

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

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.7667/M/2013
Assessment Year: 2009-10**

ACIT – 19(2), Room No.322, 3 rd Floor, Piramal Chambers, Lalbaug, Parel, Mumbai - 400012	Vs.	Ms. Jenifer Noshir Sanjana, 14, Golden View, Sunder Nagar Road, Kalina, Santacruz (E), Mumbai – 400 098 PAN: AATPS1077L
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Nitesh Joshi, A.R.

Revenue by : Shri Jeevan Lal, D.R.

Date of Hearing : 27.06.2016

Date of Pronouncement : 30.06.2016

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the Revenue against the order dated 21.10.2013 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2009-10.

2. The sole issue raised by the Revenue is as to whether the consideration received by the assessee on sale of her rights to get the conveyance of the flat in her favour is to be treated as capital gain eligible for claim of deduction under section 54F of the Act.

3. The brief facts of the case are that the assessee during the year declared long term capital gains of Rs.28,05,075/- on account of sale proceeds of rights in O zone flat on 27.03.09 for Rs.69,30,000/-. The value of the above flat as on 17.08.04 was taken at Rs.34,02,000/- and the indexed cost at Rs.41,24,925/- and the capital gains were arrived at Rs.28,05,075/-. The said amount was

claimed exempt under section 54F of the Act on the ground that the entire sale proceeds of Rs.69,30,000/- had been deposited in capital gain account scheme. The Assessing Officer (hereinafter referred to as the AO), however, noticed that the assessee had not acquired the ownership of the flat in question and that the flat in question was still under construction. Neither the ownership of the house nor the transaction of sale by the assessee of his rights in the flat was registered as per the provisions of the Registration Act. He observed that the amount paid by the assessee to the builder was in the nature of advance and security and that the same was not the consideration for the purchase of the flat. He further observed from the allotment letter that the allotment letter was a tentative letter only evidencing the money received by the developer and that there existed no property or right in respect of any tangible asset as on the date of the said allotment letter. He further observed that as per para 5 of the said allotment letter, the assessee had to exercise the option of having the property in her name or in the name of her nominee which was to be exercised within 30 months of the date of the allotment letter. That the said letter was dated 31.01.05 and the period of 30 months had lapsed on 31.08.07 and since the period of 30 months had lapsed and the assessee had not entered into an agreement with the builder for the purchase of said flat, hence no rights had accrued to the assessee in the said flat. He therefore held that the entire receipt on sale of said property could at the most be considered as being return of advance in nature of income under section 56 of the Act. That there was no property in existence or right of the assessee in such a property and hence no capital asset was sold by the assessee and thereby no capital gains had been earned by the assessee. Therefore, the benefit under section 54F was not available to the assessee. He accordingly taxed the difference between the amount paid and amount received by the assessee as income from other source calculated at Rs.36,57,428/-. Aggrieved by the order of the AO, the assessee preferred appeal before the Ld. CIT(A).

4. The Ld. CIT(A), considering the submissions of the assessee and going through the evidences on the file, allowed the claim of the assessee observing as under:

“5.3 The above facts, therefore, show that the consideration amount of Rs.69,30,000/- was received by the appellant on account of agreement for sale of his flat in flat no.1202 in tower no.01 in O Zone building vide tripartite agreement dtd.27.03.2009 between the developer, the appellant and the purchaser. The appellant's right in the said flat has been recognised in the above agreement for sale, which is duly registered. The said right is arising out of booking made on 17.06.2004 being option money given by the appellant for the above flat in O Zone building and the option to purchase the said flat vide letter dtd.31.01.2005 from the developer for a consideration of amount of Rs.34,02,000/-, against which the appellant, prior to the date of agreement for sale of the above flat, had made payment of Rs.32,31,900/-. The appellant's right in the said property, therefore, exists from the date of signing of the offer letter dtd.31.01.2005 to the date of agreement for sale, which is dtd.27.03.2009, and, without this right, there could not have been "Agreement for Sale" between the purchaser and the transferor (the appellant). The appellant, was thus holding the above right for a period of more than 3 years.

5.4 As far as the position whether there has been a transfer of capital asset is concerned, under section 2(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, and u/s 2(47) "transfer" in relation to a capital asset, includes- (i) the sale exchange or relinquishment of the asset or (ii) the extinguishment of any rights therein... (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 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. Under Explanation 1 inserted by the Finance Act 2012, w.r.e.f. 01.04.1962, for the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of the section 269UA. The meaning of immovable property under section 269UA has been defined as; "(i) any land or any building or part of building, and includes, where any land or any building or part of a building is to be transferred together with any machinery, plant, furniture, fittings or other things, such machinery, plant, furniture, fittings or other things also. Explanation. - For the purposes of this sub-clause, "land, building, part of a building, machinery, plant, furniture, fittings and other things" include any rights therein: (ii) any right in or with respect to any land or any building or a part of a building (whether or not including any machinery, plant, furniture, fittings or other things therein) which has been constructed or which is to be constructed, accruing or arising

from any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other AOP or by way of any agreement or any arrangement of whatever nature), not being a transaction by way of sale, exchange or lease of such land, building or part of a building".

5.5 The assessing officer has cited the ITAT decision in the case of Late Vasudev (2011) to hold that at the time of allotment letter issued by the builder, flat no.1202 did not exist and the allotment letter was merely a security against the advance made by the appellant. However, it is seen that the aforesaid decision was rendered in a different context. The issue there related to claim of exemption u/s 54F, which was denied to the said assessee on the ground that the above claim is being made on the basis of allotment letter only and proposed plan of the building and the flat was not in place. In the case of the appellant, the claim u/s 54 of the Act, has been disputed not on the ground that investment of sale consideration has been made in a capital gain saving scheme but, when the offer/allotment letter dtd.31.01.2005 to purchase the above flat was made by the developer, the flat did not exist. The assessing officer has, thus, applied the above decision on a reverse situation, which was not before the ITAT.

5.6 In view of the above discussion, I hold that sale consideration of Rs.69,30,000/-, is to be computed under the head 'long term capital gain' and, as the entire sale proceeds have been deposited in a capital gain account scheme, the appellant is eligible for exemption u/s 54F of the Act. The appellant's ground of appeal is, therefore, allowed."

5. Being aggrieved by the above order of the Ld. CIT(A), the Revenue has come in appeal before us agitating the action of the Ld. CIT(A) in treating the rights of the assessee in the said flat as capital asset and thereby allowing of her claim under section 54F of the Act.

6. We have heard the rival contentions and have also gone through the records. It is not disputed that the amount of Rs.69,30,000/- was received by the assessee on sale of her rights in the flat in question. The property in which the alleged rights were sold was earmarked and distinguishable as flat No.202 at 12th floor in tower No.01 admeasuring 82.24 sqr. meters in the building known as Rustomjee's O Zone in Luxmi Singh Complex. It is also not disputed that against the total consideration amount of Rs.34,02,000/- the assessee had already made payment of Rs.32,31,900/- during the period from 17.06.2004 to 12.04.2008. The assessee had paid two installments of

Rs.3,40,200/- each as earnest money before 14.06.04 and the remaining amount was paid as per the schedule of the installments given in the allotment letter. The period of the said installments paid as observed above was running into four years. The assessee had to pay the installments at the different stages of the construction of the property/flat in question e.g. on the completion of first slab; on the condition of third slab; on the completion of 11th slab and so on and the last installment was payable on possession of the flat being given to the assessee. From the above circumstances it clearly reveals that while making the payment to the builder, the intention of the assessee was not to earn any quick profits but the purpose was of investment. The assessee not only paid the earnest money in the year 2004 but subsequently paid installments to the builder at certain stages of the completion of the construction. However, before the possession of the flat being offered to the assessee, the assessee decided to transfer his rights to a third party at some profit. The said profit was treated by the assessee as capital gains. From the facts narrated above it clearly reveals that the payment made by the assessee was not an advance or security but it was towards the consideration of the flat in question which was under construction and payment of the installments were made at different stages of the completion of the construction. There accrued a right to get the possession/conveyance of the said flat in favour of the assessee from the said builder. A tripartite agreement was executed vide which the assessee, with the consent of the builder, had agreed to sale his rights in favour of the third party. So far as the observation of the AO that the assessee had to exercise his option within 30 months, the Ld. A.R. of the assessee has brought our attention to the relevant part of the assessment order wherein the assessee had explained to the AO that the time period for exercise of option was extended by the builder to 40 months vide its letter dated 01.07.07. However, the AO has not discussed that aspect in the assessment order. Even otherwise, the assessee had booked the flat, paid earnest money, paid installments at certain stages of the completion of the building as per the schedule of the allotment letter, hence

under such circumstances a definite right had accrued to the assessee to get the possession and conveyance of the flat in her favour. The Ld. A.R. of the assessee has brought our attention to the decision of the Hon'ble Bombay High Court in the case of "CIT vs. Vijay Flexible Containers" (1990) 186 ITR 693 wherein the Hon'ble Bombay High Court has held that the right to obtain conveyance of immovable property is a capital asset and giving up of the right to obtain conveyance of immovable property amounts to transfer of a capital asset. Similar observations have been made in another decision of the Hon'ble Bombay High Court in the case of "CIT vs. Data Services Ltd." (1980) 122 ITR 594.

7. In the light of the above decisions and in view of the factual aspects as discussed above, we do not find any infirmity in the order of the Ld. CIT(A) while allowing the appeal of the assessee.

8. In the result, the appeal of the Revenue is hereby dismissed.

Order pronounced in the open court on 30.06.2016.

Sd/-
(G.S. Pannu)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 30.06.2016.

* Kishore, Sr. P.S.

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

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.