

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA**

**Before Shri Pramod Kumar (Accountant Member),
and Shri Mahavir Singh (Judicial Member)**

I.T.A. No.: 1459/ Kol. / 2011
Assessment year: 2008-09

**Dy. Commissioner of Income Tax
Central Circle VI, Kolkata**

.....**Appellant**

Vs.

Tejinder Singh
18D, Everest, 46 C, J L Nehru Road,
Kolkata 700 071 [PAN : AMAPS8248J]

.....**Respondent**

C.O. No. 62/Kol/ 2011
Arising out of I.T.A. No.: 1459/ Kol. / 2011
Assessment year: 2008-09

Tejinder Singh
18D, Everest, 46 C, J L Nehru Road,
Kolkata 700 071 [PAN : AMAPS8248J]

.....**Cross objector**

Vs.

**Dy. Commissioner of Income Tax
Central Circle VI, Kolkata**

.....**Respondent**

Appearances by:

A P Roy, for the assessing officer
LK Kanoongo, for the assessee

Date of instituting the appeal : October 31,2011
Date of concluding the hearing : February 27,2012
Date of pronouncing the order : February 29,2012

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the appellant Assessing Officer has challenged correctness of learned Commissioner (Appeals)'s order dated

9th August 2011, in the matter of assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), on the following ground:

1. That, on the facts and in the circumstances of the case, the learned CIT(A) has erred in deleting addition of Rs 14,64,692 on account of long term capital gain.

2. That, in doing so, learned CIT(A) erred in holding that Section 50C has no application on transfer of leasehold right in building.

2. In the related cross objection filed by the assessee, following grievance has been raised:

For that the learned CIT(A) is not justified in not considering the alternative ground that Section 50 C is not applicable when full value of the consideration is invested under section 54F as far as meaning of full value of consideration under section 54F is concerned.

3. The grievances, which have been raised in the appeal and the cross objections, are interconnected and centre around treatment of capital gains on sale of a property in which the assessee had tenancy rights. We will, therefore, take up all the grievances together.

4. The material facts are not in dispute. The assessee, alongwith one Amardeep Singh, had acquired, vide registered lease deeds dated 19th November 1992 with Shree Khubchand Sethia Charitable Trust (*KSCT, in short*), lease hold rights for 99 years in a house property situated at 5/1, Ripon Street, Kolkata. This property was collectively purchased by three entities, namely Sugam Builders Pvt Ltd, Neelanchal Sales and Suppliers Pvt Ltd and Pleasant Niryat Pvt Ltd (*collectively referred to as 'purchasers', in short*), from the owner, i.e. Khubchand Sethia Charitable Trust, vide registered deed dated 20th day of July 2007. This registered

sales deed was a tripartite agreement between the owner, i.e. KSCT, the lessees, i.e. the assessee and Amardeep Singh, and the purchasers. Under the said agreement, while owner transferred *inter alia* "all its rights, title and interest, ownership and reversionary rights in the said property" etc for a consideration of Rs 1,00,00,000, the lessees gave up all its rights and interests in the said property and proceeded to, *inter alia*, "grant, convey, transfer and assign their leasehold rights, title and interest in the said premises", for a consideration of Rs 3,19,00,000. The total consideration of Rs 3,19,00,000 paid by the purchasers for the said premises was thus divided as follows:- (i) Rs 1,00,00,000 for the owner of the premises i.e. KSCT; (ii) Rs 1,59,50,000 for Tejinder Singh, i.e. the assessee before us in this appeal; and (iii) Rs 1,59,50,000 for Amardeep Singh, i.e. co lessee.

5. In the course of assessment proceedings, however, the Assessing Officer noted that the stamp duty valuation of the property, which was sold by KSCT, was Rs 5,59,57,375, whereas the stated sales consideration of the property was only Rs 4,19,00,000. He was of the view that, in terms of the provisions of Section 50 C, the sales consideration, for the purpose of computing the capital gains, is to be taken at the stamp duty valuation adopted by the stamp valuation authority. He thus adopted the amount of Rs 5,59,57,375 as sales consideration, and proceeded to notionally divide the said amount amongst the owner and the lessees in the same ratio in which the actual consideration was divided. Accordingly, as against the amount of Rs 1,59,50,000 actually received by the assessee, he included the amount of Rs 2,12,47,375 in computation of capital gains in the hands of the assessee. He then proceeded to compute cost of acquisition as the lease rentals paid by the assessee over the years, and after indexing the same, computed the cost of acquisition at Rs 28,79,698. On this basis, long term capital gain was computed at Rs 1,84,17,692. The Assessing Officer then noted that since while the gross sales consideration under section 50 C in the hands of the assessee is Rs

2,12,97,390, the assessee had made an investment of Rs 1,96,03,685 in qualifying investments under section 54 F, and, accordingly, assessee is entitled to 54F deduction only to the proportionate extent. The deduction under section 54 F was thus computed at Rs 1,69,53,000, and the balance capital gain of Rs 14,64,692 was brought to tax in the hands of the assessee. While doing so, and almost as a postscript to the assessment order, the Assessing Officer also noted as follows:

The authorised representative of the assessee argued that no capital gain is chargeable on account of sale of leasehold property at 5/1 Ripon Street Kolkata because the assessee had no absolute right to the sell the property. The assessee is simply a lessee of the said property and he has only the right to transfer the said lease right of the property. The contention of the assessee is not acceptable. Consideration is paid on sale of the property for giving up right of the owner of the property. In the case of leasehold property, the right of owner is divided between lessor and lessee. That does not give either to the lessee or the lesser immunity for not being charged under section 45 of the Act.

6. Aggrieved by the stand so taken by the Assessing Officer and by an amount of Rs 14,64,692 being brought to tax in the hands of the assessee as capital gain, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) held that the assessee was a tenant in the property sold by the owner and, therefore, so far as the assessee is concerned, the receipt is in the nature of receipt on surrendering tenancy rights. He was further of the view that the provisions of Section 50 C apply only in respect of 'land', 'building' or 'land and building'. Relying upon various decisions of this Tribunal, he was his view that the provisions of Section 50 C cannot be pressed into service in a case in which the assessee has received the amount on surrender of tenancy rights. He, therefore, held that "Section 50 C has no application to the facts of the case under consideration and the capital gains will have to be recomputed on the basis of actual consideration and not the stamp duty value". As regards the alternate plea that full consideration on sale of capital asset has been

invested in qualifying investments under section 54F, learned CIT(A) declined to deal with the same and observed that "Since the ground no. 1 has been allowed and it has been held that the AO was not correct in applying the deeming provisions of Section 50 C, the alternative additional ground taken by the appellant that the deeming fiction under section 50 C will not be applicable to Section 54 F as far as the meaning of full value of consideration is concerned, becomes academic and, is, therefore, not considered". None of the parties is satisfied by the stand so taken by the CIT(A). The Assessing Officer is aggrieved that the CIT(A) ought to have upheld applicability of Section 50 C in this fact situation as well, the assessee is aggrieved that the CIT(A) ought to have adjudicated on the alternative ground of appeal as well. That's how the Assessing Officer is in appeal before us, and the assessee has also filed a cross objection before us.

7. We have heard the rival contentions, perused the material on record and duly considered applicable legal position in the light of the facts of the case.

8. A plain look at the undisputed facts of this case clearly shows that the assessee was a lessee in the property which was sold by the KSCT; there is no dispute on this aspect of the matter. Yet, the Assessing Officer has treated the assessee a seller of property apparently because the assessee was a party to the sale deed, and because, according to the Assessing Officer, "consideration is paid on sale of the property for giving up right of the owner of the property" and that "in the case of leasehold property, the right of owner is divided between lessor and lessee". We are unable to share this line of reasoning. It is not necessary that consideration paid by the buyer of a property, at the time of buying the property, must only relate to ownership rights. In the case of tenanted property, as is the case before us, while the buyer of property pays the owner of property for ownership rights, he may also have to pay, when

he wants to have possession of the property and to remove the fetters of tenancy rights on the property so purchased, the tenants towards their surrendering the tenancy rights. Merely because he pays the tenants, for their surrendering the tenancy rights, at the time of purchase of property, will not alter the character of receipt in the hands of the tenant receiving such payment. What is paid for the tenancy rights cannot, merely because of the timing of the payment, cannot be treated as receipt for ownership rights in the hands of the assessee. This distinction between the receipt for ownership rights in respect of a property and receipt for tenancy rights in respect of a property, even though both these receipts are capital receipts leading to taxable capital gains, is very important for two reasons – first, that the cost of acquisition for tenancy rights, under section 55(2)(a), is, unless purchased from a previous owner – which is admittedly not the case here, treated as ‘nil’; and, - second, since the provisions of Section 50 C can only be applied in respect of “transfer by an assessee of a capital asset, being land or building or both”, the provisions of Section 50 C will apply on receipt of consideration on transfer of a property, being land or building or both, these provisions will not come into play in a case where only tenancy rights are transferred or surrendered. It is, therefore, important to examine as to in what capacity the assessee received the payment. No doubt the assessee was a party to the registered tripartite deed dated 20th July 2007 whereby the property was sold by the KSCT, but, as a perusal of the sale deed unambiguously shows, the assessee has given up all the rights and interests in the said property, which he had acquired by the virtue of lease agreements with owner and which were, therefore, in the nature of lessee’s rights; these rights could not have been, by any stretch of logic, could be treated as ownership rights. It has been specifically stated in the sale deed that the lessee, which included this assessee before us, had proceeded to, *inter alia*, “grant, convey, transfer and assign their leasehold rights, title and interest in the said premises”. There is nothing on the record to even remotely suggest that the assessee was owner of

the property in question. The monies received by the assessee, under the said agreement, were thus clearly in the nature of receipts for transfer of tenancy rights, and, accordingly, as the learned CIT(A) rightly holds, Section 50 C could not have been invoked on the facts of this case. Revenue's contention that the provisions of Section 50 C 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 50 C 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.** (emphasis supplied by us by underlining) **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 50 C that the transfer must be of a "capital asset, being land or building or both", but then a 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. We, therefore, approve the conclusion arrived at by the CIT(A) on this aspect of the matter.

9. Having held so, we may also point out that the Assessing Officer has adopted cost of acquisition of the asset as lease rent paid for the same and even granted indexation benefits thereon. In the impugned order, CIT(A) has directed that consideration for computation of capital gains on surrendering the tenancy rights is to be taken at actuals, and not as recomputed by the Assessing Officer by taking stamp valuation as the sale consideration for the property, but then what the CIT(A) has apparently missed out is the fact that in the case of surrender of tenancy rights, the cost of acquisition of the tenancy rights, in view of the specific provisions of Section 55(2)(a), should have been taken as 'nil'. This aspect of the matter is somewhat academic and tax neutral because admittedly

qualifying investment under section 54F is more than the consideration for surrender of these tenancy rights. The Assessing Officer has given a categorical finding about the quantum of qualifying investment of Rs 1,96,03,685. In view of these discussions, we are of the considered view that the assessee did not have any taxable capital gain in respect of receipt of Rs 1,59,50,000 on account of surrender of tenancy rights. The relief granted by the CIT(A), therefore, deserves to be upheld.

10. Learned counsel for the assessee submits that in the event of our upholding the relief granted by the CIT(A), the grievance raised in the assessee's cross objection will be wholly academic and would not need any adjudication on merits. He submits that in such a situation, he would not press the cross objection. We have upheld the order of the CIT(A), and, therefore, we dismiss the cross objection as not pressed.

11. In the result, the appeal as also the cross objection are dismissed. Pronounced in the open court today on 29th day of February, 2012.

Sd/xx
Mahavir Singh
(Judicial Member)

Sd/xx
Pramod Kumar
(Accountant Member)

Copies to : (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *The Departmental Representative*
(6) *Guard File*

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata