IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL APPELLATE JURISDICTION

INCOME TAX APPEAL NO.2482 OF 2013

Commissioner of Income Tax 25 ..Appellant

Vs.

Bhatia Nagar Premises Co-op Society Ltd ..Respondent

Mr. Arvind Pinto, for the Appellant.

None for the Respondent.

CORAM :- **S.C. DHARMADHIKARI & B.P.COLABAWALLA, JJ.**

DATE :- **FEBRUARY 22, 2017.**

P. C.:

By this Appeal, the Revenue challenges the order passed by the Income Tax Appellate Tribunal dated 21st June, 2013.

2 Mr. Pinto appearing for the Revenue would submit that the substantial questions of law and formulated and proposed at paragraphs 5.1 and 5.2 arise from the Tribunal's

finding and conclusion that no transfer within the meaning of Section 2(47)(v) has taken place and therefore the requirements of capital gains for levying tax on capital gains accrued allegedly in this case are not satisfied. Mr. Pinto would submit that the agreement which was arrived at between the assessee and the builders / developers denotes as to how the assessee obtained benefit. The assessee has also retained the sum initially paid though the agreement never fructified or stood cancelled. Hence, the ingredients of the above definition and consequently Section 45 of the Income Tax Act, 1961 are satisfied. These provisions are clearly attracted.

3 We are unable to agree with Mr. Pinto for more than one reason. With his assistance, we have perused the order passed by the Assessing Officer as also the First Appellate Authority. The Tribunal was approached by the assessee because it is a Co-operative Housing Society registered under the Maharashtra Co-operative Societies Act, 1960. The assessment year is 2009-2010. The only effective

ground was taxability of capital gain of Rs.53,86,29,592/- on account of Development Rights Agreement. How that agreement was arrived at and for what object and purpose is clearly narrated in the Tribunal's order. It is evident from the agreement between parties and which must be read as a whole that the developer was to construct the building rather reconstruct the existing residential building and erect a new additional building having ground plus nine upper floor alongwith the basement for storage. The developer was therefore allowed to exploit the potential of the land in the form of Floor Space Index (FSI) and additional FSI. These stipulations apart, in the event the developer is not in a position to obtain Intimation of Disapproval (IOD) and Commencement Certificate (CC) within six months from the agreement, the agreement shall be terminated without any further notice. It was also to stand terminated in the event the developer obtains these certificates but does not commence the construction activity and complete it within the time frame. In the present case, when the developer could not obtain the Intimation of Disapproval (IOD) and

Commencement Certificate (CC) within the prescribed time limit, the society passed the resolution terminating that agreement. Once the agreement stood cancelled and terminated as above, then, the only question arose was whether any capital gain and taxable accrued to the society. In that regard after referring to the agreements in great detail, reading all its clauses together and harmoniously, the Tribunal found that the provisions of section 2 (47) (v) would be attracted if in the present case the agreement had gone further. The development right agreement was registered on 12th February, 2009. The assessee received a sum of Rs. 1.10 lakh from the developer. On this basis alone the authorities concluded that there was transfer during the assessment year 2009-2010. In view of the definition of term "transfer", the assessee said that it has never lost its control over the property. It never handed over possession. Rather the agreement stood terminated. There was no transfer of the land and building. The assessee had only transferred its entitlement to additional FSI to the developer for reconstruction of building. However, once that agreement itself did not survive and this benefit was to flow from the agreement then, the Tribunal concluded in paragraph 9 that in the light of the factual circumstances, when there is no benefit obtained by way of transfer of additional FSI and that could have been transferred only on demolition of old building, the ingredients of Section 2(47) (v) are not at all satisfied and attracted.

4 We did not see how such finding of fact and rendered consistent with all the materials produced before the Tribunal can be termed as perverse or vitiated by any error of law apparent on the face of the record. The correct legal principles have been invoked and applied to the admitted facts and circumstances. In view of this, the order of the Tribunal under challenge for the Assessment year concerned, does not raise any substantial question of law. The Appeal is devoid of merits and is dismissed. No costs.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)