

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

I.T.A. No.472/M/2015 (Assessment Year: **2010-2011**)

Mrs. Anupama Agarwal, 7 th Floor, Somerset Place, 61-D, Bhulabhai, Desai Road, Mumbai – 400 026.	बनाम/ Vs.	DCIT, Central Circle-2, Mumbai.
स्थायी लेखा सं./PAN : AANPA8600K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri R.S. Goradia
प्रत्यर्थी की ओर से/ Respondent by	:	Shri A. Ramachandran

सुनवाई की तारीख /Date of Hearing : 31.08.2016

घोषणा की तारीख /Date of Pronouncement : 23.09.2016

आदेश / O R D E R

PER D. KARUNAKARA RAO, AM:

This appeal filed by the assessee on 20.1.2015 is against the order of the CIT (A)-36, Mumbai dated 1.10.2014 for the assessment year 2010-2011. In this appeal, assessee raised the following grounds which read as under:-

- "1. (a) The Ld CIT (A) erred in law and on facts in upholding the order of the AO which is illegal and bad in law.
(b) The Ld CIT (A) has erred in law and on facts in sustaining the order of the AO computing the total income of the appellant at Rs. 64,69,648/- as against the returned income of Rs. 9,02,800/-.
(c) The Ld CIT (A) has erred in law and on facts in confirming the order of the AO assessing the Long Term Capital Gain offered by the appellant on sale of residential flat at Neelkant Palm, Thane as Short term Capital Gain and consequently denying the benefit of exemption u/s 54 of the Act.
(d) Without prejudice to the above and in alternative, the Ld CIT (A) ought to have directed the assessing officer to adopt the market value of the residential premises as on the date of acquisition considered by him as the cost of acquisition for the purpose of computation of capital gain.
2. The Ld CIT (A) has erred in law and on facts in sustaining the order of the AO denying the benefit of one self-occupied property and considering all as deemed let out properties as well as not allowing deduction for municipal taxes paid by the appellant and also enhancing the annual value in respect of Surat Property
3. The Ld CIT (A) has erred in law and on facts in confirming the interest, which is not in accordance with the law, charged by the AO."

2. At the outset, Ld Counsel for the assessee brought our attention to the above grounds and mentioned that there are **three issues** for adjudication viz **(i)** allowability of deduction u/s 54 of the Act *qua* issue of computation of holding period with reference to date of allotment of flat; **(ii)** allowing the benefit of one self-occupied property; **(iii)** charging of mandatory interest related issues.

3. Referring to the **third issue**, Ld Counsel for the assessee submitted that the same requires to be remanded to the file of the CIT (A) as he has mistakenly held that the related issues are required to be dismissed as consequential in nature. He also submitted that the said decision of the CIT (A) is not correct considering the requirement of giving adjudication with reference to the interest calculations u/s 234A, 234B and 234C of the Act. The fact of assessee's request for excluding of certain party from the working of the interest was highlighted. He also submitted that the rectification application was filed long time ago and the same is still pending before the assessing authorities.

4. After hearing both the parties on this issue, we are of the opinion, the order of the CIT (A) is deficient on the issue with reference to Ground no.3 raised before us. Considering the same, we direct the CIT (A) to adjudicate all the aspects of this ground by passing a speaking order after granting a reasonable opportunity of being heard to the assessee. Accordingly, **ground no.3 is allowed for statistical purposes.**

5. **Ground no.1** has four sub-grounds and all of them relate to the allowability of deduction u/s 54 of the Act with reference to the long term capital gains earned on the transfer of old asset. Referring to the facts of the case, Ld Counsel for the assessee submitted that the assessee booked a flat on 30.3.2005 and there is a letter of allotment in support of the same. Subsequently, the flat was taken possession by the assessee on 30.3.2009 (after four years) and the flat was registered in the name of the assessee on the said date. This flat was subsequently sold on 30.3.2010, which is a date of sale of flat and earned capital gains. Assessee considered the date of booking and the letter of allotment as a basis for computing the holding period and claimed benefit of the long term capital gains. *Per contra*, Assessing Officer in the assessment proceedings, held that the date of possession of

flat cum date of registration on 30.3.2009 is the relevant date for calculating the holding period. Accordingly, AO computed the short term capital gains and denied the benefit of section 54 of the Act when the gains are reinvested in the new asset. On this factual matrix of the case, Ld Counsel for the assessee submitted that the issue now stands covered in favour of the assessee by the decision of the Mumbai Bench of the Tribunal. Bringing our attention to a decision of the Tribunal in the case of Richa Bagrodia vs. DCIT in ITA No.3601/M/2012 (AY 2008-2009), dated 22.4.2014 and read out the relevant paras 6 to 8 and submitted that the date of allotment should be relevant for reckoning the holding period of the asset sold. He also submitted that the said decision of the Tribunal was based on the judgment of the Hon'ble Gujarat High Court in the case of CIT vs. Anilaben Upendra Shah (2003) 262 ITR 657 (Guj.). Further, he also brought our attention to another decision of the Tribunal in the case of Surendra Mohan Khanna vs. ITO in ITA No.6505/M/2012 (AY 2007-2008), dated 19.8.2016. He relied on the contents of para 2.1 of the said Tribunal's order (supra) for the identical proposition that the date of booking should be relevant. Further, he also relied on various decisions in support of the same.

6. On the other hand, Ld DR for the Revenue relied heavily on the orders of the Revenue Authorities.

7. On hearing both the parties, we find there is no dispute on the facts. However, the dispute exists with reference to the holding period *qua* the date of booking / date of allotment. In this regard, we have perused the orders of the Tribunal cited above. For the sake of completeness of this order, relevant paras 6 to 8 of the Tribunal's order in the case of Richa Bagrodia (supra) are extracted as under:-

"6. We heard both the parties and perused the orders of the Revenue Authorities as well as the judgments of the Hon'ble High Court and the decisions of the Tribunal cited by learned representatives of both the parties. The only issue that is to be decided is whether the date of allotment of the flat or the date of possession of the flat by the assessee should be considered as the date for computing the holding period of 36 months. On perusal of the cited orders of the Tribunal (supra), we find that an identical issue came up for adjudication before the Tribunal in the case of Meena A Hemnani (supra), order dated 17th January, 2014 wherein one of us (AM) is a party and the issue was decided in favour of the assessee by relying on various decisions of the Tribunal as well as the judgment of the Hon'ble Gujarat High Court in the case of CIT vs. Anilaben Upendra Shah (2003) 262 ITR 657 (Guj). Relevant discussion is given in paras 3 & 4 of the said order of the Tribunal which read as under:

" 3. There are couple of issues raised in this appeal. Rest of the grounds raised in the appeal are either consequential or general in nature. Accordingly, they are dismissed as general or consequential. The issues, which need to be adjudicated in this appeal are (i) if the capital gains earned by the assessee are in the nature of the short term as held by the AO or long term capital gains as offered by the assessee in the return. At the outset, Ld Counsel for the assessee mentioned that the assessee purchased a flat vide the allotment letter dated 9.9.2003 from the builder namely Prestige Estates Projects Pvt. Ltd. There was a construction agreement between the parties dated 1.12.2003 and the registered deed of the same was dated on 22.9.2006. The said flat was sold by the assessee to Bennet Coleman & Company on 10.11.2006. The assessee earned capital gains on this transaction and offered the same as long term capital gains reckoning the date of allotment i.e., 9.9.2003 for the purpose of determining the holding period of three years relevant for the long term capital gains. However, in the assessment proceedings, AO considered the date of registration i.e., 22.9.2006 the date of registration and determined the short term capital gains. Therefore, now the issue to be decided by the Tribunal relates to if the date of allotment should be considered for the purpose of computing the said long term capital gains. In this regard, Ld Counsel filed various decisions to suggest that the **date of allotment** must be considered for the purpose of computing the long term capital gains instead of date of registration. Ld Counsel filed the order of the Tribunal in the case of ACIT vs. Smt. Vandana Rana Roy vide ITA No.6173/M/2011 (AY 2007-2008) dated 7.11.2012, wherein one of us (AM) is a party, and stated that the "date of allotment" should be reckoned as relevant date for computing the holding period for the purpose of computing the capital gains. In this regard, Ld Counsel brought our attention to para 7 and 8 of the said order of the Tribunal to support his case. The said judgment was decided considering the judgment of the Gujarat High Court in the case of CIT vs. Anilaben Upendra Shah (2003) 262 ITR 657 (Guj) apart from other decisions of the Tribunal in the case of Jitendra Mohan vs. ITO (2007) 11 SOT 594 (Del) and also another decision of the ITAT in the case of Pravin Gupta vs. ACIT and the relevant propositions are extracted in para 7 of the Tribunal's order dated 7.11.2012. The said paras 7 and 8 from the order of the Tribunal in the case of Smt. Vandana Rana Roy read as under:

"7. We have heard both the parties, perused the cited decisions and we find that there is no dispute on the facts. The only issue that is to be decided is whether date of allotment of the flat or the date of possession of the flat by the assessee should be considered as date of holding for computing the holding period of 36 months. In alternative, the "date of registration" should be the relevant date. On perusal of the said decisions relied upon by the Ld Counsel, we find that the decisions are relevant and applicable to the facts of the present case. The conclusion of the Hon'ble **Gujarat High Court judgment in the case of CIT vs. Jindas Panchand Gandhi** reads as under:

"Assessee having sold the flat allotted to him by a co-operative housing society after a period of 36 months from the date of allotment, capital gains arising to him were long-term capital gains despite the fact that the physical possession of the flat was given to the assessee much later and, therefore he was entitled to deduction from such gains as per law."

7.1 The conclusion of the **Hon'ble Gujarat High Court judgment in the case of CIT vs. Anilaben Upendra Shah** reads as under:

"Assessee having held the shares and allotment of a flat in a co-operative housing society for a period of more than 36 months the capital gain arising from sale of said flat was long-term capital gain and assessee was entitled to benefit of section 80T irrespective of the fact that the assessee did not get possession of the flat in question at the time of allotment and it was constructed later on."

7.2. The conclusion of **Hon'ble ITAT, Delhi Bench in the case of Jitendra Mohan vs. ITO** reads as under:

"On the facts of the case, assessee held the capital asset (shed) allotted to it on installment basis from 28th December, 1994, the date of payment of second installment and sale thereof on 15th December, 2000, gave rise to long term capital loss even though possession of shed was handed over by DSIDC to assessee on 28th May, 1998."

7.3. The conclusion of **Hon'ble ITAT, Delhi Bench in the case of Praveen Gupta vs. ACIT** reads as under:

"Assessee can be said to have held the flat when he made the payment to the builder and received the allotment letter, and therefore, benefit of indexation of cost of acquisition of the flat has to be granted to the assessee from the date (1995) when he started making payment to the builder and not from the date of execution of conveyance deed in 2001."

8. *All the above decisions are uniform in concluding that the "date of allotment" is reckoned as the date for computing the holding period for the purpose of capital gains. The date of allotment in this case being 19.11.2001 and the date of sale is 23.8.2006, therefore, the holding period is much more than 36 months. In this case, the gains earned by the assessee on the sale of flat have to be computed as capital gains. Without prejudice, even if the date of possession, being 14.8.2003, is considered; the assessee is still entitled to the benefits of the Long Term Capital Gains. Therefore, in our opinion, order of the CIT (A) does not call for any interference. Accordingly, the grounds raised by the Revenue are dismissed."*

4. *Considering the above settled nature of this issue, we are of the opinion that the assessee must succeed on this issue. Accordingly, the relevant grounds of appeal are allowed."*

7. *From the above settled position of the issue, it can be safely concluded that the "date of allotment" should be reckoned as the date for computing the holding period for the purpose of capital gains. In the instant case, the date of allotment is **11.04.2003** (FY 2003-2004) and the date of sale of the property is **14.10.2007**, therefore the holding period is more than 36 months. Therefore, the capital gains earned by the assessee on the sale of the flat have to be treated as 'long term capital gains'. The assessee paid the first installment on 11.4.2003, thereby conferring a right to hold a flat, which was later identified and possession delivered on later date. The Hon'ble Punjab & Haryana High Court in the case of Mrs. Madhu Kaul vs. CIT vide Income Tax Appeal No.89 of 1999, dated 17th January, 2014 held that the mere fact that possession was delivered later, does not detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter. Thus, the Id DR's arguments on non-existence of the flat at the time of issuing of allotment letter stands answered by the said judgment of the Hon'ble High Court of Punjab & Haryana (supra). The same view was supported by various decisions of the Tribunal as well as the judgments of the Hon'ble Gujarat High Court and the relevant conclusions were already extracted in the above paragraphs of this order. Regarding the judgments of the Hon'ble jurisdictional High Court relied on by the Ld DR are distinguishable on facts. Therefore, considering the above settled nature of the issue as well as the following the principle of consistency, we are of the considered opinion that the ground no.1 raised by the assessee should be allowed. Accordingly, ground no.1 is **allowed."***

8. Further, we have also perused para 2.1 of the order of the Tribunal in the case of Surendra Mohan Khanna (supra) and the relevant lines are extracted as under:-

"2.1. Nothing contrary was brought to our knowledge on behalf of Revenue. Facts being similar, so, following same reasoning, we are not inclined to concur with the finding of CIT (A) because date of acquisition of flat in question will be first booking ie 1986 and possession of flat will relate back to 1986 for purchase of computation of capital gain. Assessing Officer is directed accordingly."

9. Thus, from the above, it is evident that the date of booking being the date where rights on the flat arose to the assessee and the same constitutes a starting date for calculating the holding period of the asset for the purpose of section 54 of the Act. Accordingly, in this case, the date 30.3.2005 should be the relevant date. AO is directed to compute the holding period accordingly. In effect, grounds no.1 (a); 1(b) and 1(c) of the appeal are allowed. Considering the relief granted to the

assessee in this regard, the adjudication of the ground no. 1(d) becomes academic. Accordingly, the said ground no.1 (d) is dismissed. Ground no.1 is **partly allowed**.

10. **Ground no.2** relates to the allowing of the benefit of self occupied property. Relevant facts connected to the ground are that the assessee owns three residential houses in Thane, Surat and Navi Mumbai. There is no dispute about the property at Navi Mumbai as per the Ld Counsel for the assessee. Bringing our attention to the property at Surat, Ld Counsel for the assessee submitted that the issue of computation of ALV has to be re-examined by the AO in view of the binding jurisdictional High Court judgment in the case of CIT vs Tip Top Typography [2012] **368 ITR 330** (Bom).

11. After hearing both the parties, we direct the AO to apply the said binding judgment of the Hon'ble jurisdictional High Court judgment in the case of Tip Top Typography (supra) to the facts of the instant case after affording a reasonable opportunity of being heard to the assessee. We order accordingly.

12. With reference to the property at Thane, Ld Counsel for the assessee submitted that the property is generated out of merger of flats no.901 and 902 into one functional unit. This resultant property was never let out by the assessee during the year under consideration. Therefore, the same was vacant and was being used sporadically by the assessee and when she visits Thane. Otherwise, it is the claim of that the assessee lives in Mumbai with her husband. The limited request of the assessee with reference to this property is that the Assessing Officer denied any property as self occupied property. Referring to the other two properties at Navi Mumbai and Surat, Ld Counsel for the assessee submitted that the Thane property should constitute self occupied property as the same was not let out.

13. On the other hand, Ld DR for the Revenue submitted that this issue may also be sent back to the file of the AO considering the fact that the property at Thane is the merger of two independent flats ie flats no.901 and 902 and there is a dispute about the allowability of one property as self occupied property. On facts, the property at Thane consists of two properties and there is a requirement of adjudication and finding of fact on this issue also.

14. On hearing both the parties on this issue, we are of the opinion that the assessee is, in principle, entitled for one self occupied property. The aspects relating

to the merger of two flats into one requires detailed examination by the Assessing Officer. If the AO comes to the conclusion that the flats no.901 and 902 constitutes one functional residential unit, AO should decide accordingly and allow the entire property as self occupied property. Alternatively, if the merger of flats is not borne out of flats, assessee, in any case, is entitled to one of the two merger flats as self occupied flats. AO shall pass a speaking order on this issue after granting a reasonable opportunity of being heard to the assessee as per the set principles of natural justice. Thus, **ground no.2 is allowed for statistical purposes.**

15. In the result, appeal of the assessee is partly allowed for statistical purposes.
Order pronounced in the open court on 23rd September, 2016.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 23.09.2016
व.नि.स./ OKK, Sr. PS

Sd/-
(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**