



ITA.No.1244/Mum/2017
Ramesh A. Radhakrishnan
Assessment Year- 2012-13

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No.1244/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2012-13)

Ramesh A. Radhakrishnan G-306, Oberoi Splendor Grande, JVLR, Opposite Majas Depot Andheri (E), Mumbai-400 060	बनाम/ Vs.	Assistant Commissioner of Income Tax Range-35(2) Mumbai
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. ADLPR-4380-C		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Hiro Rai, Ld.AR
Revenue by	:	Ram Tiwari, Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	24/07/2018
घोषणा की तारीख / Date of Pronouncement	:	12/09/2018

आदेश / ORDER

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year [AY] 2012-13 contest the order of Ld. Commissioner of Income-Tax (Appeals)-46 [CIT(A)], Mumbai, *Appeal No.CIT(A)-46/ACIT-35(2)/64/2015-16 dated 02/01/2017* by raising following grounds of appeal:-

1. *The learned CIT(A) erred in considering residential property sold during the year as short term capital asset and thereby treating the gain on its sale as short term capital asset.*



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2. *The learned CIT(A) failed to appreciate that the appellant has entered in agreement for purchase of the residential property on 06.10.2008 and has entered into agreement for its sale on 08.11.2011, holding the said residential property for more than 36 months, and consequently, a long term capital asset.*
3. *The learned CIT(A) erred in denying the benefit of deduction u/s 54 to the appellant against capital gains from sale of residential property.*
4. *The appellant craves leave to add, amend, modify or alter the above grounds of appeal to any stage of appellate proceedings.*

The assessment for impugned AY was framed by *Ld. Assistant Commissioner of Income Tax-35(2), Mumbai [AO] u/s 143(3)* of the Income Tax Act, 1961 on 30/03/2015 wherein the income of the assessee has been determined at Rs.177.60 Lacs after certain disallowances as against returned income of Rs.79.73 Lacs filed by the assessee on 30/09/2012. As evident from grounds of appeal, the subject matter of the appeal is the nature of certain *capital gains* earned by the assessee during the year and admissibility of deduction u/s 54 as claimed by the assessee, but denied by the lower authorities.

2.1 During assessment proceedings, it was noted that the assessee sold one property situated at *Flat No. 308/1, 3rd Floor, D Wing, Oberoi Splendor, Andheri (E), Mumbai [in short 'Property']* on 08/11/2011 for sale consideration of Rs.197.80 Lacs. Against the same, the assessee claimed expenses on transfer for Rs.3.97 Lacs and indexed cost of indexation as Rs.131.41 Lacs. On the balance capital gains of Rs.62.40 Lacs, exemption u/s 54 was claimed.

2.2 The *Ld. AO*, upon perusal, noted that the flat was sold immediately after taking possession. The assessee pointed out that the flat was purchased from developer vide agreement dated 06/10/2008 by making payments as per the terms of the agreement and the assessee obtained possession on 04/07/2011 which was in continuation of its holding right



in the property. Therefore, the earlier period was also to be counted for the purpose of computation of *capital gains*. However, not convinced, Ld. AO noted that the flat was sold immediately after taking possession and further the assessee was staying in rented accommodation and therefore the sold flat was not being used for residential purposes and therefore, not entitled for exemption u/s 54. The Ld. AO further opined that for a flat that was constructed and ready for occupation, the date of taking possession of the flat would be the purchase date for the purpose of determining the holding period. Since, the holding period, as counted from the date of possession, was less than 3 years, the resultant gains were treated as *Short Term Capital Gains* and accordingly, indexation of cost of acquisition as well as deduction u/s 54 was denied to the assessee, which resulted into impugned additions.

3. Aggrieved, the assessee agitated the same without any success before Ld. CIT(A) vide impugned order dated 02/01/2017 wherein the reliance was placed on certain judicial pronouncements. The Ld.CIT(A), after perusal of agreement dated 06/10/2008 noted that the developer was entitled to terminate the contract and could sell the premise to another party and therefore the complete right, title, domain got conveyed to the assessee upon possession only and till then the right in the property was not absolute right. In other words, the agreement did not confer absolute right in the property and the assessee could not claim to have an absolute domain and control on the property till the occupancy or possession of the property. It was further noted that the assessee had made payment to the extent of approx. 66% only till the date of allotment. The Ld. CIT(A) also noted the ratio of this Tribunal



rendered in *Jaimal K. Shah [ITA No. 6966/Mum/2010 30/05/2012]* & *Sushil Kumar Aggarwal [ITA No. 5720/Mum/2010 dated 25/07/2012]* & *CBDT circular numbers 471 & 672 dated 15/10/1986 & 16/12/1993* respectively. Finally, the stand of Ld. AO was confirmed by making the following observations:-

- 7.10 *As in the case of the assessee, the agreement entered on 06-10-2008 and later registered on 14-10-2008, it did not give any absolute right in the property under purchase. As extracted above in para 6.4, there are specific clauses which give the builders the right to terminate and sell the premises to a new purchaser. As on the date of agreement, the assessee had paid only 66.20%, the future payments in time were material as per the terms and percentage of payments made, the assessee cannot be held to be owning absolute right. Even on the legal aspect, the decision relied require the period of holding to be considered from date of possession.*
- 7.11 *As per the facts of the case and the above decisions, the period between possession and sale would be relevant for transfer of right and occupancy title as in the case of assessee. As the assessee got possession on 04-07-2011 and sold it on 08-11-2011, the period of holding was only 3 months, and thus the capital gain was "short term"*
- 7.12 *In light of the above, the decision of the Assessing Officer in treating the capital gains as short term capital gains is upheld and **Ground of Appeal on this issue is dismissed.***

As a logical consequence, the action of Ld. AO in denying deduction u/s 54 was also confirmed. Aggrieved, the assessee is in further appeal before us.

4. The Ld. Authorized Representative for Assessee [AR], *Shri Hiro Rai*, submitted that the issue stood covered in assessee's favor by subsequent judicial pronouncements of this Tribunal as well as of higher judicial authorities, the copies of which have been placed in the *paper-book*. At the same time, the case laws being relied upon by Ld. CIT(A) were sought to be distinguished on factual matrix. Per *Contra*, Ld. Departmental Representative [DR], *Shri Ram Tiwari*, submitted that the assessee had sold a flat and not a right to acquire the flat, the holding



period of which was less than 3 years and therefore, the stand of lower authorities was justified.

5.1 We have carefully heard the rival submissions and perused relevant material in record including the *premises ownership agreement* between assessee and the builder and judicial pronouncements cited before us. The undisputed facts are that the property in question has been sold on 08/11/2011, the right in the same was acquired by the assessee by agreement dated 06/10/2008 and the possession of the same was obtained on 04/07/2011. As per assessee's contention, the holding period should be counted from date of agreement i.e. 06/10/2008 whereas the stand of the revenue is that the period of holding should be counted from date of possession i.e. 04/07/2011.

5.2 From the perusal of documents on record, it is evident that the origin of the subject property in assessee's favor spring from *Premises Ownership Agreement dated 06/10/2008* entered into between the assessee and the developer namely *Oberoi Constructions Private Limited*. The said agreement has been duly registered on 13/10/2008 upon payment of stamp duty of Rs.4.29 Lacs. As per *recital Y*, the assessee has expressed desire to acquire the aforesaid flat and approached the builder to allot the specific property *Flat No. 308, ad-measuring 889 Square Feets carpet area on 3rd Floor Wing-D of Building No.-1 of Oberoi Splendor*. The perusal of the recital reveals that the property being acquired by the assessee was specific & a unique property which was clearly identified under the agreement. The agreed sale consideration of the same has been fixed as Rs.89.34 Lacs, the schedule of which has already been provided in clause 3(B) of the



agreement. The assessee, at the time of execution of agreement, out of agreed consideration, had already paid amount of Rs.57.75 Lacs i.e. approx. 64% of the agreed consideration.

5.3 As per *Clause-7* of the agreement, the developer could terminate the agreement in certain event of default as enumerated therein. Upon such event of default, in terms of *clause-8*, the developer could terminate the agreement and forfeit the specified amount towards losses / damages and refund the balance amount to the purchaser. It is the terms of *clauses 7 & 8*, which has led the Ld. first appellate authority to conclude that the assessee did not have absolute domain and control on the property till the occupancy or possession of the property. However, the aforesaid clauses, in our opinion, was nothing more than to safeguard the interest of the parties therein in the eventuality of default being made by the other party and did not operate so as to circumvent the right or title of the assessee, in any manner.

5.4 The Ld. CIT(A), in our opinion, got misled by treating the *right to acquire the property* and *actual possession of the property* as two separate / distinct capital assets while forgetting the fact that the right of possession to the property essentially sprang only from the *premises ownership agreement* dated 06/10/2008 and was in furtherance of the aforesaid agreement only. The possession of the property was obtained pursuant to the agreement, which was distinctly identified / earmarked before hand at the time of entering of agreement and therefore, part & parcel of the same transaction. Nothing in the agreement suggest that the assessee gave up the *right to acquire the property* at the time of possession and got a new capital asset in the shape of flat, in exchange



rather it was the case, where the right / title of the assessee over the subject property got better and more perfect.

5.5 So far as the statutory provisions are concerned, we find that *Short Term Capital Gains* as defined in Section 2(42A) in the Income-Tax Act, 1961 reads as under:-

(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':

We find that the expression used is 'held' as against 'acquired' or 'purchased' as used in other Sections like section 54 / 54F which shows that legislatures were conscious while making use of this expression. The expressions like 'owned' / 'acquired' 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 was clear that for the purpose of determining the nature of capital gain, the period during which the asset was held by the assessee for all practical purposes on *de-facto* basis was to be considered and not the date of obtaining absolute legal ownership of the asset for determining the holding period. The term "held" has been interpreted by the Courts wherein unanimous view has been that the said term 'held' is different from the term 'acquire'. The Hon'ble Punjab and Haryana High Court, in the case of *CIT Vs. Ved Prakash & Sons (HUF) 207 ITR 148*, stated that the term 'held' is deliberately used as against term 'owned'. Hence, a person can hold the asset as owner, lessee, tenant, etc. Therefore, the right to the property is held by a person from the date when he enters into an agreement for purchase and not when he acquires possession. A similar phrase has been used in the *Explanation (iii)* to section 48 which



defines the term "indexed cost of acquisition". The said phrase is reproduced hereunder:-

(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the **asset was held by the assessee** or for the year beginning on the 1st day of April, 1981, whichever is later;

(emphasis added)

A perusal of the above provision reveals that even for calculating indexation the base year is to be taken as the year from which the capital asset is 'held' by the transferor and not the year in which the asset is acquired by the transferor. Such a difference cannot be ignored.

5.6 So far as the case laws are concerned, we find that in the case of *Sushil Kumar Aggarwal*, the date of possession was earlier than the date of the agreement and the Tribunal confirmed the stand of first appellate authority to reckon the period of holding from the date of possession. Therefore, the same is clearly distinguishable on fact. The case of *Jaimal K.Shah* dealt with a situation where the assessee entered into development agreement with the builder and therefore, the facts of the same do not directly apply to the facts of the case under hand. Further, post *Jaimal K.Shah*, we find that various higher judicial authorities, in catena of judgment, taken a view favorable to the assessee. Few of which are listed below:-

1. *Madhu Kaul Vs CIT (P & H HC) 363 ITR 54*
2. *CIT Vs Ramakrishnan (Delhi HC) 363 ITR 59*
3. *CIT Vs S R Jeyashankar (Madras HC) 373 ITR 120*

5.7 Viewed from any angle, we are unable to find ourselves in agreement with the conclusion of Ld. first appellate authority that the



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capital gains earned were Short Term in nature and therefore, we reverse the same. The resultantly gain as counted from date of agreement, in our opinion, was *Long Term Capital gain* eligible for indexation benefit. This ground stands allowed.

5.8 So far as the deduction u/s 54 is concerned, we find that the lower authorities have denied the same primarily by concluding that the same was not available since the nature of capital gains was *Short Term Capital Gains*. Therefore, on factual matrix, the matter stand remitted back to the file of Ld. AO for re-adjudication & verification of deduction u/s 54 with a direction to the assessee to substantiate the same with documentary evidences / requisite information.

6. Resultantly, the appeal stands partly allowed in terms of our above order.

Order pronounced in the open court on 12th September, 2018.

Sd/-

(Saktijit Dey)

न्यायिकसदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखासदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated :12.09.2018

Sr.PS:-Thirumalesh

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai