

**IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'H' MUMBAI**

**ITA No.3848/Mum/2010
Assessment Year: 2007-08**

**INCOME TAX OFFICER
16(1)(4), R NO 222, MATRU MANDIR
MUMBAI -400007**

Vs

**MRS HAJRA I MEMON
427, ARUN CHAMBERS
TARDEO ROAD, MUMBAI -400034
PAN NO:ALWPM6969M**

P M Jagtap, AM and R S Padvekar, JM

Dated: January 18, 2012

ORDER

Per: R S Padvekar:

This appeal is filed by the revenue challenging the order of the Ld. CIT (A)-27, Mumbai dated 18.02.2010 for the A.Y. 2007-08. The revenue has taken the following grounds: -

"1. The Ld. CIT (A) erred in directing the addition of Rs.68,45,651/- as Long Term Capital Gain, and accepting the Tenancy Right got converted into ownership right as per consent decree dated 28.05.1999 and not in A.Y. 2007-08 when the agreement for giving ownership right was registered through a transfer deed.

2. The Ld. CIT (A) erred in not accepting the fact that the assessee tenant surrendered / exchanged / transferred the Tenancy Right acquired for Rs.9 lakhs with ownership right worth Rs.1,13,49,000/- on 22.02.2007 and not on 28.05.1999 when the consent decree was passed.

3. The Ld. CIT (A) erred in applying section 50C whereas the exchange/surrender/transfer value is taken at Rs.1,13,49,000/- by applying section 2(47) 45, 50C, 55 and section 112 and not just applying section 50C.

4. The Ld. CIT (A) erred in following the decision of Hon'ble ITAT, Mumbai in the case of Kishori Gaitonde vs. ITO."

2. The first issue which arises from ground no.1 & 2 is whether the capital gain is taxable in the A.Y. 2007-08 if it is held that there is transfer within meaning of sec. 45(1) of the I. T. Act.

3. The facts which revealed from the record are as under. The assessee is an individual. The assessee filed the return of income declaring income at 'Nil'. The assessee's case was

selected for scrutiny on the basis of the AIR information as it was noticed by the A.O. that the assessee has registered transaction of immovable property worth Rs.1,13,49,000/- on 22.02.2007.

4. Brief history of the property which is the subject matter of this assessment proceeding is as under. One Mr. M.K. Mohammed was in adverse possession/tenant of the land situated at Dr. Annie Besant Road, Worli, Bombay, admeasuring 1799.36 sq.yards bearing Cadastral Survey No.3 of Worli Division in the building known as "Shriniketan". Shri M.K. Mohammed constructed restaurant thereon which was formerly known as "Gurukripa". There was a litigation in Hon'ble High Court of Bombay between co-owners of the land and said Shri M.K. Mohammed. The Hon'ble High Court appointed one Shri D.B. Khade in High Court Suit No.120 of 1978 who instituted a suit against Shri Mohammed (High Court Suit No.1318 of 1980) seeking the declaration as to the title of the said land and for the vacant possession of the land/property. The Hon'ble of High Court of Bombay passed interim order in the nature of an injunction against Shri M.K. Mohammed and prohibited him from carrying out any work on the said land pending hearing and final disposal of the suit except completion of Restaurant work on the roof. Subsequently, there was a settlement between Shri M.K. Mohammed and the Court Receiver appointed by Hon'ble High Court of Bombay and Consent Terms were filed and on the basis of consent terms, Consent Decree was passed dated 21.03.1988 and Shri M.K. Mohammed was ordered to pay to the Plaintiff sum of Rs.7,00,000/- in full and final settlement of the claim of the Plaintiff, Shri D.B. Khade; the Court Receiver appointed by the High Court of Bombay. It was further directed if Shri M.K. Mohammed makes the payment as ordered then the Plaintiff, the Court Receiver was to withdraw the said suit filed against him. As per the Consent Decree passed by the Hon'ble High Court, the property admeasuring 1823.53 sq.mtrs was declared as an absolute property of said Shri M.K. Mohammed and he was declared as an owner of said property. It is pertinent to note here that the assessee had entered into an agreement dated 6.8.1986 with Shri M.K. Mohammed for acquiring the rights in the disputed property for the consideration of Rs.9 lakhs.

5. One of the Co-owners of the property, i.e. Lalben M. Patel filed a Suit being Civil Suit No.1593 of 1999 against the assessee making the other co-owners as the defendants, challenging the validity of the Consent Decree dated 21.03.1988 passed by Hon'ble High Court in Suit No.1318 of 1980. Subsequently, there was settlement arrived at in the Suit filed by the Co-owners and the assessee and they filed Consent Terms on 28.05.1999 in the Hon'ble High Court and by its order dated 28.05.1999, Hon'ble Court was pleased to pass the Consent Decree as per the consent terms filed by the co-owners and the assessee. Assessee paid Rs.7 lakhs to the Court Receiver out of the agreed consideration of Rs.9 lakhs as per agreement dt. 06.08.1986 with Mr. M. K. Mohammad. The Hon'ble High Court set aside the Consent Decree dated 21.03.1988 in Suit No.1318 of 1980 and the assessee undertook to the Hon'ble High Court to remove herself and all furniture, fixtures, articles and things from the property which was subject matter of the litigation of the said land admeasuring 1823.53. sq.mtrs. As per the consent terms, upon removing the structure standing thereon by the assessee and making the compliance of the terms of the Consent Decree, the Co-owners undertook to create a monthly tenancy in favour of the assessee or her nominee in respect of 14000 sq.ft. carpet area in Shriniketan Building (now known as Ceejay House) situated at Dr. Annie Besant Road, Worli, Mumbai 400018, on the third and fourth floors thereon together with six covered car parking spaces and one open car parking space, in the compound of the said building at a monthly rent of Rs.10,000/- per month. The co-owners further undertook that upon the said premises would be converted in to ownership consequent upon a Co-operative Society or a Condominium being formed, they agreed to convert assessee's tenancy in the said area of 14000 sq.ft as well as six covered car parkings and one open car parking spaces in to the ownership on the same terms and

conditions as were applicable in case of other existing tenant of Shriniketan building. The assessee nominated her two sons namely Asif Iqbal Memon and Junaid Iqbal Memon, along with herself as the tenants in respect of property of 14000 sq.ft. carpet area on the third and fourth floors of Shriniketan building (Ceejay House) together with agreed parking spaces. As per the nomination of the assessee she had retained 60% and gave 20% each for her two sons Asif and Junaid in the undivided share; right title and interest in the said premises. It appears that the Co-owners of the said property entered into the Development Agreement with M/s. Millennium Developers P. Ltd. and in the Development Agreement the developer accepted the liability of the co-owner together agreed area of 14000 sq.ft. carpet area in the Shriniketan building as well as car parking spaces to be given to the assessee. In pursuance of the said Consent Decree dated 28.5.1999 in Suit No.1593 of 1999, the co-owners have offered to the assessee alternate accommodation as per the Consent Decree as well as the car parking spaces initially on tenancy basis. In pursuance of the Consent Decree, the assessee vacated the disputed premises which she was holding and shifted to the alternate agreed premises of 14000 sq.ft. carpet area which was on third and fourth floors of Shriniketan building with six covered and one open parking spaces on agreed payment of rent of Rs.10000 per month. It appears that balance payment of Rs.2 lakhs out of agreed Rs.9 lakhs consideration to be paid by the assessee to Shri M.K. Mohamed and the co-owners of the said property executed an agreement dated 4.11.2004 but the said agreement was not registered. The part of the terms of the agreement are reproduced in the assessment order on page No.13, 14 & 15. The said agreement was in respect of accepting the alternate accommodation in the form of 14000 sq.ft. carpet area in the Shriniketan building + other amenities including proportionate area of the common toilets, six covered car parking spaces and one open car parking space, on ownership basis in lieu of the tenant vacating the said tenanted premises held by them as a tenant of the co-owners. Finally, the another Deed of Confirmation agreement was executed and registered on 22.02.2007 and for the purpose of payment of stamp duty and registration charges, the valuation of the property which was transferred to assessee and her sons was made at Rs.1,13,49,000/-.

6. The A.O. was of the opinion that as the Deed of confirmation was registered on 22.02.2007, hence, there was a transfer within the meaning of section 45(1) r.w. sec. 2(47) of the I.T. Act as the assessee surrendered her tenancy right and acquired the ownership right to the extent of Rs.1,13,49,000/- (as per the valuation made for the Stamp duty purpose) and same was taxable as long term capital gain (LTCG) in the A.Y. 2007-08. The A.O. gave the benefit of cost of acquisition i.e. amount paid by the assessee to Shri M.K. Mohammed of Rs.9,00,000/- in 06.08.1986 for acquiring her rights and also gave the benefit of deduction in respect of the share of stamp duty and registration charges borne by the assessee and brought to tax Rs.68,45,651/- as long term capital gain. The assessee seriously resisted action of the A.O. by taking the stand that her tenancy rights were 'blossomed' into the ownership and there was no transfer involved and hence, whatever the ownership right the assessee acquired that cannot be subject matter of capital gain within the meaning of section 45(1) of the Act. The assessee further pleaded that the capital gain if at all cannot be brought to tax in the A.Y. 2007-08 as the assessee acquired the rights vide Consent Decree dated 28.05.1999 and at the most the capital gain could have been taxed in that year. The contentions of the assessee were rejected by the A.O. and hence, the assessee carried the issue before the Ld. CIT (A). The Ld. CIT (A) held that the assessee acquired the ownership of the property as per the Consent Decree of the High Court dated 25.05.1999 and hence it cannot be said that the ownership right had been acquired in the A.Y. 2007-08. The operative part of the decision of the Ld. CIT (A) is as under: -

"Looking to the facts of the case, it is seen that the AO has himself stated in his order that the appellant had acquired the tenancy rights from one Mr. M.K. Mohd on 6.8.1986 who was

in adverse possession of the property and had constructed 2 restaurants on the same. Mr. M.K. Mohd. Had to pay Rs.7 lakhs to the Court Receiver who had instituted a suit against him and the appellant had paid Rs.9 lakhs on behalf of Mr. M.K. Mohd. And to Mr. M.K. Mohd and he had assigned all the rights of the property to the appellant. Subsequently one of the co-owners of the property had filed a suit against the appellant challenging the consent decree the appellant had obtained from Mr. M.K. Mohd and this was again compromised in the Court by terms of a consent suit dt.28.5.1999 in the Hon'ble Bombay High Court, whereas, as per consent decree passed by the Hon'ble High Court, the appellant had agreed to vacate the whole plot of 18.23 sq.mts. occupied by them and in return the owners undertook to create area with 6 covered and uncovered car parking spaces in Shri Niketan bldg. at Worli, Mumbai at a monthly rent of Rs.10,000/- per month and the Hon'ble High Court had also stated that the owners had agreed that upon the premises been converted into ownership consequent upon a co-operative society or a condominium been formed, the owners undertook to the Hon'ble High Court to convert such tenancy of the appellant into ownership. As per this agreement dt.12.3.1999, the appellant had given the owners the right to carry out necessary repairs and restoration of the building to the builder, M/s. Millennium Developers Pvt. Ltd. who had to handover 14,000 sq.ft. carpet area with 6 covered and uncovered car parking spaces in the new building to the appellant. By an agreement dt.4.11.2004, the appellant who was tenant had vacated the building and had accepted alternate accommodation. It is the AO's contention that this alternate accommodation in Ceejay House whose stamp duty and registration charges were Rs.1.13 crores should be considered as the sale value for rights purchased in 1986 from Mr. M.K. Mohd and should be assessed in this year as long term capital gain, taking the cost of acquisition as Rs.9 lakhs paid to Mr. M.K. Mohd. It is the appellant's contention in this A.Y. 2007- 08, no property has been acquired by them and the tenancy rights were converted into ownership rights as per consent decree of the Hon'ble Bombay High Court dt. 28.5.1999 in terms of consent suit No.1593 of 1999, copy of which has been filed. The contention of the appellant is correct. As per the copy of the consent decree, the appellant had acquired the ownership of the property as per the decree of the High Court dt.28.5.1999, whereas the Hon'ble High Court had stated that the tenancy rights would convert into ownership rights. Hence, it cannot be said that these ownership rights had been acquired in A.Y. 2007- 08. In this year only the right which was acquire in 1999 by the Hon'ble High Court's decree had been registered. The date of registration cannot be taken as the date of transfer because the transaction had taken place much earlier, it was just registered in this year. The appellant had become the owner vide the High Court's decree in 1999. Registration was the final culmination of the ownership rights acquired in 1999. Hence, it cannot be assessed as capital gains in A.Y. 2007-08. Further, the appellant has also stated that provisions of sec.50C do not apply in this case, for this, they have relied upon the order of the Hon'ble ITAT, Mumbai in the case of Kishori Sharad Gaitonde vs. ITO (A.Y. 2005-06) I.T.A. No.1561/M/09 wherein the Hon'ble Members have held that, 'it is noticed from plain reading of sec.50C, unless the property transfer has been covered by that sec.50C, i.e. a capital asset been land or building or both registered by sale deed and for that purpose the value has been assessed and stamp duty has been paid by the parties only when sec.50C cannot come into operation. In the case under consideration, there is a transfer of tenancy rights though that is a capital asset, but not a capital asset been land or building or both. Therefore, sec.50C is not applicable to the facts of the case under consideration. Accordingly, the AO is not correct in taking the value adopted or assessed by the authority of a State Government. The stamp valuation for the purpose of calculation of capital gains on transfer of tenancy rights.' As per this decision, the provisions of sec.50C are not applicable on transfer of tenancy rights, but only on transfer of land or building or both. However, as discussed in this case, no transfer has taken place in A.Y. 2007-08. The appellant had acquired ownership rights in A.Y. 200-01. Hence, the action of the AO in taxing the capital gains in this year is not correct and the additions made stands deleted."

Now, the revenue is in appeal before us.

7. We have heard the rival submissions of the parties and perused the records. The facts pertaining to the controversy are already narrated in detail in upper part of this order. One Mr. M.K. Mohammed was in adverse possession of the land situated at "Gurukripa" Dr. Annie B. Road, Worli, Mumbai. The said Shri Mohammed was running the restaurant there as he has constructed the structure on the said property. It appears that there was a litigation between co-owners in the Hon'ble High Court. The Hon'ble High Court has appointed one Court Receiver namely Mr. D.B. Khade. As per facts on record Shri M.K. Mohammed and other occupants / tenants were in the said property. The Court Receiver filed the Suit against Shri M.K. Mohammed in the Hon'ble High Court of Bombay seeking the relief by way of directions to get the vacant possession of the said property from Shri M.K. Mohammed. There was compromise or settlement between Shri M.K. Mohammed and Court Receiver and in pursuance of the Consent Terms filed in the Hon'ble High Court in the Suit filed by the Court Receiver, the Hon'ble High Court passed a Consent Decree. Meantime, the assessee entered into an agreement with Shri M.K. Mohammed for acquiring the rights in the property which was in his possession for the consideration of Rs.9,00,000/- and the said agreement was executed in 06.08.1986. It appears that the assessee took over the possession of the disputed property from Shri M.K. Mohammed and hence, the co-owners of the said property challenged the Consent Decree of the Court passed in 1988 and also made the assessee as a party to the Suit Proceedings. Again there was settlement between the co-owners and the assessee and it was agreed that the assessee would remove her from the property which was subject matter of the Court litigation and also she would remove all the furniture, fixture and other belongings and give the vacant possession to the co-owners and the co-owners agreed to give alternate premises in the form of 14000 sq.ft. carpet area on the third and fourth floors of Shriniketan Building together with six covered car parking spaces and one open car parking space. As per the Consent Terms, it was also agreed that when the co-operative society would be formed the assessee would be given the full ownership rights of the said premises and till that time the assessee would be treated as the tenant on the monthly rent of Rs.10,000/-. The Hon'ble High Court passed the Consent Decree as per the Consent terms filed by the coowners and the assessee 29.05.1999. In pursuance of the Consent Decree the assessee vacated the property which was subject matter of the litigation and took the possession of the alternate premises in Shriniketan building. There was an agreement on 4.11.2004 to that effect. When the assessee made the compliance of the Consent Decree and agreement was executed on 04.11.2004, in our opinion, at the most, the transfer can be treated on that day when the effective agreement was executed in pursuance of the consent decree even if said agreement was not registered but subsequently registered on 22.02.2007 by way of Confirmation Deed. So far as plea of the assessee that there was no transfer at all is without any base. The assessee was accepted as a tenant by the co-owners and as per the well settled law on this issue the tenancy cannot be equated with the ownership. The ownership is the bundle of rights but rights of the tenants are limited. Admittedly, the assessee's tenancy was converted into ownership and that can be the subject matter of the capital gain as it is a 'transfer' within the meaning of section 2(47) r.w.s. 45 of the I.T. Act.

8. Core question of controversy to be decided is whether the said transfer was in the A.Y. 2007-08. Admittedly, the assessee made the compliance on 4.11.2004 and in our opinion this issue has to go in favour of the assessee as the transfer took place on the date i.e. 4.11.2004 when the agreement in compliance with the Consent Decree was executed and the assessee vacated the property, which was subject matter of the litigation between her and the co-owners.

9. We are unable to accept the plea of the Ld. Counsel that at the most, the transfer could be in the year 1999 when the Consent Decree was passed for the reason that though the Consent Decree was passed it was subject to certain conditions and on compliance of the concessions only the assessee was to be conferred with the ownership of the alternate premises agreed to be given in the Shriniketan building by co-owners/landlords of the property. We, therefore, hold that the transfer took place on 04.11.2004 and not on 22.02.2007 even if the Deed of confirmation was registered on that date. We, accordingly, confirm the order of the Ld. CIT (A) on above reasons that capital gain cannot be brought to tax in this year and accordingly we decide question nos.1 & 2 against the revenue.

10. So far as ground no.3 is concerned, it is on the applicability of section 50C of the Act. As we have held that there is no transfer in the assessment year 2007-08 as per our detailed reasoning, ground no.3 becomes infructuous. We accordingly dismiss the same.

11. In the result, revenue's appeal stands dismissed.

(Order pronounced in the open court on this day of 18.1.2012.)