) Capital gains;
(F) Income from other sources unless otherwise, provided in the Act.

(15) Section 56 provides for the chargeability of income of every kind which has not to be excluded from the total income under the Act, only if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E. Therefore, if the income is included under any one of the heads, it cannot be brought to tax under the residuary provisions of section 56.

16) There is no dispute that a tenancy right is a capital asset the surrender of which would attract section 45 so that the value received would be a capital receipt and assessable if at all only under item E of section 14. That being so, it cannot be treated as a casual or non-recurring receipt under section 10(3) and be subjected to tax under section 56. The argument of the appellant that even if the income cannot be chargeable under section 45, because of the inapplicability of the computation provided under section 48, it could still impose tax under the residuary head is thus unacceptable. If the income cannot be taxed under section 45, it cannot be taxed at all. [See S. G. Mercantile Corporation P. Ltd. v. CIT (1972) 83 ITR 700 (SC)]

(17) Furthermore, it would be illogical and against the language of section 56 to hold that everything that is exempted from capital gains by the statute could be taxed as a casual or non-recurring receipt under section 10(3) read with section 56. We are fortified in our view by a similar argument being

> rejected in Nalinikant Ambalal Mody v. S. A. L. Narayan Row, CIT (1966) 61 ITR 428 (SC), 432, 435."

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 sub-section (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 Co-operative Housing Society Ltd.* The Tribunal has reproduced that conclusion. The Tribunal's conclusion arrived at in the case of *New Shailaja Co-operative 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 sub-section (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.

12) We have made a reference to all these materials only because Mr. Malhotra tried to persuade us to conclude that this aspect is also specified in sub-section (2) of section 55 and that is how the Tribunal's view is vitiated by error of law apparent on the face of the record. We are not persuaded to hold so in the light of the above discussion. In such circumstances, the Tribunal's order cannot be termed as perverse either. The Appeal does not raise any substantial question of law. It is dismissed, but without any order as to costs.

(A.A.SAYED, J.) **(S.C.DHARMADHIKARI, J.)**