

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

**BEFORE SHRI SANDEEP GOSAIN (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 813/MUM/2016
Assessment Year: 2011-12**

Shri Kamal Kishore Singhi 10/161, Kamal Park Building, V.S. Marg, Mahim, Mumbai-400016.	Vs.	Asstt. Commissioner of Income Tax-26(1) K.G. Mittal Hospital Bldg., 6 th floor, Charni Road (W), Mumbai-400002
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PAN No. AADPS3820K
Appellant

Respondent

Assessee by	: Mr. Hari S. Raheja, AR
Revenue by	: Mr. Manoj Kumar Singh, DR

Date of Hearing	: 30/08/2018
Date of pronouncement	: 28/09/2018

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)-46 [in short '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 of appeal filed by the assessee read as under:
 1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in rejecting the appellant's claim of long term capital gains on sale of flat in building Raheja Acropolis Augusta at Chembur holding that the transfer of

sale of flat was correctly assessed as short term capital gain by the Assessing Officer.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in holding that the flat which was sold during the year, the period of holding should be considered is only from 16.01.2009 i.e. date of possession to 27.08.2010 i.e. date of sale. The appellant submits that the flat which was sold, the period of holding should be considered from 26.02.2007 i.e. date of Agreement for Sale to 27.08.2010 i.e. date of sale and hence the CIT(A) ought to have held that the profit on transfer of sale of flat was 'long term capital gain'.
3. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing deduction of actual cost of Rs.79,98,308/- only while computing gain and not the indexed cost of acquisition claimed by the appellant at Rs.1,09,57,220/-. The appellant submits that the capital gain is Long Term Capital Gain and accordingly the appellant is entitled for deduction of indexed cost of acquisition at Rs.1,09,57,220/-.
4. On the facts and in the circumstances of the case the Ld. CIT(A) erred in disallowing the claim of deduction u/s 54 amounting to Rs.30,40,780/- being amount invested in purchase of new residential house.

3. Briefly stated, the facts of the case are that the appellant filed his return of income for the assessment year (AY) 2011-12 on 19.07.2011 declaring income of Rs.31,25,120/-. In the return of income filed, the appellant had disclosed Long Term Capital Gains (LTCG) on sale of Flat No. 1502 in Raheja Acropolis Augusta at Rs.30,42,780/- and after claiming deduction u/s 54 of the Act, as the entire capital gain has been invested in new residential Flat No.404 in Mahesh Cottage, Mahim, Mumbai, the LTCG was shown as *Nil*.

During the course of assessment proceedings, the Assessing Officer (AO) observed on perusal of purchase agreement (of the Flat sold) dated 26.02.2007 that the same related to a flat which was under construction. The assessee had registered the agreement and paid stamp duty thereon, but the building (in which the flat was located) itself was being constructed and the assessee had paid only Rs.7,00,000/- as part of earnest money and balance consideration of Rs.49,47,900/- was to be paid in instalments according to the progress of work as set out in Annexure-G of the agreement. The AO made verification from the developer i.e. M/s Raheja Krishna Enterprise, who vide their letter dated 07.02.2014 enclosed a copy of possession letter for the flat given by them to the assessee on 16.01.2009. On reading the same, the AO came to a finding that the assessee took possession of the flat on 16.01.2009.

In response to a query raised by the AO to explain as to why the capital gain arising from the sale of the flat on 27.08.2010 should not be treated as Short Term Capital Gains (STCG), the assessee filed a reply which has been extracted by the AO at page 3-4 of his assessment order dated 21.03.2014. Reliance was placed by the assessee on the decision in *Mrs. Seeta Subramaniam v. ACIT* (1996) 59 ITD 94 (Madras), *CIT v. Tata Teleservices Ltd.* 122 ITR 594, *CIT v. Sterling Investment Corpn. Ltd.* (1980) 123 ITR 441 (Bom), *ITO v. Smt. Kashmiraben M. Parekh* (1992) 44 TTJ (Ahd) 68, *Manju Agarwal v. ACIT* (ITA No. 3923 of 2002 dated 16.09.2004) by ITAT Mumbai, *Jitendra Mohan v. ITO* (2007) 11 SOT 594 (Del), *CIT v. Jindas Panchand Gandhi* (2005) 279 ITR 552 (Guj), *M. Symala Rao v. CIT* (1998) 234 ITR 140 (AP).

However, the AO was not convinced with the above decisions relied on by the assessee and held that after taking possession of the flat the assessee becomes the owner of the flat from the date of possession and as it is a distinct capital asset from the rights in the agreement that he formerly held, the subsequent sale of the flat would result in STCG or LTCG with the date of holding to be reckoned beginning with the date of ownership which commenced with possession of the flat. Accordingly, the AO computed the STCG at Rs.60,01,692/- and brought the same to tax.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). We find that the Ld. CIT(A), relying on the order of the ITAT 'B' Bench Mumbai in the case of *Jaimal K. Shah, Mumbai v. Department of Income Tax* in ITA No. 6966/Mum/2010 and *CIT v. Dr. Irani* 234 ITR 850 (Bom), upheld the decision of the AO treating the holding period as short term and since the capital gain arising is short term, held that the assessee is not entitled to exemption u/s 54 of the Act.

5. Before us, the Ld. counsel of the assessee files a Paper Book (P/B) containing (i) Computation of Total Income for Assessment year 2011-12, (ii) Sale Agreement dated 26th February, 2007 between Raheja Krishna Enterprise (Developer) M/s Hindustan Candle Manufacturing Company (Owner) and Mr. Kamal Kishore Singhi (Purchaser), (iii) Possession letter dated January 16, 2009 from Raheja Krishna Enterprises, (iv) Sale Deed dated 27th August, 2010 between Mr. Kamal Kishore Singhi (Transferor) and Mr Gudipaty Subba Rao & Mrs.

Vijaylakshmi Subba Rao (Transferees), (v) Sale Deed dated 14th March 2011 between Mr. Sunil Gobind Kataria and Mrs. Leela Gobind Kataria (Sellers) and Mr. Kamal Kishore B. Singhi (Purchaser), (vi) Letter dated 9th December, 2013 addressed to ACIT-26(1), Mumbai, (vii) Circular No. 471 dated 15.10.1986 and Circular No. 672 dated 16.12.1993, (viii) Written submission dated 9th December, 2015 filed before CIT(A)-46, Mumbai, (ix) Written submission dated 22nd December, 2015 filed before CIT(A)-46, Mumbai and (x) Written submission dated 16th January, 2016 filed before CIT(A)-46, Mumbai.

Further it is stated that in the instant case, the relevant dates are as under:

Particulars	Date
1. Date of Booking/Date of Allotment letter	11.01.2007
2. Date of Agreement for Sale	26.02.2007
3. Date of Registration of Agreement	07.03.2007
4. Date of possession	16.01.2009
5. Date of Sale	27.08.2010
6. Holding Period-Months	
i. From date of Allotment	42
ii. From the date of Agreement	41
iii. From date of Registration of Agreement	41
iv. From the date of possession	19

Reliance is placed by him on the order of the ITAT 'E' Bench Mumbai in the case of *Tina Kapoor* (ITA No. 5663/Mum/2016 for AY 2012-13), ITAT 'H' Bench in *Michelle N. Sanghvi* (ITA No.

3973/Mum/2016 for AY 2012-13), ITAT 'D' Bench in *Prem Tharane* (P. No.131 to 138) and in case of Girish C. Bhatija (P. No. 139 to 141).

Relying on the above decisions, the Ld. counsel submits that the date of possession/occupation of the flat has no bearing on deciding the period of holding by the assessee for the purpose of computing whether the gain is STCG or LTCG.

6. *Per contra* the Ld. DR relies on the decision in *Jaimal K. Shah* (supra), *Dr. Irani* (supra) and thus supports the order passed by the Ld. CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. In the instant case not only the agreement for sale was executed on 26.02.2007, but the agreement for sale was registered on 07.03.2007, after paying the proper stamp duty and registration fees. We are of the considered view that immovable property is not conveyed by delivery of possession, but by a duly registered deed. Further, it is the date of execution of registered documents, not the date of delivery of possession or the date of registration of document which is relevant. Once the executed documents are registered, the transfer will take place on the date of execution of documents and not in the date of registration of the document. It has been held so in *Alapati Venkataramiah v. CIT* (1965) 57 ITR 185 (SC), *CIT v. Podar Cements Pvt. Ltd.* (1997) 226 ITR 625 (SC) and *CIT v. Vishnu Trading & Investment Co. Ltd.* (2003) 259 ITR 724 (Raj).

In view of the above ratio laid down by the Hon'ble Supreme Court, we are not advertent to the other decisions relied on by both the sides.

Thus the appellant has rightly claimed the gain as LTCG.

8. In the result, the appeal is allowed.

Order pronounced in the open Court on 28/09/2018.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

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

Mumbai;

Dated: 28/09/2018

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,

(Sr. Private Secretary)
ITAT, Mumbai