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

BEFORE SRI PRASHANT MAHARISHI, AM AND SRI PAVAN KUMAR GADALE, JM

ITA No. 2339/Mum/2017

(Assessment Year 2007-08)

The Income Tax Officer-25(2)(5) Room No. 506, C-10, Pratyakshakar Bhavan, BKC, Mumbai-400 051	Vs.	Kirit Raojibhai Patel 5th Floor Ram Niwas, 34, Vallabhnagar, N.S. Road, Juhu, Vile Parele(W), Mumbai-400 049
(Appellant)		**(Respondent)**
PAN No. AABPP3139J		

Assessee represented by	:	Shri Rashmikant Choksey, AR
Department Represented by	:	Shri K.K. Mishra, CIT DR

Date of hearing:	08.12.2021
Date of pronouncement :	14.02.2022

O R D E R

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the learned Income Tax Officer-25(2)(5), Mumbai, against the order passed by the learned CIT(A)-37, Mumbai dated 05.01.2017.

02. Earlier, the learned assessing officer has raised several grounds of appeal however later on concise grounds were placed as Under:-

    i. on the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in arbitrarily deciding the appeal in favour of the assessee without

specifically discussing the ground number II raised by the assessee in respect of initiation of reassessment proceedings u/s 148 of the act

ii. on the facts and in the circumstances of the case and in law, the learned CIT – A in concluding that the receipt against the sale of TDRS/FSI are not chargeable to capital gains tax without appreciating the fact that capital asset u/s 2 (14) of the act includes not only physical property but also rights, title or interest attached to it and the consideration received for transfer of such capital asset gives rise to capital gains that is chargeable to tax u/s 45 of the income tax act – 1961.

iii. On the facts and in the circumstances of the case and in law, the learned CIT – A) has erred in not considering the fact that honourable ITAT while deciding the case of assessee's brother Mr Bharat raojibhai Patel, who is co-owner in the subject property and who received 50% share in the subject transaction, vide ITA number 5038/10/2010 order dated 31/05/2016, held that the sale of development right is to be taxed as a long-term capital gain. The learned CIT (A) has erred in concluding that the TDR/FSI rights are not chargeable to capital gains tax and decided the case in favour of assessee without appreciating the fact that two different

treatments have been given to an identical transaction.

iv. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in giving a finding that Section 50 C is applicable only in case of transfer of land and building or both without considering the fact that development rights could not be executed without transfer of land and building.

v. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in allowing exemption claimed u/s 54 and 54F of the IT act – 1961 without considering the explanatory notes to the provisions of The Finance (Number 2) Act, 2014. Further the CIT (A) has erred in allowing deduction of ₹ 40 lakhs/– deposited in capital gain account scheme utilised for renovation of the new flat which is nothing but the cost of improvement and thus cannot be included in the cost of new flat for the purpose of claiming deduction u/s 54F.

03. Brief facts of the case shows that the assessee is an individual resident who filed his return of income for Assessment Year 2007-08 declaring total income of ₹1,67,420/- on 24.12.2007. Assessee was assessed under section 143(3) of the Act on 21.12.2009.

04. Facts shows that assessee is having 50% share in one bungalow known as Ram Niwas. This was constructed in year 1973 on leasehold plot of land Under lease from Vallabhnagar co-operative housing society Ltd. The assessee along with his brother entered into development agreement on 1 December 2016 permitting the developers to load the transferable development right (permissible Under the DC rules 1991) and construct a new building by utilizing part of the plot's primary floor space index of one (after retaining Major portion of primary FSI for self use) and 100 % of transferable development right as may be sanctioned Under DC rules 1991 retaining the lease on the rights of the plot. Assessee claims that there is no cost of acquisition of the TDRs; hence, amount received is a capital receipt. The total consideration by this agreement was ₹ 35,000,000/– out of which the 50% were consideration received by the assessee of Rs 1,75,00,000/- . Assessee also received compensation for shortfall in any of the 224 square fts at the rate of ₹ 5000 per square feet amounting to ₹ 1,120,000. Accordingly the net consideration received was Rs 1,86,20,000/- share of the assessee. The assessee was also to receive flat having a carpet area of 4224 square fits being a floor space retained by the assessee for self use and two car parking area. As Assessee has received Rs 1,86,20,000 from Messer's M L builders being a sale consideration for half share in the property, he offered it under the head

capital gains and subsequently claimed indexation and deduction u/s 54 and 54 EC to compute the long-term capital gain at Rs Nil.

05. The learned assessing officer was of the view that assessee has entered into a development agreement dated 1/12/2006 only provides the developer of permission to facilitate to load additional transferable development rights on plot of land owned by the assessee and to sell the same to purchasers without relinquishing any of the rights in the plot of the assessee at Vallabhnagar CHS Ltd. Thus the payment received by the assessee was treated by the learned AO as a compensation for permitting to load additional transferable development rights in the plot hence the above transaction according to him does not amount to transfer within the provisions of Section 45 of the income tax act hence, he proposed to tax the above sum being the compensation value of ₹ 35,000,000 being the market value of the flat received and the payment made by the development for alternative residential accommodation as income from other sources. At the time of making of the assessment, the learned assessing officer noted that as he is taxing the sum received as income from other sources the issue of applicability of Section 50 C and the claim of deduction u/s 54 and 54 EC have not been looked into. Accordingly he computed the total income of the assessee at Rs 1, 87,87,423 computing the capital gain at rupees nil

and considering Rs 1,86,20,000 as income from other sources.

06. Assessee aggrieved with that order preferred an appeal before the learned Commissioner Of Income Tax (Appeals) – 32, Mumbai, who passed an order on 31/3/2010 holding that the amount received by the assessee are capital receipts and are not chargeable to capital gains tax at all. Thus, he held that the action of the learned assessing officer holding the above sum as income from other sources is not correct accordingly, he allowed the appeal of the assessee.

07. Subsequently the learned assessing officer preferred a rectification application before the learned CIT – A that in case of the brother of the assessee Shri Bharat Patel, who has also received the balance 50% share of the same receipt, the learned CIT – A has passed an order dated 31/3/2010 holding that the gain arising has to be taxed as a capital gain. The AO stated that two different treatments have been given for a single nature of the transaction and therefore there is a mistake apparent from the record.

08. Based on the same the learned CIT – A noted that order in case of Mr. Bharat Patel was made just before passing the order in case of the assessee and when the taxability of capital receipt in the case of gain arising out of the sale of the same property is already decided in the case of the co-

owner brother, therefore there is a mistake apparent from the record. He further held that two different decisions were never meant to be given in the case of two co-owner brothers and it would be absolutely illegal to treat the two coowners differently relying on the decision of CIT versus Kumarnee Srimati Minakshi Achie 292 ITR 624 (madras) (2007). Accordingly he held that that the amount received by the appellant are capital receipts and further respectfully following the various decisions of the coordinate bench as he held that the amount received by the appellant against sale of transferable development rights/floor space index rights are chargeable to capital gain tax. Accordingly, he allowed application of the ld AO by passing the order u/s 154 of the act on 20/7/2010.

09. Based on this order the learned assessing officer passed an order giving effect to the order of the learned CIT – A on 6/9/2010 working out the chargeability of the capital gain tax where the sale consideration of Rs 1,86,20,000 was reduced by the indexed cost of acquisition of ₹ 7,555,170 373 resulting into a long-term capital gain of Rs 1,30,64,827 and as assessee has made investment in various bonds deduction u/s 54 EC of the income tax act was granted to the extent of Rs 1, 30,64,827 and computed the chargeable to tax capital gain at rupees nil.

010. Assessee challenged the order of the learned CIT – A passed u/s 154 of the income tax act before the

coordinate bench in ITA number 6717/MU M/2010 challenging that the order passed by the learned CIT – A is beyond the scope of the provisions of Section 154 of the act.

011. The coordinate bench passed an order on 10th/2/2016 holding that that as on the issue conceivably two opinions could have been about the taxability of the sum and the learned CIT – A has adopted one of the two possible opinions and therefore it cannot be said that the order of the learned CIT – A was suffering from a mistake apparent from record. It was further held that the learned CIT – A has ignored the principle and basic scope of rectification of the order and hence the order passed by the learned CIT – A on 20/7/2010 u/s 154 of the act is not sustainable and hence it was set-aside.

012. Meanwhile, against the original order passed by the learned CIT – A dated 31/3/2010, learned assessing officer preferred appeal before the coordinate bench in ITA number 5001/M/2010 and the appeal of the assessee in ITA number 6717/M/2010 against the passing of the order by the learned CIT – A u/s 154 of the act was challenged for the same assessment year.

013. At the time of the hearing both the parties submitted before the coordinate bench that in view of the subsequent developments where the issue has been reopened in case of the assessee by issue of notice u/s

148 of the income tax act, the appeal of the learned assessing officer as well as the law appeal of the assessee may be treated as withdrawn. Accordingly, the coordinate bench passed an order on 26/6/2013 dismissing both the appeals but giving permission to both the parties to get revival of the same depending on the final outcome of the appeal against the reassessment if the same is in anyway prejudicial din any form to either of the parties.

014. Meanwhile another order in ITA no 6717/M/2020 came to be passed by ITAT on 10th/2/2016 holding that that as on the issue conceivably two opinions could have been about the taxability of the sum and the learned CIT – A has adopted one of the two possible opinions and therefore it cannot be said that the order of the learned CIT – A was suffering from a mistake apparent from record. It was further held that the learned CIT – A has ignored the principle and basic scope of rectification of the order and hence the order passed by the learned CIT – A on 20/7/2010 u/s 154 of the act is not sustainable and hence it was set-aside.

015. In that circumstances, perhaps the appeal of the assessee in ITA number 6717/M/2010 for assessment year 2007 – 08 was revived before the coordinate bench [However nothing is available on file or produced before us] and an order came to be passed on 10th of February 2016 by the

coordinate bench wherein the rectification order passed by the learned CIT – A was held to be not sustainable.

016. Subsequently, notice under section 147 of the Act was issued on 27.03.2012 served on assessee on 28.03.2012. The assessee filed its return of income in response to that notice on 31.04.2012 at the originally filed income. The assessee requested for the reasons recorded which were supplied on 10.05.2012. Assessee filed objections, which were disposed off on 08.02.2013.

017. The learned assessing officer has held that undoubtedly the assessee is one of the co owners of the plot having 50% share. When assessee purchased the land originally all rights present and future was embedded into, it was also acquired. As the assessee as one of the co-owners have transferred its transferable development right entitlement to the developers, consideration received by the co-owners in this regard and the consent terms are nothing but an agreement towards transfer of the transferable development rights. Therefore, benefit in the form of transferable development right arising out of the existing land is an immovable property, the transfer of which amounts to transfer of a long-term capital asset and hence liable to be taxed as income Under the head capital gains. For computation of the capital gain the learned AO considered the agreement value of ₹ 3.50 crores and stamp valuation authority determined its market value at

Rs 4,62,82,000. Both the brothers, Shri Kirit Patel and Bharat Patel are holding equal shares and therefore the total deemed consideration was taken in the hands of the assessee at ₹ 23,141,000. As the assessee has also entitled to allotment of flats in the new building to be constructed by the developer of the area of 4000 ft² and if there is a shortfall in the area, the assessee would be compensated by cash equivalent at the rate of ₹ 5000 per square feet. The assessee has received 224 ft² less and therefore the consideration on that account was ₹ 1,120,000. Further assessee was to get two flats also, the learned AO considered that flat number 801 and 901 admeasuring 1911 ft² each having the value of Rs. 2,30,00,000/- and ₹ 22,500,000/- per agreement dated 12/3/2008 and 13/2/2008, therefore the value of the flats was considered towards the sale consideration received by the assessee to the extent of Rs. 4,20,42,000. Thus the total sale consideration was determined at ₹ 66,303,000/–. For the purpose of the cost of acquisition of the above said property , originally sad that it does not have any cost of acquisition, assessee has submitted the valuation report dated 13/3/1989 valuing the asset as on 1/4/1986 at ₹ 666,000/– which was used for deriving the fair market value of the asset as on 1/4/1981 by applying the proportionately reverse cost inflation index. Accordingly as on 1/4/1981 the value was worked out at ₹ 500,752/– and 50% of that was considered as cost of

acquisition in the hands of the assessee amounting to ₹ 250,376/–. The claim of the assessee of ₹ 40 lakhs u/s 54 of the income tax act was denied by the assessing officer for the reason that assessee could not substantiate the claim of deposit in the capital gain account scheme and its utilization for the purpose of purchase of flat. The AO further noted that assessee has purchased two flats, the deduction can be allowed only with respect to one property. The AO examined the fact whether details like location/approach/entrance/communities provided in respect of both the flats can be considered as a one residential unit/house or not. As the learned assessing officer is not satisfied that both these flats can be considered as a one residential unit, he granted deduction u/s 54 of the act only with respect to one flat valued at ₹ 21,021,000 as deduction u/s 54 of the act. Accordingly the computation of capital gain was made as Under:-

Sr No	Particulars	Amount
1	Sale consideration	6,63,03,000
2	Cost of acquisition of the plot fair market value as on 1/4/1980 one is ₹ 250,003 and 76/– which is indexed for the relevant assessment year 2,50,367*519/100	12,99,450
3	Cost of improvement	Nil

4	deduction u/s 54 EC with respect to the investment in RECs capital bond	95,00,000
5	Deduction u/s 54 with respect to only one flat	2,10,21,000
6	Total deduction	3,18,20,450
7	Taxable long-term capital gains	3,44,82,550

018. Thus, the long-term capital gain was computed at ₹3,44,82,550/-. The order under section 147 read with section 143(3) of the Act was passed on 28.03.2013 determining the total income of assessee at ₹3,46,49,917/-.

019. Assessee preferred appeal before the learned CIT(A) challenging the reopening of the assessment as well as the addition on merits. On the issue of chargeability of capital gain the learned CIT(A) held that assessee has sold Transferable Development Rights (TDR), which is not chargeable to capital gain tax. The learned CIT(A) followed decision of Hon'ble Bombay High Court in case of CIT vs. Smbhaji Nagar Co.op Hs. Society Ltd. (370 ITR 325) (Bom) and also co-ordinate Bench decision in the case of Ishwarlal Manmohandas Kanakia in ITA No. 3053/Mum/2010. Therefore, he deleted the addition on account of capital gains by passing an order dated 05.01.2017. Before the learned CIT(A), decision in the case of assessee's brother Mr. Bharat Patel who was also

50% co-owner wherein the above receipt was held to be chargeable to tax was available. Despite that learned CIT – A held otherwise. Therefore learned Assessing Officer aggrieved with the same has preferred this appeal before us.

020. The learned Departmental Representative vehemently submitted that the issue is squarely covered in favour of Revenue by the decision of co-ordinate Bench in the case of other co-owner of the same property Shri Bharat Raojibhai Patel vide in ITA No. 5058/Mum/2010 dated 31.05.2016. He referred to the paragraph No. 12 of the decision and stated that the transfer of development right was held to be chargeable to tax under the head capital gain. Therefore, the learned CIT(A) has not decided the issue correctly. It was further stated that as on the date of order of the learned CIT(A) i.e. on 05.01.2017, decision of the co-ordinate Bench in the case of brother of assessee dated 31.05.2006 was already there, which was not considered by learned CIT(A) on identical issue. Therefore, the order of the learned CIT – capital is not sustainable.

021. Learned departmental representative also filed a paper book containing 84 pages wherein the complete assessment orders, appellate orders etc. were placed on record.

022. The learned Departmental Representative also stated that the assessee did not press the reopening of assessment

and the issue is already covered against the assessee on the merits of the case.

023. The learned Authorised Representative referred to Paragraph No. 3 of order of learned CIT(A) to show the history of the case. He submitted that the Assessing Officer in the original assessment proceedings treated above amount as income from other sources as against the capital receipt claimed by the appellant. On appeal before the learned CIT(A), the claim of the assessee was upheld that the sale of TDR was not chargeable to capital gain tax. However, in the case of the assessee's brother where it was claimed by the assessee himself that it was chargeable to tax under the head capital gain, it was upheld. Thus, the same 50% of the receipt was claimed by the assessee in his hands as capital gain receipt not chargeable to tax, whereas, balance 50% offered by the brother of the assessee was considered to be transfer of capital asset chargeable to capital gain tax. Therefore according to him there is a basic difference between the decision of in the case of the brother of the assessee and the same cannot be applied in the case of the assessee.

024. He further referred paragraph number 6.6 of the order of the learned CIT – A. He submitted that the order of the learned CIT – A was rectified by him u/s 154 of the act at the behest of the learned assessing officer as the order passed by the learned CIT in the case of the assessee was

aggrieved with the order passed by the learned CIT appeal in case of the brother of the assessee. Originally, the appeal of the assessee against that order of the learned CIT – A passed u/s 154 of the act was withdrawn, however, later on, as per order dated 10/2/2016 the order of the learned CIT – A was held to be not sustainable, as the rectification was not properly made. Therefore, the original order passed by the learned CIT – A dated 31/3/2010 wherein amounts received by the assessee against the sale of TDR/FSA rights were held not chargeable to tax as capital gain holds water.

025. He further referred to paragraph No. 6.8 of the order of the learned CIT(A) stating that there were divergent claims in the case of assessee as well as his brother. It was stated that in case of brother, it was never contended that the amount received on sale of TDR is not chargeable to capital gains. The brother of the assessee always pleaded that it is chargeable to capital gain tax. In the case of the assessee, it was always claimed that the same receipt on sale of TDR is a capital receipt and it is not chargeable to capital gain.

026. He submitted that the case of the assessee is supported by the decision of the Hon'ble Bombay High Court and co-ordinate Benches. Thus, the decision of the co-ordinate Bench in the case of brother does not apply. He specifically referred to the decision of Hon'ble Bombay

High Court in the case of Sambhaji Nagar Co-op. Hsg. Society Ltd. (370 ITR 325), decision of the coordinate bench in case of Batliboi Limited V deputy Commissioner of income tax ITA number 6228/M/2017 dated 21/05/2021, ITO versus Deepak T Shah ITA number 4838/M/2017 dated 25/6/2019, ACIT versus Dilip R Shringarpure ITA number 6103/M/2017 dated 26/6/2019, ACIT versus Ishwarlal Manmohandas Knakia ITA number 3053/M/2010 for assessment year 2006 – 07 dated 8/2/2012 and ITO versus Roda Khursiagar ITA number 3604/M/2012 for assessment year 2004 – 05 dated 3/6/2015.

027. The learned Authorised Representative further submitted that the issue of the reopening has already been decided against the assessee by the learned CIT(A) therefore, the same can be agitated by the assessee at any stage. He stated that this ground of appeal was already there as per ground No. 2 of the appeal. He referred to page No. 2 of the learned CIT(A) where the grounds of appeal are reproduced. He referred to the reasons recorded by the learned Assessing Officer. He submitted that the reopening has been made only for the reason of reinstating stamp duty valuation as deemed sale consideration. The other reason was for the purpose of the cost of construction deduction under section 54 and 54F of the Act. He further stated that the assessee objected against the same and the Assessing Officer passed an order dated 08.02.2013

disposing of the above appeal. He also referred to letter dated 15.03.2013, explaining the cost of construction as well as the claim of deduction under section 54C, 54EC of the Act. He further referred to the agreement stating that assessee is entitled to two flats and therefore, the deduction is allowable under section 54F of the Act. In view of this, he submitted that there is no infirmity in the order of the learned Commissioner of Income Tax (Appeals).

028. We have carefully considered the rival submissions on perusal of various orders passed by the learned assessing officer in original assessment proceedings as well as reassessment proceedings, orders of the learned CIT – A in the original appellate proceedings as well as in appeal against the reassessment order, the order of the coordinate bench in case of the assessee where appeal of the assessee as well as the learned assessing officer were dismissed as withdrawn and further the order of the coordinate bench by which the order passed by the learned CIT – A u/s 154 of the act was held to be unsustainable. We have also carefully considered the order of the coordinate bench in case of the brother of the assessee who is also the 50% owner of transferable development rights transferred by the assessee as well as his brother in ITA number 5038/M/2010 for assessment year 2007 – 08 dated 31/05/2016. In that case, the issue was whether the consideration received as a result of

transfer of land and building in terms of development agreement constitutes long-term capital gain or income from other sources. The coordinate bench held that that the sale of development right is to be taxable as long-term capital gain and not as income from other sources as held by the learned assessing officer.

029. At the time of the hearing the learned departmental representative submitted that ground number 1 and 5 of the appeal are not pressed. Therefore we dismiss the same.

030. Therefore, we first proceed to decide ground number 2 of the appeal. We would first examine the issue whether the issue is squarely covered by the decision of the coordinate bench against the assessee by the order of the brother of the assessee in ITA number 5038/M/2010 for assessment year 2007 – 08 dated 31/5/2016.

031. The fact of the case of the brother of the assessee Mr. Bharat Patel shows that he has offered the receipt from sale of TDR as chargeable to tax under the head capital gains. The learned assessing officer treated the same as income from other sources. On appeal before the ITAT, it has been held that the order of the Commissioner of income tax is correct wherein he held that the treatment given by the assessee on transfer of development right under the head capital gain is proper. However, the issue in the appeal of the assessee is that the amount received

by him on transfer of TDR by development agreement is a capital receipt and is not at all chargeable to tax under the head capital gain. Therefore, the issue in the appeal of the brother of the assessee and issue in the appeal of the assessee are two different issues. Therefore, we do not find any merit in the argument of the learned departmental representative that issue is covered against the assessee.

032. Now coming to the issue whether the sale consideration received on transfer of transferable development right was taxable as a long-term capital gain in the hands of the assessee or not. This issue is squarely covered in favour of the assessee by the decision of the honourable Bombay High Court in case of CIT versus Shambhaji Nagar Coop Housing Society Ltd 370 ITR 325 wherein it has been held as Under:-

"**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;

(*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 *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 *CIT* v. *B.C. Srinivasa Shetty* [1981] 128 ITR 294/5 Taxman 1 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 *CIT* v. *B.C. Srinivasa Saetty's* case [1981] 128 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).'

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."

033. The issue decided by the honourable Bombay High Court is also pertaining to assessment year 2007 – 08, which is also the assessment year in the impugned appeal. The learned authorised representative has also cited several orders of the coordinate benches where following the decision of the honourable Bombay High Court the coordinate benches have held that the sum received on transfer of TDR which does not have any cost of acquisition cannot be charged to tax Under the head capital gains. Therefore, the issue is squarely covered in favour of the assessee by the above judicial precedents.

034. In view of this, we hold that the consideration received by the assessee on sale of transferable development rights not chargeable to tax under the head capital gain in view of the fact that there is no cost of acquisition.

035. We are also conscious of the fact that the learned assessing officer when raised the issue of chargeability of the above sum Under the head capital gain, initially the assessee contended that there is no cost of acquisition in respect of the transfer of the asset and therefore that capital gain being the resultant transaction could not be chargeable however letter on the assessee submitted a valuation report during the assessment proceedings of Mr. K C Gandhi & co dated 13/3/1989 valuing the asset as on 31/3/1986 at ₹ 666,000. However the learned assessing officer vide para number 10.4 of his order has stated that

as the ownership of the land was vested with the assessee in consequence to execution of a deed of assignment on 20/10/1973 by assignor Mrs. Lilavati R SHelat in favour of the assessee and other coowner for the value specified therein, therefore the above cost of acquisition was derived by the assessee. However, that does not change the stand of the assessee that there is no cost of acquisition incurred by the assessee in respect of the asset transferred. In view of the above facts, we do not find any infirmity in the order of the learned CIT – A in holding that receipts against the sale of TDR are not chargeable to capital gain tax.

036. Accordingly, ground number 2 and 3 of the appeal of the the learned assessing officer are dismissed.

037. In view of our decision in ground number 2 and 3 of the appeal the ground number 4 of the appeal do not survive. Hence, same are dismissed.

038. In the result appeal of the learned AO is dismissed.

Order pronounced in the open court on 14.02.2022.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 14.02.2022
Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai