

IN THE INCOME TAX APPELLATE TRIBUNAL " B "BENCH, AHMEDABAD
(BEFORE SHRI G.C.GUPTA VICE PRESIDENT & SHRI ANIL CHATURVEDI, A.M.)

I.T.A. No. 2519 /AHD/2009.
(Assessment Year: 2006- 07)

Income Tax Officer,
Ward 5(4),
Room No.316, Aayakar
Bhavan,
Majura Gate,
Surat.

(Appellant)

Vs. Shri Yasin Moosa Godil,
4/3198 Zoanb Complex,
Vansfodapull,
Salabatpura,
Surat.

(Respondent)

PAN: ABHPG 3746 R

Appellant by : Shri Samir Tekriwal, Sr. D.R.
Respondent by : Shri Manish J. Shah.

(आदेश)/ORDER

Date of hearing : 27-3-2012

Date of Pronouncement : 13/4/2012

PER: SHRI ANIL CHATURVEDI,A.M.

This appeal is filed by the Revenue against the order of Ld. CIT
(A) III, Surat dated 30-6-2009 for the Assessment Year 2006-07.

2. The only effective ground raised by the Revenue is as under:-

“On the facts and in the circumstances of the case and in law, the Ld. CIT (A)-III, Surat has erred in deleting the addition of Rs.41,45,255/- holding that the A.O. has not mentioned section 50C of the I.T. Act.”

3. The facts of the case are that the appellant is an Individual. The appellant filed his return of income on 8.1.2007 declaring total income of Rs 80,050/-. The case was selected for scrutiny and the assessment was completed u/s 143(3) on 30.12.2008 by determining the total income at Rs 42,25,305/-. During the course of assessment proceedings the Assessing Officer (A.O) noticed that on 25-6-2004 i.e. in the A.Y. 2005-06, the appellant had booked a flat No.701 with M/s. Patel Brothers Construction Corporation, Patel Apartment, Byculla Mumbai, which was under-construction. The total agreed purchase price was Rs.15,99,000/- out of which Rs.50,000/- was payable at the time of booking and the balance amount was payable in installments in such a manner that the entire amount was paid before taking possession of the flat. In addition to the purchase consideration, the appellant had to pay Rs.13,000/- for legal charges, taxes, electric water deposit, formation of society charges etc. Out of the agreed aggregate consideration of Rs.16,12,000/- the appellant had paid an amount of Rs.50,000/- at the time of booking on 25-6-2004 by cash and the balance amount was paid by the appellant in various installments from time to time. An amount of Rs.1,00,000/- was kept outstanding by the appellant since the builder i.e. M/s. Patel Construction Corporation had failed to give the possession of the flat in time to the

appellant and also failed to allot the promised parking place. As the entire amount was not paid by the appellant, the builder had neither handed over the possession of the flat to the appellant nor had executed any registered sale deed in favour of the appellant. In the current year in the month of May, 2005 the appellant requested the builder to cancel the booking of the flat and return the booking amount as paid by him towards the said flat. In response to the request of the appellant to cancel the booking and return the booking amount, the builder informed that the booking will be cancelled and the amount thereof will be returned back, only after another buyer is located for the said flat and payment is received for it.

4. On 28-2-2006 i.e. in the year under consideration, the appellant, the builder and the new buyer, Mr. Meeraj Abdul Aziz Bhagad, entered into a triparty registered sale agreement for transfer of the said flat, wherein the appellant (addressed as the vendor in the sale agreement) was to transfer all his rights, title and interest in the said flat to the buyer viz. Mr. Meeraj Abdul Aziz Bhagad; the builder M/s. Patel Brothers Construction Corporation (addressed as the confirming party in the sale agreement) was to give the possession of the said flat to the buyer and was also to allot the said flat to the buyer which was originally agreed to be allotted to the appellant and the new buyer viz. Mr. Meeraj Abdul Aziz Bhagad (addressed as the purchaser in the sale agreement) was to acquire only the rights in the said flat from the appellant and the possession and the allotment thereof from the builder. Accordingly, during the year under

consideration, the appellant received back the booking amount paid by him to the builder, from the buyer.

5. During the course of assessment proceedings, the AO observed that the Jt. Sub Registrar's Office Mumbai, had considered the value of the said flat at Rs. 57,57,255/- for registration of flat as against the total value of Rs.16,12,000/- . Accordingly, on the basis of information received from office of the Jt. Registrar Office, Mumbai, the AO treated the difference amount of Rs.41,45,255 (i.e. Rs.57,57,255 – Rs.16,12,000/-) as the unexplained income of the appellant and made addition thereof to the total income of the appellant.

6. Aggrieved by the order of A.O, the appellant preferred appeal before CIT (A). Before CIT(A), appellant contended that as appellant had only paid booking amount and had neither taken possession nor had executed registered purchase document in his name, the flat, being an immovable property never stood in his name and therefore provisions of Section 50C was not applicable. Appellant had only the "booking rights" in the said flat and has recovered back the booking amount as paid by him and hence provision of Section 50C are not applicable and therefore the A.O had erred in considering Rs 41,45,255 as unexplained income of the appellant.

7. CIT (A) deleted the additions made by A.O. by observing as under:-

“ I have considered the facts of the case and the rival positions. I have gone through the tri party registered sales deed executed between the appellant, the builder and the new buyer and on going through the same it is seen that no registered document had been executed between the appellant and the builder in respect of purchase of flat No.701 but the appellant had only booked the said flat with the builder.

Further, prior to the execution of the subject tri party registered sale deed in respect of flat No.701, the appellant had not acquired the possession of the said flat from the builder and the full consideration as agreed at the time of booking was also not paid. Thus it is evident from the registered sale deed itself that the appellant had neither entered into any legal document in his name as an owner nor had he acquired the possession of the said flat from the builder and therefore, the appellant was not the legal owner of the said flat being an immovable property as per the provisions of section 2(47) of the I. T. Act.

The tri party registered sale deed further mentions that the new buyer shall acquire the possession of the said flat from the builder and not from the appellant. The deed also clearly states that the appellant agrees to sell, transfer and assign only his rights, title and interest in the said flat to the buyer and the builder in turn agrees to allot the said flat to the new buyer and also put the new buyer in possession of the said flat.

Thus, it is evident from the registered sale deed that it is the builder who is transferring the capital asset i.e. the flat to the new buyer, by handing over the possession of the flat as also the legal ownership thereof to the new buyer and the appellant only receives back the booking advance paid by him to the builder, by relinquishing his booking right in the said flat.

The appellant has been addressed in the registered sale agreement as a vendor only to sell, transfer and assign his right as a booking member in the said flat to the new buyer as is clearly mentioned in point No.1 on page 5 of the registered sale deed and it is clearly provided in the registered sales deed that it is actually the builder who is transferring the possession and

allotment of the said flat to the new buyer and thus, the transferor vendor of the capital asset i.e. the flat is the builder.

However, the ITO only on the basis of information received from office of the Jt. Registrar Office, Mumbai, has treated the amount of Rs.41,45,255 being the difference between the stamp duty valuation and the value as per the registered sale deed as the unexplained income of the appellant and made addition thereof to the total income of the appellant, by erroneously treating the appellant as the vendor transferring a capital asset being land or building or both. The ITO has not mentioned section 50C of the Act while making the said addition however, it is seen that the powers of substituting the stamp duty value for the actual sales consideration are provided only in section 50C of the I. T. Act and therefore, the impugned addition has been clearly made only as per the provisions of the said section since, there is no other evidence on record of any unaccounted income being received by the appellant.

It is further seen that the provisions of section 50C of the I. T. Act are applicable in the case of an assessee when he transfers a capital asset being land or building or both, however, in the present case from the tri party registered sale deed it is explicit that the appellant has transferred only his booking rights in the said flat to the buyer and has not transferred the flat i.e. a capital asset land or building or both and therefore, the provisions of section 50C are not applicable in the case of the appellant.

Accordingly, in view of the facts of the case, I hold that the provisions of section 50C of the Act are not applicable in the case of the appellant case, first of all the appellant had only given booking advance for flat No.701 to the builder and had neither entered into any registered purchase deed nor had taken the possession of the said flat from the builder and thus was not the owner of the said flat and secondly the appellant not being the owner of the said flat cannot be said to have transferred the same to the new buyer but what has been transferred is only the booking rights and therefore, I hereby delete the addition of

Rs.41,45,255/- as made by the ITO by adopting the stamp duty valuation as provided in section 50C of the Act. However the ITO is directed to inform the Assessing Officer of the builder namely Patel Bros Construction Corporation to examine the issue of on money receipt in respect of this sale.”

8. Aggrieved by the order of Ld. CIT (A), Revenue now is in appeal before us.

9. The Ld. D.R. vehemently argued and urged that the order of the Assessing Officer needs to be upheld. According to the Ld. D.R., in the balance sheet filed by the appellant in earlier year, the appellant himself had shown the amount paid for booking the flat as a “flat”. Now in the year of sale, the appellant has changed his stand and argues that what has been sold is “booking rights” of the flat and not the “flat” per-se and therefore, provisions of section 50C are not applicable. According to D.R., the appellant cannot change the stand. Ld. D.R. pointed out to the fact that appellant had agreed to purchase the flat for Rs.16 lacs out of which the appellant had already paid Rs.15 lacs which constitute more than 90% of the agreed consideration. In such a situation it can very well be said that appellant had already purchased flat and therefore, on its transfer it was a case of transfer of flat and not “booking rights” and therefore the provisions of section 50C would become clearly applicable. He further stated that the word “transfer” and “capital asset” has not been defined in section 50C and accordingly the meaning of these terms should be understood in the way in which it is defined in sec. 2(42) and Sec.2(47). He further stated that section 50C cannot be

considered in isolation. He therefore, vehemently argued and contended that the sale made by appellant should be considered as sale of flat and not of booking right and accordingly Sec. 50C would be applicable and therefore the order of A.O. should be upheld. In support apart from various cases, he relied on the following decisions:-

- (1) CIT v. Narang Dairy Products (1996) 219 ITR 478 (SC)
- (2) CIT v. Mormasji Mancharji Vaid (2001) 250 ITR 542 (Guj) (FB)
- (4) J.K. Kashyap v. ACIT (2008) 302 ITR 255 (Del.)
- (5) Sanjaybhai Z Patel Vs ACIT (2011) 48 SOT 231 (Ahd)
- (6) Ferdoon Irani Vs ITO (1986) 15 ITD (Bom) 627

10. Ld. D.R. thus vehemently argued and urged that the order of CIT (A) should be set aside and that of A.O. be upheld.

11. Ld. A.R. on the other hand urged that section 50C is a deeming provision by virtue of which a legal fiction has been created. It is a settled law that legal fiction cannot be extended beyond the purpose for which it is enacted. Legal fiction is only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond the legitimate field.

12. The Ld. A.R. further stated that what has been sold by the appellant was “booking rights” and not the flat. He stated that appellant cannot sell the flat because he never got the possession of the flat, He pointed to the agreement for sale dated 28-2-2006 that was

entered into between appellant, the purchaser and the builder. He pointed out the recital clause of agreement wherein it has been stated that Appellant owing to certain unavoidable circumstances, could not make payment of balance amount to the Builder and as such could not avail the possession of the flat. He further stated that provisions of section 50C are applicable in the case of an appellant when he transfers a capital asset being land or building or both. In the case of appellant the tri-party registered agreement it is explicit that the appellant has transferred only his “booking rights” in the flat to the buyer and has not transferred the flat i.e. a capital asset being land or building or both and therefore, the provisions of Sec.50C are not applicable in the case of appellant. He also drew our attention to the finding of CIT (A) which has been reproduced hereinabove at para 7 to support his claim. The Ld. A. R. relied on the following decisions:-

- (a) Atul Puranik vs ITO (2011) 132 ITD 499.(Mum)
- (b) DCIT Vs Tejinder Singh (ITA No.1459/Kol/2011) order dated 29.2.2012
- (c) Smt Kishore Sharad Gaitonde Vs ITO (ITA 1561/M/09) order dated 27.11.2009 .

13. We have heard the rival contentions perused the material placed on record. It is undisputed fact that tripartite agreement for sale has been entered on 28-2-2006 between the appellant, the builder and the purchaser in respect of flat No.701. It is also an undisputed fact that prior to the execution of the tripartite agreement the appellant had neither paid full consideration of the flat nor the appellant had

acquired the possession of the flat from builder. From the agreement it is evident that it is the builder who is transferring the capital asset i.e. the flat to the new buyer, by handing over the possession of the flat as also the legal ownership thereof to the new buyer and the appellant only received back the booking advance paid by him to the builder, by relinquishing his booking right on the said flat.

14. Sec.50C reads as under:-

“50C. Special provision for full value of consideration in certain cases. –(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 by any authority of a State Government (hereinafter 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 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.”

15. In the case of DCIT vs Tejinder Singh (supra) it has been held as under:

“8.... Revenue’s contention that the provisions of section 50C also apply to the transfer of leasehold rights is devoid of legally sustainable merits and is not supported by the plain words of the statute. Section 50C can come into play only in a situation “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 For the purpose of payment of stamp duty in respect of such transfer”. Clearly, therefore, it is sine qua non for application of section 50C that the transfer must be of a “capital asset, being land or building or both”, but then leasehold right in such a capital asset cannot be equated with the capital asset per se. We are therefore unable to see any merits in revenue’s contention that even when a leasehold right in “land or building or both” is transferred, the provisions of section 50C can be invoked.”

16. From the reading of Sec. 50C, it is evident that Sec. 50C is a deeming provision and it extends to only to land or building or both. Section 50C can come into play only in a situation where the consideration received or accruing as a result of the transfer by an appellant of a capital asset, being land or building or both is less than the value adopted or assessed or assessable by any authority of State Government therefore for the purpose of payment of stamp duty in respect of such transfer. It is settled legal proposition that deeming provision can be applied only in respect of the situation specifically given and hence cannot go beyond the explicit mandate of the section. Clearly therefore, it is essential that for application of Sec.50C that the transfer must be of a capital asset, being land or building or both. If the capital asset under transfer cannot be described as “land or building or both” then section 50C will cease to

apply. From the facts of the case narrated above, it is seen that the assessee has transferred booking rights and received back the booking advance. Booking advance cannot be equated with the capital asset and therefore section 50C cannot be invoked.

17. We have perused the case laws relied by Ld. DR. All those case laws are distinguishable on facts. As the facts of the present case are different, the ratio of the judgments relied upon by the Ld. D.R. cannot be applied to the present case.

18. In view of the facts and in the circumstances of the case, we therefore, are in agreement with the conclusion arrived at by CIT (A) on this aspect and therefore relief granted by CIT(A) deserves to be upheld.

19. In the result the appeal of the Revenue is dismissed.

Order pronounced in Open Court on 13-4 - 2012.

Sd/-
(G.C.GUPTA)
VICE PRESIDENT

Sd/-
(ANIL CHATURVEDI
ACCOUNTANT MEMBER

Ahmedabad.

S.A.Patki.

Copy of the Order forwarded to:-

1. **The Appellant.**
2. **The Respondent.**
3. **The CIT (Appeals) III, Surat.**
4. **The CIT concerned.**
5. **The DR., ITAT, Ahmedabad.**
6. **Guard File.**

By ORDER**Deputy/Asstt.Registrar
ITAT,Ahmedabad.**

- 1.Date of dictation 15 - 3 -2012
- 2.Date on which the typed draft is placed before the Dictating Member.....Other Member..... 21 / 3 / 2012
- 3.Date on which the approved draft comes to the Sr.P.S./P.S 9 - 4 -2012.
- 4.Date on which the fair order is placed before the Dictating Member for pronouncement 13 - 4 -2012
- 5.Date on which the fair order comes back to the Sr.P.S./P.S 13 - 4 -2012
- 6.Date on which the file goes to the Bench Clerk 13 - 4 -2012.
- 7.Date on which the file goes to the Head Clerk.....
- 8.The date on which the file goes to the Asstt. Registrar for signature on the order.....
- 9.Date of Despatch of the Order.....