IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES " I ", MUMBAI

BEFORE SHRI P. M. JAGTAP, ACCOUNTANT MEMBER &
SHRI N.V. VASUDEVAN, JUDICIAL MEMBER

ITA No. : 3053/Mum/2010
Assessment Years : 2006-07

Asst. Commissioner of Income Tax, Circle-12(1), Aayakar Bhavan, M.K. Marg, Mumbai-400 020	Vs.	Shri Ishverlal Manmohandas Kanakia 2nd Floor, Wake Field House, Sprott Road, Ballard Estate, Mumbai-400 038 **PAN NO: AACPK 2466 Q**
(Appellant)		(Respondent)

&

ITA No. : 2650/Mum/2010
Assessment Years : 2006-07

Shri Ishverlal Manmohandas Kanakia 2nd Floor, Wake Field House, Sprott Road, Ballard Estate, Mumbai-400 038 **PAN NO: AACPK 2466 Q**	Vs.	Asst. Commissioner of Income Tax, Circle-12(1), Aayakar Bhavan, M.K. Marg, Mumbai-400 020
(Appellant)		(Respondent)

Assessee by : Shri Vijay Mehta
Department by : Shri Parthasarthi Naik

Date of hearing : 30.01.2012
Date of Pronouncement : 08.02.2012

O R D E R

Per N. V. Vasudevan (JM) :

ITA No. 3053/Mum/2010 is an appeal by the Revenue, while ITA No. 2650/Mum/2010 is an appeal by the assesse. Both these appeals are directed against the order dated 27.01.2010 of CIT-23, Mumbai relating to the Assessment Year 2006-07.

2. The grounds of appeal nos. 1 to 3 raised by the assessee and the additional grounds of appeal sought to be raised by the assesse before the Tribunal for the first time and the grounds of appeal of the Revenue are all in relation to the taxation of capital gain on sale of the property owned by the assessee. These grounds read as under:-

Ground No.1 :

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) grossly erred in upholding the action of the A.O. taxing the appellant's 1/3rd share of Rs.70,34,000/- received from the developer as long term capital gain. It is prayed that the said receipt is not taxable at all under the capital gain provisions.

Ground No.2:

Without prejudice to Ground No. 1 as above, on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) grossly erred in upholding the action of the AO in not allowing the payment to two co-owners of Rs.39,34,000/- (Rs.19,67,000/- to each co-owner) as cost from the capital gain. It is prayed that this expenditure may kindly allowed as cost while computing the capital gains.

Ground No.3:

Without prejudice to Ground No. 1 as above, on the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) grossly erred in upholding the action of the AO in not allowing the solicitors expenditure of Rs.1,00,000/- and Architect's fees of Rs.27,550/-.

It is prayed that this expenditure may kindly allowed as cost while computing the capital gains.

3. The additional grounds raised by the assessee reads as under :-

Ground No.5 :

The learned CIT(A) ought to have allowed deduction in respect of the indexed cost of acquisition towards the cost of the asset or its valuation as on 01.04.1981 whichever is higher from the full value of consideration.

Ground No.6 :

The learned CIT(A) ought to have held that the Full Value of Consideration shall be restricted to Rs.29,54,023/- as returned by the appellant being amount received as per the Development Agreement from the developer of Rs.38,32,000/- as reduced by the amounts paid to the other co-owners of Rs.7,32,000/- and other expenses of Rs.1,45,977/-.

Ground No.7 :

The learned CIT(A) ought to have allowed the deduction u/s.54F of the Act from the capitals gains chargeable as the appellant has in principle invested the entire sum in the new flat acquired.

4. The grounds raised by the Revenue reads as under:-

1) *"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that transfer of TDR and additional FSI does not attract provision of section 50C."*

2) *"On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that FSI is inextricably connected with land and building and transfer of the same is as good as transfer of land and building."*

3) *"The appellant prays that the order of the CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored."*

4) *"The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary".*

5. We shall first take up for consideration Ground No.1 raised by the Assessee in his appeal in which the Assessee has contended that the consideration received by the Assessee for allowing development of property owned by him under a Development Agreement with a developer is not chargable to tax as capital gain u/s.45 of the Income Tax Act, 1961 (the Act). The facts relevant for adjudication of the aforesaid ground are that the Assessee, who is an individual, and two his brothers were co-owners owning leasehold rights over a plot of land measuring 8400 Sq.ft. in Vile parle, Survey No.287 (Part) and C.T.S.No.45, hereinafter referred to as "the property" having acquired the same by virtue of deed of assignment dated 10.4.1963 registered as Sl.No.1507/63 with the sub-registrar of assurances. A building known as "Ashirwad" had been constructed over the property consisting of ground plus two floors. There were 9 premises in the building so constructed out of which 6 were occupied by tenants and 3 by the Assessee. The Assessee and his two brothers entered into a registered Agreement for development of the property dt.28.10.2005 with M/S.Heena Builders and Developers, a partnership firm, hereinafter referred to as "the Developer" for demolition of existing structures and putting up new construction. The construction permissible on the property owned by the assessee in accordance with the Development Control Regulations 1991 ("DCR 1991") the present Floor Space Index ("FSI") of the said plot of land was 1 : 1, and on that basis yield/area available for construction on the said plot of land was 8,400 square feet FSI. Besides this, since the said plot of land is capable of receiving Transferable Development Rights ("TDR") as per the provisions of DCR 1991 additional area could be constructed by consuming / loading TDR to the extent of 8,400 square feet FSI on the said plot of land. In these circumstances, building/s that could be constructed on the said plot of land by consuming FSI admeasuring 8400 square feet and TDR admeasuring 8400 square feet. Under the Development Agreement, the Developer was

allowed to construct the permissible FSI and also the additional FSI by loading TDR as plot capable of receiving TDR.

6. Certain clauses in the agreement are required to be extracted for better appreciation of the facts of the case which are as follows :-

> *"2. The Owners hereby grant to the Developers and the Developers hereby accept and acquire from the Owners Development Rights in respect of the said property, subject to the occupancy of the Owners and the tenants.* ***For the purpose of this Agreement, the expression "Development Right" shall mean entire FSI including originating from the said plot of land and/or married to it and right to load consume and use FSI credit by way of TDR and incidental FSI which may available by payment of premium or free of charge.***
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> *3. The Developers shall have unconditional right and be entitled to construction, reconstruction, additions, alternations, amendments, modification and extensions using and consuming the Development Rights including to demolish the existing structures after obtaining possessions from the First Owners and the tenants of the premises in their occupation,* ***and construct building on the said plot of land by consuming FSI admeasuring 8400 square feet (carpet) and TDR to the extent of 8400 (carpet) square feet, and other incidental FSI including by FSI that may be obtained/sanctioned by payment of premium as per applicable laws."***
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> *(underlining by us for emphasis)*

7. The owners were to get 2,689 sq. ft. carpet area comprising of two flats admeasuring 1,362 sq. ft. carpet area of two flats, one in the 2nd floor and the other in the 5th floor. Besides the constructed area, the developer also agreed to pay a consideration of Rs.2,11,00,000/-. The manner in which the same has to be paid is set out in clause 43A of the agreement.

8. The assessee filed a return of income for the A.Y. 2006-07, wherein he declared capital gain on transfer of the property at a sum of Rs.29,54,023/. The AO was of the view that the total monetary consideration for transfer of the property was Rs.2,11,00,000/- and the assessee as a 1/3rd owner was to get Rs.70,33,000/-. The AO further found that the registration authorities have determined a value of the property for the purpose of registration and stamp duty at Rs..2.59 crores. The AO held that the provision of section 50C of the Act were applicable and accordingly adopted the value of Rs.2.5 crore as the full value of consideration received on transfer against Rs.2.11 crore mentioned in the instrument of transfer. The AO computed 1/3rd of Rs.2.59 crores and arrived at sale consideration received by the assessee on transfer of the property at Rs.86,33,333/-. The assessee had claimed expenditures of Rs.32,02,000/- and Rs.7,32,000/- being amount paid to other co-owner and fees paid to Architect, respectively, as deduction, from the full value of consideration received on transfer for determining capital gain. This was also rejected by the AO for the reason that the assessee did not furnish evidence to substantiate the claim. Thus the AO determined the long term capital gain on sale of 1/3rd share of the property by the assessee at Rs.86,33,333/-.

9. Aggrieved by the order of the AO, the assessee preferred an appeal before Ld. CIT(A). Before the Ld. CIT(A) the assessee submitted that the provisions of section 50C of the Act could not be applied where development rights are sold to a builder. Besides the above, the assessee also submitted that it had acquired the property in the year 1963 and in accordance with the Development Control Rules, the assessee could construct only 1 FSI i.e. 8,400 sq. ft. of built up area over the plot. The assessee further submitted that by virtue of the Development Control Regulations for Greater Bombay, 1991 and in particular Regulation 14 to Appendix VII to the aforesaid regulations, the property of the assessee could be considered eligible as a

receiving plot for loading TDR and consequently another 8,400 sq. ft. of plot area could be construted on the land belonging to the assesse over and above the 1 FSI of permissible construction viz., 8400 Sq.ft. of built up area. It was the submission of the learned counsel of the assessee that as far as the right to load TDR as a receiving plot is concerned; it was a right which was acquired in the year 1991 pursuant to the DCR for Greater Bombay Regulations, 1991 and by virtue of these regulations, the development potential of the assessee's property increased. In other words, the capital asset sold by the assessee had a cost of acquisition when the land was acquired in the year 1963. By virtue of such acquisition, the FSI permitted on the assessee land was only 1 FSI equivalent to 8,400 sq. ft being the plot area. By the 1991 Regulations there was an improvement to the capital asset in as much as a receiving plot the assessee could build an additional area of 8,400 sq. ft. As far as the right of the assessee as owner of receiving plot is concerned, it was an improvement of a capital asset originally owned by the assessee for which it was not possible to determine cost of acquisition. The assessee submitted that as laid down by the Hon'ble Supreme Court in the case of CIT vs. B. C. Srinivasa Setty, 128 ITR 294 (SC) where in respect of a capital asset it was not possible to determine the cost of acquisition or cost of improvement, then capital gain on transfer of such capital asset cannot be brought to tax u/s.45 of the Act. On the same principle, the assessee submitted that since the cost of improvement of the property could not be ascertained, the computation provision of section 45 fail and, therefore, no capital gain can be brought to tax in the hands of the assessee. In this regard, the assessee placed reliance on the decision of the Mumbai Bench of the ITAT in the case of Maheshwar Prakash-2 Co-operative Housing Society Ltd. vs. ITO (2008) Vol 24 SOT 366 (Mum) wherein on identical facts the Tribunal had held that there can be no capital gain when right to load TDR is granted by the owner of a receiving plot owner because of the absence of cost of acquisition for such right. Besides the above, reliance was also

placed on the decision of the Mumbai Bench of the ITAT in the case of Jethalal D. Mehta vs. DCIT 2 SOT 422 (Mum), wherein in case of her transfer of right as a receiving plot to load TDR it was held that there can be no computation of capital gain possible and therefore the charge fails.

10. The Ld. CIT(A) however, did not agree with the submissions made on behalf of the assessee and he held as follows :-

> *"2.3. I have carefully examined the order of the Assessing Officer and the submissions made by the appellant. I have also perused the order of the Hon'ble Mumbai ITAT in the case of Maheshwar Prakash CHSL V/s ITO (supra) on which the appellant has based his arguments. I find that in Para 9 of the said order, the Hon'ble Tribunal has stated as under:*
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> > *"The perusal of the above scheme shows that TDR is available to the owner or lessee of a land which is surrendered to the Government and therefore, the acquisition of such TDR is detriment to the land surrendered by the owner or lessee. Therefore, it can be said that the cost of the TDR is equal to the cost of the land surrendered. However, such TDR can be utilized on any plot vacant or already developed or by erection of additional storey's subject to the FSI available in Regulation 14 of the Appendix. On the other hand, by virtue of Regulation 14 the FSI of a receiving plot is automatically allowed to be exceeded by 0.8 as mentioned in the said Regulation. For example, a plot in the suburb of Mumbai had an existing FSI of 1 prior to the year 1991 which had already been exhausted by construction of various flats. However, by virtue of Regulation 14 the society in respect of that building automatically got extension of FSI by 0.8. That means if the plot of land was 1000 sq. mtrs., then additional floors could be constructed to the extent of built up area of 800 sq. mtrs. As per the new scheme, either the society could construct additional floors having total area of 800 sq. mt. by purchasing TDR from the market or could transfer such right to any other building or developer who had the TDR on the receiving plot. The above discussion shows that separate and distinct rights arose as per DCR 1991 i.e. TDR and the right to construct additional floor. The former has inbuilt cost while the later one arose without any cost. Regulation 14 makes it clear that FSI! of receive plot*

> *shall be allowed to be excluded in the prescribed manner. Such right was made available automatically without paying anything either to the BMC or to the government".*
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> *This is clearly indicative of the fact that the Hon'bte Tribunal has held that there are two separate and distinct rights arose as per DCR 1991 i.e. TDS and the right to construct additional floors. The first would have an inbuilt cost and the later would be without any cost. Complete reading of the said order makes it clear that in case where only additional FSI is transferred by the Society to a developer, who uses TDR obtained from elsewhere, no capital gains would result. However, if the owner/s transfers the TDR plus additional FSI that had incurred to it on account of the DCR 1991, TDS would definitely have a value and would be a capital asset on which capital gains are to be calculated. In view of this, it cannot be said that no capital gains arose to the appellant since as per the statement of the appellant; the appellant has sold or transferred the TDR to the Developer alongwith additional FSI for certain amount of money. Therefore, the action of the Assessing Officer in applying the provisions of Long Term Capital Gains on the said amount received is correct and is upheld. However, I find that the Assessing Officer has wrongly applied the provisions of section 50C in the case of the appellant. Section 50C is applicable only on immovable tangible assets. TDR would not fall under the said provisions as it is an intangible asset. The Assessing Officer is therefore directed to calculate the Long Term Capital Gain on transfer, keeping in mind that section 50C is not applicable in the case of the appellant on transfer of TDR."*

11. Aggrieved by the relief given by the Ld. CIT(A) in terms of the section 50C of the Act, the Revenue has preferred the present appeal before the Tribunal. Aggrieved by the order of the Ld. CIT(A) in holding that capital gain is chargeable to tax in the hands of the assessee and in rejecting the claim of the assessee with regard to proper computation of capital gain, if it is held to be chargeable to tax, the assessee has raised ground nos. 1 to 3 and additional ground nos. 5 to 7 before the Tribunal.

12. We have heard the rival submissions. Before us the learned counsel for the assessee reiterated the arguments that were put forth before the Ld.

CIT(A) on the issue of chargeability to tax of the capital gains on sale of the property. The Ld. DR relied on the order of the Ld. CIT(A).

13. We have considered the rival submissions. We will first take up for consideration the question with regard to the chargeability to tax of the capital gain in the hands of the assessee. At this stage, we may also mention that in the case of other two co-owners, the capital gain offered was accepted and to the best of knowledge of the assesse as stated by the learned counsel for the Assessee across the bar, the Revenue has not invoked the provision of section 50C in the case of the other co-owners. With this background, we will examine the claim of the Assessee.

14. The Hon'ble Supreme Court in the case of in CIT v. B. C. Srinivasa Shetty [1981] 128 ITR 294(SC) dealt with the question whether capital gain accrue or arise when "Goodwill" of a business is transferred. The Hon'ble Supreme Court held that section 45 of the Act operates if there is a transfer of a capital asset giving rise to a profit or gain. The Hon'ble Court held that the expression "capital asset" is defined in section 2(14) to mean "property of any kind held by an assessee" and therefore was of the widest amplitude, and apparently covers all kinds of property and goodwill is not expressly excluded by the definition. The Hon'ble Court however held that the definitions in section 2 of the Act are subject to an overall restrictive clause viz., "unless the context otherwise requires". The Hon'ble Court therefore went into the question whether contextually section 45, in which the expression "capital asset" is used, excludes goodwill. The Hon'ble Court after referring to Sec.48 which provides the mode of computation of capital gain viz., deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset "the cost of acquisition of the capital asset ", held that the asset contemplated in sec.45 of the Act is an asset which possesses the inherent quality of being available on the expenditure of money to a

person seeking to acquire it. The Hon'ble Court held that goodwill is something built up by the carrying on of a business or profession and cannot be acquired by just paying money. Therefore there can be no cost of acquisition for goodwill which is a self -generated. The Court held that Sec.45 which is the charging section and Sec.48 which is the computation provision together constitutes an integrated code. When there is a case to which the computation provisions cannot apply at all, such a case was not intended to fall within the charging section. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain. The following were the relevant portion of the decision of the Hon'ble Supreme Court:

> "Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. The asset must be one which falls within the contemplation of the section. It must bear that quality which brings s. 45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head " Capital gains ". Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the I. T. Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through

> the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head."

15. It can thus be seen that for attracting charge to tax under the head capital gain there are certain conditions necessary to be fulfilled, viz.,

(a) There must be a capital asset;
(b) There should be a transfer of the capital asset;
(c) The capital asset should be something which can be acquired by paying a cost i.e., it should be capable of determining the cost of acquisition of the capital asset as well as cost of improvement if any to the capital asset.
(d) There must be accrual of consideration for transfer of capital asset.

16. In present case what was transferred by the Assessee was Development Rights in respect of the property. The Agreement contemplates that the expression "Development Right" shall mean entire FSI including originating from the said plot of land and/or married to it and right to load consume and use FSI credit by way of TDR and incidental FSI which may available by payment of premium or free of charge. The right to construct building on the said plot of land by consuming FSI admeasuring 8400 square feet (carpet) is a capital asset which was acquired by the Assessee by paying cost. The right as a receiving plot owner to load TDR to the extent of 8400 (carpet) square feet, and other incidental FSI including by FSI that may be obtained/sanctioned by payment of premium as per applicable laws is a right which accrued to the Assessee by virtue of the Development Control Regulations for Greater Bombay, 1991 without payment of any cost, as will be explained in the following paragraphs.

17. Rule 10(2) of Development Control Rules, 1967 provided for grant of extra FSI to the owner of a land including a lessee thereof if the land required by the planning authority for road widening or for constructing new road proposed under the development plan was surrendered by the owner free of compensation as more particularly set out therein. The said rule provided that the Municipal Commissioner shall permit the additional floor space to the extent of 100% of the area required for road widening or for constructing new roads as aforesaid subject to such 100% of the area being limited to 40% of the area of the plot remaining after release of the part of land required for road widening or road construction. Under old Rule 10(2), additional FSI available on surrender of land required for road widening etc. could be used on development of the very land of which surrendered land formed a part and that too to the extent of 40% of area of such plot remaining with the owner after release of land needed for road widening or road construction.

18. On 25th March, 1991, the Development Control Regulations for Greater Bombay, 1991 (hereinafter referred to as “Regulations”)came into force and thereafter the Development Control Rules, 1967 ceased to be operative.

19. The Development Control Regulations for Greater Bombay, 1991 evolved a new scheme for grant of transferable development rights (T.D.R.) as more particularly set out in Regulation 34 and Appendix VII thereto. The object of 1991 was to make liberal provisions for transfer of development rights so as to encourage owners to surrender plots needed for road widening or road construction free of compensation and free of compensation.

20. Regulation 2(42) of 1991 Regulations define the expression "floor space index" (FSI) as a quotient of the ratio of the combined gross floor area of all

floors, excepting areas exempted from the purview of the regulations, to the total area of the plot as set out therein.

21. Regulation 32 of the said Regulations prescribe the maximum permissible floor space indices and tenement density for various occupancies and locations and for various use zones as set out in Table 14 there under. Different floor space index was prescribed by Regulations 32 for development of plots in residential zones and residential zones with shop line etc. situate in island city on the one hand and the plots of land situate in suburbs and extended suburbs of Greater Bombay on the other hand.

22. Regulation 33(1) of the said Regulations provided that such 100% of the FSI of the land surrendered by the owner or the lessee to the Corporation for roads, open spaces etc., will be allowed and can be utilised on the remainder of the land upto the limit of 40% of the area of the plot remaining after such surrender and the balance as a development right in accordance with the Regulations governing the transfer of development rights in Appendix VII.

23. Appendix VII deals with the subject matter of regulation for grant of 'transferable development rights' (TDRs) to owners/developers and prescribes conditions for grant of T.D.R. Under the said regulations the Municipal Commissioner is entitled to issue development rights certificates in favour of the owner including the lessee of the land who surrenders the reserved plot etc. to Municipal Corporation free of compensation. Appendix VII empowers the Municipal Commissioner to issue development rights certificates allowing the owner including the lessee thereof to avail of extra FSI as more particularly set out therein, where the owner or the lessee of the land surrenders the plot of land affected by proposed road widening or by proposal of construction of new roads to the Municipal Corporation free of compensation. Regulation 8 of Appendix VII provides that the rights of

original holder of development rights certificates are transferable and development rights certificates could be or can be transferred to the transferee in whose favour the necessary endorsement is made by the Municipal Commissioner on receipt of the appropriate application for endorsement of new holders' name i.e. transferee on the said certificate.

24. Regulations 10, 11 and 12 of the said Regulations provide that a holder of the development rights certificate is entitled to use the extra FSI or the extra FSI certificate on receiving plot of land within the para-meters of the said Regulations. No development right certificate can be used in the island city. No development right certificate can be used on receivable plot in the areas specified in Regulation 11 of Appendix VII. The development rights certificate can be used only within the areas specified in Regulation 12.

25. Regulation 13 and Regulation 14 are directly relevant for our purpose. Regulation 13 of the said Regulations provides that development rights certificate may be used on one or more plots of land whether vacant or already developed or by the erection of additional storey or any other manner consistent with the Regulations but not so as to exceed in any plot a total built-up FSI higher than that prescribed in Regulation 14 in this Appendix. Regulation 14 of the said Regulations is reproduced in extenso. Regulation 14 of Appendix VII reads as under :

> "14. The FSI of a receiving plot shall be allowed to be exceeded by not more than 0.4 in respect of a DR available in respect of the reserved plot as in this Appendix and upto a further 0.4 in respect of a DR available in respect of land surrendered for road-widening or construction of new roads according to sub-regulation (i) of Regulation 33."

26. In the case of the Assessee entitlement of floor space index was FSI 1.00 in normal course as per Regulation 32 of the Regulations i.e., right to construct 8400 Sq.ft. of built up area. As a receiving plot owner in terms of Regulation 14 of the Regulations, the Assessee had a right to load another 8400 Sq.ft. of built up area. The right as receiving plot owner is a right which accrued to the Assessee by virtue of the Regulations in the year 1991. Thus this right was improvement to the "capital asset" held by the Assessee. This right could not be acquired by paying a price. The right to normal FSI has cost of acquisition whereas the right as a receiving plot owner which is an improvement to the capital asset held by the Assessee has no cost of acquisition nor can it be purchased by paying a price. Therefore it was not possible to compute capital gain by giving any value for the cost of improvement to the capital asset held by the Assessee. As laid down by the Hon'ble Supreme Court in the case of B.C.Srinivasa Shetty (supra) under Sec.48 of the Act which provides the mode of computation of capital gain viz., deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset "the cost of acquisition of the capital asset ", and " cost of improvement of the capital asset" the asset contemplated in sec.45 of the Act is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. The right as owner of a receiving plot to load TDR on a plot of land is a right which cannot be acquired by just paying money. Therefore there can be no cost of improvement. Sec.45 which is the charging section and Sec.48 which is the computation provision together constitutes an integrated code. When there is a case to which the computation provisions cannot apply at all, such a case was not intended to fall within the charging section. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain. Thus the charge to capital gain itself will fail and nothing can be brought to tax.

27. In the case of Jethalal D.Mehatha (supra), the facts were that the assessee was owner of, what is termed in DCR as a 'receiving plot'. The assessee had acquired the leasehold rights in that plot of land in the month of October 1971 and thereafter the assessee constructed the two storey building containing some flats. All these flats were given on monthly tenancy to several tenants. By constructing the said building, the available FSI was fully exhausted. It was in the year 1991 and by the virtue of 'Development Control Regulations for Greater Mumbai 1991' that the assessee became owner of the valuable right of availing additional floor space index under through transferable development rights. He has entered into an arrangement with a developer who has used TDRs on assessee's plot to avail additional floor space index. Additional storeys of the building were thus constructed, which, under the arrangements that the assessee had with developer, belonged to the developer. In consideration of allowing the said developer to construct on the said additional floor space, the assessee has received a consideration of Rs. 33,62,500. The right to construct this additional floor space have been thus assigned to the developer and in consideration of this assignment, the said sum of Rs. 33,62,500 is received. The dispute which has travelled in appeal before us is whether or not this amount is taxable in the hands of the assessee. The assessee's contention that there was no cost of acquisition of this right as 'receiving plot', and, therefore, the sale of this right cannot lead to a taxable capital gain in the hands of the assessee, did not find favour with the assessing officer. The Tribunal on the aforesaid claim of the Assessee held as follows:

> "……We need not go further into this aspect of this aspect of the matter. The only other reason of rejecting the claim that the assignment of additional floor space index is that, according to the authorities below, this right has cost of acquisition which consists of cost of purchase of plot, costs of getting the designs approved and costs of constructing the building. In this context, however, what is necessary

to appreciate is that the rights assigned to the developer are the rights to receive and apply the transferable development rights, and that these rights arose to the assessee by the virtue of introduction of 'Development Control Regulations for Greater Mumbai 1991'. Until the point of time these development regulation came into existence, the assessee did riot have right to receive and apply the transferable development rights. It is these rights on the assignment of which the assessee has received the impugned amount.

Therefore, the expenditure incurred on purchase of plot and construction thereon cannot be said to be the costs for acquisition of these rights. The rights are acquired by the virtue of being owner of the plot in the specified area but that does not mean that the cost incurred on the plot is the cost of acquiring these rights. The effect of the rights being relatable to the leasehold rights in the plot could at best be that the amount received by the assessee on assignment of rights to receive the transferable development rights ends up reducing effective cost of acquisition of the land and building in the said plot. Therefore, as and when the assessee transfers the said plot, building or any portion thereof and while determining capital gains arising on such sale, the cost of acquisition may stand reduced by the amount received by the assessee on assignment of rights to receive the TDRs. The CIT(A)'s observations that this right cannot be said to be without any cost of acquisition because the TDRs have been received on surrender of reserved plot to the government is ex facie incorrect inasmuch as what we are really concerned with is the right to receive the TDR on the plot owned by the assessee, and not with the right to receive the TDR from the government. The person getting TDRs from the government has to surrender the reserved plot but the person on whose plot such TDRs can be used, as is the case we are in seisin of, does not do anything more than owning the 'receiving plot'. The costs incurred by a third party for acquiring the TDR has nothing to do with the right to availing the said TDR on assessee's plot. Similarly, the costs of plot and costs of construction are also not the cost of acquisition of these rights. What the assessee has transferred is not the plot or the building, but a right

parting with which does not result in parting with land or building. The costs of obtaining BMC approval for the building plan can also not be said to be the costs of acquisition of these rights as these rights do not arise by the virtue of getting these approvals but by the virtue of a legal right independent thereof. The law is trite, and there is no dispute on the said position, that when an asset has no cost of acquisition, the gains on sale or transfer of same cannot be brought to tax. The law laid down by the Hon'ble Supreme Court in the case of CIT v. B.C. Srinivasa Setty (1981) 128 ITR 294(SC) clearly holds so. For all these reasons, we are of the considered view that the receipts on sale of assignment of rights to receive TDRs are not liable to tax. The authorities below erred in law and on facts in holding to the contrary.

28. In the case of Maheswar Prasad 2 CHS Ltd. (supra) the Tribunal had to consider a case where The assessee a co-operative housing society owned a building viz., Maheshwar Prakash-2 in Santa Cruz, Mumbai. This building had been constructed after utilising the entire FSI available to it and, therefore, no right was available for any further construction on this plot of land. However, the Municipal Corporation relaxed the development regulations in the year 1991 and on that account additional TDR FSI was allowed under the Development Control Regulation, 1991 (DCR). Thus, the assessee became entitled to construct additional space of 15,000 sq. ft. In view of the availability of such right, the assessee entered into an agreement with M/s. U.S. Magnet Pvt. Ltd. and M/s. Spartek Properties and Securities Pvt. Ltd. on 25-11-2002 for construction of additional floors on the existing structure of the society building and development of the said property against a consideration of Rs. 280 per sq. ft. which amounted to Rs. 42 lakhs. The question before the Tribunal was taxability of the sum of Rs.42 lacs received by the Society. The Tribunal discussed the DCR for Greater Mumbai Regulations and the right of a receiving plot of land to load TDR over and above permissible normal FSI. The Tribunal held

"...by virtue of Regulation 14, the FSI of a receiving plot is automatically allowed to be exceeded by 0.8 as mentioned in the said Regulation. For example, a plot in the suburb of Mumbai had an existing FSI of 1 prior to the year 1991 which had already been exhausted by construction of various flats. However, by virtue of Regulation 14, the society in respect of that building automatically got extension of FSI by 0.8. That means, if the plot of land was 1,000 sq. mtrs. then additional floors could be constructed to the extent of built up area of 800 sq. mtrs. As per the new scheme, either the society could construct additional floors having total area of 800 sq. mtrs. by purchasing TDR from the market or could transfer such right to any other builder or developer who had the TDR or who could arrange the TDR from the market. However, it is made clear that the construction could not be made without loading the TDR on the receiving plot. The above discussion shows that two separate and distinct rights arose as per DCR, 1991 i.e., TDR and the right to construct additional floor. The former has inbuilt cost while the later one arose without any cost. Regulation 14 makes it clear that FSI of receiving plot shall be allowed to be excluded in the prescribed manner. Such right was made available automatically without paying anything either to BMC or to the Government.

10. In view of the above discussion, let us now deal with the contentions raised by learned counsel for the assessee. Section 45 of the Act is the charging section in respect of profits or gains arising from the transfer of capital asset. The expression 'capital asset' has been defined in clause (14) of section 2 of the Act according to which 'capital asset' means property of any kind held by an assessee whether or not connected with the business or profession. It excludes certain assets from the scope of the above definition with which we are not concerned. The word 'property' not only includes tangible assets but also includes intangible assets as held by the Hon'ble Supreme Court in the case of B.C. Shrinivasa Shetty (supra) wherein the goodwill was held to be a capital asset. Even the right to obtain conveyance of the property has been held to be as capital asset by the Hon'ble Bombay High Court in the case of CIT v. Tata Services Ltd. [1980] 122 ITR 594. In view of this legal position, it is held that the right to construct the additional storeys on account of increase in FSI by virtue of Regulation No. 14 of the Appendix VII to DCR, 1991 was a capital asset held by the assessee. Therefore, assignment of such right in favour of the developers amounted to transfer of capital asset. The contention of the counsel for the assessee that there cannot be any transfer without having TDR is without force since right to construct additional floors and TDR are different and distinct rights which can be transferred for a consideration.

11. Now, the moot question which arises for our consideration is whether the sum of Rs. 42 lakhs received by the assessee can be treated as longterm capital gain chargeable to tax under the Act. The contention of the learned counsel for the assessee is that the right to construct additional floors was acquired by the assessee free of cost and automatically by virtue of DCR, 1991 and, therefore, the computational provisions under section 48 fail and consequently no capital gain can be said to arise under the head 'Capital gains' in view of the judgment of Hon'ble Supreme Court in the case of B.C. Shrinivasa Shetty (supra). On the other hand, the contention of the revenue is that as per the amended provisions of section 55, the cost of acquisition has to be taken as nil and, therefore, the lower authorities were justified in computing the long-term capital gains at Rs. 42 lakhs. Another contention of the revenue is that the right to construct is embedded in the land itself and accrual of such right is akin to issue of bonus shares and, therefore, it cannot be said that the additional right was without cost.

12. This aspect of the matter has been examined by the Tribunal in the case of Jethalal D. Mehta (supra). In that case, the assessee had acquired the leasehold rights in a plot of land in October, 1971 on which the assessee had constructed two storeys building containing some flats and the FSI available on that was fully exhausted. However, by a virtue of the Development Control Regulations, 1991, the assessee became the owner of the valuable right of availing additional floor space index through transfer development rights. Accordingly he entered into an arrangement with a developer who used TDR on assessee's flat to avail additional FSI against such consideration. The question arose whether the assessee could be chargeable to tax under section 45 of the Act in respect of the consideration received by him. The contention of the assessee before the authorities was that there was no cost of acquisition of the right obtained by him and therefore, the capital gain could not be computed in view of the Hon'ble Supreme Court judgment in the case of B.C. Shrinivasa Shetty (supra). The lower authorities did not accept such contention. However, the Tribunal upheld the contention of the assessee by holding that right to construct the additional floors under the Development Control Regulation, 1991 was acquired without incurring any cost and therefore, assessee was not chargeable to tax in respect of such receipts in view of the aforesaid Hon'ble Supreme Court judgment. The facts of the present case are similar to the aforesaid case and therefore, the said decision would squarely apply to the present case. Even as a rule of precedent, we are bound by the decision of a co-ordinate Bench in the absence of any decision of High Court or the Supreme Court."

29. The above decisions are directly applicable to the facts of the case of the Assessee in this appeal. The only reason for the CIT(A) to reject the claim of the Assessee was that in the cases referred to above the Assessee's as owners of receiving plot permitted loading of TDR whereas the Assessee in the present case sold not only right to load TDR but also the right to construct the original FSI on the plot of land. In our view this distinction sought to be projected by the CIT(A) is incorrect. The issue raised by the Assessee is that while computing capital gain cost of improvement should also be capable of being determined. The dispute in the case decided by Tribunal in the case of Jethalal D.Mehtha (supra) and Maheshwar Prasad-2 CHS Ltd. (supra) was while computing capital gain cost of acquisition of the capital asset was not capable of determination. As per the law laid down by the Hon'ble Supreme Court in the case of B.C.Srinivasa Shetty (supra) both cost of acquisition and cost of improvement should be capable being ascertained and only then the machinery provisions of Sec.48 can be applied. Therefore if cost of improvement cannot be ascertained the principle laid down in the case of B.C.Srinivasa Shetty would equally apply. The decisions rendered by the Tribunal in the case of Jethalal D.Mehtha (supra) and Maheshwar Prasad-2 CHS Ltd. (supra) clearly lay down that right as owner of a receiving plot to load additional FSI in terms of Regulation 14 of the Regulations is a right for which there is no cost of acquisition. If that be so, then the computation of capital gain in the case of the Assessee is not possible and therefore the receipt by the Assessee is a capital receipt which cannot be brought to tax as laid down by the Hon'ble Supreme Court in the case of B.C.Srinivasa Shetty (supra). In that view of the matter we are of the view that the receipts on assignment of FSI including originating from the plot of land and/or married to it and right to load consume and use FSI credit by way of TDR which was the subject matter of transfer by the Assessee was a capital asset in respect of which the cost of improvement could not be ascertained and therefore the receipts of consideration for transfer of the said rights cannot be brought to

tax as the said receipts will be capital receipts and not capital gain. The authorities below erred in law and on facts in holding to the contrary. We hold accordingly.

30. In view of the above conclusions, the other issues raised by the assessee in ground no. 2 and 3 and the additional grounds of appeal and that raised by the Revenue in its appeal do not require any consideration.

31. Ground No.4 raised by the assessee in its appeal reads as follows :-

> ***Ground No.4:***
>
> *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) grossly erred in upholding the action of the A.O. in not allowing a deduction at the rate of 30% on the sum of Rs.50,000/- in respect of House property income. It is prayed that the A.O. may be directed to allow the deduction under section 24 of the Act.*

32. The AO found that the assessee owned three housing units. He gave allowance for one self occupied property and determined income from house property in respect of the other two residential units by estimating the same at Rs.50,000/-. The assessee's claim before the Ld. CIT(A) was that the AO had not given 1/3rd deduction u/s.24(a) of the Act on the annual value determined. This was rejected by the Ld. CIT(A) by holding that the property were self occupied properties. The submission of the assessee before the Ld. CIT(A) was that even in respect of self-occupied property deduction u/s.24(a) of the Act should be allowed.

33. Before us, the same submissions as was made before CIT(A) were reiterated. We have considered the submissions of the learned counsel of the assessee. We find that the assessee had declared income from house property at Rs.7,543/-. This income is after considering deduction u/s.24(a)

of the Act. The AO has estimated the same at Rs.50,000/-. Thus by implication, the AO has allowed deduction u/s.24(a) of the Act. Though the order of the AO or Ld. CIT(A) are not clear on this aspect, but the inevitable conclusion that one can reach is that the AO has allowed deduction u/s.24(a) of the Act. We, therefore, do not find in ground to interfere with the order of the Ld. CIT(A). Consequently ground no. 4 raised by the assessee is dismissed.

34. In the result, the appeal by the Revenue is dismissed while the appeal by the assessee is partly allowed.

Order pronounced on this 8th day of February, 2012.

Sd/-	Sd/-
(P. M. JAGTAP)	**(N.V. VASUDEVAN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, Dt : 08.02.2012

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T.
4. CIT (A)
5. The DR, I- Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

Roshani