

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM]

I.T.A No. 1405/Kol/2017

Assessment Year : 2014-15

ITO, Ward-35(2), Kolkata

-vs-

Smt. Nalini Bothra.

[PAN: ADRPB 5103 F]

(Appellant)

(Respondent)

For the Appellant : Shri A. Bhattacharjee, Addl. CIT

For the Respondent : Shri A. Kochar

Date of Hearing : 13.06.2018

Date of Pronouncement : 04.07.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-10, Kolkata [in short the Id CIT(A)] in Appeal No. 219/CIT(A)-10/W-35(3)/16-17/Kol. dated 14.03.2017 against the order passed by the ITO, Ward-35(2), Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 27.12.2016 for the Assessment Year 2014-15.

2. The only issue to be decided in this appeal is as to whether the Id CITA was justified in granting exemption u/s 54 of the Act in the facts and circumstances of the case.

3. The brief facts of this appeal are that the assessee is an individual deriving income from capital gains and other sources. The return of income for the Asst Year 2014-15

was filed on 23.8.2014 declaring total income of Rs 6,37,430/- comprising of the following:-

Income from short term capital gains	- Rs 1,39,413/-
Income from other sources	- Rs 6,16,494/-

	Rs 7,56,907/-
Less: Deductions under Chapter VIA	Rs 1,18,479/-

	Rs 6,37,428/-

3.1. The assessee along with a co-owner Mr Manoj Kumar Bothra (husband of assessee) jointly received an allotment offer letter from South City Projects (Kolkata) Ltd vide their letter No. UN/5/00007 dated 12.4.2008 for allotment of Unit no. B at Floor No. 15 of Tower No. 5, CYPREES in the residential complex of South City Projects (Kolkata) Ltd, 375, Prince Anwar Shah Road, Kolkata – 700068 having super built up area of 3175 sq.ft against unit price of Rs 1,61,13,125/- along with car parking space for Rs 7,00,000/- totaling of Rs 1,68,13,125/- . The assessee's share of purchase comes to Rs 84,06,562/- being 50% of her ownership. The details of payments made thereon together with incidental expenses are as under:-

Sl	Cheque no	Dated	Name of bank	Amount
1	859785	03/05/2008	ICICI Bank	Rs. 5,00,000/-
2	859789	03/04/2009	ICICI Bank	Rs. 10,00,000/-
3	460318	03.04.2009	Canara Bank	Rs. 6,81,312/-
4	246606	18/01/2011	ICICI Bank	Rs. 17,24,606/-
5	288476	11/05/2011	ICICI Bank	Rs. 7,22,803/-
6	246608	11/05/2011	ICICI Bank	Rs. 7,22,803/-
7	288477	30/06/2011	ICICI Bank	Rs. 11,00,000/-
8	246609	30/06/2011	ICICI Bank	Rs. 6,22,803/-
9	668309	30/04/2013	ICICI Bank	Rs. 14,79,024/-
			Total	Rs. 88,30,550/-

3.2. The assessee sold this property along with the co-owner for a total consideration of Rs 5,50,00,000/- pursuant to an agreement dated 10.9.2013 entered into with Mrs Nitu Chowdhury and Mr Santosh Kr. Chowdhury and handed over possession of the property to them as on the date of agreement. The assessee's share of 50% of the sale

consideration was Rs 2,75,00,000/-. Thereafter the assessee along with the co-owner reinvested the sale consideration in purchase of another flat vide agreement dated 6.12.2013 with M/s Bangiya Vanijya Pvt Ltd for purchase consideration of Rs 3,70,00,000/- , out of which Rs 2,33,14,159/- was paid as on the date of agreement. The Id AO observed from the aforesaid facts as under:-

- a) The assessee was offered allotment letter by South City Projects (Kolkata) Ltd on 18.4.2008.
- b) The assessee paid purchase consideration in instalments commencing from April 2008 to April 2013.
- c) Thereafter the assessee took possession of the property as on 13.5.2013.
- d) The property was not a registered property and the assessee became owner of the property as per agreement basis with South City Projects (Kolkata) Ltd as part performance of the contract in terms of section 53A of the Transfer of Property Act that envisages that ‘Where any person contracts to transfer for consideration any immovable property by writing signed by him and the transferee has in part performance of the contract taken possession of the property or any part thereof then the transfer has been completed.’ So, it is evident that the term ‘possession’ of the property is an important factor in the case where property has been transferred in terms of provisions of section 53A of the Transfer of Property Act.

4. The assessee replied to the Id AO by stating that she had acquired the right to the said flat vide allotment letter dated 12.4.2008 and since this is the right in consequent to which the assessee got possession of the flat as on 13.5.2013, the transfer as per provisions of section 2(47) of the Act is to be considered from 12.4.2008 and not 13.5.2013. The Id AO observed that the assessee’s contention is not acceptable on the ground that in terms of provisions of section 2(47)(v) of the Act, transfer has been defined as ‘any transaction involving the allowing the possession of immovable

property to be taken or retained in part performance of contract of the nature referred to section 53A of the Transfer of Property Act'. So in terms of provisions of section 2(47) of the Act, he held that property was acquired by the assessee only on 13.5.2013 and the said property was transferred on 10.9.2013. Since the property was an immovable property which was held by the assessee only for 4 months under her possession, so the assessee's claim of long term capital gain from transfer of such property is not acceptable and gain earned by such transfer is to be considered as short term capital gain amounting to Rs 1,90,93,438/- (Rs 2,75,00,000 – Rs 84,06,562). Consequently the claim of deduction u/s 54 / 54F of the Act is also not eligible . The Id AO accordingly made an addition of Rs 1,90,93,438/- in the assessment.

5. The Id CITA observed that the assessee and her husband being co-owners of the property, received an allotment offer letter from South City Projects (Kolkata) Ltd vide their letter dated 12.4.2008 for allotment of Unit No. B at Floor No. 15 of Tower No. 5, CYPRESS in residential complex of South City Projects (Kolkata) Ltd at 375, Prince Anwar Shah Road, Kolkata – 700068 having super built up area of 3175 sq.ft against unit price of Rs 1,61,13,125/- along with car parking space for Rs 7,00,000/- totaling to Rs 1,68,13,125/-. So the share of the assessee's share of purchase comes to Rs 84,06,562/- being 50% of her ownership. He took cognizance of the fact that an information was obtained by the Id AO from South City Projects (Kolkata) Ltd u/s 133(6) of the Act from which the Id AO came to the conclusion that the possession of the property from South City Projects (Kolkata) Ltd was given only on 13.5.2013. The Id CITA appreciated the fact that the assessee and her husband had acquired the right, title and interest in the subject mentioned flat vide allotment letter dated 12.4.2008 itself pursuant to which monies were paid in installments towards the property, as per their demand upon completion of the stage wise construction. The Id CITA also appreciated the fact that this right was acquired pursuant to allotment letter dated 12.4.2008 and it was this right in consequent to which the assessee had become owner of the subject

mentioned flat and later this right has been transferred. There was no deed of conveyance. It is only a matter of nominating the transferees. The Id CITA held that the assessee and her husband had held the right in the property from 12.4.2008 onwards for more than three years and had subsequently transferred that right to Mrs Nitu Chowdhury and Mr Santosh Kr. Chowdhury on 10.12.2013. He held that as per section 2(47) of the Act , transfer in relation to a capital asset includes the extinguishment of any right therein. Hence it is this right in the capital asset which has been disposed off by the assessee and time gap is more than three years and hence the gain that arose is Long Term Capital Gain. The Id CITA also observed that section 2(14) of the Act defines Capital Asset as under:-

Property includes and shall be deemed to have always included any rights in or in relation to an Indian Company, including rights of management or control or any other rights whatsoever.

5.1. The Id CITA categorically held that the crucial date is the date of allotment and the payment of monies in installments is a follow up action. The Id CITA also placed reliance in support of his observations on the following decisions :-

- a) *Co-ordinate Bench of Mumbai Tribunal in the case of Anita D Kanjani vs ACIT reported in (2017) 79 taxmann.com 67 (Mumbai – Trib.) dated 13.2.2017 .*
- b) *Decision of Hon’ble Punjab & Haryana High Court in the case of Smt Madhu Kaul vs CIT, Chandigarh reported in (2014) 43 taxmann.com 417 (P&H High Court)*
- c) *Decision of Hon’ble Punjab & Haryana High Court in the case of Vinod Kumar Jain vs CIT, Ludhiana reported in 344 ITR 501 (P&H)*

5.2. The Id CITA held that the assessee had held the right in the property for more than three years and later transferred the same for a consideration and hence the gain arising on transfer of such long term capital asset should be construed only as long term capital gain. Consequently he directed the Id AO to grant exemption u/s 54 of the Act. Aggrieved, the revenue is in appeal before us.

6. We have heard the rival submissions. The Id DR vehemently relied on the order of the Id AO. The aforesaid facts remain undisputed and hence the same are not reiterated for the sake of brevity. It is not in dispute that the assessee had acquired the right in the immovable property pursuant to initial allotment letter dated 12.4.2008 issued by South City Projects (Kolkata) Ltd. It is not in dispute that the said allotment letter conferred right on the assessee to nominate any other person in her stead. The said right was subsequently transferred by the assessee in favour of Mrs Nitu Chowdhury and Mr Santosh Kr. Chowdhury on 10.12.2013 . This is nothing but a transfer of nominees in the subject mentioned property. There was no deed of conveyance executed either in favour of the assessee or in favour of Mrs Nitu Chowdhury and Mr Santosh Kr. Chowdhury. Section 2(14) of the Act clearly stipulates that ‘right in a property ‘ is a capital asset. Since this right has been acquired by the assessee pursuant to allotment letter dated 12.4.2008 and the same has been held by the assessee up to 9.12.2013 (i.e for more than three years) , the gain arose pursuant to such transfer would have to be construed only as long term capital gain, which has been rightly considered by the Id CITA. It is not in dispute that the assessee had duly reinvested the sale consideration in new property proposed to be purchased for Rs 3,70,00,000/- and out of which Rs 2,33,14,159/- was paid on 10.12.2013 itself (i.e the date of agreement). Hence the resultant gain is long term capital gain and since the reinvestment had happened within the stipulated time, the assessee would be entitled for exemption u/s 54 of the Act. We find that the Id CITA had rightly placed reliance on the decision of Hon’ble Punjab & Haryana High Court in the case of Vinod Kumar Jain vs CIT reported in 344 ITR 501 (P&H) among others, wherein the head notes are reproduced below:-

Section 2(29A), read with section 54 of the Income-tax Act, 1961 - Capital gains - Long-term capital gains/assets - Assessment year 1989-90 - Assessee was allotted a flat under scheme of DDA on 27-2-1982 - Delivery of possession of said flat took place on 15-5-1986 when actual flat number was allocated to assessee - Assessee sold said flat on 6-1-1989 - He claimed that capital gains arising on sale of flat was a long-term capital gain but according to revenue authorities, flat was allotted on 15-5-1986 and, therefore, capital gain was short-term capital gain -Whether under

self-financing scheme, an allottee gets title to property on issuance of an allotment letter and payment of instalments is only a consequential action upon which delivery of possession flows - Held, yes - Whether therefore, right of assessee prior to 15-5-1986 was a right in property and even prior to said date assessee was holding said flat - Held, yes - Whether, therefore, capital gain arising on sale of said flat was a long-term capital gain and, consequently, assessee was entitled to set off same under section 54 - Held, yes

Circulars and Notifications : CBDT Circular No. 471, dated 15-10-1996

6.1. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the judicial precedent relied upon hereinabove, we do not find any infirmity in the order of the Id CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed.

7. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 04.07.2018

Sd/-

[S.S. Godara]
Judicial Member

Sd/-

[M.Balaganesh]
Accountant Member

Dated : 04.07.2018

SB, Sr. PS

Copy of the order forwarded to:

1. ITO, Ward-35(2), Kolkata, Room No. 716, 7th Floor, Aayakar Bhawan Poorva, 110, Shantipally, E.M. Bye Pass, Kolkata-700107.
2. Smt. Nalini Bothra, 146/2, Old China Bazar Street, Kolkata-700001.
- 3..C.I.T.- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches

