

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एफ', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH, MUMBAI
 सर्वश्री राजेन्द्र, लेखा सदस्य, एवं , राम लाल नेगी न्यायिक सदस्य के समक्ष
BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./ITA No. **5653/Mum/2016**
 (निर्धारण वर्ष / Assessment Year: 2013-14)

Shri Umashankar P. Mishra, 27-B, Gopal Vihar Chawl, Navgaon, Dahisar (West), Mumbai - 400068	Vs.	The DCIT-13(3)(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACPM2434L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./ITA No. **5652/Mum/2016**
 (निर्धारण वर्ष / Assessment Year: 2013-14)

Smt. Vandana Mishra, 27-B, Gopal Vihar Chawl, Navgaon, Dahisar (West), Mumbai - 400068	Vs.	The DCIT-13(3)(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ACROM5217G		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./ITA No. **6167/Mum/2016**
 (निर्धारण वर्ष / Assessment Year: 2013-14)

The ACIT-13(3)(1), Room No. 229, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400068	Vs.	Shri Umashankar P. Mishra, 27-B, Gopal Vihar Chawl, Navgaon, Dahisar (West), Mumbai - 400068
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACPM2434L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Bhupendra Shah
 राजस्व की ओर से /Revenue by : Sh. B.S. Bist

सुनवाई की तारीख / **Date of Hearing :** 03/05/2017
घोषणा की तारीख/**Date of Pronouncement:** 02/08/2017

आदेश / O R D E R

PER RAM LAL NEGI, JM

ITA No. 5653/Mum/2016 and ITA No. 6167/Mum/2016 are cross appeals filed by the assessee and the revenue respectively against order dated 23/08/2016 passed by the Ld. CIT (A)-21, Mumbai, whereby the Ld. CIT (A) has partly allowed the appeal filed by the appellant/assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act'). ITA No. 5652/Mum/2016 has been preferred by assessee Smt. Vandana Mishra Wife of Sh. Umashankar Mishra against order dated 23/08/2016 passed by the Ld. CIT (A)-21, Mumbai, whereby the Ld. CIT (A) has partly allowed the appeal filed by the appellant/assessee against assessment order passed u/s 143 (3) of the Act. Since, all the three appeals are inter connected, the same were clubbed, heard together and are being disposed of by this common order for the sake of convenience.

ITA No. 5653/MUM/2016 (Assessment Year: 2013-14)

2. Brief facts which have given rise to the present appeal are that the assessee an individual filed his return of income for the relevant assessment year declaring the total income of Rs. 22,90,400/-. The return was processed and after scrutiny, AO determined the total income of the assessee at Rs. 96,87,900/-, after making disallowance of exemption claimed by the assessee u/s 54 of the Act and making addition of Rs. 73,97,500/- as income from short term capital gain and Rs. 9,414/- towards income from other sources. The AO noticed during assessment

proceedings that the assessee and his wife Ms. Vandana Mishra jointly booked Flat No. 2401, Grandeur Bldg., Vasant Marvel, Phase-II, Mallad (East) from M/s Sheth Developers Pvt. Ltd. for Rs. 46,02,500/- (including Rs. 9,61,165/- cost of improvement) in the year 2006. Allotment letter was issued on 26.11.2006. However, the agreement was registered on 21/08/2012. Thereafter, the assessee entered into an agreement with Sh. Divyesh Shah and Smt. Daksha Shah for sale of the said property on 27/08/2012 for the sale consideration of Rs. 1,20,00,000/- and earned Rs. 73,97,500/-. Thereafter the assessee and his wife jointly purchased Flat No. B-501 in Bldg. Aquaria Grand on 24/10/2012 for a total value of Rs. 4,07,37,00,000/- vide agreement dated 24.10.2012. Accordingly, the assessee claimed exemption of Rs. 57,23,796/- u/s 54 of the Act. AO rejected the claim of the assessee on the ground that the assessee had registered the agreement for purchase of flat No. 2401 aforesaid on 21.08.2012 and entered into an agreement for sale thereof on 27.08.2012, therefore the holding period is less than 36 months. Since, the flat in question was sold within 6 days from the date of entering in to an agreement for purchase of flat No 2401, the income arising out of the sale thereof is short term capital gain therefore the assessee is no eligible for exemption u/s 54 of the Act.

3. The assessee assailed the assessment order before the Ld. CIT (A). The Ld. CIT (A) after hearing the assessee partly allowed the appeal holding that though the assessee has earned long term capital gain however, the assessee is not eligible for exemption u/s 54 of the Act as the long term capital gain is not on account of sale of residential house but from sale of right in the property. Still aggrieved, the assessee is in appeal before the Tribunal.

4. The assessee has challenged the impugned order on the following grounds of appeal:

[A] Grounds of Appeal

1. *"In the facts and the circumstances of the case and in law, the learned Commissioner of Income Tax (A) erred in*
 - a) *disallowing claim of Rs. 57,23,796/- as deduction u/s 54 or alternatively, u/s 54F in respect of LTCG on sale of allotment letter having rights in the flat and*
 - b) *Allowing the benefit of indexation of cost of acquisition from the date of each payment instead of full on date of allotment by overlooking the orders of jurisdictional tribunal.*
2. *The AO wrongly charged interest u/s 234B and D and initiated penalty us. 271 (1) (c).*

[B] Relief Prayed

- 1 *To allow the LTCG claimed by the Appellant of Rs. 57,23,796/- as deduction u/s 54/54F and also to allow indexation of cost of acquisition on sale of allotment letter from the date of allotment rather than the date of payments of the Appellant.*
- 2 *To delete interest charged u/s 234 and initiation of penalty u/s 271(1)(c).*

[C] General

- *The appellant reserve rights to add alter or delete any portion of this appeal before its conclusion.*
- *This appeal is filed in time and may please be allowed in full.*
- *A detailed paper book along with case laws will be submitted at the time of hearing."*

5. Before us, the Ld. counsel for the assessee submitted that the Ld. CIT (A) has wrongly held that since the transfer is of a capital asset comprising of right to acquire property and not building which is residential house, the appellant is not entitled to deduction u/s 54 of the Act. Relying upon the judgments of Hon'ble Bombay High Court passed in *CIT Vs. Tata Services Ltd.* 122 ITR 594 and *CIT Vs. Vimal Lalchand Mutha* 187 ITR 613 and decision of Mumbai Tribunal rendered in *Anita D. Kanjani*, [2017]79 taxmann.com 67(Mumbai Tribunal) submitted that as per the settled law holding period in case of under construction property must be reckoned from the date of allotment and the asset/right acquire in under constructions property/building shall be the capital asset within the meaning of section 2 (14) of the Act. In view of the fact that allotment letter in this case was issued on 26.11.2006, the Ld. CIT (A) has rightly held that the gain is long term capital gain. Since, the gain is long term capital gain arising from the transfer of long term capital asset, the assessee is entitled for exemption u/s 54 of the Act as Flat No.B-501 in Aquaria Grand was purchased vide agreement dated 24/10/2012. The Ld. counsel further submitted that in alternative the assessee should be allowed the benefit of section 54F in respect of sale of rights in the flat and further the assessee should be allowed the benefit of indexation of cost of acquisition from the date of each payment.

6. On the other hand, the Ld. Departmental Representative (DR) relying on the assessment order submitted that the Ld. CIT (A) has wrongly held the gain in question as long term capital gain and the department has challenged the findings of the Ld. CIT (A) on this point. Since, the gain in question is a short term capital gain as held by the AO, the assessee is not entitled for benefit either u/s 54 or u/s 54F of the Act. The Ld. DR further contended that the facts of the cases relied upon by the assessee are

different from the facts of the present case, hence not applicable in the present case.

7. We have heard the rival submissions and also perused the material placed on record including the cases relied upon by the parties. The issues to be adjudicated in this case is whether the assessee is eligible for the benefit either u/s 54 or 54F of the fact? Secondly, whether the assessee is entitled for indexation of cost of acquisition from the date of each payment, as alleged by the assessee. For determination of these issues, first of all it is necessary to ascertain whether the gain in question is long term capital gain or short term capital gain? We notice that the letter of allotment in respect of Flat No. 2901 was issued on 26/11/2006 and since then the assessee made payments from time to time during the financial year 2006-07 to 2011-12. Payment of Rs. 36,41,335/- was, however, made before entering into the agreement for purchase of the said flat. As per section 2(42A) of the Act short term capital asset means a capital asset held by the assessee for not more than thirty-six months immediately preceding the date of its transfer and as per section 2(42B) short term capital gain means capital gain arising from the transfer of a short term capital asset.

8. In *Commissioner of Income Tax vs. Vimal Lalchand Mutha* (supra), the assessee had entered into an agreement on Nov. 8, 1977 for purchase of a flat, however, the formal agreement with the seller was executed on December 4, 1978. The assessee obtained possession in June 1981. In April 1983, the assessee entered into an agreement for sale of the right title and interest in the said flat and accordingly the same was transferred to the purchaser. The Mumbai Bench of the Tribunal held the gain as long term capital gain by computing the holding period from the date of agreement. In appeal, the Hon'ble Bombay High Court upheld the findings

of the Tribunal. In the latest decision of the coordinate Bench rendered in the case of *Anita D Kanjani vs. ACIT (supra)*, the coordinate Bench of the Tribunal has held that holding period has to be computed from the date of issue of allotment letter. In the present case, admittedly, the letter of allotment was issued in favour of the assessee on 26.11.2006 and agreement was entered into on 21.08.2012. Further agreement to sell the said property was entered into on 27.08.2012. Therefore, the Ld. CIT(A) has rightly, held the gain as long term gain by computing the holding period from the date of allotment of letter and not from the subsequent agreement. Hence, in the light of the cases discussed above, we uphold the findings of the Ld. CIT(A) and direct the AO to treat the gain in question as long term capital gain.

9. So far as the second question, as to whether the assessee is entitled for claim u/s 54 or 54F is concerned, since, we have already held the gain as long term capital gain, it is necessary here to determine whether the capital gain in question comes within the ambit of section 54 or 54F of the Act. On this point we find merit in the contention of the assessee that any right which can be called property falls within the definition of "capital asset". As has been held by the Hon'ble Bombay High Court in *CIT vs. Tata Services Ltd. 122 ITR 594*, the word "property" used in section 2(14) of the Act is a word of the widest amplitude and the definition has emphasized the same by the words "of any kind". Therefore anything which can be called property will be included in the definition of capital asset. Therefore, in the light of the ratio of law laid down by the Hon'ble High Court, we hold that the assessee's rights and interest whatsoever in the flat in question is an asset within the definition of section 2(14) of the Act. Hence, the Ld. CIT(A) has rightly held that the assessee's right to obtain property being capital asset gives rise to capital gain.

10. No doubt, the asset sold by the assessee, is not a building or land appurtenant thereto and a residential house, the income of which is chargeable under the head "income from house property" within the meaning of section 54 of the Act so as to get benefit of the said section.

11. However, the assessee is entitled to get benefit u/s 54F of the Act as the assessee has invested the long term capital gain for purchase of residential house within the meaning of section 54F of the Act. Therefore, the findings of the Ld. CIT(A) is contrary to the expressed provisions contained under section 54F of the Act. Section 54F clearly says that where the assessee being an individual, earns capital gain from transfer of any long term capital asset, not being a residential house and purchases residential house within a period of one year before or two years after the date from the date of such transfer, the capital gain shall be dealt with in accordance with the provisions of this section. Since, we have held the transfer of asset by the assessee as transfer of long term capital asset and the consequential gain as long term capital gain and since the assessee has invested the said capital gain for purchasing residential house in the same year, the assessee fulfills all the conditions contemplated under section 54F of the assessee. Although it appears from the record that the assessee has not taken the alternative plea of section 54F in the first appeal before the Ld. CIT(A) however, the benefit of the provisions of this section cannot be denied on this ground. We accordingly, modify the order of the Ld. CIT(A) to that extent and allow the benefit u/s 54F of the Act to the assessee. Accordingly, we direct the AO to compute the claim of the assessee in accordance with the provisions of section 54F of the Act.

12. Since, we have allowed the assessee's claim u/s 54F of the Act by holding the gain as long term capital gain we also direct the AO to allow the benefit of indexation of cost of acquisition from the date of each payment.

13. Ground pertaining to interest u/s 234B and D is consequential and the ground pertaining to initiation of penalty u/s 271(1)(c) is premature. Hence, we do not consider it necessary to adjudicate the same.

ITA No. 5652/MUM/2016 (Assessment Year: 2013-14)

14. The assessee has challenged the impugned order passed by the Ld. CIT(A) on the following grounds:

[A] Grounds of Appeal

1. *"In the facts and the circumstances of the case and in law, the learned Commissioner of Income Tax (A) erred in*
 - c) *disallowing claim of Rs. 40,95,732/- as deduction u/s 54 or alternatively, u/s 54F in respect of LTCG on sale of allotment letter having rights in the flat and*
 - d) *Allowing the benefit of indexation of cost of acquisition from the date of payment instead of date of allotment by overlooking the orders of jurisdictional tribunal.*
2. *The AO wrongly charged interest u/s 234B and D and initiated penalty us. 271 (1) (c).*

[B] Relief Prayed

1. *To allow the LTCG claimed by the Appellant of Rs. 40,95,732/- as deduction u/s 54/54F and also to allow indexation of cost of acquisition on sale of allotment letter from*

the date of allotment rather than the date of payments of the Appellant.

2. *To delete interest charged u/s 234 and initiation of penalty u/s 271(1)(c).*

[C] General

- *The appellant reserve rights to add alter or delete any portion of this appeal before its conclusion.*
- *This appeal is filed in time and may please be allowed in full.*
- *A detailed paper book along with case laws will be submitted at the time of hearing.”*

15. The assessee in this case is the wife of Sh. Umashankar, assessee in ITA No. 5653/Mum/2016 discussed above. Sh. Umashankar had purchased Flat No 2401 jointly with his wife and the present assessee had purchased Flat No 2402 jointly with her husband. Both the assesseees sold the said flats and entered into an agreement to purchase Flat No 501 jointly (discussed in ITA No 5653). On the basis of said agreement, both the assessee claimed exemption u/s 54 of the Act. The AO rejected the claim of both the assesseees holding that the income in question being short term capital gain the assesseees are not entitled for the benefit u/s 54 of the Act. So, the facts of both the cases are identical except the amount of sale consideration of assets sold by the assesseees and the amount of exemption claimed in both the case. Therefore, the assessee in this case has challenged the impugned order on the identical grounds.

16. Since we have decided the identical grounds in ITA No 5653/Mum/2016 aforesaid, we decide this appeal on the sale lines. Accordingly, we direct the AO to treat the gain from sale of asset in

question as long term capital gain and to compute the exemption as per the provisions of section 54F of the Act. We further direct the AO to allow the benefit of indexation of cost of acquisition from the date of payment.

17. Ground pertaining to interest u/s 234B and D is consequential and the ground pertaining to initiation of penalty u/s 271(1)(c) is premature. Hence, we do not consider it necessary to adjudicate the same.

ITA No. 6167/MUM/2016 (Assessment Year: 2013-14)

The Department has challenged the impugned order passed in respect of assessee sh. Umashankar Mishra on the following grounds:

1. *“Whether on the facts and the circumstances of the case and in law, the ld. CIT (A) erred in treating the gain on sale of residential flat as Long Term Capital Gain when the sale has been made within a period of less than 36 months from the date of registration of the said flat.*
2. *The appellant prays that the order of the CIT (A) on the above ground be set aside and that of the Assessing Officer be restored.*
3. *The appellant craves leave to amend or alter grounds or add a new ground which may be necessary.”*

18. Before us, the Ld. DR submitted that the Ld. CIT (A) has wrongly held the gain arising out of the sale of the flat no. 2901 as long term capital gain because the agreement for purchase of the said flat was entered into on 21.08.2012 and the sale agreement was executed on 27.08.2012 which clearly indicates that the holding period of the assessee is less than 36 months. The assessee has also failed to produce documentary evidence to establish his possession.

19. On the other hand, the Ld. counsel for the assessee relying on the law laid down by the Hon'ble Bombay High Court in *Commissioner of Income Tax Vs. Vimal Lalchand Mutha 187 ITR 613* and decision rendered by the Mumbai Bench of the Tribunal in *Anita D Kanjani Vs. ACIT (2017) 79 taxmann.com 67* submitted that the period of holding of the capital asset/house is taken from the date of allotment letter and not from the actual possession of the flat. Therefore, the Ld. CIT (A) has rightly held that the income arising out of the sale of the property in question comes within the ambit of long term capital gain.

20. We have heard the rival submissions and also perused the material placed before us. The revenue has challenged the findings of the Ld. CIT(A) in holding the gain from sale of asset in case of assessee Sh. Umashankar as long term capital gain. Since, we have upheld the findings of Ld. CIT(A) on this issue in assessee's appeal the ITA No.5653/Mum/2016, the appeal of the revenue has become infructuous. Hence, we dismiss the sole ground of appeal raised by the revenue.

In the result, appeals filed by the assesseees are partly allowed and the cross appeal filed by the revenue is dismissed.

Order pronounced in the open court on 2nd August, 2017.

Sd/-

(RAJENDRA)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 02 /08/2017

Alindra, PS

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER

आदेश 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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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