आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "एफ" मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

BEFORE HON'BLE S/SHRI D. MANMOHAN , VICE-PRESIDENT AND B.R.BASKARAN (AM)

सर्वश्री डी. मन्नमोहन, उपाध्यक्ष एवं बी.आर.बास्करन, लेखा सदस्य

आयकर अपील सं./I.T.A. No.7423/Mum/2011
(निर्धारण वर्ष / Assessment Year : 2006-07)

Shri Vishwanath Achrekar, Ramakrishna Nagar, Block No.18/226, Khar(W), Mumbai-400052	बनाम/ Vs.	Income Tax Officer-19 (1)(2), Mumbai.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPA3223C

अपीलार्थी ओर से / Appellant by :	Shri Vishwas Mehandale
प्रत्यर्थी की ओर से/Respondent by :	Shri Sambit Mishra

सुनवाई की तारीख / Date of Hearing : 30.7.2014
घोषणा की तारीख /Date of Pronouncement : 20.8.2014

आदेश / O R D E R

Per B.R.BASKARAN, Accountant Member:

The appeal filed by the assessee is directed against the order dated 23.8.2011 passed by Ld CIT(A)-22, Mumbai and it relates to the assessment year 2006-07.

2. The Assessee has raised as many as 7 grounds of appeal. At the time of hearing, the ld. AR did not press ground no.6 and hence the same is dismissed as withdrawn. Ground No.7 is general in natural and it does not require any adjudication.

3. The ground No.3 pertains to the amount of Rs.2,20,000/- relating to the amount received by the Assessee from the developer as rent compensation.

According to the assessee, the AO has assessed the same as part of capital gains. However, we notice that the first appellate authority has rejected the identical ground urged before him on the reasoning that there is no discussion in the assessment order about the assessability of the amount of Rs.2,20,000/-, referred above. At the time of hearing, the ld A.R admitted that the AO did not discuss about the taxability of Rs.2.20,000/- referred above. Hence, we are of the view that the ld. CIT(A) was justified in rejecting this claim, as the same is not an issue arising out of the assessment order.

4. Before discussing about other grounds, it is necessary to discuss about the facts relating to the case, as it will help to appreciate the contentions in a better manner. The Assessee was having a Flat at No.226, Building No.18, 1st Floor Sunshine CHS, Ram Krishna Nagar, Khar (W), Mumbai. The father of the assessee had inherited this property in the year 1975 from the mother of the Assessee. Later on it was transferred to the name of the Assessee on 30.7.2000, which is evident from the noting made in the record of the Society. The above said society entered into a development agreement dated 16.4.2004 with a Builder for re-development of the area in which the assessee's flat was located. According to the said agreement, the Assessee was agreed to be given a flat having carpet areas of 451 sq. ft. and a sum of Rs.2.50,000/- towards compensation for hardship and inconvenience and Rs.2,20,000/- as rent compensation. The Assessee received the monetary consideration of Rs.2,50,000/- and Rs.2,20,000/- as referred above on 14.7.2005.

5. In the return of income, the Assessee did not disclose any capital gain relating to the above said transactions. Hence, the AO called for explanations from the Assessee in this regard. The assessee, however, contended that no capital gain has arisen in respect of this transaction. The AO did not agree with the contention of the Assessee. Hence, he proceeded to compute the capital gains as under :

	Cost of acquisition of old flat : The previous owner namely Pandurang Achrekar father of the Assessee has received the property by way of inheritance on 29.7.1995 (sic. 1975) from Ashalata P Achrekar. The cost of acquisition of the asset to the previous owner is Nil, hence, applying the provisions of section 49(1)(iii)(a)	NIL
	Capital gains-sale consideration	
(i)	Market value of flat having 441 sq.ft. @ Rs.6320 per sq. ft as per Ready Reckoner @ 68000 per sq. mts.	Rs.27,87,120/-
	Less : Depreciation @ 20% (since old bldg)	Rs.5,57,424/-
		Rs.22,29,696/-
(ii)	Compensation value in cash as per terms of development agreement	Rs.2,50,000/-
	Capital gains	Rs.24,79,696/-

It is pertinent to note that the AO took the cost of acquisition of asset as NIL since the cost to the father of the Assessee was NIL, as the father had inherited the property from his wife. The Assessee claimed deduction u/s 54 of the Act in respect of the cost of new flat. The AO also rejected the said claim saying that the new flat is neither purchased by the Assessee nor constructed by him.

6. The Assessee carried the matter in appeal before the ld. CIT(A). The first appellate authority held that the impugned transaction would give rise to capital gain, since under the provisions of Section 2(47) of the Income Tax Act, 1961 (the Act) "transfer" includes exchange. The ld. CIT(A) held that the AO has rightly taken the cost as on 1.4.1981 as NIL since the cost was NIL to the father of the assessee. The ld. CIT(A) also held that the sum of Rs.2,50,000/-

relating to the compensation for hardship is forming part of sale consideration. However, the ld. CIT(A) did not adjudicated the issue relating to deduction claimed by the assessee u/s 54 of the Act. Aggrieved by the order of ld. CIT(A) the Assessee has filed this appeal before us.

7. In ground no.1, the assessee is contesting that the impugned transaction would not give rise to any Capital gain. We have heard the parties on this issue. Admittedly, the assessee, along with the other flat owners, has given the land and building for development purposes. There should not be any doubt that the builder has come with the proposal of development, only because he could make the profit by constructing additional flats by using the TDR available and selling those additional flats. In this process, the assessee has actually sold his share of right in the TDR and has also parted with his old flat and the said transactions, in our view also, would give rise to capital gain. Further, as observed the Ld CIT(A), the assessee has exchanged the existing flat with a new flat plus compensation amount. Under sec. 2(47) of the Act, the expression "transfer" includes exchange also. Hence, in our view, the Ld CIT(A) was justified in holding that the impugned transaction would give rise to Capital Gains.

8. Ground No.2 relates to the assessment of Rs.2,50,000/- received as compensation towards hardship and other inconveniences as part of consideration. We have already noticed that the assessee was entitled to receive a flat of 441 Sq. ft. and Rs.2,50,000/- in cash towards hardship compensation. Since the above said amount has been given as consideration for handing over the old flat, in our view, the tax authorities are justified in taking as part of consideration.

9. Ground No.4 relates to the decision of tax authorities in taking cost of the of flat as NIL. The assessee had inherited the property from his father. The father of the assessee had inherited the property from his wife (mother of the assessee). Since the cost was NIL in the hands of the father of the assessee, from whom the assessee had inherited, the tax authorities have rejected the claim of the assessee for adopting the market value as on 1.4.1981 as the cost of the assessee. In this regard, it is pertinent to extract below the Explanation given under sec. 49(1) of the Act:-

> "Explanation:- In this sub section the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) or clause (iv) of this sub-section."

The assessee's father had inherited the flat from his wife (mother of the assessee). However, the mother of the assessee has obtained allotment of the said flat in the year prior to 1960 by MHADA under the LIG housing for Lower Income Group Scheme. In view of the Explanation extracted above the 'mother of the assessee' becomes the previous owner of the property. Since she has acquired the property prior to 1.4.1981, the assessee is entitled to adopt the market value as on 1.4.1981 as the cost of acquisition of the property. Accordingly we set aside the order of Ld CIT(A) and direct the AO to adopt the market value as on 1.4.1981 as cost of the property for the purpose of computing the Capital gain. We have given this direction on the impression that the assessee herein has inherited the old flat from his father. We notice that the manner of acquisition of the old flat by the assessee is not clearly brought out in the orders. Hence, the AO may also verify the manner of acquisition of flat and if it is found that the manner of acquisition is not in the methods listed out in sec.49 of the Act, the AO may then decide the issue in accordance with the law.

10. The fifth ground relates to the rejection of deduction claimed by the assessee u/s 54 of the Act. We notice that the Ld CIT(A) did not adjudicate this issue. We notice that the AO rejected the above said claim on the reasoning that the allotment of new flat cannot be considered as either purchase or consideration. We are unable to agree with the same, since we have already held that the handing over of the possession of the old flat is a "transfer" within the meaning of Sec. 2(47) of the Act. In consideration of the transfer, the assessee has obtained a new flat and certain sum by way of money. When the value of new flat is taken as part of sale consideration, then the said value should also be considered as investment made by the assessee eligible for deduction u/s 54 of the Act. However, the assessing officer is required to examine whether the new flat was constructed within the prescribed period. From the assessment order, the relevant facts are emanating. Hence, we set aside this matter also to the file of the AO with the direction to re-examine the issue of deduction claimed u/s 54 of the Act.

11 In the result, the appeal filed by the assessee is treated as partly allowed for statistical purposes.

The above order was pronounced in the open court on 20 Aug, 2014.

घोषणा खुले न्यायालय में दिनांकः 20th Aug, 2014 को की गई ।

Sd sd

(डी. मन्नमोहन/**D. MANMOHAN**) (बी.आर. बास्करन,/ **B.R. BASKARAN**)

उपाध्यक्ष /**VICE- PRESIDENT** लेखा सदस्य/**ACCOUNTANT MEMBER**

मुंबई Mumbai: 20th Aug,2014.

व.नि.स./ SRL , Sr. PS

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

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

आदेशानुसार**/** BY ORDER,

True copy

सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai