2011:BHC-OS:13998-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.3378 OF 2010

The Commissioner of Income Tax-12,

Aayakar Bhavan, M.K.Road, Mumbai. ..Appellant.

V/s.

Manjula J. Shah

309, Marine Chambers, 11

New Marine Lines, Mumbai-400 020. ..Respondent.

Mr. B.M. Chatterjee for the appellant.

Mr. Hiro Rai with Mr. Subhash S. Shetty and Mandar Vaidya for the respondent.

CORAM : J.P. DEVADHAR AND
K.K. TATED, JJ.

DATED : 11TH OCTOBER, 2011

JUDGMENT (PER J.P. DEVEDHAR, J.)

1) Although several questions of law are raised by the revenue in this appeal, counsel for the revenue presses only the last question. The said question (as reframed) reads thus :-

> " While computing the capital gains arising on transfer of a capital asset acquired by the assessee under a gift, whether the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset or the year in which the assessee became the owner of the asset ? "

The appeal is admitted on the above substantial question of law and taken up for final hearing by consent of both the parties.

2) The assessment year involved herein is AY 2004-05.

3) The relevant facts are that the assessee is an individual who derived income from business, house property, capital gains and other sources.

4) In the assessment year in question, the assessee had declared total income of Rs.20,92,400/-. The said return of income included long term capital gains arising from the sale of a residential flat bearing No.1202-A ('capital asset' for short) at Chaitanya Towers, Prabhadevi, Mumbai. The said flat was originally purchased by the daughter of the assessee ('previous owner' for easy reference) on 29/1/1993 at a cost of Rs.50,48,350/-. By a gift deed dated 1/2/2003, the previous owner gifted the said capital asset to the assessee. On 30/6/2003, the assessee sold the said capital asset for a total

consideration of Rs.1,10,00,000/- and offered the long term capital gains to tax.

5) During the assessment proceedings, the assessee contended that though the capital asset in question was acquired by the assessee under a gift deed dated 1/2/2003 and transferred on 30/6/2003, under Section 48 read with Section 49 and Section 2(42A) of the Income Tax Act, 1961 ('the Act' for short), the gains arising therefrom were liable to be computed as long term capital gain, by deducting from the total consideration received, inter alia, the amount of indexed cost of acquisition. The assessee contended that the indexed cost of acquisition has to be determined with reference to the cost inflation index for the year in which the cost of acquisition was incurred. In the present case, the cost of acquisition was incurred on 29/1/1993 and, hence, cost inflation index for 1993-94 would be applicable. The assessing officer was of the opinion that under Explanation (iii) to Section 48 of the Act, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the asset was first held by the assessee. According to the assessing officer, the asset was held by the assessee from 1/2/2003 and, therefore, the cost inflation index for 2002-03 would be applicable in determining the indexed cost of acquisition.

6) On appeal filed by the assessee, the CIT(A) allowed the claim of the assessee by holding that the long term capital gain has to be determined by computing the indexed cost of acquisition with reference to the cost inflation index for 1993-94 instead of the cost inflation index for AY 2002-03 as held by the assessing officer.

7) On further appeal filed by the revenue, the ITAT concurred with the decision of CIT(A) and dismissed the appeal filed by the revenue. Challenging the aforesaid order, the present appeal is filed by the revenue.

8) According to Mr. Chatterjee learned counsel for the revenue, Explanation (iii) to Section 48 specifically provides that the indexed cost of acquisition has to be determined with reference to the first year in which the capital asset was held by the assessee. In the present case, admittedly, the capital asset was acquired by the assessee under a gift on 1/2/2003 and, therefore, the first year of holding the capital asset by the assessee is FY 2002-03. Therefore, the indexed cost of acquisition in the present case has to be computed with reference to the cost inflation index for 2002-03. Mr. Chatterjee further submits that the deeming fiction contained in Explanation 1(i)(b) to Section 2(42A) of the Act cannot be applied in determining the indexed cost of acquisition, in view of the specific words used in clause (iii) of the Explanation to

Section 48 of the Act, The submission is that the deeming fiction under Explanation 1(i)(b) to Section 2(42A) of the Act to include the period for which the asset was held by the previous owner in the period for which the asset was held by the assessee under a gift or will, is for the limited purpose of determining as to whether the asset was held as a short term capital asset or long term capital asset and that the said fiction cannot be applied in determining the indexed cost of acquisition in view of the express language used in Explanation (iii) to Section 48 of the Act. It is contended that to determine the 'indexed cost of acquisition' what is relevant under Explanation (iii) to Section 48 of the Act is the cost inflation index for the first year in which the capital asset was held by the assessee and not the first year in which the capital asset was held by the previous owner. Accordingly, it is contended that when the words used in Explanation (iii) to Section 48 of the Act are clear and unambiguous, it would not be proper to interpret Section 48(iii) of the Act by importing the meaning given in Explanation 1(i)(b) to Section 2(42A) of the Act.

9) In support of the above contention, Mr. Chatterjee relied upon a decision of the Mumbai Bench of the ITAT in the case of *DCIT V/s. Kishore Kanungo* reported in *(2006) 102 ITD 437 (Mum),* wherein it has been held that under Explanation (iii) to Section 48, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the asset was held by the assessee and

not with reference to the cost inflation index for the first year in which the asset was held by the previous owner. Relying upon a decision of the Apex Court in the case of *CIT V/s. Anjum M.H. Ghaswala & Ors.* reported in *252 ITR 1 (S.C.),* Mr. Chatterjee submitted that where the language of a statute is clear and unambiguous, one has to apply the literal interpretation and not the purposive interpretation. Mr. Rai, learned counsel for the assessee, on the other hand, supported the order passed by the ITAT by detailed submissions which are dealt with in the subsequent paragraphs of this judgment.

10) Before dealing with the rival contentions, we may refer to the relevant provisions of the Act relating to the taxability of the gains arising on transfer of the capital assets under the head 'capital gains'. Section 45 of the Act provides that any profits or gains arising from the transfer of a capital in the previous year shall be chargeable to income tax under the head 'capital gains'. Where the gains arise on transfer of a short term capital asset as defined under Section 2(42A) of the Act, the gains are taxed as short term capital gains. Where the gains arise on transfer of long term capital asset, as defined under Section 2(29A) of the Act, the said gains are taxed as long term capital gains. Section 47(iii) of the Act provides that where a capital asset is transferred under a gift or will, then, such transaction shall not be regarded as transfer and in such a case the liability to pay capital gains tax would not arise.

Liability to pay capital gains tax, however, would arise when the assessee transfers the capital asset acquired under a gift or will for valuable consideration.

11) The mode and the manner of computing the capital gains is provided under Section 48 of the Act. As per Section 48, the income chargeable under the head "capital gains" is liable to be computed by deducting from the full value of the consideration received on transfer of the capital asset, the amount of expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset and the cost of any improvement thereto. Where the assessee acquires any capital asset under a gift or will without incurring any cost of acquisition, there would be no capital gains liability. However, Section 49(1)(ii) of the Act provides that in the case of an assessee acquiring an asset under a gift or will, the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the asset incurred or borne by the previous owner or the assessee as the case may be. Thus, on account of the deeming fiction contained in Section 49(1)(ii) of the Act, gains arising on transfer of a capital asset acquired by the assessee under a gift or will would arise. In such a case, the capital gains under Section 48 of the Act would have to be determined by deducting from the total consideration received by the

assessee, inter alia the deemed cost of acquisition.

12) Where the gains are long term capital gains (other than long term capital gains arising to a non resident from the transfer of shares in, debentures of an Indian Company), then, as per the second proviso to Section 48 of the Act, the capital gains have to be computed by deducting from the full value of consideration the 'indexed cost of acquisition' and the 'indexed cost of any improvement' instead of deducting the 'cost of acquisition' and 'cost of improvement'.

13) In the present case, the capital asset in question (Flat No. 1202-A) was originally acquired by the previous owner (daughter) on 29/1/1993 and the same was acquired by the assessee under a gift deed dated 2/1/2003 without incurring any cost. The assessee sold the said capital asset on 30/6/2003 for Rs.1,10,00,000/-. Since the assessee held the capital asset for less than thirty six months (2/1/2003 to 30/6/2003) in the ordinary course, as per Section 2(42A) of the Act the assessee would have held the asset as a short term capital asset and accordingly liable for short term capital gains tax. However, in view of Explanation 1(i)(b) to Section 2(42A) of the Act which provides that in determining the period for which any asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner shall be included, the assessee is deemed to have held the asset as a

long term capital asset and accordingly, liable for long term capital gains tax. Thus, by applying the deeming provision contained in the Explanation 1(i)(b) to Section 2(42A) of the Act, the assessee is deemed to have held the asset from 29/1/1993 to 30/6/2003 (by including the period for which the said asset was held by the previous owner) and accordingly held liable for long term capital gains tax.

14) It is not disputed by the revenue that the assessee must be deemed to have held the capital asset from 29/1/1993 (though actually held from 1/2/2003) by applying the Explanation 1(i)(b) to Section 2(42A) of the Act and hence liable for long term capital gains tax. However, the revenue disputes the applicability of the deemed date of holding the asset from 29/1/1993 while determining the indexed cost of acquisition under clause (iii) of the Explanation to Section 48 of the Act.

15) For better appreciation of the dispute, we quote the relevant part of Section 48 herein :-

" *Mode of Computation*.

48. The income chargeable under the head "capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the result of the transfer of the

capital asset the following amounts, namely:-

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto;

Provided that ....

Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:

Provided also ....

Provided also ....

[**Provided also** ....]

Explanation - For the purposes of this Section, -

(i) ....

(ii) ....

(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;

(iv) "indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the year in which the improvement to the asst took place;

(v) 'Cost Inflation Index', in relation to a previous year, means such Index as the Central Government may, having regard to seventy-five per cent of average rise in the Consumer Price Index for urban non-manual employees for the immediately preceding previous year to such previous year, by notification in the Official Gazette, specify, in this behalf. "

16) It is the contention of the revenue that since the indexed cost of acquisition as per clause (iii) of the Explanation to Section 48 of the Act has to be determined with reference to the Cost Inflation Index for the first year in which the asset was held by the assessee and in the present case, as the assessee held the asset with effect from 1/2/2003, the first year of holding the asset would be FY 2002-03 and accordingly, the cost inflation index for 2002-03 would be applicable in determining the indexed cost of acquisition.

17) We see no merit in the above contention. As rightly contended by Mr. Rai, learned counsel for the assessee, the indexed cost of acquisition has to be determined with reference to the cost inflation index for the first year in which the capital asset was 'held by the assessee'. Since the expression 'held by the assessee' is not defined under Section 48 of the Act, that expression has to be understood as defined under Section 2 of the Act. Explanation 1(i)(b) to Section 2(42A) of the Act provides that in determining the period for which an asset is held by an assessee under a gift, the period for which the said asset was held by the previous owner shall be included. As the previous owner held the capital asset from 29/1/1993, as per Explanation 1(i)(b) to Section 2(42A) of the Act, the assessee is deemed

to have held the capital asset from 29/1/1993. By reason of the deemed holding of the asset from 29/1/1993, the assessee is deemed to have held the asset as a long term capital asset. If the long term capital gains liability has to be computed under Section 48 of the Act by treating that the assessee held the capital asset from 29/1/1993, then, naturally in determining the indexed cost of acquisition under Section 48 of the Act, the assessee must be treated to have held the asset from 29/1/1993 and accordingly the cost inflation index for 1992-93 would be applicable in determining the indexed cost of acquisition.

18) If the argument of the revenue that the deeming fiction contained in Explanation 1(i)(b) to Section 2(42A) of the Act cannot be applied in computing the capital gains under Section 48 of the Act is accepted, then, the assessee would not be liable for long term capital gains tax, because, it is only by applying the deemed fiction contained in Explanation 1(i)(b) to Section 2(42A) and Section 49(1)(ii) of the Act, the assessee is deemed to have held the asset from 29/1/1993 and deemed to have incurred the cost of acquisition and accordingly made liable for the long term capital gains tax. Therefore, when the legislature by introducing the deeming fiction seeks to tax the gains arising on transfer of a capital asset acquired under a gift or will and the capital gains under Section 48 of the Act has to be computed by applying the deemed fiction, it is not possible to accept the contention of revenue that the

fiction contained in Explanation 1(i)(b) to Section 2(42A) of the Act cannot be applied in determining the indexed cost of acquisition under Section 48 of the Act.

19) It is true that the words of a statute are to be understood in their natural and ordinary sense unless the object of the statute suggests to the contrary. Thus, in construing the words 'asset was held by the assessee' in clause (iii) of Explanation to Section 48 of the Act, one has to see the object with which the said words are used in the statute. If one reads Explanation 1(i)(b) to Section 2(42A) together with Section 48 and 49 of the Act, it becomes absolutely clear that the object of the statute is not merely to tax the capital gains arising on transfer of a capital asset acquired by an assessee by incurring the cost of acquisition, but also to tax the gains arising on transfer of a capital asset inter alia acquired by an assessee under a gift or will as provided under Section 49 of the Act where the assessee is deemed to have incurred the cost of acquisition. Therefore, if the object of the legislature is to tax the gains arising on transfer of a capital acquired under a gift or will by including the period for which the said asset was held by the previous owner in determining the period for which the said asset was held by the assessee, then that object cannot be defeated by excluding the period for which the said asset was held by the previous owner while determining the indexed cost of acquisition of that asset to the assessee.

In other words, in the absence of any indication in clause (iii) of the Explanation to Section 48 of the Act that the words 'asset was held by the assessee' has to be construed differently, the said words should be construed in accordance with the object of the statute, that is, in the manner set out in Explanation 1(i)(b) to section 2(42A) of the Act.

20. To accept the contention of the revenue that the words used in clause (iii) of the Explanation to Section 48 of the Act has to be read by ignoring the provisions contained in Section 2 of the Act runs counter to the entire scheme of the Act. Section 2 of the Act expressly provides that unless the context otherwise requires, the provisions of the Act have to be construed as provided under Section 2 of the Act. In Section 48 of the Act, the expression 'asset held by the assessee' is not defined and, therefore, in the absence of any intention to the contrary the expression 'asset held by the assessee' in clause (iii) of the Explanation to Section 48 of the Act has to be construed in consonance with the meaning given in Section 2(42A) of the Act. If the meaning given in Section 2(42A) is not adopted in construing the words used in Section 48 of the Act, then the gains arising on transfer of a capital asset acquired under a gift or will be outside the purview of the capital gains tax which is not intended by the legislature. Therefore, the argument of the revenue which runs counter to the legislative intent cannot be accepted.

21) Apart from the above, Section 55(1)(b)(2)(ii) of the Act provides that where the capital asset became the property of the assessee by any of the modes specified under Section 49(1) of the Act, not only the cost of improvement incurred by the assessee but also the cost of improvement incurred by the previous owner shall be deducted from the total consideration received by the assessee while computing the capital gains under Section 48 of the Act. The question of deducting the cost of improvement incurred by the previous owner in the case of an assessee covered under Section 49(1) of the Act would arise only if the period for which the asset was held by the previous owner is included in determining the period for which the asset was held by the assessee. Therefore, it is reasonable to hold that in the case of an assessee covered under Section 49(1) of the Act, the capital gains liability has to be computed by considering that the assessee held the said asset from the date it was held by the previous owner and the same analogy has also to be applied in determining the indexed cost of acquisition.

22) The object of giving relief to an assessee by allowing indexation is with a view to offset the effect of inflation. As per the CBDT Circular No.636 dated 31/8/1992 [see 198 ITR 1 (St)] a fair method of allowing relief by way of indexation is to link it to the period of holding the asset. The said circular further provides that the cost of

acquisition and the cost of improvement have to be inflated to arrive at .the indexed cost of acquisition and the indexed cost of improvement and then deduct the same from the sale consideration to arrive at the long term capital gains. If indexation is linked to the period of holding the asset and in the case of an assessee covered under Section 49(1) of the Act, the period of holding the asset has to be determined by including the period for which the said asset was held by the previous owner, then obviously in arriving at the indexation, the first year in which the said asset was held by the previous owner would be the first year for which the said asset was held by the assessee.

23) Since the assessee in the present case is held liable for long term capital gains tax by treating the period for which the capital asset in question was held by the previous owner as the period for which the said asset was held by the assessee, the indexed cost of acquisition has also to be determined on the very same basis.

24) In the result, we hold that the ITAT was justified in holding that while computing the capital gains arising on transfer of a capital asset acquired by the assessee under a gift, the indexed cost of acquisition has to be computed with reference to the year in which the previous owner first held the asset and not the year in which the assessee became the owner of the asset.

25) Accordingly, we dispose off the appeal by answering the question in the affirmative i.e. in favour of the assessee and against the revenue with no order as to costs.

(K.K. TATED, J.) (J.P. DEVADHAR J.)

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

BEFORE SHRI RAJENDRA SINGH, A.M. AND SHRI VIVEK VARMA, J.M.

ITA No. : 6921/Mum/2010
Assessment Year : 2006-07

Shri Jatinder Kumar Madan 43, Madhur Milan CHS Ltd. 14 B, Road, Khar West Mumbai-400 052. **PAN NO: AACPM 6314 K**	Vs.	Income tax Officer Ward 19(1)(3) 314, Piramal Chambers, Lalbaug, Parel Mumbai-400 012.
(Appellant)		(Respondent)

Appellant by : Shri Biren Gabhawala
Respondent by : Shri Parthasarthi Naik

Date of hearing	:	11.4.2012
Date of Pronouncement	:	25.4.2012

O R D E R

PER RAJENDRA SINGH, AM:

This appeal by the assessee is directed against the order dated 2.8.2010 of CIT(A) for the assessment year 2006-07. The assessee in this appeal has raised disputes on two different grounds.

2. The first dispute is regarding addition of Rs.43,91,866/- as long term capital gain on account of surrender of flat. The facts in brief are that the assessee vide development agreement dated 8.7.2005, had surrendered his own flat of carpet area 866 sq.ft. to the builder and in

lieu of the surrender of the flat, the assessee had been allotted new flat of carpet area 1040 sq.ft. and also given cash compensation of Rs.11,25,800/-. The cash compensation had been invested by the assessee in REC bonds which was claimed as exempt under section 54EC. Since the assessee had acquired the new flat in lieu of the old flat, capital gain arising on account of the transfer of the old flat was treated as exempt under section 54 of the Income tax Act, 1961 (the Act). The assessee submitted before AO that the capital gain computed at Rs.55,91,866/- was less than the value of the new flat and, therefore, the same was exempt under section 54 of the Act.

2.1 The AO however, observed that for applicability of provisions of section 54, the assessee should have purchased a house property within one year before or two years after the date of transfer or constructed a new residential house within a period of 3 years from the date of transfer. In this case, the assessee had neither purchased nor constructed the house property. The AO, therefore, held that the assessee was not entitled for exemption under section 54 of the Act. He, therefore, did not allow the claim of deduction under section 54. The sale consideration in respect of transfer of the old flat was computed by the AO at Rs.86,96,760/- consisting of sum of Rs.75,64,960/- being market value of the new flat and Rs.11,25,800/- being cash compensation and long term capital gain was computed at

Rs.55,91,866/- after deducting the indexed cost of acquisition from the sale consideration.

2.2 In appeal, CIT(A) agreed with the AO that exchange of old flat with new flat constituted transfer and the capital gain was therefore taxable. He also agreed with the AO that the assessee had not fulfilled the conditions of section 54 for allowing exemption under the said section. He therefore, confirmed the disallowance made by AO aggrieved by which the assessee is in appeal before the Tribunal.

3. Before us, the ld. AR for the assessee submitted that the provisions of section 54 are applicable in case the assessee transfers a residential house and purchases a new house within a period of one year before or after 2 years after date of transfer or constructs a residential house within a period of 3 years from the date of transfer. In this case, the assessee had exchanged the old flat with a new flat which amounted to transfer, which was also admitted by the authorities below. Thereafter, the new flat had been built by the builder and possession handed over to the assessee which amounted to construction of a new flat which had been done within a period of 3 years from the date of transfer as the construction of the new flat was completed on 14.6.2007. In this connection, he referred to the letter dated 30.5.2007, of the builder addressed to society in which it was

mentioned that possession of the flat would be given on 14.6.2007. The ld. AR also referred to the decision of the Tribunal in the case of ITO vs. Abbas Ali Shiraz (5 SOT 422), in which it was held that acquisition of new flat under a development agreement with a builder in exchange of old flat amounted to construction of new flat and therefore, the time period of 3 years from the date of transfer as mentioned in section 54 would apply for the acquisition of new flat. The ld. DR on the other hand supported the order of authorities below and argued that provisions of section 54 were not applicable as the assessee had neither purchased a new residential house nor constructed a new residential house.

4. We have perused the records and considered the rival contentions carefully. The dispute is regarding allowability of exemption under section 54 of the Act and computation of long term capital gain in respect of exchange of old flat with a new flat and cash compensation under development agreement with the builder. The authorities below have held that since assessee had neither purchased a new flat or constructed a new flat, the provisions of section 54 are not applicable. We, however, are not able to agree with the view taken by authorities below. The exemption under section 54 is allowable in case the assessee transfers a residential house and within a period of 1 year before or 2 years after the date of transfer,

purchases a new residential house or constructs a new residential house within a period of 3 years from the date of transfer. In this case, the assessee had exchanged old flat with new flat to be constructed by the builder under development agreement which amounts to transfer under section 2(47) of the Act. Thus, the only other condition which is required to be satisfied is that assessee either purchases a new residential flat within the prescribed limit or constructs a new residential flat within a period of 3 years from the date of transfer. The acquisition of a new flat under a development agreement in exchange of the old flat amounts to construction of new flat. This view is supported by the decision of the Tribunal in the case of ITO vs. Abbas Ali Shiraz (supra). Therefore, the provisions of section 54 are applicable and assessee is entitled to exemption if the new flat had been constructed within a period of 3 years from the date of transfer. The ld. AR has also argued that cash compensation received by the assessee amounting to Rs.11,25,850/- can not be taxed as capital gain as assessee had invested a sum of Rs.12.00 lacs in REC bonds under section 54EC. Since cash compensation was part of consideration for transfer of the old flat and the assessee had invested the money in REC bonds, the exemption under section 54 EC will be available. In any case, the long term capital gain computed by the AO including cash compensation as part of sale consideration is much below the cost of new flat and therefore, the cash component is also exempt under section 54. As regards the completion of new flat within a period of 3 years, assessee has filed a copy of letter dated 30.5.2007 of the builder in which it has been mentioned that the builder had applied for occupation certificate and possession was to be given on 14.6.2007. This letter was not available before lower authorities. The exact date of taking possession of the flat is also not clear. This aspect therefore, requires verification by the AO as to whether assessee had taken possession of new flat within a period of 3 years. We, therefore, allow the claim of exemption under section 54 subject to verification of above aspects by the AO after providing opportunity to the assessee.

5. The second dispute is regarding taxability of compensation of Rs.7,01,460/- received by the assessee for alternate accommodation during the period of construction of property for 18 months. The AO treated its income as income from other sources and after deducting the rent paid by the assessee for the said period, the sum of Rs.2,05,706/- was assessed as income from other sources. The assessee disputed the decision of AO and submitted before CIT(A) that the compensation received by the assessee for alternate accommodation was of the nature of capital receipt and, therefore, not taxable. CIT(A) however did not accept the contentions and agreed

with the AO that the amount received was revenue receipt taxable under the provisions of the Act. CIT(A) accordingly confirmed the order of AO aggrieved by which assessee is in appeal before us.

6. Before us, the ld. AR for the assessee argued that the compensation received for alternate accommodation was capital receipt and was not taxable under the provisions of the Act. He referred to the decision of the Tribunal in the case of Kaushal K. Bangia vs. ITO in ITA No.2349/Mum/2011 for assessment year 2007-08 order dated 31.1.2012 in which, it was pointed out, that the Tribunal had held that cash compensation received in connection with construction of new flat in exchange of the old flat under development agreement was a capital receipt and was not taxable. The ld. Departmental Representative on the other hand submitted that compensation had been received for alternate accommodation and was not referable to any capital asset and therefore, the same had been rightly taxed as income from other sources.

7. We have perused the records and considered the rival contentions carefully. The dispute is regarding taxability of compensation received by the assessee from the builder for providing alternate accommodation during the period of construction of the building as per development/building agreement. The assessee had

received compensation of Rs.7,01,460/- and after deducting the rent paid by the assessee during the period of construction, net amount of Rs.2,05,766/- has been taxed by the AO as income from other sources which has also been confirmed by CIT(A). The ld. AR has argued that the said amount could not be taxed as income from other sources. He placed reliance on the decision of the Tribunal in the case of Kaushal K. Bangia vs. ITO (supra).

7.1 We have perused the said order of the Tribunal. In that case the issue was taxability of cash compensation of Rs.11,75,000/- as income from other sources. The Tribunal held that the said amount was referable to the capital asset and thus a capital receipt which was not taxable as income from other sources. In that case, the assessee had also received displacement compensation for Rs.6,12,000/-. However, there was no dispute raised on this issue in the said case. In the present case, cash compensation of Rs.11,25,800/- had been offered by the assessee as part of consideration of the old flat which has been claimed as exempt on the ground that entire amount had been invested in REC bonds under section 54EC. The dispute is in relation to displacement compensation or compensation received for alternate accommodation which has been taxed as income from other sources after deducting the expenses incurred in relation to the said compensation. In our view displacement compensation is not related to any capital asset. The compensation had been paid in connection with the alternate accommodation given to the assessee to facilitate construction of the flat. Since the actual rent paid by the assessee for the alternate accommodation was lower than the amount received, there was net income to the assessee which has been rightly taxed as income from other sources. We, therefore, see no infirmity in the order of CIT(A in confirming the addition and the same is, therefore, upheld.

8. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 25.4.2012.

Sd/-	**Sd/-**
(VIVEK VARMA)	**(RAJENDRA SINGH)**
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated: 25.4.2012.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench
True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.