



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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI RAM LAL NEGI, JM

ITA No.4853/Mum/2016

(Assessment Year 2012-13:)

Shri Sanjaykumar Footermal Jain, 503/C, Shankeshwar Darshan, Soc. A.G. Pawar Lane, Cross Lane Road, Byculla (E), Mumbai – 400 027	Vs.	ITO WD 20(3)(2) Wd. 20(3)(2) Mumbai
PAN/GIR No.AABPJ5017F		
Appellant)	..	Respondent)

Assessee by	Shri Rakesh Joshi
Revenue by	Shri Rajat Mittal
Date of Hearing	09/06/2018
Date of Pronouncement	14/08/2018

आदेश / ORDER

PER R.C.SHARMA (A.M):

This is an appeal filed by assessee against the order of CIT(A)-32, Mumbai dated 18/05/2016 for A.Y.2012-13 in the matter of order passed u/s.143(3) of the IT Act, 1961.

2. The only grievance of assessee relates to computation of capital gain of sale of property. The AO has computed period of holding and held that assessee had earned short term capital gain whereas contention of the assessee is that property was held for more than 36 months,

therefore, capital gain arose of sale of property was liable to be taxed as long term capital gains.

3. Rival contentions have been heard and record perused.

4. Facts in brief are that the assessee Shri Sanjay kumar Footarmal Jain is individual filed the return of income for AY 2012-13 declaring Total Income of Rs. 6,84,760/- on 17-06-2012, the sources of income are under Capital gain and Income from other sources. In the course of scrutiny assessment u/s.143(3), the AO has disallowed claim of long/ term capital gain on sale of godown of Rs. 5,71,282/- on the ground that tht capital gain arisen out of sale of the original assets i.e. godown has not being held for the period more than 36 months . The LD AO has treated entire capital gain on sale of long term capital assets as short term capital gain and added Rs. 86,82,000/-.

5. By the impugned order, CIT(A) confirmed the action of the AO against which assessee is in further appeal before us.

6. At the outset learned AR placed on record the order of the Co-ordinate Bench in case of Anita D Kanjani in ITA No.2291/Mum/2015 dated 13/02/2017 wherein similar issue was decided in favour of the assessee.

7. On the other hand, learned DR relied on the order of the lower authorities and also decision of Bombay High Court in case of Rasiklal M. Parikh dated 10/03/2017.

8. We have heard rival contentions and carefully gone through the orders of the authorities below. We have also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the instant case. From the record we found that the assessee has purchased the long term capital asset being godown as per agreement dt. 24-04-2008. On going through the agreement, it is evident that the assessee has made initial payment of Rs. 1,26,000/- as against purchase consideration of Rs. 12,26,000/- with the promise to make the balance of payment on or before 03-05-2008, as against the agreement for sale and part payment dt. 24-04-2008, the transferor has transferred all the right, title and interest in the favour of the transferee including five shares under share certificate no. 1/87 bearing distinctive no. 11 to 15 allotted to transferor by the society. The assessee has paid the Stamp Duty on the said agreement dt 20/04/2008 on the same date i.e. 24 April 2008. On combine reading of article 1,2,3,4,5 of the agreement dt. 24-04-2008 clearly indicates that all the rights, titles, and interest of the said premises were irrevocably transferred to the assessee by the transferor. The transferor has undertaken to do rest of formalities including the registration of the property on receipt of full and final payment. The transferor has also moved the society for the transfer of shares with issue of no objection certificate.

9. As a consequences to the agreement dt. 24-04-2008, the balance of payment was received and agreement was subsequently registered with the stamp duty authority on 11-07-2008. In the course of the assessment proceedings, the Ld AO while discussing the relevant terms of the agreement for sale on page no. 2 and page no. 3 of the assessment order dt. 23-04-2015, wrongly held that since the registration for purchase of property is made on 11-07-2008, the period for the holding long term assets benefits should be reckoned from the date of registration and not from date of transfer being 24-04-2008. Therefore AO held that the period of holding the capital assets was less than 36 month. We also observed that the assessee transfer / sold the Godown, and sale transaction was completed on 30-04-2011 with handling over of the possession on the same date.

10. As per learned AO, since the registration of original asset was completed on 11-07-2008 the long term capital assets sold subsequently on 30-04-2011 was held for a period less than 36 months and therefore the capital gain arising out of sale of capital assets was short term capital gain and not a long term capital gain. The LD AO accordingly added entire capital gain of Rs. 86,82,000/- without granting the benefit of cost of indexation of original capital assets and deduction u/s. 54F of the Act.

11. Chronological events are as under:-

- | | | |
|----|--|------------|
| 1. | Date of purchase agreement duly stamped | 24/04/2008 |
| 2. | Date of Registration of purchase agreement | 11/07/2008 |

3. Date of Registration of sale agreement 11/04/2011
4. Date of handingover possession to buyer 30/04/2011

12. As per the provision of the Act, the clause (v) and clause (vi) of the section 2 (47) envisaged a transfer with payment of part consideration and possession / enjoyment of the property. The clause (v) and clause (vi) of the section 2 (47) does not stipulates the registration of the immovable property being mandatory condition in order to constitutes transfer within the meaning of provision of Section 2(47) of the act. That is to say transfer for the purpose of Section 2 (47) of the income Tax Act means a defacto ownership and not necessarily legal ownership as laid down by the Supreme Court of India in the case of Poddar Cement 225 1TR 675 and Mysore Minerals 275ITR 775.

13. In the instant case it is crystal clear that by virtue of agreement for sale dt. 24-04-2008, and making a part payment, the assessee has acquired irrevocable tight, title and interest including possession in the house property in the form of Godown. The registration of the property which was done subsequently on 11-07-2008 was only a formality. And therefore the period of 36 months of holding of long term capital Assets should be reckoned from 24-04-2008 and not from 11-07-2008 as wrongly adopted by the LD AO. For the purpose of Section 54 benefit, date of Agreement to purchase should be taken as the date of purchase and date of Registration of sale deed is not relevant CIT v/s. R L Sood (2000) 108 Taxman 227 ITR 245 Delhi H C.

15. For the purpose of computing the period of holding the issue is squarely covered by the decision of the Co-ordinate Bench in case of Anita D Kanjani (supra). The facts of the case cited by learned DR Rasiklal M. Parikh are distinguishable in so far as assessee has got the property by way of purchase agreement and not by way of allotment letter. The precise observation of the Tribunal with regard to computing capital gain as per provisions of 2 (47) of the IT Act are crystal clear. Precise observation of the Co-ordinate Bench was as under:-

8. We have gone through the facts and circumstances of the case, orders passed by the lower authorities, submissions made and judgements relied upon before us by both the sides. The chronology of relevant events in this regard is as under:-

1. Date of allotment of office unit to the assessee - 11-04-2005

2. Date of signing of the agreement to sell - 28-12-2007

3. Date of registration of the aforesaid property with the Registrar - 24-04-2008

4. Date of sale of aforesaid property 11-03-2011 The AO has computed the holding period from the date of registration, i.e. 24-04-2008 and accordingly it was held that when the property was sold on 11-03-2011 it was held for less than 36 months and, therefore, it was 'short term capital asset'. On the other hand, assessee has claimed that the property was held by the assessee since when allotment letter was issued to the assessee of the said property, i.e. on 11-04-2005; when the property was duly identified and part payment was made. It was alternatively argued that in any case, if the date of transfer of property is to be taken as the beginning point of holding period, then the date of signing of the agreement i.e. 28-12-2007 should be taken into account and not the date of registration of the agreement in terms of section 47 of Registration Act, 1908 as has also been clarified by the Hon'ble Supreme Court in the above mentioned two judgements.

9. With a view to resolve this dispute, we have firstly analysed the provisions of section 2(42A) which defines 'short term capital asset' as under:-

"Section 2(42A) in the Income- Tax Act, 1961 (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":

Perusal of aforesaid definition shows that the legislature has used the expression 'held'. It is further noted by us that in various other allied or similar sections, the legislature has preferred to use the expression 'acquired' or 'purchased' e.g. in section 54 / 54F. Thus, it shows that the legislature was conscious while making use of this expression. The expressions like 'owned' has not been used for the purpose of determining the nature of asset as short term capital asset or long term capital asset. Thus, the intention of the legislature is clear that for the purpose of determining the nature of capital gain, the legislature was concerned with the period during which the asset was held by the assessee for all practical purposes on de facto basis. The legislature was apparently not concerned with absolute legal ownership of the asset for determining the holding period. Thus, we have to ascertain the point of time from which it can be said that assessee started holding the asset on de facto basis.

10. *It is noted that the letter of allotment was issued to the assessee on 11-04- 2005, the letter of allotment makes a mention of the identity of the flat as office unit No.107, located at First Floor of Everest Grande. It also makes a mention that total consideration of the said property is a sum of Rs.29,64,000/- out of which a sum of Rs.5 lakhs was paid by the assessee on 04-04-2005 by cheque No.539104 as part payment against the said office unit. It is further noted by us that Hon'ble Karnataka High Court in the case of CIT vs A Suresh Rao 223 Taxmann 228 (Kar) dealt with similar issue wherein the significance of the expression 'held' used by the legislature has been analysed and explained at length. Hon'ble High Court analysed various provisions of the Act pertaining to computation of capital gain under various situations and also circulars issued by the CBDT on this issue. Relevant portion of the observation wherein the issue before us has been properly analysed is reproduced hereunder:-*

12. *"The definition as contained in Section 2 (42A) of the Act, though uses the words, "a capital asset held an assessee for not more than thirty-six months immediately preceding the date of its transfer", for the purpose of holding an asset, it is not necessary that, he should be the owner of the asset, with a registered deed of conveyance conferring title on him. In the light of the expanded definition as contained in Section 2(47), even when a sale, exchange, or relinquishment or*

extinguishment of any right, under a transaction the assessee is put in possession of an immovable property or he retained the same in part performance of the contract under Section 53-A of the Transfer of Property Act, it amounts to transfer. No registered deed of sale is required to constitute a transfer. Similarly, 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, also constitutes transfer and the assessee is said to hold the said property for the purpose of the definition of 'short-term capital gain'. In fact, the Circular No.495 makes it clear that transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are common mode of acquiring flats particularly in multistoried constructions in big cities. The aforesaid new sub- clauses (v) and (vi) have been inserted in Section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above. A person holding the Power of Attorney is authorized the powers of owner, including that of making construction though the legal ownership in such cases continues to be with the transferor. The intention of legislature is to treat even such transactions as transfers and the capital gain arising out of such transactions are brought to tax. Further, the Circular No.471 goes to the extent of clarifying that for the purpose of Income-tax Act, the allottee gets title to the property on the issuance of the allotment letter and the payment of installments is only a follow up action and taking the delivery of possession is only a formality. In case of construction agreements, the tentative cost of construction is already determined and the agreement provides for payment of cost of construction in installments subject to the condition that the allottee has to bear the increase, if any, in the cost of construction. Therefore, for the purpose of capital gains tax the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in installments does not affect the legal position. Therefore, in construing such taxation provisions, what should be the approach of the courts and the interpretation to be placed is clearly set out by the Apex Court in the case of Smt. Saroj Aggarwal vs CIT 156 ITR 497 wherein it is held as under:

"Facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Where it is possible to draw two inferences from the facts and where there is no evidence of any dishonest or improper motive on the part of the assessee, it would be just and equitable to draw such inference in such a manner that would lead to equity and justice. Too hyper-technical or legalistic approach

should be avoided in looking at a provision which must be equitably interpreted and justly administered.....Courts should, whenever possible unless prevented by the express language by any section or compelling circumstances of any particular case, make a benevolent and justice oriented inference. Facts must be viewed in the social milieu of a country."

Therefore, keeping the aforesaid principles in mind, when we look at Section 48, the language employed is unambiguous. The intention is very clear. When a capital asset is transferred, in order to determine the capital gain from such transfer, what is to be seen is, out of full value of the consideration received or accruing, the cost of acquisition of the asset, the cost of improvement and any expenditure wholly or exclusively incurred in connection with such transfer is to be deducted. What remains thereafter is the capital gain. It is not necessary that after payment of cost of acquisition, a title deed is to be executed in favour of the assessee. Even in the absence of a title deed, the assessee holds that property and therefore, it is the point of time at which he holds the property, which is to be taken into consideration in determining the period between the date of acquisition and date of transfer of such capital gain in order to decide whether it is a short-term capital gain or a long-term capital gain."

Thus, from the aforesaid judgment, it is clear that for the purpose of holding an asset, it is not necessary that the assessee should be the owner of the asset based upon a registration of conveyance conferring title on him.

11. Similarly, in the case of Madhu Kaul (supra), the Hon'ble Punjab & Haryana High Court analysed various circulars and provisions of the Act that on allotment of flat and making first installment the assessee was conferred with a right to hold a flat which was later identified and possession delivered on later date. The mere fact that possession was delivered later, would not detract from the fact that assessee (allottee) was conferred a right to hold the property on issuance of an allotment letter. The payment of balance amount and delivery of possession are consequential acts that relate back to and arise from the rights conferred by the allotment letter upon the assessee.

13. In the case of Vinod Kumar Jain vs CIT 344 ITR 501 it was held by Hon'ble Punjab & Haryana High Court that conjoined reading of section 2(14), 2(29A) and 2(42A) clarifies that holding period of the assessee starts from the date of issuance of allotment letter. Since allottee gets title of the property on the issuance of allotment letter and payment of first installment is only a consequential action upon which delivery of possession flows. Even if the sale deed or agreement to sell is executed or registered subsequently but the assessee always had a

right in the property since the date of issuance of allotment letter. Therefore, it can be said that assessee held the property immediately from the date of allotment letter.

14. In the case of CIT vs K Ramakrishnan (supra), Hon'ble Delhi High Court analysed the provisions of the Act and held that date of allotment is relevant for the purpose of computing holding period and not the date of registration of conveyance deed. Similarly in the case of CIT vs S.R. Jeyashankar(supra), Hon'ble Madras High Court took a similar view following the aforesaid judgment and held that holding period shall be computed from the date of allotment. It is noted by us that similar view has been taken by other High Courts in the judgments which have been relied upon by the Ld. Counsel before us and mentioned in earlier part of our order.

15. In the assessment order, the Ld. AO has placed reliance upon the judgment of Hon'ble Supreme Court in the case of Suraj Lamps & Industries Pvt Ltd (supra) for the proposition that transfer of a property shall be effective only on registration of conveyance deed in view of section 54 of Transfer of Property Act. In our view, it is a settled proposition of law and there is no dispute on that. The absolute legal ownership of an immovable property shall take place in terms of various provisions of Transfer of Property Act which needs to be read with provisions of section 2(47) of Income-tax Act, 1961 for the purpose of computing tax liability arising on account of sale / purchase of immovable properties under Income-tax Act. But the issue here before us is different. As discussed earlier, the holding period is to be determined in terms of section 2(42A) of the Act which has been reproduced and discussed above. The issue of transfer of ownership is not the issue to be decided here for computing the holding period. Therefore, we find that application of the ratio of aforesaid judgment would not be appropriate here.

16. Thus, respectfully following the judgements of various High Courts wherein this very issue has been analysed in detail as discussed above at length, we find that holding period should be computed from the date of issue of allotment letter. If we do so, the holding period becomes more than 36 months and consequently, the property sold by the assessee would be long term capital asset in the hands of the assessee and the gain on sale of the same would be taxable in the hands of the assessee as Long Term Capital Gain. We direct accordingly.

17. As a result, grounds raised by the assessee are allowed in terms of our directions as given above. However, the alternative issue raised by the assessee is not being adjudicated at this stage.

18. In the result, the appeal of the assessee is allowed.

16. As the facts and circumstances are similar, respectfully following the order of the Co-ordinate Bench, we do not find any merit in the action of lower authorities for declining claim of long term capital gain and thereby giving exemption u/s.54 of the IT Act.

17. In the result appeal of the assessee is allowed.

Order pronounced in the open court on this 14/08/2018

**Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER**

**Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER**

Mumbai; Dated 14/08/2018

Karuna Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai