

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI**

**BEFORE SHRI PRAMOD KUMAR, VP AND SHRI ABY T. VARKEY, JM**

I.T.A. No.1929/Mum/2020/ Assessment

Years: 2011-12)

Mr. Mahesh D. Saini 203, Lukhi Niwas Kailash Puri, Upper Govind Nagar, Plot No. 135, Malad (E), Mumbai-400097.	<b>बिधम/</b> Vs.	ITO, Ward-35(2)(3) Room No. 745, 7 <sup>th</sup> Floor, Kautilya Bhavan, C-41 to C-43, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400051.
<b>PAN/GIR No. : AAJPS1048M</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>
Assessee by:	Shri Haresh B. Shah	
Revenue by:	Dr. Pratap Narayan Sharma (Sr. AR)	

Date of Hearing:

27/06/2022

Date of Pronouncement:

10/08/2022

**ORDER PER ABY T.**

**VARKEY, JM:**

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-46, Mumbai dated 28.02.2020 for assessment year 2011-12.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) in confirming the addition of Rs.1,05,37,002/- as long term capital gain (LTCG) treating the purported capital asset as transfer in view of the provisions of Section 2(47) (v) of the Income Tax Act, 1961 (hereinafter "the Act") r.w. Section 53A of the Transfer of Property Act, 1882 (4 of 1882) (hereinafter in short as "TOPA").

3. Brief facts of the case as noted by the Ld. CIT(A) is that the AO noticed that during the year, the assessee jointly with his two (2) brothers, viz Shri Formal Dedrajmali alias Sainik/Siani and Shri Kailash Dedraj Mali alias Sainik/Saini, entered into sale Cum



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Development Agreement on 21.10.2010 with the Developer cum Purchasers, viz. Bhupatbhai Ravjibhai Lukhi and Shri rameshchai Ravjibhai Lukhi, for transfer of their ancestral property being Plot No. 135, bearing CTS No. 97-A-29/1 and 97A-29 of village Chincholi, admeasuring 1053 square yards equivalent to 880.31 square meters together with the construction existing there on. And that all the three brothers had equal undivided share in the said property. And as consideration for transfer of his share in the aforesaid property, Shri Kailash Dedraj Mali alias sainik/Saini agreed to transfer/sell his 1/3<sup>rd</sup> right, title and interest in the said property for a consideration of Rs. 1,90,00,000/-. However, for transfer of their respective rights, title, the assessee and Shri Tormal Dedraj Mali alias Sainik Saini jointly received Rs. 70 Lac and a right in the house property of 5000 sq. feet built up area wall to wall cost fully developed constructed flats without any obligation in the projects to be constructed by the developer at the Plot No. 135, mentioned above. Accordingly, consideration received by the assessee for transfer of his 1/3<sup>rd</sup> right, title and interest in the said property was Rs. 36 Lac and a right in the house property of Rs. 2,500/sq. feet built up area wall to wall flat. Taking note of the aforesaid facts, the AO noticed that the assessee has not offered any capital gains in his return of income for A.Y. 2011-12 [in respect of transfer of his 1/3<sup>rd</sup> share in the ancestral property as mentioned above].



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4. Therefore, the AO issued show cause notice to the assessee as to why the LTCG in respect of property may not be taxed in the hands of the assessee in this relevant AY 2011-12. The assessee in response brought to the notice of AO that there was an agreement dated 20.10.2010 which was executed by the assessee (Vendor no. 3) along with his two brothers (Vendor no. 1 and Vendor no. 2) each having 1/3<sup>rd</sup> share in the property (ancestral property being Residential Bungalow) with the Developer cum Purchasers (Bhupatbhai Lukhi & Rameshbhai Lukhi). According to the assessee, the transfer of the property/their 1/3<sup>rd</sup> share in the property did not take place in the assessment year under consideration. And therefore it was pleaded that neither any capital gain arose this year nor it could be taxed in this year. However, the AO did not agree with the contention of the assessee and according to him, the transfer [of immovable property] has taken place, since the developer has been given possession of the property, so by virtue of Section 53A of transfer of property Act, transfer has taken place. Therefore, as per AO since the incident of tax (transfer of capital asset) having taken place, the assessee was bound to offer the capital gain on it. And therefore he held as under: -

“4.6 As regards the applicability of section 50C of the Act, the AR has not furnished any specific submission. It is stated that section 50C of the Act is a deeming provision of the Act and it is a settled law that the deeming provision of the Act has to be applied strictly. In this case, the Stamp Duty Authority has computed fair market value of the entire property at Rs.3,63,00,000/-. The assessee was having undivided one third share in the land and construction existing there on as mentioned in the Sale Cum Development Agreement dated 20.10.2010. Accordingly, the fair market value of the assessee’s share in the right title of the property is computed at



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Rs.1,21,00,000/-. Hence the deemed consideration of the said transfer of the share of the assessee comes to Rs.1,21,00,000/-. Accordingly, long term capital gains arisen out of transfer of the 1/3 right title of the share of the assessee in the property covered in the Sale-Cum -Development Agreement is computed as under:

Sr. No.	Description	Amounting in Rs.
1	Deemed consideration as computed above	1,21,00,000
2	Fair Market Value as on 01.04.1981 as per Regd. Valuer Report dated 12.02.2016	6,17,725
3	Indexed cost of acquisition (i) Year of indexation allowable to the assessee, as discussed above: 1995-96 Cost Inflation Index: 281 (ii) Year in which right title was transferred: 2010-11 Cost inflation index: 711 Indexed Cost: 6,17,725 x 711/281	15,62,998
4	Long term capital gains (1-3)	1,05,37,002/-

4.7. In view of the above discussion, long term capital gains arising out of transfer of right title of the share of the assessee in the property mentioned in the Sale - Cum - Development Agreement dated 21.10.2010, is computed at 1,05,37,002/-. In the return of income, the assessee has not reported any capital gains in respect of the transfer of right title in the immovable property as mentioned above. Therefore, an addition of Rs.1,05,37,002/which represents long term capital gains earned by the assessee during the year, is made to the total income under the head "Capital Gains."

**5.** Aggrieved by the aforesaid action of the AO computing the long term capital gain (LTCG) of Rs.1,05,37,002/-. The assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the same by holding as under: -

"5.2 The submissions and contentions of the appellant have been duly considered. Though the appellant has contended that as per clause 37 of the Sale Cum Development Agreement dated 20.10.2010, if the purchaser cum Developer makes default in completing the development within the stipulated period of 24 months, the vendor shall be entitled to make time essence of the contract and to cancel the



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agreement. In this connection, the AR has further contended that unless the property is constructed and comes into existence and possession is handed over by the developer to the buyer, it cannot be said that transfer of property has taken place. However, the fact remains that the possession over the property covered in the sale cum development of the said developer. The assessee in the agreement has been handed over assessment proceedings, has also submitted a letter dated 06.06.2014 issued by the developer to the effect that possession of the fully constructed residential flats is expected by June 2015. One brother of the assessee, viz Shri Kailash Dedraj Mali alias Sainik / Sani has received the entire consideration of Rs. 1,90,00,000/in respect of transfer / sell of his equal and undivided share in the right title and interest in the said property. The assessee as well as his another brother, viz Shri Toramal Dedraj Mali alias Sainik / Saini has also received consideration of Rs. 70 Lac (jointly) and right in the house property of 2500 sq. feet built up area wall to wall flats to the assessee as well as his brother. Therefore, the transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882, as mentioned in section 47 (v) of the Act has taken place in this case. Hence, this contention raised by the appellant relating to transfer is not as per provisions of the Act and is therefore not acceptable.

5.3 Further, in this case, the appellant has transferred the right in land and house property vide sale-cum-development agreement dated 21.10.2010 and therefore the new house property should have been constructed on or before 21.10.2013. Moreover, as per the Development Agreement dated 21.10.2010 the appellant will get 3 flats in his name having combined built up area of 2270 sq ft. As per provisions of section 54, the deduction of LTCG can be allowed only in respect of purchase / construction of only one house property within the specified time frame. Therefore, in my considered view, the AO has rightly computed the LTCG at Rs 1,05,37,002/and also rejected the claim of the appellant for deduction u/s 54. Accordingly, ground Nos 1 to 3 are dismissed.”

**6.** Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

**7.** We have heard both the parties and perused the records. The short point to be decided is whether in the facts and circumstances of



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the case whether the incident of tax [i.e, transfer of immovable property] for charging capital gain has arisen in this year (AY. 2011-12) against the assessee or not. The AO's case is that since the assessee has executed an agreement dated 20.10.2010 with the developer cum purchaser and having received Rs.35 Lakhs, the assessee has transferred the land in question. And therefore he is bound to have offered the capital gain for the transfer of his share of land. However, the assessee's contention is that based on the agreement executed by the assessee with the developer cum purchasers, the incident of tax (transfer of his share of property) has not taken place in this relevant assessment year. And therefore no capital gain could have been charged in this assessment year from him. For adjudicating this issue, we need to look into the certain relevant provisions. First of all let us look at Section 2(47) of the Act which is reproduced as under: -

“Section 2(47) of the Income Tax Act, 1961

(47) “transfer”, in relation to a capital asset,

Includes, -

v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanations:

1. For the purposes of sub-clauses (v) and (vi), “immovable property” shall have the same meaning as in clause (d) of section 269UA.

2. For the removal of doubts, it is hereby clarified that “transfer” includes and shall be deemed to have always included disposing of or parting with an asset or any



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interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.”

**8. And Section 53A of the Transfer of Property Act, 1882 [TOPA] which is reproduced as under: -**

“Section 53A of the Transfer of Property Act, 1882.

53A. Part performance. —Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for

consideration who has no notice of the contract or of the part performance thereof.”

**9. Now let us have a look at important clauses of the agreement in question dated 20.10.2010 which is reproduced as under: -**

“7. The Purchasers-cum-Developer have already paid a sum Rs.70,00,000 (Rupees Seventy Lakhs only) as the consideration money inter alia for obtaining the sale-cum-development rights to the Vendors Nos.1 and 3, as orally agreed he Vendors shall hand over free vacant and peaceful possession-of-the property to the purchasers-cum-developer on or before the Purchasers-cum-Developers obtaining the



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IOD from the competent authority for the purpose of development. Further, on these presents being executed i.e. Sale-cum-Development, the Vendors shall give their 'No Objection/Consent to convey the said property in the name of the Purchasers-cum-Developer or the society as the case may be. This shall be subject to the proportion of their share in the sold property.

**10.** The Vendors also agreed to give free vacant and free out of which the possession of the said property to the purchasers-cum-developer for the purpose of Development after getting IOD.

2. As per the provisions of this Agreement for Sale-cum-Development, the purchasers-cum-Development is entitled to carry out development work in respect of the said property.

11. It is agreed by and between the Vendors the Purchasers-cum-Developers that upon the Purchasers-cum-Developer producing the sanction plan and IOD from the Municipal Corporation of Mumbai, the Vendors shall vacate and give the vacant and careful possession to the Purchasers-cum- Developers and that the Purchasers-cum-Developer can demolish the existing up a new building/ develop the said property in accordance with the sanctioned plant from the Municipal Corporation of Greater Mumbai.

37. If the Purchasers-cum-Developer makes default in completing the development, within the stipulated period of 24 months, the Vendors shall be entitled to make lime essence of the contract and to cancel the agreement, thereafter by giving at least fifteen days notice in writing to the Purchasers-cum-Developer to that effect and on the cancellation of the agreement, the Purchasers-cum-Developer shall forfeit his right to the sale money which will appropriated by the Vendors towards the claim for damage including cost, charges and expenses of and incidental to this agreement.”

**10.** In the light of the above agreement and the relevant law (supra), we have to examine the impugned action of Ld. CIT(A). According to AO/Ld. CIT(A) since the possession of land has been handed over by the assessee to the developer on execution of the agreement dated 20.10.2010, the transfer of property have taken place in view of the Section 2(47) (v) of the Act r.w. Section 53A of the Transfer of Property Act, 1882 (4 of 1882) (referred hereinafter in short as



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“TOPA”). In this regard, the Ld. Counsel for the assessee contended that on perusal of the agreement executed by the assessee with the developer would reveal that there was no transfer of a capital assets in view of the provisions of Section 2(47) (v) of the Act r.w. Section 53A of the TOPA. According to him, in order to attract provisions of Section 53A of the TOPA, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee (developer) must have performed or be willing to perform his part of the agreement. It is only when these two important conditions, among others, are satisfied that the provisions of Section 53A of the TOPA can be said to be attracted on the facts of a given case and referred to the decision of the Hon’ble Supreme Court in the case of Seshasayee Steels Pvt. Ltd. Civil Appeal No. 9209 of 2019 (2020) 421 ITR 46 (SC).

**11.** Having perused the sale-cum-developments agreement dated 20.10.2010 it is noted that as per the terms of the ibid agreement, the assessee shall hand over physical possession of the property to the purchaser cum developer after the purchaser cum developer obtain IOD (i.e. Intimation of Disapproval) from the competent authority for the purpose of development. IOD has to be issued by the local authority Municipal Corporation of Greater Mumbai (MCGM). As per the agreement, the assessee only has to hand over possession of the immovable property in the event the transferee obtains the IOD from the MCGM. So it is noted that the possession of property to transferee will be only after he obtains the IOD from MCGM and in this case, the



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IOD (the intimation of disapproval) was undisputedly issued by the MCGM only on 15.04.2013 (i.e. in AY. 2014-15). Thereafter only assessee need to hand over the vacant and peaceful possession of the property to the transferee/developer i.e, only on or after 15.04.2013. Thus, it is seen that AO/Ld. CIT(A) erred in assuming that assessee by virtue of the sale-cum-development agreement dated 20.10.2010 has handed over/allowed the transferee to take possession of the immovable property and thus erroneously held that section 53A of TOPA read with section 2(47)(v) of the Act stood attracted. Thus we note that AO/Ld. CIT(A) mis-interpreted the agreement dated 20.10.2010 and applied the law erroneously, so their impugned action cannot be sustained. Having held so, we further note that there was no evidence/material before AO/LD CIT(A) to suggest that the assessee has given possession of the property to the developer before the IOD was issued by the MCGM and any way that is not the case of AO/Ld. CIT(A). In this regard, we note that assessee has produced evidence to substantiate that he had not vacated the house in the immovable property till IOD was issued by MCGM. For that he has has filed the Electricity Bill in the name of assessee (Mahesh Saini) for the month of April 2011- June 2011, April-2012 – June 2012 found placed at page no. 1 to 4 of the P.B-III and Property Tax Bill issued by BMC in the name of Mother of assessee Smt. Parvati Devi of Property No. 1481 & 1482 upto 28.12.2012 (Receipt dated 04.05.2012) found placed at page no. 5 to 7 of the P.B-III. In the light of the facts discussed supra, we find that there was no transfer of immovable



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property, so no capital gain could have been taxed in the hands of the assessee in this assessment year, therefore, the assessee succeeds.

**12.** In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 10/08/2022.

Sd/-

**(PRAMOD KUMAR)**  
**VICE PRESIDENT**

Sd/-

**(ABY T. VARKEY)**  
**JUDICIAL MEMBER**

Mumbai; Dated : 10/08/2022.

*Vijay Pal Singh, (Sr. PS)*

/Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. / The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

True Copy//

BY ORDER,

**ITAT, Mumbai**

/(Dy./Asstt. Registrar)