

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"G" BENCH, MUMBAI**

**BEFORE SHRI G.S. PANNU, PRESIDENT AND**  
**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA No.5351/Mum./2016**  
**(Assessment Year : 2010-11)**

M/s. Shri Ganadhiraj Co-operative Housing  
Society, E-47, Shri Ganadhiraj  
Mithagar Road, Mulund (East)  
Mumbai 400 081 PAN – AAVAS03568R

..... Appellant

v/s

Dy. Commissioner of Income Tax  
Circle-23(3), Mumbai

.....Respondent

Assessee by : Shri Devendra Jain  
Revenue by : Shri Anil Kumar Das

Date of Hearing – 21/07/2022

Date of Order – 14/09/2022

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 01/06/2016, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by learned Commissioner of Income Tax (Appeals)-40, Mumbai, [*learned CIT(A)*], for the assessment year 2010-11.

2. In its appeal, the assessee has raised following grounds:

*"1. On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in confirming the action of the Ld AO of subjecting the capital gains to tax in AY 2010-11 whereas the plot had been sold in the previous year relevant to AY 2001-02 when the provisions of Sec. 50C were not applicable;*

*2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in confirming the action of the Ld AO of adopting the stamp duty value as on date of registration (Rs. 98,08,500/-); and*

*3. On the facts and in the circumstances of the case and in law the Ld CIT(A) has erred in applying the provisions of Sec 50C without benefit of the proviso inserted by Finance Act. 2016.”*

*The Appellant craves leave to add, amend, supplement, alter and/or delete any of the above Grounds of Appeal.*

3. The brief facts of the case, as emanating from the record, are: The assessee is a society registered under the Maharashtra Co-operative Societies Act, vide registration no. BOM/HOUSING/1448 of 1967. For the year under consideration, assessee e-filed its return of income on 21/03/2012 declaring total income of Rs. Nil, after claiming deduction under section 80P of Rs. 2,14,164. Subsequently, on the basis of information received from CIB/AIR that assessee had purchased and sold immovable property for Rs. 1,59,91,002 and Rs. 98,08,500, respectively, during the year under consideration, which has not been declared in the return of income for assessment year 2010-11, reassessment proceedings were initiated in the case of the assessee and notice under section 148 of the Act was issued. Pursuant thereto, assessee filed a letter requesting that the return filed on 21/03/2012, be treated as having been filed in response to notice under section 148 of the Act. During the course of reassessment proceedings, assessee submitted that the property was purchased and occupied by the assessee society since 1969. As the seller of the property had expired, the conveyance deed of the property was not executed in its favour by the legal heirs of the seller and therefore, the name of the society was not entered in

the land revenue records. The assessee further submitted that in the previous year under consideration the legal heirs have agreed to register the document and therefore there was no purchase of property by the assessee society during the year under consideration and only registration was done. As regards the sale of property, the assessee submitted that vide letter dated 04/10/2000, the assessee agreed to give development rights over the land to M/s Shree Sainath Builders, however, the agreement in this regard was entered only on 20/05/2009, and was registered on 18/02/2010. The assessee further submitted that the development right of plot of land i.e. 310 sq. mtrs. was assigned to the aforementioned builder for a total consideration of Rs. 19,29,700. The assessee submitted that the transaction of sale of plot of land pertains to the financial year 2000-01, relevant to the assessment year 2001-02, and only the agreement was executed during the previous year relevant to assessment year under consideration, which does not give rise to any income under the head capital gains during the year under consideration. The Assessing Officer ('AO') vide order dated 11/02/2014 passed under section 143(3) r/w section 147 of the Act did not agree with the submissions of the assessee and held that there was no contract during the financial year 2000-01 and therefore there was no transfer of property during that year as claimed by the assessee. The AO further held that contract was entered during the relevant financial year and was registered in that period only and therefore transfer of property took place during the year under consideration. Accordingly, the capital gain on transfer of land accrues in the year under consideration. The AO, by taking into consideration provisions of

section 50C of the Act, computed the long term capital gain of Rs. 86,22,980, after adopting sale value of Rs. 98,08,500 as determined by the Stamp Duty Valuation Authorities as against actual consideration of Rs. 19,29,700 received by the assessee. In appeal, learned CIT(A) vide impugned order upheld the assessment order, by observing as under:

*"6.4 Thus, the main conditions for transfer as per section 2(47)(v) read with section 53A of the transfer of property Act, which are contracts to transfer for consideration any immovable property and taking over of possession of the property has not been fulfilled as on 4.10.2000 or any time after that upto 20.5.2009, as is evident hereunder-*

*i) The letter of offer dated 4.10.2000 cannot be said to be contract as it is only an offer letter.*

*ii) It has been discussed earlier, even the important conditions in the letter of offer have not been fulfilled by the person to whom the offer was made, thus the letter of offer was not acted upon.*

*iii) The agreement dated 20.5.2009 was the contract, which has been signed by both the parties and have been executed by registration on 18.2.2010. Thus the letter of offer dated 4.10.2000 has not been acted upon and only the terms and conditions as per agreement dated 20.5.2009 has been acted upon.*

*iv) The facts of the case clearly prove that the possession of the property was always with the appellant even as on 20.5.2009. Thus upto 20.5.2009 the possession of the property was not taken over by the purchaser.*

*6.5 In view of the above it cannot be said that the transfer of property has taken place before 20.5.2009 on account of provisions of section 2(47)(v). As discussed above, the "agreement for development of vacant plot" was entered into on 20.5.2009 and the same has been registered on 18.2.2010 and thus, both the events have happened in F.Y. 2009-10, and therefore, in the facts and circumstances of the case I am of considered opinion that the Ld. AO has correctly taxed the capital gain in A.Y. 2010-11, hence this ground no 1 of appeal of the appellant is dismissed.*

4. During the course of hearing, learned Authorised Representative ('learned AR') submitted that due to delay in execution of conveyance deed amongst the legal heirs and the assessee society, the execution and registration of agreement for development of vacant plot entered into between the assessee society and the aforesaid builder was delayed and the

same was ultimately registered on 18/02/2010. The learned AR further submitted that vide letter dated 04/10/2000 assessee agreed to give development right over the plot of land to the builder for a total consideration of Rs. 19,29,700, which was accepted by the builder and advance payment of Rs. 10,00,000, was also made by the builder. The learned AR also referred to the affidavit of the partner of the builder, filed by way of application seeking admission of additional evidence under Rule 29 of ITAT Rules in order to support its submission that the possession of the plot of land is with the builder since the year 2001. Accordingly, learned AR submitted that since the entire transaction has undertaken between the assessee society and the builder in the financial year 2000-01, therefore, provisions of section 50C, which were introduced in the Act w.e.f. 01/04/2003, are not applicable in the present case.

5. On the other hand, learned Departmental Representative (*'learned DR'*) by vehemently relying upon the orders passed by the lower authorities submitted that the builder did not comply with the basic conditions, viz. payment of Rs. 10,00,000, as advance, mentioned in the offer letter dated 04/10/2000, addressed by the assessee to the builder and therefore, even the offer letter was not honoured by the parties.

6. We have considered the rival submissions and perused the material available on record. In the present case, the main issue for consideration is the year in which the transfer of property has taken place. As, only on the basis of determination of said issue it can be decided whether section 50C of

the Act is applicable to the facts of the present case for computation of long term capital gains. As is evident from the material available on record, assessee society purchased the property from Smt. Shridevi Shridhar Mahale, vide agreement for sale dated 06/02/1969. However, as the seller of the property expired, the conveyance deed could not be executed in favour of the assessee society and the name of the society could not be entered in the land revenue records, despite the fact that the entire consideration was paid by the society to the original owner of the land. Only in the year under consideration, the legal heirs of the seller agreed to register the document and thereafter the agreement for sale was registered in favour of the assessee society. There is no dispute among the parties insofar as above facts are concerned. Further, the assessee society vide letter dated 04/10/2000, agreed to give development rights in respect of plot admeasuring 310 sq. Mtrs., out of the aforesaid property, in favour of M/s Shree Sainath Builders for a total consideration of Rs. 19,29,700. It is the plea of the assessee that since the original conveyance deed in respect of the property purchased from late Smt. Shridevi Shridhar Mahale, could only be registered in the year under consideration, therefore, the agreement for development of vacant plot could be entered and registered only thereafter i.e., on 08/02/2010. However, as per the assessee, the transfer in respect of the aforesaid plot of land took place in the financial year 2000-01.

7. Before proceeding further, it is relevant to note the meaning of term '*transfer*', which is defined in section 2(47) of the Act, in relation to a capital asset. Section 2(47) of the Act reads as under:

- "(47) "transfer", in relation to a capital asset, includes,—
- (i) the sale, exchange or relinquishment of the asset ; or
  - (ii) the extinguishment of any rights therein ; or
  - (iii) the compulsory acquisition thereof under any law ; or
  - (iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
  - (iva) the maturity or redemption of a zero coupon bond; or
  - (v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or
  - (vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

*Explanation 1.—For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA.*

*Explanation 2.—For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;"*

8. We find that section 2(47) of the Act uses the word 'or' instead of 'and'. Therefore, all the conditions laid down in the provisions of section 2(47) of the Act are not required to be cumulatively satisfied and even if any condition is satisfied, the capital asset can be considered to be transferred within the meaning of section 2(47) of the Act. We find that the lower authorities have relied upon clause (v) to section 2(47) of the Act in order to deny the claim of the assessee on the basis that no contract of the nature referred to in section 53A of the Transfer of Property Act, 1982 was entered amongst the parties in the assessment year 2001-02 and therefore the property cannot be said to

be transferred during that year. Further, as per the Revenue, agreement was registered only during the year under consideration and therefore capital gains in the hands of assessee is to be computed by applying the provisions of section 50C of the Act. We find that as per provisions of clause (ii) to section 2(47) of the Act extinguishment of any right in the capital asset also results in transfer in relation to the capital asset. We are of the considered view that the term '*any right*' used in aforesaid clause is wide enough to even include the development rights in the plot of land. In the present case, it has not been disputed that assessee has transferred the development rights in the plot of land to the builder. The only issue is whether the same can be considered to have been transferred on the date of letter dated 04/10/2000, or on the date of agreement dated 18/02/2010.

9. We find that in *Sanjeev Lal vs CIT*, in [2014] 365 ITR 389 (SC), the Hon'ble Supreme Court, while dealing with the facts, wherein the assessee claimed the benefit under section 54 of the Act in respect of the capital gains arising from transfer of property vide sale deed registered on 24/09/2004, while the agreement to sell was executed on 27/09/2002, considered the question as to whether the date on which agreement to sell was executed could be considered the date on which the property was transferred. The relevant observations of the Hon'ble Supreme Court, in the aforesaid decision, are as under:

*"20. The question to be considered by this Court is whether the agreement to sell which had been executed on 27th December, 2002 can be considered as a date on which the property i.e. the residential house had been transferred. In normal circumstances by executing an agreement to sell in respect of an immovable property, a right in personam is created in favour of the*



*transferee/vendee. When such a right is created in favour of the vendee, the vendor is restrained from selling the said property to someone else because the vendee, in whose favour the right in personam is created, has a legitimate right to enforce specific performance of the agreement, if the vendor, for some reason is not executing the sale deed. Thus, by virtue of the agreement to sell some right is given by the vendor to the vendee. The question is whether the entire property can be said to have been sold at the time when an agreement to sell is entered into. In normal circumstances, the aforestated question has to be answered in the negative. However, looking at the provisions of Section 2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred. Relevant portion of Section 2(47), defining the word "transfer" is as under:*

*'2(47) "transfer", in relation to a capital asset, includes,-*

*(i)\*\**

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*(ii) the extinguishment of any rights therein; or. . . . .'*

*21. Now in the light of definition of "transfer" as defined under Section 2(47) of the Act, it is clear that when any right in respect of any capital asset is extinguished and that right is transferred to someone, it would amount to transfer of a capital asset. In the light of the aforestated definition, let us look at the facts of the present case where an agreement to sell in respect of a capital asset had been executed on 27th December, 2002 for transferring the residential house/original asset in question and a sum of Rs. 15 lakhs had been received by way of earnest money. It is also not in dispute that the sale deed could not be executed because of pendency of the litigation between Shri Ranjeet Lal on one hand and the appellants on the other as Shri Ranjeet Lal had challenged the validity of the Will under which the property had devolved upon the appellants. By virtue of an order passed in the suit filed by Shri Ranjeet Lal, the appellants were restrained from dealing with the said residential house and a law-abiding citizen cannot be expected to violate the direction of a court by executing a sale deed in favour of a third party while being restrained from doing so. In the circumstances, for a justifiable reason, which was not within the control of the appellants, they could not execute the sale deed and the sale deed had been registered only on 24th September, 2004, after the suit filed by Shri Ranjeet Lal, challenging the validity of the Will, had been dismissed. In the light of the aforestated facts and in view of the definition of the term "transfer", one can come to a conclusion that some right in respect of the capital asset in question had been transferred in favour of the vendee and therefore, some right which the appellants had, in respect of the capital asset in question, had been extinguished because after execution of the agreement to sell it was not open to the appellants to sell the property to someone else in accordance with law. A right in personam had been created in favour of the vendee, in whose favour the agreement to sell had been executed and who had also paid Rs.15 lakhs by way of earnest money. No doubt, such contractual right can be surrendered or neutralized by the parties through subsequent contract or conduct leading to no transfer of the property to the proposed vendee but that is not the case at hand.*

22. ....

23. *Consequences of execution of the agreement to sell are also very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed.*

24. *Thus, a right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27th December, 2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated.*

25. *In view of the aforesaid peculiar facts of the case and looking at the definition of the term 'transfer' as defined under Section 2(47) of the Act, we are of the view that the appellants were entitled to relief under Section 54 of the Act in respect of the long term capital gain which they had earned in pursuance of transfer of their residential property being House No. 267, Sector 9-C, situated in Chandigarh and used for purchase of a new asset/residential house."*

10. In the present case, as per the terms of the aforesaid offer letter dated 04/10/2000, offer letter was accepted by the builder and advance payment was made. The said fact has also been confirmed by the builder vide letter dated 30/01/2014, forming part of the paper book at page No. 26. It has not been disputed that the possession of the plot of land was taken by the builder in the year 2001. Vide impugned order, learned CIT(A) noted that the offer letter was not acted upon by the builder as the entire advance amount of Rs. 10,00,000, was not paid within the stipulated time. From the copy of the bank statement of the assessee society, we find that amount of Rs. 6,00,000, was paid by the builder on 25/11/2000, while an amount of Rs. 5,33,350,

was paid in the year 2001. Therefore, it is evident that the builder had made the payment of the advance amount as agreed between the parties vide aforesaid offer letter dated 04/10/2000. Thus, all the essentials of a contract i.e. offer, acceptance and consideration are fulfilled in the present case. In any case, by non fulfilment of any condition of the contract, same becomes only voidable at the option of the parties and it does not render the contract to be void. We find that despite the delay in payment of the advance money, the vendor i.e., the assessee society honoured the initial terms of offer letter and ultimately executed agreement dated 20/05/2009, with the builder. Thus, we do not agree with the view of the learned CIT(A) that the letter of offer was not acted upon between the parties.

11. In addition to above, it is interesting to note that on one hand the Revenue did not dispute the fact that the impugned property was purchased by the society in the year 1969 and accordingly computed the long term capital gain, despite the fact that conveyance deed in respect of that transaction was also delayed and was ultimately executed in the year under consideration, while, on the other hand, in respect of the transaction of transfer of development right to the builder, the Revenue is considering the date of registration of the agreement, i.e. 18/02/2010, as the date of transfer for the purpose of computation of capital gains tax. Thus, in view of the aforesaid factual and legal position, we are of the considered view that development rights in the plot of land were transferred to the builder in the financial year 2000-01. Further, since provisions of section 50C of the Act

were inserted in the Act w.e.f. 01/04/2003, the same are not applicable in the present case. Accordingly, grounds raised by the assessee are allowed.

12. In the result, appeal by the assessee is allowed.

Order pronounced in the open Court on 14/09/2022

**Sd/-**  
**G.S. PANNU**  
**PRESIDENT**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 14/09/2022**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai