

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.2901/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09)

Shri Ketan Chhotalal Sheth, 6/12, 1st floor, Bouna Casa, Sir P.M. Road, Fort, Mumbai - 400 001.	<b>बनाम/</b> v.	ITO - 12(3)(4), Mumbai.
स्थायी लेखा सं./PAN : AADPS9601E		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by	Shri Bhupendra Shah
Revenue by :	Shri A. Ramachandran

सुनवाई की तारीख / **Date of Hearing** : 27-6-2016

घोषणा की तारीख / **Date of Pronouncement** : 20-09-2016

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 2901/Mum/2012, is directed against the appellate order dated 12<sup>th</sup> March, 2012 passed by learned Commissioner of Income Tax (Appeals)- 23, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2008-09, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 22<sup>nd</sup> December, 2010 passed by the learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income Tax Act,1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1. In the facts and circumstances of the case and in law, the learned A.O. erred in disallowing Indexed cost of acquisition of office by wrongly treating the office as short term capital asset instead of long term capital asset as claimed by the Appellant.

2. The AO has wrongly levied interest u/s 234 and wrongly initiated penalty under section 271(1)(c).

Relief prayed

a) To treat the booking of the office as long term capital asset and allow indexation thereon

b) To delete interest under section 234 and initiation of penalty under section 271 (1)(c).”

3. The brief facts of the case are that assessee is an individual deriving income from house property, business income, capital gains and income from other sources. It was observed by the A.O. during the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act , that the assessee has shown long term capital loss of Rs. 2,84,844/- on sale of property which was claimed to be carried forward. The details with respect to the transaction were sought from the assessee including sale and purchase agreement. Despite repeated requests by the AO , the assessee merely filed a copy of rough purchase agreement wherein there were no dates mentioned and there was no registration evidence or payment of stamp duty. Further, no copy of the sale agreement was filed and only supporting with respect to the sales were two receipts of Rs. 12 lacs and Rs. 5,46,000/- stated to be towards the consideration for sale of the property were filed. The assessee has computed the long term capital gain by considering the property to have been sold for a consideration of Rs. 17,46,000/- and taking the purchase cost at Rs. 4,80,150/- and the date of purchase as year 1986 and hence consequently

the indexed cost was shown at Rs. 18,89,733/-. Apart from the above, the assessee has also claimed property tax of Rs. 1,41,111/- against the sale consideration.

The A.O. observed that the actual date of purchase was not verifiable from the documents filed by the assessee but it was clear to the A.O. that the purchase had been made subsequent to the year 1987 as the plot on which the property was constructed had been allotted to the builders vide allotment letter dated 21<sup>st</sup> October, 1986 and hence accordingly the building could not be constructed in 1986 itself. Further, it was observed that there was a letter dated 10<sup>th</sup> March, 2008 written by the assessee to the builders wherein it was mentioned that the letter of allotment for the said property was dated 1<sup>st</sup> day of August, 1994, which also indicated that the assessee has obtained possession subsequent to 1994. In view of the above and also in absence of any evidence, the A.O. disallowed the indexation cost and only an amount of Rs. 4,80,150/- was allowed as cost of the asset as the working of the assessee that the property was purchased in 1986 was incorrect and inaccurate. The assessee has also not filed any supporting evidence with respect to the property tax paid of Rs. 1,41,111/- and also the property tax cannot be considered as cost of asset or cost of improvement or expense incurred wholly and exclusively for the transfer of asset and hence the same could not be allowed as deduction while computing the capital gain. It was also observed that the assessee has not filed the stamp duty value of the asset as on date of sale and as per the provisions of section 50C of the Act, the value that is to be adopted is the stamp duty value or actual consideration whichever is higher. In the instant case, it was estimated that the stamp duty value was Rs. 25 lacs and since the consideration received was only 17.46 lakhs, the amount of Rs. 25 lakhs was considered as sales consideration receivable/ accrued to the assessee from the said property and accordingly the A.O. worked out the long term capital gain at Rs. 20,19,850/-

being the difference of gains receivable u/s 50C of the Act at Rs. 25 lacs and cost of asset at Rs.4,80,150/- and the gain was taxed as long term capital gain as prima facie evidence indicated that the assessee should have held property for more than three years the gain was taxed as long term capital gains , as against the loss of Rs. 2,84,844/- as claimed by the assessee in the return of income filed with the Revenue vide assessment order dated 22-12-2010 passed by the AO u/s. 143(3) of the Act.

4. Aggrieved by the assessment order dated 22-12-2010 passed by the A.O. u/s. 143(3) of the Act, the assessee filed first appeal before the ld. CIT(A).

5. Before the ld. CIT(A), the assessee submitted the letter of allotment received by the assessee on 26<sup>th</sup> July, 1992. The assessee submitted that the payments were made slab wise from time to time after the booking was made and the A.O. has erred in treating the asset as short term capital asset and disallowed the indexation of cost because no agreement was entered into between the assessee and the builder, Apex Hotel Enterprises P. Ltd. The assessee relied on the case of CIT v. Tata Tele Services Ltd., 122 ITR 594, Kizhakke Madathil Venkateshwara Iyer, AIR 1917 Mad 358 and others to support the contention that any right in property would be capital asset which is also assignable. Therefore, it was submitted that right to obtain conveyance of immovable property was clearly 'property' as contemplated under section 2(14) of the Act. Registration and conveyance is not necessary to prove purchase of any capital asset. It was also contended that unregistered document is not covered u/s 50C of the Act by relying upon the decision of the Tribunal in the case of Pravin Gandhi in ITA No. 2216/Mum/2009 and in the case of Navneet Kumar Thakkar v. ITO reported in (2008)110 ITD 525(Jod)(SMC).

The Id. CIT(A) observed that in the instant case by virtue of the allotment letter dated 26<sup>th</sup> July, 1992, the assessee was offered Flat No. 601 in the 6<sup>th</sup> floor, Pujit Plaza, situated at Plot No. 67, Sector 11, Belapur, Navi Mumbai. Thus, the Id. CIT(A) observed that no flat was in existence as on the date of the said allotment letter. Hence, the question of assessee becoming owner of a non-existent property and holding the same does not arise. Hence, the assessee could not have held the property on the date when the said property was allotted by the builder to the assessee by way of the allotment letter. Thus, it was observed that the builder entered into a contract for sale of the property which were to come into existence at a future date. Thus, it was observed that the said allotment letter is merely a document evidencing contract for sale of the immovable property. A contract for sale of immovable property is a contract that the sale of such property shall take place on terms settled between the parties. It was observed that the capital asset that came to be held by the assessee under the allotment letter was property in the form of “right of specific performance” or “right to obtain conveyance of immovable property” and not the “ownership right in the immovable property”. It was observed that on the execution of the sale deed and receipt of the possession, the assessee would have acquired ownership rights over the immovable property. It was observed that by virtue of the allotment letter, no interest in or charge on the immovable property was created in favour of the assessee, hence, the claim of the assessee that the right in the property was created from the time the investment was made is not tenable. The AO referred to provisions of Section 54 of the Transfer of Property Act to contend that no interest in or charge on such property is created by contract for the sale of immovable property. The assessee did not submit any documentary evidence to show the date on which the assessee acquired ownership of the flat by way of sale agreement. Only a rough purchase agreement was filed by the assessee. Thus, it was observed by learned CIT(A) that the date on which the assessee acquired ownership right in the property was not proved. The

evidence filed by the assessee shows that the flat and the ownership right in the flat would have vested only subsequent to year 1994. The copy of letter issued by the builder dated 5<sup>th</sup> April, 1993 filed by the assessee showed that the builder called upon the assessee to deposit the amount of Rs. 80,000/- which clearly indicates that till 5<sup>th</sup> April, 1993 full payment of the flat had not been made and the assessee had not acquired ownership rights as on this date and thus the date of acquisition of ownership right was not clear and is certainly not the year 1986, the date from which indexation had been claimed by the assessee and thus the A.O. rightly denied the indexation claimed by the assessee. It was observed that the capital asset in the form of immovable property came to be held by the assessee only on the date the assessee acquired ownership right by the purchase deed. The ld. CIT(A) held that since the flat was sold and the period for which it was held is not ascertainable, the A.O. had rightly denied the indexation. The learned CIT(A) held that the right of ownership is to be treated as held for less than 36 months, hence, the gain is from transfer of a short term capital asset and was liable to be taxed as short term capital gain. With respect to the applicability of section 50C of the Act, the ld. CIT(A) accepted the contention of the assessee that the same is not applicable to unregistered documents. The words "or assessable" in addition to the value adopted or assessed has been inserted in section 50C of the Act w.e.f. 1.4.2009 and is not applicable for the assessment year 2008-09. Thus, the ld. CIT(A) directed the A.O. to compute the capital gains on the basis of the value for which property has been sold without application of section 50C of the Act, vide appellate order dated 12-03-2012 passed by learned CIT(A).

6. Aggrieved by the appellate order dated 12-03-2012 passed by the ld. CIT(A), the assessee filed second appeal before the Tribunal.

7. The ld. Counsel for the assessee submitted that the assessee has sold the property during the impugned assessment year for Rs. 17,46,000/-. The ld. Counsel for the assessee drew our attention to paper book page No. 19 filed with the Tribunal and submitted that the letter dated 26<sup>th</sup> July, 1992 was issued by the Builder confirming the booking of the flat, whereby it is shown the assessee's has purchase an office flat no. 601 on the 6<sup>th</sup> floor in Building Pujit Plaza for Rs.4,80,150/- and interest of the assessee in the property is created. The assessee also drew our attention to page 20-21 /paper book whereby the assessee was asked by the builder vide letter dated 05-04-1993 to deposit the amount of Rs.80,000/- and confirming that the assessee has already deposited Rs.2,00,000/- against the demand of Rs. 3,60,000/- made by the Builder. It was shown by the learned counsel for the assessee that vide letter dated 10-3-2008 addressed to the Builder in context of transfer of flat by the assessee, the assessee mentioned the date of allotment to be 01-08-1994 which is placed in paper book page 22. The assessee relied on the decision in the case of CIT v. Tata Services Ltd., 122 ITR 594(Bom.) and the decision in the case of Ms. Nita A Patel, 7 ITR 659(Mum.) and several other decisions as placed in paper book and contended that the assessee is entitled for treating this property as long term capital asset as the flat was allotted to the assessee on 26<sup>th</sup> July, 1992 based upon the letter issued by the Builder confirming the booking of flat. The assessee also relied upon the Circular No. 471 dated 15<sup>th</sup> October 1986 and also circular no. 672 dated 16-12-1993 issued by CBDT whereby the date of allotment will be treated as date of construction of the flat for the purposes of Section 54/54F of the Act.

8. The ld. D.R., on the other hand, relied upon the decision in the case of Hon'ble Delhi High Court in the case of Gulshan Malik v. CIT (214) 43 taxmann.com 200 (Delhi) and submitted that the flat shall be deemed to be acquired when the agreement to sell has been entered into by the assessee

with the Builder and hence period of holding shall have to be calculated from the date of agreement to sale with the Builder. It is also submitted that the indexation cannot be allowed on the total cost but is allowable based on the actual payments made by the assessee from time to time and that too from the date of agreement to sale with the Builder provided the assets is long term capital asset.

9. We have considered the rival contentions and also perused the material available on record including the case laws cited by the parties. We have observed that the assessee has booked flat bearing No. 601 in 6<sup>th</sup> floor in the building known as Pujit Plaza situated at plot No. 67, Sector 11, Belapur, Navi Mumbai for a consideration of Rs. 4,80,150/- on 26<sup>th</sup> July, 1992 wherein the builder agreed to sell the flat and the assessee agreed to buy the flat on consideration to Rs.4,80,150/-. A letter was issued by the builder Apex Hotel Enterprises Pvt. Ltd. dated 26-07-1992 wherein booking was confirmed by the builder of the flat in favour of the assessee and the said builder agreed to sell and the assessee agreed to purchase the office flat on payment of stated consideration. It was agreed by the Builder to execute regular agreement of sale once full and final consideration is paid by the assessee to the builder. The assessee has made the installment payments slab wise from time to time over a period of time. However, we have observed that the assessee has written a letter to the Builder Apex Hotels Enterprises Private Limited dated 10-03-2008 whereby it was stated that a beneficial right and interest in the flat was acquired by the assessee under the allotment letter dated 01-08-1994 issued by the Builder with respect to flat bearing No. 601 in 6<sup>th</sup> floor in the building known as Pujit Plaza situated at plot No. 67, Sector 11, Belapur, Navi Mumbai, which is now proposed to be sold by the assessee in March 2008 . The said letter dated 10-03-2008 addressed to the Builder is placed on record in paper book/page 22/25 filed by the assessee. However, the assessee has not placed the said allotment letter dated 01-08-1994 on record in the

paper book filed with the Tribunal for our study and perusal to determine whether in fact the assessee acquired rights, title and interest in the flat vide the said allotment letter dated 01-08-1994. The order of the AO did mention about this allotment letter dated 01-08-1994. CBDT Circular No. 471 dated 15<sup>th</sup> October 1986 and also CBDT circular no. 672 dated 16-12-1993 stipulates that in case of allotment of flat under self financing scheme of Delhi Development Authority(DDA) and co-operative societies , the date of allotment shall be the date of construction for the purpose of Section 54/54F of the Act. Thus, by virtue of allotment letter dated 01-08-1994 , prima facie it appears that the assessee has acquired the interest , rights and title in the property but the said allotment letter dated 01-08-1994 is not placed on record by the assessee to enable us to study detailed terms and conditions. The matter in our considered view, need to be set aside and restored to the file of the AO for re-determination of the issue on merits by the AO after examining the terms and conditions of allotment letter dated 01-08-1994 to enable the AO to determine whether the assessee has in-fact acquired rights , title and interest in the said flat by virtue of the said allotment letter dated 01-08-1994 . The assessee has sold the flat in March 2008 and hence if it is held by the AO that the assessee acquired rights, title and interest in the flat w.e.f. 01-08-1994 i.e. the date of allotment, the gains shall be brought to tax as long term capital gains. The assessee will be allowed to file all necessary evidences and explanations before the AO to support his contentions to determine the actual date when the assessee acquired rights, title and interest in the flat. The AO shall grant sufficient and adequate opportunity of being heard in accordance with principles of natural justice in accordance with law. Since the assessee has made the payment for flat slab wise in installments over a period of time and hence , the assessee consequentially will be entitled for indexation computed with respect to the date of actual payments of installments slab wise made from time to time rather than indexation on total cost of flat from the date of allotment of flat as contemplated by the assessee despite the same

being not actually paid to the Builder. The appeal of the assessee is allowed in accordance with the terms indicated above. We order accordingly.

10. In the result, appeal filed by the assessee in ITA No. 2901/Mum/2012 for the assessment year 2008-09 is allowed for statistical purposes as indicated above.

Order pronounced in the open court on 20<sup>th</sup> September, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 20-09-2016 को की गई ।

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 20-09-2016

I

व.नि.स./ R.K., Ex. Sr. PS

**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)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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