IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI

BEFORE, SHRI SHAMIM YAHYA, JUDICIAL MEMBER AND

SHRI PAWAN SINGH, ACCOUNTANT MEMBER

ITA No. 3063/Mum/2017 (Assessment Year 2013-14)

Mr. Vijay Rangroo C/o 761, Building No. 7, Solitaire Corporate Park, Andheri East, Mumbai-400093. **PAN: AFYPR2330H**	Vs.	ITO (IT) 4(1)(1), Air India Building, Nariman Point, Mumbai-400021.
Appellant		Respondent

Appellant by : Shri Milind Bakhai (AR)
Respondent by : Shri Rajiv Gubgutra (DR)
Date of Hearing : 29.08.2018
Date of Pronouncement : 28.09.2018

ORDERUNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under section 253 of the Income-tax Act (The Act) is directed against the order of ld. CIT(A)-58, Mumbai dated 09.01.2017 for Assessment Year 2013-14. The assessee has raised the following grounds of appeal:

> 1. The Commissioner of Income Tax (Appeals) ['CIT(A)'] has erred in confirming the order of the Assessing Officer ("AO") in considering the base year for computing indexed cost of acquisition as the year in which possession was granted to the appellant i.e. FY 2009-10 instead of the year in which agreement was entered into by the appellant i.e. FY 2008-09. On the facts and in circumstances of the case and in law, the consequential increased capital gain of Rs.13,83,333/- determined ought to be deleted.
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> 2. The appellant craves leave to add, alter, amend and/or rescind any grounds of appeal during the course of the hearing.

2. Brief facts of the case are that the assessee is a non-resident individual filed his return of income for Assessment Year 2013-14 on 29.07.2013 declaring

total income of Rs. 25,58,790/-. In the return the assessee claimed exemption of long-term capital gain earned on sale of a flat No. 3501A &3502B, Torino, Hiranandani Garden, Powai, Mumbai, acquired by the assessee vide allotment letter dated 27th March 2006. The agreement of purchase a property was executed on 31st July 2008. The assessee obtained the possession of flats on 02nd September 2009. The assessee sold the said flats by agreement dated 5th November 2012 for a sale consideration of Rs. 3.65 Crore. The assessee claimed the indexation cost from financial year 2008-09 and calculated long term capital gain of Rs. 1,85,65,375/-. The assessee deposited Rs. 1,86,00,000/- in capital gain tax saving scheme and claimed exemption under section 54. The assessment was completed on 11th March 2016 under section 143(3). The assessing officer while passing the assessment order not allowed the indexation cost to the assessee from the date of allotment of the said flat from financial year 2008-09, rather adopted from the financial year 2009-10 on taking his view that the assessee is entitled for indexation cost from the date of possession i.e from 02.09.2009. Accordingly the assessing officer computed the indexed cost of acquisition at Rs. 1.65 crore instead of Rs. 1.70 crore thereby determine the taxable capital gains of Rs. 1.99 crore and after allowing deduction of Rs. 1.86 crore under section 54 computed taxable long-term capital gain of Rs. 13,83,333 /-. On appeal before learned CIT(A) the action of assessing

officer was confirmed. Therefore, further aggrieved by the order of ld. CIT(A), the assessee has raised filed the present appeal before us.

3. We have heard the submissions of ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the Revenue and perused the material available on record. The ld. AR for the assessee submits that the assessee is entitled for indexation cost from the date of registered agreement executed on 31st July 2008. The assessee paid more than 95% of the cost of the total purchase price.

4. On the other hand the ld. DR for the revenue relied on the order of the lower authorities. The ld DR further submits that the developer received the occupation certificate of the building only on 31.08.2009.

5. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. We have noted that there is no dispute about the date of agreement of purchase, date of possession of the flats and sale thereof (asset). The lower authorities have not disputed about the Long Term Capital Gain earned by the assessee on sale of flats. A narrow dispute is whether the assessee is entitled to indexation cost from the date of registered agreement or from the date of possession. The Hon'ble Punjab & Haryana High Court in Vinod Kumar jain Vs CIT 344 ITR 501 (P&H) / [2010] 195 Taxman 174 (Punjab & Haryana) while considering the similar held as under:–

> **7.** The sole point for consideration in this case is, whether the capital gain arising on allotment of flat under the scheme of the DDA on 27-2-1982 of

which actual flat number and delivery of possession took place on 15-5-1986 and the flat having been sold on 6-1-1989, was a long-term capital gain; and consequently, whether the assessee was entitled to set off the same under section 54 of the Act.

8. The assessee relied upon judgment of this Court in *CIT* v. *Ved Parkash & Sons (HUF)*[1994] 207 ITR 148 and Circular No. 471, dated 15-10-1986 [162 ITR (St.) 41] to contend that allottee gets title to the property with the issuance of allotment letter and payment of instalments is only a follow-up action and taking of the delivery of possession is only a formality and no right as such accrues thereon. According to the assessee, the transaction stood completed on 27-2-1982 and the flat having been sold on 6-1-1989, the same amounted to long-term capital gains and benefit of section 54 was available to the assessee. The counsel further relied upon the provisions of section 2(*42A*) of the Act to contend that it was holding of the property and not the ownership of the property that was germane for determination of the question regarding long-term capital gains and since the assessee had held the flat for approximately seven years, he was entitled to adjustment of long-term capital gains under section 54 of the Act in respect of the property purchased by him. Learned counsel for the revenue, with the aid of judgment in *CIT* v. *Smt. Beena K. Jain*[1996] 217 ITR 363 (Bom.) supported the order of the Tribunal.

9. We have given our thoughtful consideration to the entire matter and find force in the submission of learned counsel for the assessee.

10. Before delving on the controversy involved herein, it would be apposite to refer to relevant statutory provisions.

11. Section 2(*14*) defines capital asset. Under section 2(*29A*) long-term capital asset is one which is not a short-term capital asset. According to section 2(*42A*) short-term capital asset at the relevant time meant, a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer. A conjoint reading of aforesaid provisions leads to one conclusion that a capital asset which is held by the assessee for 36 months would be termed as a long-term capital asset and any gain arising on account of sale thereof would constitute long-term capital gain.

12. It would also be advantageous to refer to Circular No. 471, dated 15-10-1996 [162 ITR (St.) 41] issued by CBDT on which heavy reliance has been placed by the assessee whereby instructions have been issued regarding treatment of capital gains tax in case of a flat purchased under Self-Financing Scheme. It reads thus:—

"Circular No. 471

Capital gains tax - Whether investment in a flat under the Self-Financing Scheme of the Delhi Development Authority would be construction for the purpose of sections 54 and 54F of the IT Act, 1961.

15-10-1986

Capital gains

Sections 54, 54F.

Sections 54 and 54F of the Income-tax Act, 1961, provide that capital gains arising on transfer of a long-term capital asset shall not be

charged to tax to the extent specified therein, where the amount of capital gain is invested in a residential house. In the case of purchase of a house, the benefits available if the investment is made within a period of one year before or after the date on which the transfer took place and in case of construction of a house, the benefit is available if the investment is made within three years from the date of transfer.

2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under the Self-Financing Scheme of the Delhi Development Authority amounts to purchase or its construction by the Delhi Development Authority on behalf of the allottee. Under the Self-Financing Scheme of the Delhi Development Authority the allotment letter is issued on payment of the first instalment of the cost of construction. The allotment is final unless it is cancelled or the allottee withdraws from the Scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the Delhi Development Authority to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession.

3. The Board have been advised that under the above circumstances, the inference that can be drawn is that the Delhi Development Authority takes up the construction work on behalf of the allottee and that the transaction involved is not a sale. Under the Scheme, the tentative cost of construction is already determined and the Delhi Development Authority facilitates the payment of the cost of construction in instalments subject to the conditions that the allottee has to bear the increase, if any, in the cost of the construction. Therefore, for the purpose of capital gains tax, the cost of the new asset is tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position stated above. In view of these facts, it has been decided that cases of allotment of flats under the Self-Financing Scheme of the Delhi Development Authority shall be treated as cases of construction for the purpose of capital gains."

13. On careful reading of the Circular issued by the Board, para 2 thereof describes the nature of right that an allottee acquires on allotment of flat under Self-Financing Scheme. According to it, the allottee gets title to the property on the issuance of an allotment letter and the payment of instalments is only a consequential action upon which the delivery of possession flows.

14. The next issue is the meaning to be assigned to the word "held" occurring in section 2(*42A*) of the Act. A Division Bench of this Court in *Ved Parkash & Sons (HUF)'s* case (*supra*) while interpreting the provisions of section 2(42A) of the Act elaborated the expression "held by an assessee", in the following words:—

"*As is clear from a bare reading of section 2(42A) of the Act, the word "owner" has designedly not been used by the Legislature. The word "hold", as per dictionary meaning, means to possess, be the owner, holder or tenant of (property, stock, land....). Thus, a person can be said*

to be holding the property as an owner, as a lessee, as a mortgagee or on account of part performance of an agreement, etc. Conversely, all such other persons who may be termed as lessees, mortgagees with possession or persons in possession as part performance of the contract would not in strict parlance come within the purview of "owner". As per the Shorter Oxford Dictionary, Edition 1985, "owner" means one who owns or holds something; one who has the right to claim title to a thing."

15. Now adverting to the case law relied upon by learned counsel for the revenue, reference is made to *Smt. Beena K. Jain's* case (*supra*). The assessee therein had sold office premises on 23-7-1987 which had resulted in long-term capital gain. Prior thereto, the assessee had entered into an agreement for purchase of a residential flat *vide* agreement dated 4-9-1985 which was registered on 27-10-1985. The construction of the flat was finally completed in July, 1988 and assessee was put in possession on 30-7-1988. The claim of the assessee under section 54F of the Act was upheld by the Tribunal. Aggrieved, the department had approached the High Court and the petition of the department was dismissed and the issue was decided in favour of the assessee. The said pronouncement does not help the revenue.

16. In view of the above, it is concluded that the provisions of sections 2(*14*), 2(*29A*) and 2(*42A*) encompasses within its ambit those cases of capital asset which are held by an assessee. Once that is so, adverting to the facts of the present case, the assessee was allotted flat on 27-2-1982 on payment of instalments by issuance of an allotment letter and he had been making payment in terms thereof but the specific number of the flat was allocated to the assessee and possession delivered on 15-5-1986. The right of the assessee prior to 15-5-1986 was a right in the property. In such a situation, it cannot be held that prior to the said date, the assessee was not holding the flat.

6. Considering the decision of Hon'ble Punjab & Haryana High Court, we direct the Assessing Officer to allow the indexation cost to the assessee from the date of execution of agreement. Hence, the ground of appeal raised by assessee is allowed.

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

Order pronounced in the open court on this 28/09/2018.

Sd/-	**Sd/-**
SHAMIM YAHYA	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 28.09.2018
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Copy of the Order forwarded to :

1. Assessee **2.** Respondent

3. The concerned CIT(A)
4.The concerned CIT
5. DR "F" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai