आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'सी',मुंबई।

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

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**
श्री जी. मंजूनाथ, लेखा सदस्य**,** के समक्ष

Before Shri JOGINDER SINGH, Judicial Member, and
Shri G. MANJUNATHA, Accountant Member

ITA NOs.389 & 4473/Mum/2015
Assessment Years: 2010-11 & 2011-12

M/s Paradise Textiles Pvt. Ltd. 113-11th Floor, 68, Brij Kutir, Nepean Sea Road, Mumbai-400006	**बनाम**/ Vs.	DCIT Circle-5(2), Mumbai
(निर्धारिती /Assessee)		(राजस्व /Revenue)
P.A. No.AAACP7725L		

निर्धारिती **की ओर से /** Assessee by	Shri Naresh Kumar
राजस्व **की ओर से** / Revenue by	Shri Rajat Mittal -DR

सुनवाई की तारीख **/ Date of Hearing :**	**28/11/2017**
घोषणा की तारीख/**Date of Pronouncement**	**28/11/2017**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

Both these appeal are by the assessee for Assessment Years 2010-11 and 2011-12 only challenging the impugned orders dated 03/11/2014 & 21/05/2014 of the Ld. First Appellate Authority, Mumbai, with respect to confirming the gain on sale of rights of flats no.1703 and 1704 at Ashok Garden as Short Term Capital Gains instead of Long Term Capital Gains, offered by the assessee. No other ground was agitated by the assessee.

2. During hearing, the Ld. counsel for the assessee, Naresh Kumar, advanced arguments, which is identical to the ground raised by explaining that rights were purchased in the flats by the assessee and the agreement was registered on 09/06/2007. It was fairly agreed that possession of the flats was not taken by the assessee and merely rights were sold on 10/12/2009, therefore, it may be taxed as long term capital gain. Reliance was placed upon the decision from Hon'ble Punjab & Haryana High Court in the case of CIT vs Ved Prakash & Sons (HUF) (1994) 207 ITR 148 (P & H) along with Circular No.471 dated 15/10/1986.

Further reliance was placed upon the decision in CIT vs Vimal Lalchand Mutha (1991) 187 ITR 613 and other decisions of the Tribunal and also Hon'ble Gujarat High Court placed on record in the paper book running into 48 pages.

2.1. On the other hand, Shri Rajat Mittal, Ld. DR, strongly defended the impugned order by placing reliance upon a later decision from Hon'ble Delhi High Court in the case of Gulshan Mallik vs CIT (2014) 43 taxman.com 200(Del.) by contending that Hon'ble High Court has duly considered/distinguished the decision in the case of CIT vs Ved Prakash & Sons (supra), relied upon by the assessee and even the SLP, preferred by the assessee, was dismissed by Hon'ble Apex Court. This factual matrix was not controverted by the Ld. counsel for the assessee.

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee declared income of Rs.96,60,860/- in its return filed on 13/10/2010 (Assessment Year 2009-10). Likewise, for Assessment Year 2010-11, the assessee

declared nil income in its return filed on 30/09/2011, declaring loss of Rs.5,87,294/- but declared books profit at Rs.35,80,941/-. Both the returns were processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter the Act) and subsequently selected for scrutiny, consequently, statutory notices u/s 143(2) and 142(1) along with questionnaire dated 13/12/2013 were served upon the assessee. The assessee is engaged in the business of investment, financing in shares and securities and dealing in properties. The assessee booked two flats in Financial Year 2004-05, registered in Financial Year 2007-08 and sold on in December, 2009. The assessee made initial payment of Rs.3,08,810/- on 05/03/2005 and further payment was made on 14/10/2009. The assessee made total payment of Rs.68,78,700/- and Rs.75,06,200/-, respectively of the flats. The assessee never occupied the flats. The stand of the Revenue is that as per transfer of Property Act, section 53A, possession is necessary for ownership purposes. Thus, before adverting further, we are reproducing hereunder the relevant provision of section 53A of the Transfer of Property Act for ready reference:-

"53A. Part performance

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

***PROVIDED** that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."*

The aforesaid section, if analyzed, it speaks about taking possession of the property or any part thereof or the transferee, being already in possession, whereas, in the present cases, no possession was taken by the assessee and only rights were sold. The assessee made the payments in 2009 and thereafter he got the rights to sale the property, therefore, prior to that he was having no right to sale the same. The reply of the assessee vide letter dated 12/03/2013 (reproduced in the assessment order) was duly considered. There is no dispute to the fact that the final

payment was made by the assessee in September 2009 and subsequently, without taking the possession of the flats, the rights were sold in the December 2009. The assessee received the rights or the flat, when he made final payments to the builder in September, 2009. Thus, in our view, the capital gain arose on the transaction in September, 2009, which has to be treated as Short Term Capital Gain as the holding period over the flats was less than three years. Our view find support from the decision, on identical facts and the ratio laid down therein by Hon'ble Delhi High Court, in the case of Gulshan Mallik vs CIT (2014) 43 taxman.com 200(Del.)/(2014) 223 taxman 243(Del.). The relevant portion of the same is reproduced hereunder for ready reference and analysis:-

> "This is an appeal filed against the order of the Income Tax Appellant Tribunal ("ITAT") in ITA No. 161/Del/2012 dated 27.02.2013, which upholds the order of the Commissioner of Income Tax (Appeals) ("CIT-A") confirming the assessment order of the Assessing Officer ("AO"). The short question of law that arises is whether on facts, capital gains are taxable as long-term or short-term capital gains. The brief facts are as follows:
>
> 2. The appellant (the assessee) and his wife had booked an apartment vide an application dated 31.07.2004, by payment of a booking amount of Rs. 2,00,000/-on 3.08.2004 and consequently, it is claimed, acquired rights or interests in the same. The builder DLF Universal Limited ("DLF") issued a letter dated 6.08.2004 provisionally allotting the apartment and two parking spaces, stating specifically the receipt of Rs. 2,00,000/- (Annexure 3). Consequent to this, regular payments were made per the payment plan of the builder. A buyer's agreement was executed on 4.11.2004 between DLF and the allottees i.e. the appellant and his wife. Per the payment schedule, a total payment of

Rs. 87,12,500/- was made from 31.07.2004 to 03.08.2006 towards the purchase of the apartment. Following this, the appellant and his wife entered into an agreement to sell dated 2.11.2007 to sell their booking rights/rights or interest in the apartment to Smt. Srilekha Nayak for a sum of Rs. 1,44,87,500/-. The period between acquisition and sale of the booking rights in the apartment is claimed to be 39 months and 2 days, thus greater than 36 months, i.e. from 31.07.2004 to 02.11.2007. The appellant subsequently filed return of income on 31.3.2009 for the assessment year 2008-2009, with income declared to be Rs. 3,84,874/-. In the computation of income, the appellant had declared a long term capital gain of Rs. 31,35,740/- on the sale of booking rights/extinguishment of rights in the apartment. An exemption was claimed under Section 54 of the Act, 1961 as the same was invested in purchase of another apartment in June 2008.

3. After the return was processed under Section 143(1) of the Act and the case was thereafter selected for compulsory scrutiny, an order of assessment was passed under Section 143(3) of the Act on 30.12.2010 whereby an addition of Rs. 28,20,000/- was made by the Assessing Officer (AO) to the income declared by the appellant on account of short-term capital gain. No deduction under Section 54 was allowed since it is available only in respect of long-term capital gains. The total income was thus assessed to be Rs. 32,10,145/-. The appeal against the order of the AO before CIT-A was dismissed by an order dated 25.11.2011, on the grounds that the rights in the apartment accrued to the appellant only when the apartment was purchased by the agreement dated 4.11.2004. It was also noted that only rights in the property and not title were transferred vide the agreement of 2.11.2007 as the assessee never had possession of the apartment. The assessee's second appeal before the ITAT was also dismissed vide order dated 27.02.2013 on the ground that no rights in the property accrued to the appellant/allottees on the date of filing of the application for allotment i.e. 31.7.2004, as notes 1 and 2 enclosed with the confirmation letter dated 06.08.2004 received in response to the allotment application states clearly that no rights to the property would accrue to the allottees until the buyer's agreement was signed and returned; the buyer's agreement was executed only on 4.11.2004. Consequently, the ITAT found that the capital asset was sold within a period of 36 months thus rendering the profits from the sale taxable as short-term capital gains, which do not qualify for the deduction under Section 54.

4. The question that arises for consideration is whether any right accrued to the assessee by way of the application for allotment that can be considered a capital asset; this would determine whether the date of application for allotment of the apartment or the date of the buyer's agreement ought to be considered the date of acquisition of the capital asset that was sold on 2.11.2007 as well as whether the capital gain is taxable as long-term or short-term capital gains.

5. The appellants submit that by way of application dated 31.7.2004 for allotment and payment of the booking amount, the appellant had acquired the "right to purchase the property"/booking rights, which were extinguished by execution of the agreement to sell dated 2.11.2007 in favour of Smt. Srilekha Nayak, thus making his booking rights a long-term capital asset, held for a period of 39 months and 2 days. Alternatively, the appellant submits placing reliance on CIT v.

Ved Parkash & Sons (HUF) [1994] 207 ITR 14873 Taxman 70 (Punj. & Har.) that rights in the apartment were acquired on the date of receipt of allotment letter i.e. 6.8.2004, by which the apartment was provisionally allotted to him, which rights were sold on 2.11.2007 thus making his right in the apartment a long-term capital asset. The two grounds for this submission are first, that Section 2(47) of the Act, which defines "transfer" in relation to a capital asset, is a wide and inclusive definition that encompasses even transfer of a right in property, thus including within its ambit, transfer of booking rights, second, that a combined reading of Sections 2(14) and 2(47) of the Act show that transfer of a capital asset is not restricted to transfer of ownership in immovable property alone. The learned counsel for the Revenue, on the other hand, relies on the order of the learned ITAT member who held that booking rights accrued in the assessee only once the buyer's agreement of 4.11.2004 was signed, thus making the profits from sale taxable as short-term capital gains.

6. It would be appropriate to extract Section 2(14), 2(42A), 2(47) here in relevant part. Section 2 of the Act reads:

'2. In this Act, unless the context otherwise requires,

(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include

**	**	**

(42A) "short-term capital asset" means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer:

**	**	**

(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 ; or
(iii)	the compulsory acquisition thereof under any law ; or
(iv)	in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or
(iva)	the maturity or redemption of a zero coupon bond ; or
(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 (4 of 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.	
Explanation 1. **	**	**

Explanation 2. For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India .'

7. It is clear that a "capital asset" under the Act is property of "any kind" that is "held" by the assessee. Necessarily, a capital asset must be transferable. Thus, to understand what kind of property can be considered a capital asset, it would be apposite to refer to the definition of transfer in Section 2(47) of the Act. Section 2(47)(v) and (vi), and Explanation 2 make it adequately clear that possession, enjoyment of immovable property, as well as an interest in any asset are all transferable "capital assets". The reference to acquisition "by way of any agreement or any arrangement or in any other manner whatsoever" establishes that it is not conveyance of property or the doctrine of part performance (enacted through Section 53A of the Transfer of Property Act) which result in enforceable rights, for the purposes of the Income Tax. The scheme of the Act puts it beyond doubt that even rights or interests in a property are kinds of property that are transferable capital assets. Thus, there is no doubt that booking rights or rights to purchase the apartment or rights to obtain title to the apartment are also capital assets that can be transferable. However, even while this Court agrees with the submissions of the appellant, it is pertinent to note that this question does not arise in these facts. Neither the CIT-A nor the ITAT have held that a capital asset can only be title to/ownership of the apartment. The order of the CIT-A locates the source of the booking rights i.e. date of acquisition of capital asset as the buyer's agreement dated 4.11.2004, which finding is subsequently confirmed by the ITAT by additionally relying on the receipts at the time of confirmation of allotment. Thus, in these facts, the question of whether the booking rights are a transferable capital asset is not contentious. The judgment in Ved Parkash (supra) is also consequently of no assistance in this matter since the reasoning therein turns on whether "capital asset" refers only to title to property as opposed to other rights/interests in the property.

8. This being the case, the only question that arises for consideration is whether the booking rights to the apartment accrued to the assessee on the date of application for allotment/confirmation of allotment or on the date of execution of the agreement to sell i.e. the buyer's agreement. This Court is of the opinion that a right or interest in an immovable property can accrue only by way of an agreement embodying consensus ad idem. The nature of the right sought to be transferred here is the right to purchase the apartment and obtain title, termed "booking

rights". Only that agreement which intends to convey these rights according to both parties can be considered as the source of accrual of rights to the assessee. The confirmation letter dated 6.8.2004 (Annexure 3) specifically states first, that no right to provisional/final allotment accrues until the Buyer's Agreement is signed and returned to the builders and second, that no right to claim title/ownership results from the confirmation letter itself. Thus, it is clear that the Builders do not intend to convey any right of provisional/final allotment or any right to claim title/ownership under the confirmation letter. There being no intention to convey rights in this document, it would be impermissible for this Court to find that the right to obtain title/"booking rights" emanated from the confirmation letter. These rights may only be located in the Buyer's agreement, and thus, the date of acquisition of the capital asset must be considered the date of signing of said agreement i.e. 4.11.2004

9. These rights were transferred by the assessee on 2.11.2007. Thus, this Court is of the opinion that the capital asset in the form of these rights was held for a period of 35 months and 28 days, i.e. a short-term capital asset thus rendering the profits from the transfer of this capital asset taxable as short-term capital gains.

10. Ved Parkash (supra), in any event, can be distinguished from the facts in this case. In Ved Parkash (supra), the assessee sought to claim that the date of acquisition of the capital asset was the date of entering into the agreement to sell with the builder, by which the assessee had also received possession of the property. The Department, on the other hand, claimed that according to the conditions of the agreement, no right, title or interest in the property would be conveyed to the assessee until all instalments due and payable under that agreement were completed. It was also sought to be argued that the assessee became the titleholder to the property only once all the instalments were paid, and that title to the property was the only capital asset that could be transferred. It was in the context of these arguments that the Court held first, that it is incorrect to say that the assessee had no right or interest in the property until the completion of payment of all instalments under the agreement as the assessee was a beneficial owner from the date of signing the agreement, having been put in possession of the property as of that date and second, that Section 2(42A) of the Act, in any event only uses the term "held" and not "owned", thus indicating that a capital asset need not only refer to full title over any property. Ved Parkash (supra) can thus be distinguished on two grounds, first, that in the instant matter, booking rights are sought to be sourced in the allotment application/confirmation letter and not in an agreement to sell, second, no right of possession or similar beneficial interest was conveyed to the assessee in the instant case when the application for allotment was made/confirmation letter was received. The agreement to sell was considered to be the source of a beneficial interest to the assessee in Ved Parkash (supra) only because the right of possession had been transferred to the assessee along with the agreement to sell. There cannot be any parity between the allotment application/confirmation letter in the instant case and the agreement to sell in Ved Parkash (supra), since the confirmation letter specifically states that no right of provisional allotment/final allotment will result from it to the assessee.

11. This Court is thus of the opinion that there is no legal infirmity in the order of the ITAT. The appeal is thus dismissed along with pending applications."

2.3. It is noted that in the aforesaid decision, the Hon'ble High Court duly considered/distinguished the decision in the case of CIT vs Ved Prakash & Sons (HUF) (supra), wherein, in Para-8 onwards, clearly held as under:-

8. This being the case, the only question that arises for consideration is whether the booking rights to the apartment accrued to the assessee on the date of application for allotment/confirmation of allotment or on the date of execution of the agreement to sell i.e. the buyer's agreement. This Court is of the opinion that a right or interest in an immovable property can accrue only by way of an agreement embodying consensus ad idem. The nature of the right sought to be transferred here is the right to purchase the apartment and obtain title, termed "booking rights". Only that agreement which intends to convey these rights according to both parties can be considered as the source of accrual of rights to the assessee. The confirmation letter dated 6.8.2004 (Annexure 3) specifically states first, that no right to provisional/final allotment accrues until the Buyer's Agreement is signed and returned to the builders and second, that no right to claim title/ownership results from the confirmation letter itself. Thus, it is clear that the Builders do not intend to convey any right of provisional/final allotment or any right to claim title/ownership under the confirmation letter. There being no intention to convey rights in this document, it would be impermissible for this Court to find that the right to obtain title/"booking rights" emanated from the confirmation letter. These rights may only be located in the Buyer's agreement, and thus, the date of acquisition of the capital asset must be considered the date of signing of said agreement i.e. 4.11.2004

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transferred. It was in the context of these arguments that the Court held first, that it is incorrect to say that the assessee had no right or interest in the property until the completion of payment of all instalments under the agreement as the assessee was a beneficial owner from the date of signing the agreement, having been put in possession of the property as of that date and second, that Section 2(42A) of the Act, in any event only uses the term "held" and not "owned", thus indicating that a capital asset need not only refer to full title over any property. Ved Parkash (supra) can thus be distinguished on two grounds, first, that in the instant matter, booking rights are sought to be sourced in the allotment application/confirmation letter and not in an agreement to sell, second, no right of possession or similar beneficial interest was conveyed to the assessee in the instant case when the application for allotment was made/confirmation letter was received. The agreement to sell was considered to be the source of a beneficial interest to the assessee in Ved Parkash (supra) only because the right of possession had been transferred to the assessee along with the agreement to sell. There cannot be any parity between the allotment application/confirmation letter in the instant case and the agreement to sell in Ved Parkash (supra), since the confirmation letter specifically states that no right of provisional allotment/final allotment will result from it to the assessee."

It is also noted that the assessee challenged the aforesaid decision of Hon'ble Delhi High Court before Hon'ble Apex Court, wherein, the SPECIAL LEAVE TO APPEAL (C) NO(S). 30670/2014 was dismissed, meaning thereby the case was decided in favour of the Revenue. No contrary decision was brought to our notice by the assessee.

2.4. So far as, the decision in the case of CIT vs Vimal Lalchand Mutha (1991) 187 ITR 0613 (Bom.) is concerned, the question before the Hon'ble High Court was with respect to validity of Long Term Capital Gain, where the assessee was holding rights for more than 36 months before transferring the same, whereas, in the present appeals, before us, the holding period is less than three years/36

months. It is also noted that the Hon'ble Delhi High Court affirmed the decision of the Tribunal considering various aspects including section 2(42A) of the Income Tax Act, 1961, section 2(14), 2(47) along with explanation. The Hon'ble Delhi High Court considered the question 'whether the booking rights to the apartment accrued to the assessee on the date of application for allotment/confirmation of allotment or on the date of execution of the agreement to sale i.e. buyers agreement'. The Hon'ble Court held that a right or interest in any immovable property accrues only by way of an agreement embodying consensus ad idem. The assessee made the final payment in September 2009 only, therefore, the decision in the case of Ved Prakash & Sons (HUF) is not applicable to the facts of the present appeals. The final payment was made in September, 2009 and thereafter the assessee got the right to sale the property and before that he was having no right to sale the same. So far as, the other cases, relied upon by the assessee, are concerned (made available in the paper book) since, either the facts are different and no decision from Hon'ble Apex Court was cited, whereas, as mentioned earlier, the SLP

against the decision from Hon'ble Delhi High Court in the case of Gulshan Mallik vs CIT (supra) was dismissed by Hon'ble Apex Court and further the decision of Hon'ble Delhi High Court is dated 14/03/2014, whereas, the decision in the case of Ved Prakash & Sons (HUF)(supra) was reported in 1994. Therefore, respectfully following the same, we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), resultantly; both the appeals of the assessee are having no merits, therefore, dismissed.

Finally, the appeals of the assessee are dismissed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 28/11/2017.

Sd/-	***Sd/-***
(G. Manjunatha)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 28/11/2017
*Shekhar, P.S.*नि.स.,

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त,(अपील) / The CIT, Mumbai.

4. आयकर आयुक्त / CIT(A)- , Mumbai
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**