

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3111/MUM/2016  
Assessment Year: 2011-12**

Shri Rajesh Atalram Rupani  
6<sup>th</sup> floor, Makhija Chamber,  
196 Turnover Road, Bandra  
(W),  
Mumbai-400050

**PAN No. AFAPR9279R**

**Appellant**

Vs. DCIT Circle -23(3)  
Matru Mandir,  
Grant Road,  
Mumbai400007

**Respondent**

Assessee by : Mr. S. M. Makhija, AR  
Revenue by : Mr. M.C. Omi Ningshen, DR

Date of Hearing : 06/04/2018  
Date of pronouncement : 04/07/2018

**ORDER**

**PER N.K. PRADHAN, AM**

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-34 [hereinafter 'CIT(A)'], Mumbai and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds raised by the assessee/appellant in this appeal are that the Ld. CIT(A) has erred in (i) holding that the allotment letter issued by the builder for booking rights coupled with part payment made towards purchase consideration did not constitute a capital asset in the

hands of the appellant relying on irrelevant consideration/erroneous interpretation of law and (ii) confirming the action of the Assessing Officer (AO) in holding that the surplus received by the appellant on cancellation of booking of a flat by the builder was not a capital receipt in the hands of the assessee but was income chargeable to tax under the head "income from other sources."

Therefore, it is submitted that the surplus/compensation received by the appellant on surrender of his rights in a property (booking rights in flat) may be held as capital receipt and consequential reliefs as per provisions of Sec. 54/54F be allowed.

3. Briefly stated, the facts of the case are the appellant claimed before the AO that he had booked one flat on 10.04.2007 at a total cost of Rs.30,58,640/-. He paid Rs.2,51,000/- on 02.04.2007 and a further amount of Rs.20,00,000/- on 04.05.2007 thus aggregating to Rs.22,51,000/-. The appellant explained to the AO that the flat was booked four years back for Rs.30,58,000/- and the above payment of Rs.22,51,000/- only was made. And no payment was made during the last four years for the remaining amount. During the impugned assessment year, the appellant claimed that the booking of the said flat was cancelled and he received Rs.38,17,520/- from the builder. The AO thus found that as against the payment of Rs.22,51,000/-, the appellant received Rs.38,17,000/- and thus Rs.15,66,520/- was additionally received during the year. This amount was offered by the appellant as capital gains and claim of deduction u/s 54F was made by stating that he had invested

Rs.34,00,000/- in the Mayfair Meridian, Thane. The appellant submitted before the AO a copy of letter allotment in respect of the said flat.

The AO arrived at a finding that (i) there was no transfer as there was neither any purchase in 2007, nor any sale in 2011, (ii) there was no transfer of capital asset in the instant case, (iii) money was given to the builder as advance as can be seen from the submission of the assessee that only Rs.22,51,000/- was paid as against total of Rs.30,58,640/- which remained as advance for four years without conversion into sale, (iv) as per clause 3 of the letter dated 10.04.2007 of Satya Realtors, it was only a provisional booking,(v) no agreement for sale was finalized in this case, (vi)in the balance sheet of the assessee as on 31.03.2011, the amount given to Satya Realtors, is shown under the head 'loan and advances' and not under the head 'fixed assets'.

The appellant further claimed before the AO that an amount of Rs.42,50,000/- was given to M/s Rajlaxmi Developer on 18.10.2011 for booking of flat and thus deduction u/s 54F be allowed. However, as per the AO the appellant had neither executed the purchase deed nor taken physical possession of the new flat. Thus the ownership of the property was never transferred to the appellant and therefore, the AO disallowed the claim of deduction u/s 54F.

Since the appellant had claimed deduction u/s 54 only on the basis of allotment letter without having actual possession of the property as well as without having registration of the said property in his name, the AO relying on the judgment of the Hon'ble Supreme Court in *M/s Suraj*

*Lamp & Industries Pvt. Ltd vs. State of Haryana* 340 ITR 1 (SC), denied the claim of exemption made u/s 54F of the Act.

From the above facts, the AO concluded that the entire arrangement was made to give money on interest to the builder and the consideration received was nothing but interest chargeable under the head "income from other sources". Therefore, the AO brought to tax income of Rs.15,66,000/- as "Income from other sources".

4. Aggrieved, by the order of the AO, the appellant filed an appeal before the Ld. CIT(A). Having gone through the submissions of the appellant and particularly the letter issued by the builder dated 10.04.2007 regarding the provisional booking of the flat and the letter dated 25.07.2011 issued by the builder for cancellation of booking of the flat, the Ld. CIT(A) held that (i) from the letter issued by the builder, it becomes clear that the transaction was treated as provisional booking and not even a regular booking and the letter was not in the form of allotment letter as claimed by the assessee in the written submissions, (ii) since the plans for building were not sanctioned, it is difficult to believe that the letter issued by the builder communicating about the provisional booking on plain paper and without any details such as plan of the building, details of the flats as annexure to the building was having any validity in legal/quasi legal terms in order to come to a conclusion that some kind of right was created on account of issue of such letter, which was worth of treating the same as capital asset.

As per the Ld. CIT(A), the transaction of purchase, sale of ownership flats in Maharashtra are governed by the Maharashtra

Ownership Flat Act (MOFA) of 1963. The Ld. CIT(A) thus observed that as per the provision of MOFA, mere provisional booking of the flat by the purchaser does not confer right to get conveyance of the ownership of flat to the purchaser. At the maximum, it confers right to get the agreement as prescribed by the MOFA registered from the builder.

The Ld. CIT(A) thus held that the right created by virtue of provisional booking of the flat was a limited right capable of specific performance for entering into an agreement as prescribed by the MOFA. This right cannot be considered as right embedded in immovable property and therefore does not get covered within the meaning of “property of any kind” as mentioned in Sec. 2(14) of the Act. Therefore, the right created by virtue of provisional booking of flat made by the appellant is not a capital asset. Thus, the transaction on receipt of amount of Rs.15,66,520/- in addition to the booking amount from the builder on cancellation of booking does not deserve to be treated as capital gain. Therefore, the Ld. CIT(A) upheld the order of the AO treating the compensation received under the head “Income from other source” and dismissed the appeal.

5. Before us, the Ld. counsel of the appellant submits that the assessee had agreed to purchase flat no.-5, situated on the 10<sup>th</sup> Floor of a building no- A being constructed by M/s Satya Realtors at Thane (West). The total cost of the flat agreed to be purchased by the appellant was Rs.30,18,080/- and the area of the flat was 770 sq. ft (carpet), 1040 sq. ft built up area approximately. As against the total consideration of Rs.30,18,080/-, the appellant made the payments of Rs.22,51,000/- to the

builder. The builder M/s Satya Realtors, at the time of booking of the flat in its under- construction building known as Satyam Residency situated at Thane, issued an allotment letter dated 10.04.2007. Since the construction was over delayed and even the quality of work was not satisfactory to the appellant as was agreed originally after prolonged discussion between the assessee and the builder, it was agreed that the assessee against surrender of his right in the property would be given by the builder total sum of Rs.38,17,520/- representing refund of amount of paid at Rs.22,51,000/- and a further sum of Rs.15,66,520/- against surrender of assessee's right in the property agreed to be acquired by way of allotment letter issued by the builder and confirmed by the assessee. After the appellant had relinquished his right in the property agreed to be purchased from M/s Satya Realtors, he agreed to purchase another flat admeasuring about 603 sq. ft (carpet area) in the building Mayfair Meridian from M/s Raj Laxmi Developers, Mumbai *vide* allotment letter dated 18.10. 2011. The total cost of new flat agreed to be purchased was Rs.42,50,000/- as against which the appellant during the year had paid an amount of Rs.34,00,000/- .In the above transaction, the appellant had received surplus of Rs.15,66,520/- on transfer of his right in the property consisting of residential flat on 25.08.2011, which right he had acquired by booking flat *vide* allotment letter dated 10.04.2007 and since the property (right in property) was held by him for more than 36 months, the asset being a nature of long term capital asset, the appellant had earned long term capital gain. Since within the period of one year from the date of earning of long term capital gain, the appellant had

agreed to purchase another property from M/s Raj Laxmi Developers, the long term capital gain earned on transfer of old flat booked on 10.04.2007 was claimed as deduction under Sec. 54/54F of the Act.

The ld. counsel also files (i) a copy of the allotment letter dated 10.04.2007 issued by Satya Realtors, (ii) cancellation letter dated 27.05.2011 from Satya Realtors, (iii) copy of account of M/s Satya Realtors as appearing in the books of the assessee filed before the AO (iv) letter of allotment of new flat issued by M/s Raj Laxmi Developers dated 18.10. 2011.

Also reliance is place by him on the decision in *CIT vs. Tata Services Ltd.* 122 ITR 594 (Bom.), *CIT vs. Vijay flexible Containers* 186 ITR 693 (Bom.), *Madhu Kanl vs. CIT* 225 Taxman 086 (P & H), *CIT vs. Anilaben Upendra Shah* 262 ITR 657 (Guj.), *Jitendra Mohan vs. ITO* (11 SOT 594), *Shri Khemchand Fagwani vs ITO, Wd 4(1)(3, Mumbai* (ITAT- 'A' Bench Mumbai in ITA No. 7876/Mum/2010 dated 10.09.2014), *ACIT vs. Smt. Vandana Rana Ray* (ITAT- Bench 'F' Mumbai in ITAT No. 6173/Mum/2011 dated 07.11.2012), *Smt. Meena A. Hemnani, Mumbai vs. ITO (I.T.), Mumbai* (ITA No. 5998/Mum/2010 dated 09.01.2011), *CIT v. Ram Gopal* 372 ITR 498 (Del), *Jagdish Chander Malhotra v. ITO* 62 TTJ 314.

6. *Per contra*, the ld. D.R submits that (i) there was no valid agreement for purchase of the flat entered into by the appellant with the builder, (ii) the letter of communication from the builder being described by the appellant as allotment letter was a letter communicating the provisional

booking of the flat, (iii) the appellant had considered such communication as allotment letter and wrongly treated it at par with an allotment letter issued under self-finance scheme, (iv) there was no evidence of record to prove that the letter of communication from the builder to the appellant was in the nature of contract which was capable of specific performance for conveyance of flat and was assignable and (v) the letter issued by the builder to the appellant for provisional booking of flat did not in any way confer any right to obtain conveyance of the flat.

The Id. D.R thus supports the order passed by the CIT(A).

7. We have heard rival submissions and perused the relevant material on record. The reasons for our decision are given below.

At this moment, let us discuss the decisions relied on by the Ld. counsel of the appellant. In *Tata Services Ltd.* (supra), it has been held that (i) right to acquire a property under a contract is a capital asset and the profit arising from the assignment on such right is liable for capital gains tax, (ii) where an assessee is transferring a capital asset resulting in capital gains, claim for deduction of any notional loss is not permitted and (iii) word 'property' in s. 2(14) includes any right which can be called property.

In *Vijay flexible Containers* (supra), it is held that right to obtain a conveyance of immovable property falls within the expression "property of any kind" used in s. 2(14) and amount received in connection therewith is liable to capital gains tax.

In *Madhu Kaul* (supra), it is held that mere fact that possession was delivered later, does not detract from the fact that allottee was conferred a right to hold property on issuance of an allotment letter. Payment of balance instalments, identification of a particular flat and delivery of possession are consequential acts that relate back to and arise from rights conferred by allotment letter.

In *Anilaben Upendra Shah* (supra), it is held that the assessee having held the shares of allotment of a flat in a co-operative housing society for a period of more than 36 months, the capital gain arising from sale of said flat was a long term capital gain and assessee was entitled to benefit of s. 80T irrespective of the fact that the assessee did not get possession of the flat in question at the time of allotment and it was constructed later on.

In *Jitendra Mohan* (supra), it is held that on the facts of the case, the assessee held the capital asset (shed) allotted to it on instalment basis from 28<sup>th</sup> December 1994, the date of payment of second instalment and sale thereof on 15<sup>th</sup> December 2000, gave rise long term capital loss even though possession of shed was handed over by DSIDC to the assessee on 28<sup>th</sup> May 1998.

In *Shri Khemchand Fagwani* (supra), the claim of exemption u/s 54 was denied to the assessee by the AO on the plea that the assessee did not produce any purchase agreement with regard to investment in the residential flat at Thane and if the allotment letter and proof of payment is produced, it cannot be said that the assessee did not invest in the purchase of new property.

In *Smt. Vandana Rana Roy* (supra), it is held that the 'date of allotment' is reckoned as the date for computing the holding period for the parties on capital gains.

In *Meena A. Hemnani* (supra), the issue was whether the capital gains earned by the assessee are in the nature of short term capital gains as held by the AO or long term capital gains as offered by the assessee in the return of income. In that case the assessee had purchased a flat *vide* allotment letter dated 9<sup>th</sup> September 2003 from the builder namely Prestige Estate Projects Pvt. Ltd. There was a construction agreement between the parties dated 1.12.2003 and the registered deed of the same dated 22.09.2006. The said flat was sold by the assessee to Bennet Coleman and Co. on 10.11.2006. The AO treated it as short term capital gains whereas the assessee offered the same as long term capital gains in the return of income.

In *Ram Gopal* (supra), it has been held that "possession, enjoyment as well as any interest in any transferable capital asset is included within the ambit of 'capital asset' u/s 2(14) of the Act.

In *Jagdish Chander Malhotra* (supra), it has been held that "right or interest" acquired by assessee by booking flats constituted 'capital asset' and surplus derived by cancelling the booking is assessable as capital gains; since the assessee transferred his interest before the flats were fully constructed, it cannot be treated as transfer of residential house and since assessee held the allotment for more than 36 months and invested

the capital gain in a residential house, he is entitled to exemption u/s 54F.”

7.1 Let us now refer to the following two letters issued by the builder.

**Letter dated 10.04.2007 issued by the builder regarding the provision booking of the flat-**

- “1. We hereby acknowledge receipt of Rs.2,51,000/- (rupees Two Lakh Fifty One Thousand Only) as Earnest Money against Provisional booking of the subject Flat vide cheque as follows:  
Cheque No.331470 dated 02.04.07 amounting to Rs.2,51,000/- drawn on Standard Chartered Bank, Unique Centre, Sandra (W) Branch.
2. Total cost of the Flat is Rs.30,18,080/- (Rupees Thirty Lakhs Eighteen Thousand Eighty Only). The area of the above flat is 770 sq. ft. Carpet area, 1040 sq. ft, built up area (approx.)
3. A regular agreement for Sale of flat/s shall be entered into hereinafter in our Standard Form (emphasis supplied) being finalized which shall be according to the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and transfer) Act, 1963; The Maharashtra Apartment Ownership Act, 1970 and the Rules there under with all amendments etc, in respect thereto.
4. You shall execute the Agreement for sale in respect of the above flat with us in our standard form (which is under preparation). You shall not be entitled to object any of the terms and conditions contained in such Agreement. We have informed you, that the building plans are in process of approved per available FSI (emphasis supplied) and accordingly the buildings are to be Stilt and 14 upper floors and the building plans in respect of the above

building/s will undergo changes from time to time as determined by us.

5. Stamp duty and registration charges and all expenses, in respect of this transaction shall be borne and paid by you alone. You shall also pay an amount towards society deposits and charges like service tax or any other charges / taxes in force from time to time by the State/ Central Government, TMC or any Government body at the time of handing over possession of the said flat to you.
6. Please note on the executions of the Agreement for sale, the sale of the above flat shall be governed by the terms thereof.
7. This letter is issued in duplicate. You are required to execute the duplicate hereof and return the same to in confirmation.”

**Letter dated 25.07.2011 issued by the builder for cancellation of booking flat-**

“This has reference to the discussion you had with our partner Shri Mehul L. Vasavda on various dates since last more than a month.

During the course of said discussion it was stated by you that physical possession of the flat bearing No. A/1005 in our under construction building Shree Satya Shankar Residency at Thane, was agreed to be handed over within a period of 2 years from the date of booking but the same has not been done till date. You were also not satisfied with the speed of construction being carried out and claimed that on both these counts since we have failed to keep our word, for the hardships caused to you, you demanded refund of money paid along with suitable compensation to which we had agreed due to delay in constructions and handing over possession.

It is accordingly placed on record that after prolonged discussion and taking into account overall facts and circumstances we have agreed that we shall refund you the amount of Rs. 22,51,000/- paid by you by 2 cheques of Rs.15,00,000/- and another of Rs.7,51,000/-. We have also agreed to give you further sum of Rs. 15,66,520/- as compensation towards cancellation of booking of said flat to which you have agreed to.

Please return a copy of this letter duly signed in token of your having agreed to above.

Please note that after the date of receipt of total amount of Rs.38,17,520/- (Rs.22,51,000/- + Rs.15,66,520/-) as mentioned hereinabove you shall have no right, interest or claim of any nature in the said property.”

7.2 We find that both the AO and Ld. CIT(A) have dealt the instant issue in the light of case laws instead of first verifying the facts. As the facts have not been verified by them, the issue remains hazy.

We are of the considered view that examination of letter dated 10.04.2007 issued by the builder regarding the provision booking of the flat and the letter dated 25.07.2011 issued by the builder for cancellation of booking a flat delineated at para 7.1 hereinbefore need to be examined by the AO. A proper hearing must always include a fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view. The Hon'ble Supreme Court in *State of Kerala vs. K.T. Shaduli Grocery Dealer* AIR 1977 SC 1627, recognised the importance of oral evidence by holding that the opportunity to prove the correctness or completeness of the return necessarily carry with it the

right to examine witnesses and that includes equally the right to cross-examine witnesses.

Therefore, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order after examining the Managing partner of M/s Satya Realtors and then allowing the appellant an opportunity for cross-examination. We direct the appellant to file the relevant documents/evidence before the AO. Needless to say the AO would provide reasonable opportunity of being heard to the appellant before finalizing the order.

8. In the result, the appeal is allowed for statistical purposes.

**Order pronounced in the open Court on 04/07/2018.**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 04/07/2018

Rahul Sharma, Sr. P.S.

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**