IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai

Before Shri P K Bansal, Vice President
and Shri Pawan Singh, Judicial Member

ITA No.8805 /Mum/2011
(Assessment Year: 2006-07)

Miss Indira Vasanji Shah C/o. Mr. H.S. Nandu, Advocate 228-A/3, Leela Bhavan, Near Koliwada Rly. Stn., Sioin (E) Mumbai 400022	Vs.	DCIT, Circle 18(2) Piramal Chambers, Lalbaug Parel, Mumbai 400012
PAN – ARSPS0012K		
Appellant		**Respondent**

Appellant by: Shri N.M. Porwal
Respondent by: Shri Purushottam Kumar

Date of Hearing: 05.09.2017
Date of Pronouncement: 24.10.2017

O R D E R

Per P.K. Bansal, Vice President

This appeal has been filed by the Revenue against the order of the CIT(A)-29, Mumbai dated 19.10.2011 for A.Y. 2006-07.

2. The assessee has taken as many as 17 grounds of appeal On the direction of the Tribunal, subsequently the assessee has filed, vide letter dated 13th May, 2016 the following two concise grounds of appeal: -

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in note appreciating that the right to property is a capital asset u/s. 2(14) of the Income Tax Act, 1961. He failed to appreciate that the assessee was holding the right to property i.e. Flat No. 502 during the period 1st April, 2002 to 10th February, 2006 i.e. for a period of 4 years and 9 days (exceeding 36 months).

2. The Ld. CIT(A) erred in not appreciating that the permission to redevelop the property was given on 1st April, 2002 and the allotment letter was also issued on the even date, as mentioned by the A.O. in his asstt. Order date4d 21st October, 2008."

3. The brief facts of the case are that the AO note4d during the course of assessment proceedings that the assessee has sold an immovable property for ₹74 lakhs and after reducing the cost of acquisition of ₹57 lakhs the assessee has shown a sum of ₹17 lakhs as long term capital gains. It was further noted that the assessee received an allotment letter for flat No. 502 dated 1st April, 2001 of payment of ₹1,00,000/-. He took the view that the allotment letter was a fabricated one. Till the assessee sold the flat on 20.02.2006, no agreement was executed between the assessee and the builder M/s. Amrut Dhara Enterprises. Although the agreement has been executed within six months from the date of the allotment letter. The AO also found from the sale agreement dated 10.02.2006 that the owner of the plot granted permission to the developer to develop the property only on 22.04.2002. Therefore he took the view that the allotment letter cannot be prior to this permission to develop the plot. Therefore the AO took the profit earned by the assessee to be adventure in the nature of trade and also made an addition under section 50C amounting to ₹51,955/- by taking stamp value of the property at ₹87,61,124/- instead of ₹87 lakhs as the sale consideration shown by the assessee. The assessee's share being 85% of ₹61,124/-, ₹51,955/- was added under section 50C. When the matter went before the CIT(A), the CIT(A) confirmed the same.

4. We have heard the learned D.R. and gone through the submission made by the assessee dated 7th July as well as 19th October, 2016. We noted that in this case the assessee was allotted the plot by depositing a sum of Rs.1,00,000/- through cheque No. 732661 dated 5th April, 2002 in favour of Amrut Dhara Enterprises. This very cheque was cleared and debited in the bank statement of the assessee on 5th April, 2002. The AO without verifying the fact from the developer just observed that the said allotment letter is a fabricated one. In our opinion while making this allegation the onus is on the Revenue to bring evidence on record. In this case the AO just made such observation and rejected the claim of the assessee without bringing any evidence to the contrary on record. Even no

notice under section 133(6), etc. was made on the builder. In our opinion the onus is on the Revenue to prove that the document furnished by the assessee is a fabricated one. We reverse the said finding in the absence of any evidence. It is the settled view as per the decision of the Hon'ble Supreme Court in the case of CIT vs. Daulatram Rawatmall 87 ITR 349 that the onus to prove that the apparent is not the real is on the party who alleges that the apparent is not real. Merely an agreement has not been entered into by the assessee with the Developer within a period of six months from the date of allotment did not mean that a right of the assessee has not been created in the flat to be constructed by the builder. We have also gone through the tripartite agreement dated 10th February 2006 by which the assessee has transferred his rights in the aforesaid flat. Clause J of this agreement states as under: -

> *" 'J' The promoters alone have the sole and exclusive rights to sell the flats/tenements/premises/basement, open slit parking, spaces and other rights and privileges including the rights to put up neon signs and hoardings or to affix antenna, develop terrace gardens rights to cable network station mobile phones, station or sub-stations in the said building or any part thereof and to enter into agreement with the purchasers of the flats tenement and premises and other rights and privileges and to receive the consideration in respect thereof."*

It is noted that when the assessee became the owner of the flat he has acquired his rights in a capital asset. Section 2 sub-section (14) defines a capital asset to mean a property of any kind held by the assessee, whether or not connected with his business of profession. The right by view of an allotment letter is a valuable right and that rights has been created in favour of the assessee when the builder has issued an allotment letter and received the consideration towards booking of the flat, i.e. 1st April, 2002. The assessee's right got extinguished when he transferred the said right vide agreement dated 10th February, 2006. It is a fact that M/s. Amrut Dhara Enterprises before allotting the flat to the assessee has already applied to Mumbai Building Repair and Reconstruction Board for commencement certificate on 18th March, 2002. The Chief Officer of the Mumbai Building Repair and Reconstruction Board granted their

permission for development of the property vide their letter dated 5th February, 2002. The Additional Collector and competent authority certified on 1st April, 2002 that the said plot is not a vacant land under the provisions of Urban Land Ceiling Act, 1976 and gave permission to the promoters to redevelop the said property. All these took place before the development agreement was signed on 22nd April, 2002 between M/s. Amrit Dhara Enterprises and the owners but prior to signing of the said agreement the builder applied to the Mumbai Building Repairs and Reconstruction Board for commencement certificate and prior to the signing of the development agreement on 22nd April, 2002 the owners have authorised the developer to make necessary application to various government authorities. In the tripartite agreement dated 10th February, 2006 it is clearly been mentioned under clause 'J' that the promoters/ developer has sole and exclusive right to sell the flats/tenements/ premises/basement, etc. The allotment letter was signed on 1st April, 2002 which was prior to the signing of the development agreement dated 22nd April, 2002. By virtue of this tripartite agreement dated 10th February, 2006 it is apparent that the allotment letter signed by the developer on 1st April, 2002 was ratified and he has exclusive right to sell the flat. It is not disputed that the allotment letter dated 1st April, 2002 is duly registered with the Sub-Registrar and was signed by the assessee as well as M/s. Amrut Dhara Enterprises. The AO, it appears was wanted to just disallow the claim of the assessee. Therefore, without ascertaining and brining any evidence just assumed as if the allotment letter is a fabricated one. In our opinion the AO cannot give such a finding in the absence of any evidence being brought on record. Paras 3 & 4 of the allotment letter dated 1st April, 2002 signed by the development states as under: -

> *"(3) You have satisfied yourselves as regards our title to the plot and shall not raise any regulation or objection thereto.*
>
> *(4) You have examined the sanctioned building plans and other papers in respect of the above flat and approved the same. You consent to the amendments to the building plans that may be made in the future to utilise additional or further FSI and/or TDR as also the construction of additional buildings in respect of the large layout of*

the above Plot PROVIDED the shape, size and location of the above plot is not altered."

Similarly, clause 'd' of the tripartite agreement dated 10th February, 2006 reads as under:-

"(d} by various agreements each made between the promoters of the one part, the owners of the second part *and the tenants/occupants of the said old building of the third part, the promoters agreed to allot to each of the tenants/occupants the premises in the new building to be constructed on the said plot, as alternative accommodation in lieu of the tenants/occupants agreeing to surrender their rights in the premises in their respective occupation in the said old building and agreed to give facilities to demolish the same as therein mentioned."*

From this it is apparent that the owners of the plot have authorised the developer to take the plot and the moment the assessee has booked the flat and flat has been allotted to the assessee, a valuable right has created. It is a capital asset and that right continued till the assessee entered into tripartite agreement dated 10th February, 2006. Under section 45 of the Income Tax Act transfer of a capital asset is chargeable to tax under the head 'capital gains' and not under the head 'income from business'. It is not a case of the Revenue that the assessee was regularly booking flats and selling the same so that it can be said that the assessee has entered into a business transaction. The income shown by the assessee has to be assessed under the head 'income from capital gains'. The capital derived by the assessee is long term capital gain as the assessee held the right on the asset for more than 36 months. We therefore set aside the order of the CIT(A) and direct the AO to treat the said profit as long term capital gains a returned by the assessee.

5. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 24th October, 2017.

Sd/-	Sd/-
(Pawan Singh)	**(P.K. Bansal)**
Judicial Member	**Vice President**

Mumbai, Dated: 24th October, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -29, Mumbai*
4. *The CIT - 18, Mumbai*
5. *The DR, "I" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.