

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI
BEFORE SHRI R.C.SHARMA, AM AND SHRI RAVISH SOOD, JM**

ITA No.4151/Mum/2014
(निर्धारण वर्ष / Assessment Year:2009-10)

Shri Manilal Jawaharmal Wadhwa, 205, Blue Diamond Building, Juhu Tara Road, Near SNDT College, Santacruz (West), Mumbai 400 049	बनाम/ Vs.	ITO Ward-19(2)(4), Piramal Chambers, Room No. 310, 3 rd Floor, Parel Mumbai-400 012
स्थायी लेखा सं./जीआइआर सं./PAN No.		AAKPW0582F
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Subhash S. Shetty, A.R
प्रत्यर्थी की ओर से / Respondent by	:	Shri Suman Kumar, D.R

सुनवाई की तारीख / Date of Hearing	:	23.04.2018
घोषणा की तारीख / Date of Pronouncement	:	25.04.2018

आदेश / ORDER

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-18, Mumbai, dated 07.03.2014 which in itself arises from the order passed by the A.O under Sec. 143(3) of the Income tax Act, 1961 (for short 'Act'), dated 19.12.2011. The assessee

assailing the order of the CIT(A) had raised before us the following grounds of appeal:

“Grounds of appeal against the order dated 07.03.2014 passed by the Ld. Commissioner of Income-tax (Appeals)-18, Mumbai.

Following grounds of appeal are without prejudice to each other:

- 1. The Ld. Commissioner of Income Tax (Appeals) committed a gross error of law and fact in upholding the conclusion of the Assessing Officer that the Long Term Capital Gains on transfer of the flat by the appellant was assessable in assessment year 2008-2009 and not in assessment year 2009-2010 as claimed by appellant.*
- 2. The Ld. Commissioner of Income Tax (Appeals) grossly erred in not appreciating that the possession of the flat was given to the transferee and the balance of the consideration was received by the appellant on 20.05.2008 i.e. in the previous year relevant to assessment year 2009-2010 and therefore the sale/transfer was completed giving rise to Capital Gains to be taxed only in assessment year 2009-2010.*
- 3. The Ld. Commissioner of Income Tax (Appeals) committed a gross error of law and fact in not dealing with but dismissing the remaining two grounds of appeal raised by the appellant as having become infructuous in view of the decision to tax the impugned Capital Gains in the earlier assessment year.*
- 4. The appellant craves leave to add to, amend, alter or delete all or any of the foregoing grounds of appeal.”*

2. Briefly stated, the facts of the case are that the assessee who is engaged in the business of share trading had filed his return of income for A.Y 2009-10 on 30.09.2009, declaring total income of Rs. nil after setting off business losses. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2).

3. During the course of the assessment proceedings the A.O observed that the assessee had offered long term capital gain of Rs.4,62,356/- on sale of Flat No. 15 in Jailaxmi Cooperative Housing Society Ltd. at Chandra Niwas, plot No. 786, 3rd Road, Khar (W), Mumbai, for a consideration of Rs.1,26,84,356/-. The assessee while computing the income under the head long term capital gain (for short ‘LTCG’) had claimed a deduction under Sec. 54 in respect of adjacent

flats bearing nos. 701 and 702 in 'C' wing, Pratap House at Shivaji Road, Vakola, Santacruz (E), Mumbai. It was observed by the A.O that from a perusal of the details, it stood revealed that the assessee had entered into an agreement for sale of flat to M/s Ramee Hotels Pvt. Ltd. on 21.03.2008 for a total consideration of Rs.1,26,84,356/-, and the agreement for sale was registered on 20.03.2008, with the Registering authority, Mumbai. Out of the total consideration an amount of Rs.1,24,30,669/- was received by the assessee in the A.Y 2008-09, and only an amount of Rs.2,53,687/- was received on 24.05.2008. The A.O holding a conviction that as the agreement for sale was registered on 20.03.2008 and the major part of consideration for sale was also received during the A.Y 2008-09, therefore, capital gain on sale of the aforesaid flat was liable to be assessed not in the year under consideration, viz. A.Y 2009-10, but rather, in the immediately preceding year, i.e. A.Y 2008-09. The assessee on being called upon by the A.O submitted that as the buyer was put into possession of the property on 24.05.2008, and he had on the said date itself received the balance sale consideration of Rs.2,53,687/-, therefore, the transaction of transfer of the property under consideration was completed only on 24.05.2008. The assessee in the backdrop of the aforesaid facts took support of the provisions of Sec. 2(47)(v) of the Act, to fortify his claim that the transfer of the property under consideration had concluded only in the period relevant to A.Y 2009-10. However, the A.O was not persuaded to be in agreement with the claim of the assessee and being of the view that as major part of the consideration was received by the assessee in A.Y 2008-09 and the buyer of the property was also put into possession during the said preceding year, therefore, observed that the transfer of the property stood concluded in A.Y 2008-09. The A.O further observed that as the assessee while computing his income had shown the sale value of the

property during the financial year 2007-08, as per the agreement at Rs.1,26,84,356/-, therefore, it could safely be concluded that he had accepted that the sale had taken place in A.Y 2008-09. The A.O on the basis of his aforesaid observations relating the transfer of the property to the preceding year, viz. A.Y 2008-09, thus computed the LTCG in the hands of the assessee for the year under consideration at Rs.nil.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee before him in the backdrop of the facts of the case, was however not persuaded to subscribe to the claim of the assessee and dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') took us through the facts of the case. It was submitted by the ld. A.R that the case of the assessee for A.Y 2008-09 was reopened by the department under Sec. 147 of the Act and the LTCG arising from the sale of the aforesaid flat was assessed in A.Y 2008-09. The order passed by the A.O under Sec. 143(3) r.w.s. 147 for A.Y 2008-09 was confirmed by the CIT(A). It was submitted by the ld. A.R that on further appeal the Tribunal vide its order dated 22.09.2017, following the judgment of the Hon'ble High Court of Bombay in the case of Chaturbhuj Dwarkadas Kapadia of Bombay Vs. CIT (2003) 260 ITR 491 (Bom) concluded that the long term capital gain on the sale of the property under consideration was liable to be assessed in the hands of the assessee in A.Y 2009-10. It was thus submitted by the ld. A.R that the issue pertaining to the year of assessability of the LTCG on the transfer of the property under consideration as on date stood supported by the aforesaid order of the coordinate bench of the Tribunal. It was further submitted by the ld.

A.R that the CIT(A) while disposing of the appeal had refrained to adjudicate the grounds of appeal No. 2 and 3, for the reason that as the LTCG on the transfer of the property was not to be brought to tax in the year under consideration, therefore, the said respective grounds were rendered infructuous. It was submitted by the ld. A.R that the CIT(A) be directed to adjudicate the grounds of appeal No. 2 and 3. Per contra, the ld. Departmental Representative (for short 'D.R') though relied on the orders of the lower authorities, but however, did not controvert the contention of the ld. A.R that as per the order of the Tribunal the LTCG on transfer of the property under consideration was to be assessed in the year under consideration, viz. A.Y. 2009-10.

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that the issue as regards the year of assessability of the income under the head long term capital gain on sale of Flat No. 15, Jailaxmi Cooperative Housing Society Ltd., Khar (W), Mumbai has been decided by a coordinate bench of the Tribunal, viz. ITAT "B" bench, Mumbai in the assessee's own case for A.Y 2008-09, viz. Manilal Jawaharmal Wadhwa Vs. ITO, Ward-19(2)(4), Mumbai (ITA No. 2825/Mum/2015, dated 22.09.2017). The Tribunal while concluding that the long term capital gain on the transfer of the property under consideration was liable to be assessed in the hands of the assessee in A.Y 2009-10, had observed as under :

5. *We have heard the rival contentions and gone through the facts and circumstances of the case. The ld. Counsel for the assessee Shri Vijaya Mehta filed chronology of events of the transaction which reads as under:*

Sr. No.	Date	Particulars
1.	28.01.2008	Received part payment of Rs.10,00,000/- against sale of flat.
2.	20.03.2008	Registration of agreement for sale of flat for a total consideration of Rs.1,26,84,356/-
3.	24.03.2008	Received part payment of Rs.1,14,30,669/-

4.	20.05.2008	Received balance payment of Rs.2,53,687/- received
5.	24.05.2008	Possession of flat given
6.	25.03.2009	New flat purchase by assessee and part payment made.
7.	30.07.2009	Full payment made for purchase of new flat.

The learned Counsel for the assessee stated that the possession was handed over on 24-05-2008 and also the balance payment of Rs. 2,53,687/- was received on 20-05-2008. The learned Counsel for the assessee drew our attention to the agreement registered between assessee and the purchaser dated 20-03-2008, wherein he has received out of total consideration of Rs. 1,26,84,356/- i.e. part payment of Rs. 1,24,30,669/- on 28.01 .2008 & 24-03-2008. The learned Counsel for the assessee drew our attention to clauses of the agreement wherein absolute title of the property will pass only on receipt of full and final payment and even the possession is to be given after receipt of full and final payment. The relevant clause reads as under: -

“And whereas the vendor shall simultaneously with the execution hereof execute an irrevocable Power of Attorney in favour of the Purchaser and its nominee to attend the office of the Concerned sub-Registrar of Assurances & City Survey Office & Municipal Corporation of Greater Mumbai for transfer of the said premises to the name of Purchases in case the Vendor fails to attend. However the purchaser will get absolute title the said premises only upon payments of full and final amount, as agreed.”

The learned Counsel for the assessee also drew our attention to letter of possession given on 24-05-2008, which reads as under: -

“That by and under a Conveyance Deed dated 20th Day of March 2008, the Jai Laxmi Co. Operative Housing Society Limited has sold, transferred & conveyed all that piece or parcel of land or ground situate at Khar in the Registration Sub District of Sandra bearing Final Plot No. 786 of Sandra Town Planning Scheme No. III admeasuring 945 square yards or thereabouts and bearing new cadastral survey no. F/1549 along with Three Storey Building standing on the aforesaid Plot consisting of 17 residential units which presently occupied by 17 members through their membership of the Vendor to Ramee Hotels Pvt. Ltd. the Purchaser thereof, have today handed over quiet, vacant & peaceful possession of my flat no. 15 which is one out of the said 17 residential units to the said Purchaser as against receipt of my share amounting to Rs. 1,26,84,356/- (Rupees one crore twenty six lacs eighty four thousand three hundred fifty six only) in terms of said Conveyance Deed.”

In view of this, the learned Counsel for the assessee stated that the transaction was completed only in 2009-10 and not in 2008-09.

6. We find that this issued is covered by the decision of Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia of Bombay Vs. CIT (2003) 260 ITR 491 (Bom), wherein it is held as under:

“ii. The above quoted findings of the Tribunal is apparently an error because the financial year ended on March 31, 1996, and the first day of the next financial year was April 1, 1996, and not April 1, 1997. According to the Tribunal, the letter dated February 18, 1999, shows that Floreat came into possession on the day next to March 31, 1996, i.e., April 1, 1997. As stated above, the day next to March 31, 1996, would be April 1, 1996, and not April 1, 1997, and even if April 1, 1997, is taken as a typing mistake, it could only be read as April 1, 1996, and if April 1, 1996, is the date on which Floreat/developer came into possession, then the possession was received by the developer during the financial year 1996-97 corresponding to the assessment year 1997-98, therefore, this finding of the Tribunal is erroneous because in this case we are concerned with the assessment year .1996-97 and not the assessment year 1997-98.”

7. Respectfully following the decision of Chaturbhuj Dwarkadas Kapadia of Bombay High Court (supra), we direct the AC to delete the addition of long term capital gain in this year and the assessee has already disclosed long term capital gain in AY 2009-10. Actually, the year of accessibility is AY 2009-10, which the assessee has already disclosed in the return of income.”

We have perused the aforesaid order of the coordinate bench of the Tribunal, and are persuaded to be in agreement with the contention advanced by the ld. A.R that the income from long term capital gain on the transfer of the property under consideration as held by the Tribunal, has to be brought to tax in the hands of the assessee in the year under consideration, viz. A.Y 2009-10. We thus set aside the order of the CIT(A) on the issue under consideration and direct the A.O to assess the long term capital gain on the transfer of the property under consideration in A.Y 2009-10, after considering the claim of deduction raised by the assessee under Sec. 54 in its return of income. Needless to say, the A.O shall during the course of the set aside proceedings afford a reasonable opportunity of being heard to the assessee. **The Ground of appeal No. 1 and 2** raised by the assessee before us are allowed.

7. We find that the CIT(A) had refrained from adjudicating the Grounds of appeal Nos. 2 and 3 before him, for the reason that as the long term capital gain on the transfer of the property under consideration was directed by him to be assessed in A.Y 2008-09, therefore, the said respective grounds of appeal were rendered as infructuous. As we have concluded that the long term capital gain on the sale of the property is to be assessed in the hands of the assessee in A.Y 2009-10, therefore, the CIT(A) is directed to adjudicate the Grounds of appeal No. 2 and 3 as were raised by the assessee before him. The **Ground of appeal No. 3** before us is restored to the file of the CIT(A) in terms of our aforesaid observations. The **Ground of appeal No. 4** being general in nature is dismissed as not pressed.

8. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court 25.04.2018

Sd/-

Sd/-

(R.C. Sharma)
ACCOUNTANT MEMBER

(Ravish Sood)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 25.04.2018

Ps. Rohit

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**