

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

BEFORE SHRI G.S. PANNU (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 5102/MUM/2016
Assessment Year: 2012-13**

The ITO – 21(2)(3), Room No. 105, 1 st Floor, Piramal Chambers, Parel, Mumbai - 400012	Vs.	Smt. Mridula Anoop Saxena, 1602-B, Lokhandwala Residency, NCY Towers CHS Ltd., Manjrekar Lane, Off. Dr. E. Moses Road, Worli, Mumbai - 400018 PAN: AAQPS0855F
(Appellant)		(Respondent)

Revenue by : Shri Rajesh Kumar Yadav (DR)

Assessee by : Shri B.V. Jhaveri (AR)

Date of Hearing: 25/05/2018
Date of Pronouncement: 14/08/2018

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 05/05/2016 passed by the Ld. Commissioner of Income Tax (Appeals)-33, Mumbai, for the assessment year 2012-13, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that the assessee having source of income from salary and remuneration from the partnership firm and interest income, filed her return of income for the assessment year under consideration declaring the total income of Rs. 19,80,112/-. Since, the case was selected for scrutiny, the AO issued notices u/s 143 (2) and 142 (1) of the Act. In response to the said

notices, the authorized representative of the assessee attended the proceedings and also furnished the details called for.

3. The AO noticed that during the previous year the assessee had sold residential property jointly owned by her husband for a total consideration of Rs. 3,50,00,000/-. The assessee worked out the long term capital gain on sale of the said property at Rs. 1,24,40,806/- being 50% of the total gain and claimed exemption of the said amount u/s 54 of the Act by purchasing /construction of new residential property from M/s Avarsekar Developers, Mumbai. Accordingly, AO asked the assessee to submit copy of purchase agreement and to produce proof of date of possession of the property. Since, the assessee did not produce same, the AO issued notice u/s 133 (6) of the Act to the Builder M/s Avarsekar Developers. In response to the said notice the said developers confirmed that advance of Rs. 1,25,00,000/- was received from the assessee on 12.04.2011 for purchase of flat. However, in the absence of any agreement for purchase of the Flat or the proof of construction of residential property within the three years from the sale of the property, the AO rejected the contention of the assessee and made disallowance of the entire amount of Rs. 1,24,40,806/- claimed by the assessee u/s 54 of the Act and determined the total income at Rs. 1,44,20,920/- (rounded off). In the first appeal, the Ld. CIT (A) partly allowed the appeal of the assessee holding that if the amount of capital gain is greater than the cost of new asset, the difference shall be treated as the income of previous year in which the transfer had taken place.

4. Aggrieved by the order of Ld. CIT (Appeals), the revenue has preferred this appeal before the Tribunal on the following effective ground:-

“Whether on the facts and in the circumstances of the case and in law, the CIT (A) has erred in ignoring the fact that the construction of new residential house has not been completed within three years from the date of sale of the property.”

5. Before us, the Ld. Departmental Representative (DR) relying on the assessment order submitted that, since the assessee has failed to establish that the house was constructed within the period of three years, from the date of the sale of asset in question, the AO has rightly disallowed the claim of the assessee. The Ld. DR further contended that mere making the payment of Rs. 1,25,00,000/- to the builders and developers for purchase of flat does not mean that the assessee has started construction or obtained domain over the property which is the condition precedent for claiming exemption u/s 54 of the Act. Hence, the Ld. CIT (A) ought to have confirmed the disallowances made by the AO.

6. On the other hand, the Ld. counsel for the assessee contended that the assessee had sold the asset on 01.04.2011 and an amount of Rs. 1.25 crores was paid to M/s Avarsekar Developers, vide cheque no. 083604 drawn on Standard Chartered Bank for buying new flat. The builder issued allotment letter on 20th January, 2012, as per which the assessee allotted a flat on 14th Floor of the building. The sale agreement was finally executed and registered on 09.03.2015, since the cost of acquisition of new flat was Rs. 2,35,58,440/- including the ancillary charges, the appellant's 50% share was calculated at Rs. 1,17,79,220/-. Accordingly, the assessee voluntarily offered short application of funds i.e. Rs. 6,61,586/- as taxable in the year 2015-16 i.e. in which figure of application of funds was crystallized. However, the Ld. CIT (A) has held that the excess amount of Rs. 6,61,586/- is required to be taxed in the year of transfer i.e. 2012-13 and not in the A.Y. 2015-16. The Ld. counsel further submitted that since the order passed by the Ld. CIT(A) is in accordance with the settled principles of law, there is no merit in the contention of the revenue.

7. We have heard the rival submissions and also perused the material on record. The Ld. CIT (A) has partly allowed the appeal of the assessee holding as under:-

“16. In the light of the discussion made in the preceding paragraphs, in my considered opinion, the benefit of sec. 54 of the I.T. Act is available to the appellant considering the fact that the entire payment for the new property was made by the appellant as well as the allotment letter was issued before the limitation period of 3 years.

17. It is observed that the appellant has claimed that the cost of acquisition of the new flat was Rs. 2,35,58,440/- and the appellant's 50% share comes to Rs. 1,17,79,220/-. It is contended by the AR of the appellant during appellate proceedings that the appellant has offered short application of funds i.e. amount of capital gain less amount invested i.e. .Rs. 6,61,586/- (Rs. 1,24,40,806- Rs. 1,17,79,220) as taxable LTCG in A.Y.2015-16 i.e. year in which figure of application of fund is crystallized. However, I do not agree to this proposition of the appellant. The provisions of sec. 54(1)(i) state as under:-

54.(1) Subject to the provisions of sub-section (2), where, in the case of an assessee being an individual or a Hindu Undivided family], the capital gain arises from the transfer of a long-term capital asset, being buildings or lands appurtenant thereto, and being residential house, the income of which is chargeable under the head “Income from house property” (hereafter in this section referred to as the original asset), and the assessee has within a period of one year before or two years after the date on which the transfer took place purchased, or has within a period of three years after that date constructed, one residential house in India], then], instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section , that is to say-

(i) If the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereafter in this section referred to as the new asset)], the different between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year and for the purpose of computing in respect of the new asset

any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil, or

18. *From the above provisions of sub section (i) of sec. 54(1), it is clear that if the amount of Capital Gain is greater than the cost of the new asset, the difference shall be charged as income of the previous year in which the transfer took place. In the instant case, the capital gain was excess by an amount of Rs. 6,61,586/- which is required to be charged to tax in the year of transfer i.e. A.Y. 2012-13 and not A.Y. 2015-16 as contended by the AR in the written submission. Hence the AO is directed to tax Rs. 6,61,586/- as LTCG as against Rs. 1,24,40,806/- being computed in the assessment order. The AO is also directed to make the re-computation of LTCG after making necessary verification of proof of payments of various charges and taxes related to the purchase of new asset viz., VAT of Rs. 2,68,560/- . Service Tax of Rs. 6,39,630/- and “as per clause 11” of Rs. 5,75,350/-, as claimed during appellate proceedings. With the above remarks, grounds of appeal no. 2 is partly allowed.”*

8. We notice that the findings of the Ld. CIT (A) are based on the decisions of the various Benches of the ITAT and the decision of the Hon'ble Delhi High Court and the Hon'ble High Court of Punjab and Haryana. The Hon'ble Delhi High Court has held in the case of *CIT vs. Ramakrishnan*, 48 *taxmann.com* 55(Del) has held that the date of allotment is relevant for the purpose of computing holding period and not the date of conveyance deed. Similarly, the Hon'ble P&H High Court has held in *Vinod Kumar Jain vs. CIT*, 344 *ITR* 501(P&H) that an allottee acquires a title of property on receiving allotment letter and payment of installment is only a consequential action upon which delivery of possession follows. Hence, in the light of the undisputed facts that the assessee had made payment of Rs. 1,25,00,000/- on 18.04.2011 from her share in the long term capital gain of Rs. 3,50,00,000/- and the allotment letter was issued on 20.01.2012 and finally executed and registered on 09.03.2015 and in the light of the ratio laid down by the Hon'ble High Courts

discussed above, we are of the considered view that the findings of the Ld. CIT(A) are in accordance with the law and the evidence on record. Hence, we do not find any infirmity in the order of the Ld.CIT (A) to interfere with. Accordingly, we uphold the findings of the Ld. CIT (A) and dismiss the sole ground of appeal of the revenue and direct the AO to compute the deduction in terms of the order of the Ld. CIT(A).

In the result, appeal filed by the revenue for assessment year 2012-2013 is dismissed.

Order pronounced in the open court on 14th August, 2018.

Sd/-

(G.S. PANNU)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 14/08/2018

Alindra, PS

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश 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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai