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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

ITA No.1582/Mum/2019
(Assessment Year: 2012-13)

Radharaman Constructions Ground Floor, Shri Kunj, 3A Altamount Road, Mumbai-400 026	Vs.	Asst. CIT, Circle – 19(3), Mumbai
PAN/GIR No. AAAAR 3741 A		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Dr. K. Shivaram
Respondent by	:	Shri Rakesh Ranjan

Date of Hearing	:	27.10.2020
Date of Pronouncement	:	05.01.2021

O R D E R

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-59, Mumbai ('ld.CIT(A) for short) dated 23.01.2019 and pertains to the assessment year (A.Y.) 2009-10.

2. The grounds of appeal read as under:

The Ld. Commissioner of Income Tax (Appeals) and Id Assessing Officer erred in making addition of Rs. 1,62,09,900/- to the Long Term Capital Gain as offered by the appellant under Section 50C of the Act on the basis of the valuation done by the Departmental Valuation Officer.

The Ld. Commissioner of Income Tax (Appeals) and Id Assessing Officer erred in invoking provisions of section 50C of the Income Tax Act, 1961 despite the fact that:

- The land consisted of 9,685 sq metres of which a major portion was occupied by green belt (7,873 sq metres) on which no construction is permitted.
- The land was next to river having mangroves and was in ecologically sensitive area.
- The land was reserved for Economically Weaker Section of Society,
- The sale of green belt land was part and parcel of two other sales of land adjacent to the said land. The combined sales consideration exceeded combined stamp duty valuation.

- It was not a transfer of land but only transfer of development rights in the land. The appellant was not the owner of the land but only owned development rights in the land.

The appellant prays that aforesaid additions made may be deleted.
The appellant craves your honour's leave to add, alter or amend any ground of appeal at the time of hearing or before.

3. Brief facts of the case are that the Assessing Officer noted that the assessee was in possession of a piece of land at village Mundhwa, Haveli; Pune, from 03.07.2006 onwards. During the financial year, the said land was sold by it as three plots and three separate sale agreements were executed with the following particulars:

(in Rs.)

Sr. No	Name of Purchasers (Shri)	Area of plot	Sale Consideration	Stamp Duty value
i.	Avinash Nirvuti Bhosale /Amit AvinashBhosale	20,000 sq.m	27,00,00,000/-	18,98,00,000/-
ii.	Shree Balaji Estates & Properties	18,500 sq.m	25,00,00,000/-	17,66,60,000/-
iii	Subhash Sitaram Goel	9,685 sq m	2,50,00,000/-	6,53,27,000/-
	Total		54,50,00,000/-	43,17,87,000/-

The Assessing Officer observed that the plot at (iii) above (hereinafter, 'the 3rd plot'} sold to one Shri Subhash Sitaram Goel for a consideration of Rs.2,50,00,000/- had a Stamp Duty valuation of Rs 6,53,27,000/-. Accordingly, the assessee was asked to show cause as to why the higher value should not be substituted for computing capital gains in terms of section 50C of the Act. In response thereto, the assessee explained that out of the total area of the 3rd plot sold to Shri Subash Goel, a major portion measuring 7,873 sq. meters was reserved forest land and, therefore, no development was permissible thereupon - due to which, its value was 'nil'. In contrast, the other two plots were agricultural land and were capable of being converted into non-agricultural (NA) land use. For this reason, 3rd plot was sold at a value lower than the Stamp Duty valuation and it would not be correct to invoke the provisions of section 50C of the Act, 'as it was incapable of being sold at market rate. Without prejudice, the appellant requested. The Assessing Officer that the valuation of 3rd plot should be referred to the Departmental Valuation Officer ("DVO") in accordance with the provisions of section 50C(2) of the Act.

4. The aforesaid explanation did not find favour with the Assessing Officer. He stated that section 50C of 'the Act squarely covered 3rd plot as its Stamp Duty value was higher than the Agreement value. Since the valuation was challenged, a reference dated 13.03.2015 was made to the DVO, Since, the limitation date for passing the assessment, order was approaching, the Assessing Officer without waiting for the receipt of the report, imported the Stamp Duty value of Rs.6,53,27,000/- on an *ad hoc* basis for computing LTCG, discarding the Agreement value of Rs.2,50,00,000/-. In this manner, the differential amount of Rs.4,03,27,000/- came to be added, A remark was appended in the assessment order that whenever the DVO report was received, the Stamp Duty value would be replaced by the value so determined through a rectification order passed under section 154 of the Act.

5. The requisite report was received from the DVO vide letter no. VO-SOL/PN/CG/2111/2016-17/90 dated 24.10.2016. The 3rd plot was valued at Rs.4,12,09,000/- as against the value of Rs.6,53,27,000/- adopted by the Assessing Officer in the assessment order. Resultantly, the Assessing Officer passed an order under section 154 of the Act on 25.11.2016 substituting the value taken by him by the value now determined by the DVO. *Ex- consequenti,* the amount in dispute now stood reduced to Rs.1,62,09,900/- (i.e., Rs.4,12,09,000/- minus Rs.2,50,00,000/-).

6. Upon the assessee's appeal, the ld. CIT(A) elaborately dealt with the assessee's objection. He found that the provision of section 50C are fully applicable. We may gainfully refer to his order in this regard as under:

> Section 50C of the Act, is reproduced below for ready reference:
> "Special provision on for full/value PJ consideration in certain cases.
> 50C. *(1)* Where *the consideration received or accruing as a result of the transfer by an* assesses *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 Stats Government (hereafter in this section. referred to as the "stamp valuation authority") for the purpose* o/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*
> *Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value*

adopted or assessed or . assessable by *the stamp valuation authority on the date* o/agreement *may be taken for the purposes of computing full value of consideration for such transfer:*

Provided further that the first proviso shall apply only in a cose where the amount of consideration, 'or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the , date of the agreement for transfer.

Provided also that where the value adopted or assessed or assessable by the stamp valuation authority does not exceed one hundred and five per cent of the consideration received or accruing as a result of the transfer, the consideration so received or accruing as a result of the transfer shall, for the purposes of section 48, be deemed to be the full value of the consideration.

(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;

(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-sections (2), (3), (4), (5) and (6) 'of section 16A, clause *(i) of sub-section (1.) and sub-sections (6) and (7) of section 23 A, sub-section (5) of 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 purposes of the payment of stamp duty.*

(3) Subject to the provisions contained in sub-section (2), where the value ascertained-under subsection (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."

4.1 A bare perusal of the aforesaid shows that the conditionally, as literally evident through plain words, for the successful invocation of section 50C of the Act can be encapsulated and enumerated as below:

(i) That there should be capital asset comprising either land or building or both
(ii) That there should be a 'transfer' thereof
(iii) That the stated consideration should be less than its Stamp Duty value
(iv) On this event happening, the Stamp Duty value will be deemed to be the consideration received instead of the value at (iii) above.
(v) On a protest by the seller-assessee, the Assessing Officer may refer the matter to the DVO and. on his report,, section 50C(3) would come into play.

4.2 The next step would be to apply the above to the facts obtaining in the instant appeal. . There was a 'capital asset' held by the appellant which was 'transferred' through three specific sale agreements to three separate entities for 'consideration'. To tfus extent, there is no dispute.

4.3 Examining the condition for application of section 50C of the Act as per requirement at (iii) above to the tabular representation para (2.1/pg. 2) *ants,* it is *ex fade* obvious that for the sale of the first two plots of land, the stated consideration exceeded the 'Stamp Duty. Valuation, This being so, the applicability of section 50C would fail unquestionably. However, for the sale of the 3rd plot, the stated sale consideration was lower than the Stamp Duty value. Thus, the final conditionally for invoking the modalities prescribed in section 50C of the Act would be triggered. Therefore/ it has to be unhesitatingly held so.

4.4 Turning to the elaborate reasoning given to the contrary, a facet which ' becomes immediately manifest is that it broadly constitutes an attempt to read-down the provision of section 50C of the Act. None of the arguments pressed into service by the appellant would supply a reason for eliminating the rigors of a statutory mandate. The Assessing Officer would not be entitled to apply exceptions where none has been provided for in the Act. The dominant theme of counter-arguments revolves around establishing reasons as to why the 3rd plot was sold for Rs.2.50 crores as against the Stamp Duty value of Rs.6.53 crores. Without an iota of doubt, a consideration of this aspect is not within the competence of the Assessing Officer. Had this been so, there would have been, no occasion for. the Legislature to call upon the DVO to use his technical expertise for make an accurate price discovery. Taking any other view runs' the 'unacceptable risk *of* rendering sub-clause (3) of section. 50C of the Act nugatory. Hence, claims such as the 3rd plot falling in an ecologically sensitive green zone, adjacent to a mangrove-forest lined river, government restrictions prohibiting commercial construction ' and reservation for the Economically Weaker Sections (EWS) cannot be considered or that one party had to grant easement to others. After all, the land was voluntarily sold to multiple persona, in such a configuration that it wanted and if that necessitated *inter-ss* right-of-way arrangements, then that would have no impact on statutory compliance to section 50C of the Act if otherwise warranted. Further, that the appellant chose to have all the agreements signed on the same day or that the sale agreements referred to the adjacent plots with each being a reciprocally confirming party, are wholly extraneous for determining the applicability of the said section. In other words, it would have made no difference to the legal position if the sale agreements had been entered on. three different dates or that they were to refer to more agreements or that they had common confirming parties as buyers of contiguous plots or that the three new owners, had decided to perhaps jointly prepare and submit a sub-division plan to the municipal authorities. These aspects, even if correct, are agreed to

among the parties themselves as per their own will and convenience. These would, therefore, vary from sale to sale. It is, apparent that they cannot conceivably thwart the applicability of 50C of the Act being immaterial to it. The new buyers were the new owners and not 'co-owners' as erroneously characterized by the appellant in the written submission/ as each transferee owned his plot of land independently *de hors* the fact that the three pl9ts was at some earlier point of time, a single plot of land.

4.5 Another argument proffered .by the appellant was that regardless of the three clearly apparent sales, there were actually only two sales, i.e., one to the Bhosale Group and the other to the Shri Balaji Group. The logic was that the buyer of the third plot, i.e., Shri Subhash S. Goel, was a partner in the firm buying the other plot. This argument is misconceived. It militates against a fundamental principle of taxation that a 'person' as defined in section 2(31) of the Act, would be an independent tax entity *vis-a-vis* another 'person' regardless of any other relationship that may subsist between them. - Accordingly, it would not detract .from, the applicability of section 50C of the Act even if the buyers were in "firm-partner, iarfa-HUF or trustee-trust relationship. For the same reason, it is immaterial that one of the buyers had to be. an individual since the extant regulations mandated that a forest land could be acquired only by an individual (Shri Subhas S. .Goel) and not by a firm (Shree Balaji Estates & Properties). .There is no exclusion from section 50C. of the Act based on the status of the buyer or for the fact that one of the buyers purportedly purchased an adjacent plot for preempting 'nuisance' being committed to his prime plot. It may be gainfully noticed that there is nothing akin to rule 6DD of the Income-tax Rules, 1962, being exceptions/mitigating circumstances for section 40A(3) of the Act that have been engrafted in section 50C of the Act. When the plain words of the statute are clear and where the dimensions of the sale agreement are also clearly manifested, there is no occasion for getting into extraneous reasons/causes as to why a particular land sale transaction was valued in a particular way. Many of the arguments deployed by the appellant are factors for the DVO to consider and not by the Assessing Officer-as per express provisions of the Act. This is amply borne out.from the considerable depletion in the fair market value of the 3rd plot as determined by the DVO. Hence, the arguments taken for justifying the deflated sale price, are of little relevance. The cumulative effect of all germane factors such as shape, size, location/ and future potential were duly reckoned in the report of the DVO.

4.6 There is no legal justification seeking the aggregation of the three independent sale agreements for the purpose of benchmarking the separately stated sale consideration with their Stamp Duty value. Accepting such a prayer would confer an undeserved tax advantage. The sale was as per the voluntary will, structure and scheme mutually conceived and devised by the parties concerned. The provisions of the Act must, therefore, apply to the consequences flowing therefrom. The reality is that there was transfer of land/asset through three instruments to three parties for three different sale consideration as elected by the appellant. If this be so, the Assessing Officer was duty bound to consider likewise. Hence, there is no force in the inexplicable contention that regardless of the commercial reality, the transactions should have been bundled back and lumped as one combined transaction only for the purpose of skirting a requirement of the Act. The appellant informed the Assessing Officer that it acquired the property to *"earn capital appreciation over a period of time. Since the object was investment, it was disclosed as investment, in the Balance Sheet"*.

It is not disputed that the asset that was transferred was not its stock-in-trade or a trading asset but an investment. In view of the discussion, it has to be held that the provisions of section 50C of the Act were undeniably applicable to the sale of the 3rd plot/ being independent of the other two and satisfying all the prerequisites for invoking section 50C of the Act.

7. Thereafter, the ld. CIT(A) addressed the other limb of assessee's grievance, that this was a case of transfer of development right, hence, section 50C is not applicable. He elaborately dealt with the issue and rejected the assessee's contention by holding as under:

4.7 The next argument falls in a different sphere altogether. The point raised is that section 50C of the Act speaks of 'land .or building' and not to any 'right' therein. Hence, the scope of the aforesaid section will not include or extend to the granting of Development Rights^ Reliance was placed on the decision of the Id. Appellate Tribunal, Mumbai, in Voltas *Ltd vs. ITO 7(3)(4), Mumbai* [2016] reported in 161ITD 199. On consideration. It is evident that the appellant does not have a meritorious case. In the said decision, the appellant had itself offered capital gains on sale of development rights on the basis of Development Agreement and not on the basis of Sale Agreement. Further, if the. appellant were to regard 'land' and Development Rights' as different class of capital assets and terms that were not amenable to be used interchangeably, then the same should be consistently reflected in its representation across the taxation/accounting spectrum and not only in appeal. Thus, the stand taken now that it never acquired 'land' but had only some rights, with ownership still vested in Radha Raman Co-op Housing Society; is unacceptable. The conduct of the-appellant reveals that it had all the material rights over the land - rights which are vested with an owner. For instance, in the letter dated 27.06.2016 addressed to the DVO, the reference by the appellant was to the sale of a "piece and parcel of land" and not to a 'right[1]. In the undated correspondence to the Assessing Officer/ the appellant mentions the "cost of land" to be Rs. 22,50,00, QOO/-. The appellant stated that in the sale agreements, there was a clause for the sub-division of land as per which ;the buyers shall jointly prepare a pUn for the plot and obtain requisite sanction from the authorities to issue separate 7/12 extracts. This too demonstrates that the property alienated was land itself and not some intangible, since modification of Sand records (7/12 extracts) is associated with land ownership. Accordingly, the aforesaid decision of the Id. Appellate Tribunal, Mumbai, is not on all fours.

4.8 Be that as it may, there is a far more compelling reason, as to why the provision of section 50C of the Act will apply to the transaction entered, irrespective of the fact that it is characterized as a Development Agreement. Once this is found to be so, then it does not really matter as to who is the continuing registered owner of the land in the 7/12'records or the 'Ownership History' narrated by the appellant or recorded in the valuation report of the DVO. That is to say, it would not be much of a consequence as to whether the registered owner was Radha Raman Cooperative Housing Society or Shri Manhoarlal Pittie or anybody else for that matter. In every classical Development

Agreement model, the landholder continues to be the technical owner of the land when he divests his Development Rights beneficially and irrevocably to a builder. For this reason, the landowner ordinarily continues to sign nominally in the land/flats transfer documents as the .one of the parties. In this perspective, the contention urged by the appellant that the transaction was in the nature of transfer of Development Rights and would "be beyond the scope of section is examined.

4.9 The opening sentence of the said section reads *"Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land...."*. The occurrence of the word "transfer" requires a reference to section 2(47) of the Act which provides that 'transfer' includes any transaction involving the possession of immovable property to be taken or retained in part performance as specified in section 53A of the Transfer of Property Act, 1882. It is settled .that a definitiori contained in the dictionary Clause should be used for the purposes of the Act unless the contrary is stated. A Development Agreement does *no^ipso fatto,* amount to transfer of immovable property in general law^ But the position in the Income-tax Act is different. Here, it can be considered as 'transfer' if the conditions specified in section 2(47)(v) of the Act are met. In the landmark decision of the Hon'ble Bombay High Court rendered in *Chaiarbhuj Dwarkadas Kapadia v. CIT* reporte.4 in 260 IT,R.491,; the mie import of sectipit2(47)(v) of the Act was elucidated,This provision, introduced from 1st April, 1988, is at the. core of the taxability of capital .gains, particularly in the context of Development Agreements. Elaborating the scope thereof the Hon'ble Bombay High Court held that arrangements that confer the privileges of ownership over land without transfer of.title would still be.'transfer' without waiting for the execution of conveyance. In such a situation, the date of signing the' Development Agreement would ordinarily be the date of the'transfer'. Flowing from this, it can be said with no difficulty that executing a Development Agreement would amount to 'transfer[1] contemplated in section 50C of the Act.

4.10 The Id. Appellate Tribunal, Mumbai, in *ACIT(OSD)-2(3), MumM vs. Seth Industries (P)'Ltd* (ITA 4094/Mum/2013 dated 18.05.2013) held.that 'transfer' of land would.be on the date of executing the registered Development Agreement transferring development rights. It observed as under:

> *"As could be seen from the.-facts on record, assessee has entered into a registered development agreement with MJs. Sanghvi Premises P. Ltd. on 29.10.2005. As per the terms of the agreement, transfer of the land should be concluded on the date of execution 6f the deed. Thus, in terms of Section 2(47)(v) of the Act there was transfer of capital asset insofar as it relates to the land in question."The" ratio laid down by the Hon'ble Jurisdictional High Court in the case of Chaturbhuj Dwarkadas Kapaida (supra) supports this view..."*

4.11 The Id. Appellate Tribunal, Mumbai, in *ArifAkhatar Hussain vs ITO* 12(2X1), *Mumbai* [2011] (45 SOT 257), considered an identical case and held asunder (emphasis supplied):

> *"9. The .main contention of the learned AR is <u>that the development rights does not amount to transfer of land or building and therefore the provisions of section 50C are not applicable.</u> 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 under section 2(47)(v). The deemed transfer is applied when the condition prescribed under section 53A of Transfer of Property Act are fulfilled. 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 under section 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 i$ 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 attacked 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* fry *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."*

4.12 The Hon'ble Allahabad High Court in Commissioner *of Income-tax-II, Agra vs Shimbhu Mehra* [2016] reported 65 taxmann.com 142, had two dates to consider. The first was the agreement for .sale date being 04,07.2001 and other Was the execution of Sale deed in April, 2003. It was held as ' under (emphasis added):

"14. *In the light of the aforesaid provision, it is apparently clear that the moment an agreement to sell is executed between the parties and part consideration is received, the transfer for the purpose of Section 50C of the Act takes places and computation under Section 48 of the Act will start accordingly, for the purpose of calculating the capital gains under Section* 45 *of the Act."*

The aforesaid was followed by the Id. Appellate Tribunal, Allahabad, in *Hari Mohan Das Tandon vs Pr.* CIT [2018] reported in 91 taxmann.com 199.

' 4.13 The Id, 'Appellate Tribunal, Mumbai, 'in *ACIT-25(3)$_I$ Mumbai vs Dattani Development* (1TA 5075/Murh/2010 dated 27.07.2016) considered a number of judicial precedents and held as under (emphasis supplied):

"Keeping in view the ratio of decisions cited by learned DR as detailed above and overall fads and circumstances of the case in totality, we also find that section 50C *of the Act is clearly ' applicable even to the sale pf development rights in the land as was held in the- decisions relied upon by the learned* DR *as detailed above,* more-so *we have already held that in-fact the assessee has not only sold development rights in the land but the assessee sold the entire land with ownership rights in the land if the development agreement are rend in conjunction with deed of confirmation / conveyance executed by the assessee which are placed in paper book filed with the Tribunal. Thus, the land which was sold during the previous year by the assesses, thus keeping in view our above discussions in the light offsets and circumstances of the case, was a capital asset within the provisions of Section 2(14) of the Act and the valuation of the land as per stamp .duty valuation authorities as per section 50C of the Act was rightly adopted by the Assessing Officer as full value of consideration ,...."*

One of the decisions noted was that of *Mrs. Arlette Rodrigues vs /*TO, *Ward 15(2)(2), Mumbai* [2011] reported In 10 taxmann.com 235, where it was held as under :

> "17. *The definition of the transfer given in section 2(47) is a inclusive one. The concept of the ownership is based on the basic jurisprudence that it is a bundle of rights like right to possess, use and enjoy the thing owned, to consume destroy or alienate the thing. Moreover, the ownership has a characteristics of inter-determinate in duration and also ownership has residuary character. When the . development rights, which, are residuary, are transferred, it is nothing but right to exploit the said property in favour of the developer and same is covered under clause (i) to section 2(47) i.e relinquishment of asset. We are, therefore, of the opinion that the provisions of section 50C are • applicable when the rights to develop the property are transferred. We, therefore, reject the contention of the assessee that the provisions of section 50C are not applicable."*

4.14 The Id. Appellate Tribunal, Visakhapatriam in *DCIT, Circle-2'(1), Vijayaiaadti vs Dr. Chalasani Mallikarjuns Rao* [2016] reported in 75 taxmann.com 270, observed that that it was "illogical and improper" on the part of the assessee to say that 'transfer, within the meaning of section 2(47}(v) of the Act took place, but yet there was no application of provisions of section 50C of the Act when the property has been transferred by way of registered un-pqssessory sale-cum-GPA. It noted that the assessee had computed long-term capital gain by adopting sale consideration-shown.in the sale deed. The averments of the appellant are congrupus. The Id. ITAT held as under (emphasis supplied):

"In this 'case, admittedly, the assessee himself has admitted long term capital gain on transfer of asset, The moment transfer took place inviting the meaning of section 2(47)(u) of the Act, the . deeming fiction provided u/s.50C of the Act are applicable, when the sale consideration shown in the sale deed is less than the market value determined by the stamp duty authority for the purpose of payment of stamp duty."

4.15 The Hon'ble Supreme Court in Sri *Sanjeev Lal etc. etc. v.CIT, Chandigarh & Anr. (*Civil Appeal Nos. 5899-5900/2014 dated 01.07.2014) examined this issue *albeit* in the context of section 54 and held that an agreement to sell gave rights to the vendor and reduced or extinguished rights of the assessee -'which was sufficient for the -

purpose of section 2(47) of the Act which defines the term 'transfer' in relation to a capital asset. The Hon'ble Apex Court held and observed as under (emphasis supplied).

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 circumstance by executing-un agreement to Sell in respect of an immoveable 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, looting 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,*

> *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 atnount to transfer of a capital asset.*

4.16 Moreover, the insertion of Explanation 2 to section 2(47) of the Act by the Finance Act, 2012, with retrospective effect from April 01, 1962 unambiguously provides that 'transfer[7] of an asset "includes disposing of or parting with an asset by way of an 'agreement[1]. The said Explanation read as under (emphasis supplied):

> *"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 of outside India) or otherwise, notwithstanding' that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India;"*

As thus seen, there is a catena of judicial authorities holding categorically that 'transfer of land or building' will encompass in its fold transfer of Development Rights. As. a result, even if it is taken that what was transferred was such a right alone, even then the application of section 50C of the Act remains 'intact and unaltered. Needless to add, the debate as to whether a particular Development Agreement leads to the incidence of Capital Gains or not, is settled here, as the appellant itself has recognized, computed and offered .the gains arising to tax without any dispute or reservation. Hence, this arena is not required to be ventured into *ab initio.*

4.17 Now turning to some other objections flagged, the appellant expressed his reservation at the' DVO valuing agricultural land at Rs.7,770/- per sq meter which was .purportedly above 'the Stamp Duty rate of 7,300/- per sq meter. The appellant felt that this was against the mandate of section 50C(3) of the Act providing that that the DVO cannot exceed the Stamp Duty valuation. This argument fails on two counts. Firstly, the bar if any, depending on the scenario envisaged in Chartered clause (3), is not on the DVO as how to make the valuation or his techniques, but on the Officer. Secondly, the comparison between the two valuation amounts is to be made considering the overall, value of the property/capital asset. In the instant case, while the Stamp Duty value is Rs. 6,53,27,0007-, the valuation by the DVO is much lower at only Rs.4,12,09,000/-. Hence, the point agitated is devoid .of any merit. The Assessing Officer, through the rectified order, has' correctly taken the lowest of the three .values, .namely, that made by the DVO, the Stamp Duty value and the Agreement or the stated consideration.

4.18 The appellant averred that wherever there was an intention to include a 'right', the Legislature had specifically added the same. Section 269UA(d) of the Act was cited as an illustration. The Explanation appended thereto clarified that land, building, part of a building, machinery, plant, furniture, fittings and other things - include any rights therein. However, the parallel is not apt. The said section, was part of special provisions incorporated in the erstwhile Chapter-XXC of the Act *("Purchase By Central Government Of Immoveable Properties 1$ Certain Cases of Transfer")* and resorted to only when there was a significant under-valuationln the. Agreement of Sale for evading tax. Definitions, including the one relied upon, were specially drafted for the purpose of the Chapter and would/ consequently, fail to have any relevance beyond its confines. That said, the definition of "transfer" in this Chapter too included allowing possession of property in part performance referred to in section 53A of the Transfer of Property Act, 1882. Hence, this . does not advance the case of the appellant.

4.19 The final aspect that deserves to be dwelt upon is that the Legislative intent in introducing section 50C of the Act was to curb the deliberate under-valuation of immovable property as a tool of tax-avoidance. Allowing Development Agreements, a widespread modality adopted for transfer of beneficial ownership of immoveable property, to escape the vigil of section 50C of the Act would defeat the aforementioned intent in a substantial way leading to the emasculation of the said section. The appellant has pointed out that section 50C of the Act was a deeming fiction and, hence, ought to be given a restricted, strict meaning. No doubt the provision is a deeming one, but it would be useful to refer to the decision of the Hon'ble Apex Court in *A. Madan Mohan vs Kalavakunta Chandrasekhara* (1984 AIR 871), where the following observation speaks for itself (emphasis supplied): • .

> *"It is a well settled principle of interpretation of statute that wherever a statute contains stringent provisions they must be literally and strictly construed so as to promote the object of the Act."*

4.20 From the legal and factual discussion as foregoing, it is evident that the transaction in the 3rd plot squarely fell in the ambit of 'transfer' within the meaning of section 2(47)(v) of the Act. Therefore, the application of section 50C of the Act is irresistible and unstoppable. No infirmity can be found in the action of the Assessing Officer. The impugned order under section 143(3) read with the subsequent rectified

order under section 154 of the Act,' is upheld. Both the grounds of appeal fail and are, therefore, dismissed.

8. Against the above order, the assessee is in appeal before us.

9. We have heard both the counsel and perused the records. The ld. Counsel of the assessee summarized his proposition canvassed as under:

Propositions;

1. The land consisted of 9,685 sq metres of which a major portion was occupied by green belt (7,873 sq. metres) and balance was agricultural land (1,812 sq. metres).
2. The Green Belt is given in the Development Control Regulations Pune Which states that "The Green zone has to be kept open but can be used for certain types of uses like developing garden, lawn, swimming pool, farm house with restricted FSI etc." Thus, No building can be constructed on the Green Belt land.
3. The land was in the green belt is because it was situated next to the Mula Mutha river. Thus, it is an ecologically sensitive area. Since it is next to a river, the soil needs to be preserved and no buildings can be constructed. There are mangroves along the river in the green zone which cannot be disturbed.
4. This is forest land which has no potential for development, Hence, the sale price was much lesser than the stamp duty valuation since development / construction activities were not permitted on the bulk of the land as it was situated on the green belt.
5. All the three sale transactions are part and parcel of a composite sale transaction. The combined sales consideration of Rs 54.50 Cr far exceeds the combined stamp duty valuation of Rs.43.18 Grand there can be no question of addition u/s. 50C of the Act.
6. No independent approach road to the third plot of land which the development right was obtained.
7. Land cannot be developed.
8. Comparable sale instances referred by the valuation officer, but no actual sale instances are referred.
9. Green Zone-Objections
10. Development potential
11. CIT (A) has not dealt with any of the objections of the Assesses while confirming the valuation report of the valuation officer.
12. Valuation report of the valuation officer is not binding on the CIT [A) he has to independently apply his mind and has to decide on merit.
13. In ***Suresh C. Mehta v. ITO (2013) 144 ITD 427 (Mum)(Trib.)*** held that, assessee had made various objections to such valuation report before Commissioner (Appeals), Commissioner [Appeals) was bound to look into these objections so as to arrive at proper fair market value. The Commissioner (Appeals) and the Tribunal can entertain objections relating to such valuation and Valuation Officer's valuation is not binding upon them.
14. In ***CIT v. Prabhu Steel Industries Ltd. (2013) 218 Taxman 290 / (2014) 265 CTR 581 (Bom.)(HC)*** the Court held that, valuation officer is an independent and distinct statutory forum for resolving controversy regarding determination of market value of property with all necessary powers; its order or report is made binding on Assessing Officer. When report/order of Valuation Officer under section 50C (2) is objected to by

assessee, CIT(A) or Tribunal are obliged to extend an opportunity of hearing to such Valuation Officer.

15. Without prejudice to the above, if the combined stamp duty value of all three agreements is seen, it is less than the sale agreement value.

16. Without prejudice to above; section 50C cannot apply as this was not a transfer of land or building. It was only a transfer of 'development right' in the land. By virtue of Deed of Conveyance dated 20.04.2006, the land was transferred by Mr & Mrs Pittie to Radha Raman Co-operative Housing Society Ltd. Thereafter, on 03.07.2006, Radha Raman Co-operative Housing Society Ltd entrusted the development rights of the land in favour of the appellant for a consideration of Rs.22.50 Crores. Thus, it is clarified that the owners of the land vests with Radha Raman Co-operative Housing Society Ltd.

17. In the case of ***Network Construction Company vs. CIT [2020] 119 taxmann.com 186 (Mum)(Trib.)*** held that provisions of section 50C could not be applicable to sale of development rights in respect of buildings.

18. In ***Voltas Ltd v ITO [2016] 161 ITD 199 (Mum)(Trib.)*** held that, the capital asset transferred by the assessee upon which long term capital gain has been computed by the AO is on account of transfer of Development Rights in the land. The land itself has not been transferred by the assessee.

19. In the case of ***ITO v Prem Gupta, ITA No.58Q3/M/2009 dated 28.03.2013 (Mum)(Trib.)*** the Tribunal at para 5, page 4 held that the words 'land and building' in Section 50C do not refer to immovable property as a whole.

20. n the case of ***ITO v Balkawade Dhanaji, ITA No. 686/P/2013 dated 30.10.2014, (Pune)(Trib.)*** held that the provisions of section 50C of the Act are not applicable as the same are to be applied only where there is transfer of land or building or both. In the case of the assessee, there were only development rights in the said land available to the assessee and such transfer of development rights does not establish the case of the Revenue that it amounts of transfer of land or building or both."

21. The Bombay High Court in the case of ***CIT v Greenfield Hotels & Estates Pvt Ltd. (2016) 389 ITR 68 (Bom),*** it was held that Section 50C will not be applicable while computing capital gains on transfer of leasehold rights in land and buildings.

22. Decision relied by the CIT (A) is not relevant to the present case as there is no transfer of Development Agreement. Here is a Sale Agreement wherein assessee is a confirming party.

23. In view of the above, the appeal of the Assessee may be allowed.

10. Per Contra, the learned departmental representative relied upon the orders of the authorities below. He pleaded learned CIT appeals has very elaborately dealt with all the issues raised by learned counsel of the assessee. He fully relied upon the case laws mentioned by learned CIT appeal.

11. Upon consideration of the submission of the parties and perusal of the records and case laws, we note that CIT appeals has elaborately addressed the various legal issues raised by the assessee. However, he has not dealt with the merits of the objections of the assessee that there were inherent defects/deficiencies in the said piece of land,

due to which the assessee was contesting the valuation. It is not discernible whether the merits of various objections of the assessee to the deficiency in the said piece of land were considered by the DVO in his report. We find that it is necessary in the interest of justice that the various objections on merits of the valuation be dealt with by the learned CIT appeals by a speaking order. This is also noted that the said objections were not subject matter of consideration by the assessing officer also. In this regard, the learned CIT appeals while addressing the merits of the assessee objection should also give opportunity to the DVO if he chooses to consider the various objections of the assessee and examine how the same are dealt with by the DVO. In coming to the above proposition we draw support from the decision of honourable Supreme Court in the case of *Kapurchand Shrimal* (1969) 72 ITR 623 (SC) that it is the duty of the appellate authority to correct the errors in the order of the authority below and if necessary, remit the matter for reconsideration with or without direction unless prohibited by law.

12. As regards the issue whether the transfer of development right would come under the sweep of section 50 C, the learned counsel of the assessee simply stated that the decisions referred by the learned CIT appeals are not applicable. However, he has relied upon certain case laws from the tribunal. In this regard, there is no cogent submission by the learned counsel of the assessee as to how the decisions referred by learned CIT appeals including that from the honourable Supreme Court in the case of *Sanjeev Lal* (supra) are not applicable. The decision referred by learned counsel of the assessee from honourable Bombay High Court in this regard was with reference to transfer of leasehold rights. In our considered opinion, when the issue is being remitted to the file of learned CIT appeals, the learned CIT appeals shall consider this aspect also afresh. He shall take into account the decisions referred by learned counsel of the assessee and learned counsel of the assessee shall also submit objections to the case laws referred by learned CIT appeals including that from the Supreme Court referred by him as above. We also note that the issue of transfer of development right, was never raised before the assessing officer and the claim of the assessee is also without filing the revised return of income. The learned CIT appeals shall consider this aspect also and if he deems necessary, he may seek a remand from the assessing officer in this regard.

13. Accordingly, in the background of aforesaid discussion and precedents, the issues raised in this appeal stands remitted to the file of learned CIT for a denovo consideration. The learned CIT appeals shall take into account our directions as above and also will decide as per law. Needless to add assessee should be granted adequate opportunity of being heard.

14. In the result, this appeal by the assessee stands allowed for statistical purposes.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board on 05.01.2021

Sd/-	Sd/-
(Ram Lal Negi) Judicial Member	(Shamim Yahya) Accountant Member

Mumbai; Dated :
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai