



ITA No. 4715/Mum/2015
Monish Kaan Tahilramani
Assessment Year: 2011-12

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

माननीय श्री पवन सिंह , न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI PAWAN SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ I.T.A. No. 4715/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2011-12)

ITO(International Taxation)- 4(1)(1) Room No. 14, Ground Floor Scindia House, Ballard Estate Mumbai-400 038.	बनाम/ Vs.	Monish Kaan Tahilramani 10, Ganpat Niketan 18 th Road, Khar Mumbai-400 052.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAAPT-3077-G		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Sanjay R. Parikh- Ld. AR
Revenue by	:	Shri G.N. Makwana- Ld.DR

सुनवाई की तारीख/ Date of Hearing	:	20/02/2019
घोषणा की तारीख / Date of Pronouncement	:	02/04/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [AY] 2011-12 contest the order of the Ld. Commissioner of Income-Tax (Appeals)-55 [CIT(A)], Mumbai, *Appeal No. CIT(A)-55/ITO(IT)-2(1)/IT-224/14-15 dated 13/03/2015* on various grounds of appeal. The revenue has also filed an additional ground of appeal on 06/09/2018 which concerns with manner



of computation of *capital gains*. Since the same do not require appreciation of new facts, the same is taken on record as ground no.5.

Finally, the grounds of appeal read as under: -

1. *"Whether on the facts and circumstances of the case and in law, the Id. CIT(A) erred in holding that capital gain earned by assessee on sale of flat in July, 2010 was a long term capital gain, when the commencement certificate itself for construction of flat sold was issued by MCGM to builder only 08.04.2009 and the purchase agreement was registered in December 2009? The CIT(A) failed to appreciate that in absence of CC and OC for the impugned flat, the same could not be said to be held or in possession of assessee and has thus erred in treating acquisition of property by assessee from 2005 i.e. the date of first advance made?."*
2. *"Whether on the facts and circumstances of the case and in law, the Id. CIT(A) erred in not applying the ratio of the decision of the Hon'ble Bombay High court in case of Chaturbhuj Dwarkadas Kapadia 26O ITR 491(Bom) wherein the date of transfer is the date when part performance u/s 53A of the property Act is made and possession is given."*
3. *"Whether on the facts and circumstances of the case and in law, the Id. CIT(A) erred in holding the date of making payment of small amount of advance (less than 6% of total cost) as date of acquisition without appreciating that the mere booking of fiat does not confer any right in the property per se; rather it only gives a right to purchase the property in future to assessee on agreed terms and conditions."*
4. *"Whether on the facts and circumstances of the case and in law, the Id. CIT(A) erred in accepting the plea of the assessee denying the observation made by AO in asstt order that assessee had accepted the income to be taxed as STCG vide order sheet dated 24.01.2014, when the assessee had made no such application before the AO to challenge this observation? The order of the CIT(A) is perverse as he accepted the contention of assessee without giving opportunity to the AO to provide the copies of the order sheet noting or call for the records, which revealed that the assessee did accept before the AO vide order sheet noting dated 24/1/2014 for being taxed for STCG."*
5. *"Whether on the facts and circumstances of the case and in law, and without prejudice to the other grounds of appeal, the Id. CIT(A) erred in allowing the indexation of cost of acquisition from F.Y.2004-05 without appreciating the fact that the payments were made on various dates from 2005 to 2010 in contrary to the decision of Hon'ble ITAT-Delhi in the case of Praveen Gupta Vs ACIT, Range-16, Delhi (ITA No. 2558/Del/2010)."*

2.1 Facts in brief are that the assessee being *non-resident individual* was assessed in *scrutiny assessment* u/s 143(3) for impugned AY on 30/01/2014 wherein the assessee's income was determined at



Rs.128.27 Lacs after certain adjustments as against returned income of Rs.85.36 Lacs filed by the assessee on 30/08/2011. The subject matter of present appeal is to determine the nature of certain *capital gains* earned by the assessee in the impugned AY.

2.2 During assessment proceedings, it transpired that the assessee sold an apartment bearing No. 1601, 16th Floor, C-Wing, Tower-I in Ashok Gardens, Tokersey Jiwraj Road, Sewri, Mumbai -400 015 having carpet area of 1291 Square Feets along with exclusive right to use two car parking spaces and other amenities vide *Deed of Transfer* dated 02/06/2010 for a lump sum consideration of Rs.227 Lacs. The assessee submitted that the said property was booked with the builder in the 2005 for total cost consideration of Rs.76.30 Lacs which was payable during the year 2005 to 2010 based on construction schedule starting from 16/03/2005. It was also submitted that additional garage was purchased in November, 2009 for a sum of Rs.8 Lacs. The purchase agreement for the stated property and garage was executed during December, 2009 upon payment of stamp duty / registration charges of Rs.11.48 Lacs. After indexing the cost of acquisition and transfer charges, the resultant capital gains were worked out at Rs.85.41 Lacs. The assessee pleaded that since the first installment of Rs.3.94 Lacs towards acquisition of the property was paid on 16/03/2005 and the property was sold during July, 2010, the resultant gains were *Long-Term Capital Gains [LTCG]* in nature. However, Ld. AO opined that the period of holding was to be reckoned from December. 2009 i.e. when the purchase documents were registered in assessee's favor and therefore, the gains were to be treated as *Short-Term Capital Gains [STCG]* only. The perusal of



quantum assessment order reveal that the Ld. AR is stated to have conceded to the opinion formed by Ld. AO. Accordingly, the gains were treated as *STCG* and the indexation benefit was denied to the assessee. Consequently, the set-off of earlier years *Long Term Capital Losses* for Rs.6.18 Lacs, as claimed by the assessee, was also denied. Finally, the gains were re-worked as Rs.122.13 Lacs and the same were treated as *STCG* in nature.

3.1 However, later on the assessee agitated the stand of Ld. AO before first appellate authority with success before Ld. CIT(A) vide impugned order dated 13/03/2015. The assessee submitted that the right in the stated property was acquired upon booking of the same in the year 2005 and the same right was sold during impugned AY which gave rise to capital gains in the hands of the assessee and therefore, the resultant gains were *LTCG* in nature. The attention was drawn to the fact that the property was identified at the time of booking only. Reliance was placed, *inter-alia*, on the decision of this Tribunal rendered in *Vikas P.Bajaj Vs ACIT*.

3.2 The Ld. CIT(A), after due consideration of factual matrix and assessee's submissions, concurred with the stand of the assessee by observing as under: -

9. *I have considered the AO's order as well as appellant AR's submission extracted as above. I have also taken note of the submissions, documents filed by the appellant in support of his contentions. Having taken note to the same and also to the facts of the appellant's case, it is evident that the appellant has made booking of the said property as on 16.03.2005 which was acquired by the appellant subsequently by making payment as and when the demand was made by the builder / developer as detailed in para 4 of the assessment order. The said property was subsequently sold by the appellant on June 2010 for a sale consideration of Rs.2,27,00,000/- as detailed in the deed of transfer dated 02.06.2010. Having taken note to the same and also to the Hon'ble Bombay High Court's decision cited in the*



ITA No. 4715/Mum/2015
Monish Kaan Tahilramani
Assessment Year: 2011-12

case of CIT Vs. Tata Teleservices Ltd. 122 ITR 594 and Hon'ble jurisdictional Mumbai ITAT in the case of Vandana Rana Roy Vs CIT(A) (ITA No. 6173/M/2011) and Charanbir Singh Jolly Vs ITO (2006) 5 SOT 89 (Mum), I consider it proper and appropriate to hold that the appellant's request is justified for making claim of Long Term Capital Gain. Thus, after taking note of the various judicial pronouncements, I direct the AO to work out the Long-Term Capital Gain in the hands of the appellant taking the date of acquisition as on 16.03.2005 as claimed by the appellant instead of Short Term Capital Gain. With this observation, the appellant's this ground of appeal is allowed subject to aforesaid action on the part of AO and the appellant is directed to provide all necessary documents as required by the AO.

Aggrieved, the revenue is in further appeal before us.

4. The Ld. Departmental Representative [DR], drawing our attention to the factual matrix submitted that the assessee acquired the stated property only upon execution of purchase documents in its favor when the right to acquire the property was converted into a capital asset i.e. the property under question and said capital asset came into existence only upon execution of purchase documents in assessee's favor. Our attention is drawn to the fact that the assessee acquiesced to this fact even during assessment proceedings. In the alternative, it has been submitted that the benefit of indexation was to be granted when the payments were actually made by the assessee. Per *Contra*, Ld. Authorized Representative for Assessee [AR], *Shri Sanjay Parikh*, submitted that the possession was never given to the assessee and the assessee has only sold the right to acquire the stated property. It has been submitted that there is no estoppel against the law and the revenue was obliged to compute the assessee's correct income within statutory framework.

5.1 we have carefully heard the rival submissions and perused relevant material on record. At the outset, we note that there could be no quarrel



on the point that assessee's correct income as per law was to be computed and the revenue could not derive benefit out of assessee's ignorance / submissions and could not oust the assessee to raise a legally valid claim before the appellate authorities since there could be no estoppel against the law.

5.2 Proceeding further, upon perusal, the undisputed facts that emerges are that the assessee has acquired the rights in the stated property vide *Reservation of Apartment* letter dated 16/03/2005 issued by *Swan Mills Limited* upon payment of Rs.3.94 Lacs which is stated to be 5% of the cost of the property. The assessee was required to make construction-linked payment in various installment, the details of which have already been given in the said letter as placed on *page no. 56* of the paper-book. The perusal of the same reveal that assessee has acquired rights in a specific property and the property is clearly identified in the said letter and the said right was not conditional or uncertain. The relevant *agreement for sale* has been executed in assessee's favor by the builder vide *agreement to sale dated 31/12/2009*, a copy of which has been placed on *page nos. 8 to 54* of the *paper-book*. The assessee has sold the same vide *deed of transfer dated 02/06/2010*, the copy of which has also been placed on *page nos. 74 to 97* of the *paper-book*. The *recital 'E'* of this agreement clearly states that the said *tower* was still incomplete on the date of execution of the deed of transfer which lend credence to the argument of Ld. AR that possession was never obtained by the assessee. This is more-clear from *recital 'F'* of the same deed wherein the transferor has agreed to transfer and the transferee has agreed to acquire all the rights, title and interest of the transferor in



ITA No. 4715/Mum/2015
Monish Kaan Tahilramani
Assessment Year: 2011-12

the said Apartment. Therefore, whatever rights were obtained by the assessee vide *reservation of allotment* letter dated 16/03/2005, the same rights have been transferred during the impugned AY as against the argument of revenue that the rights first got converted into new asset upon execution of agreement between the assessee and the builder which has been sold subsequently. In our opinion, the execution of stated agreement in assessee's favor was nothing but mere improvements in the assessee's existing rights in the property. Undisputedly, the right to own / obtain conveyance of immovable property was a capital asset in terms of judgment of Hon'ble Bombay High Court rendered in **CIT Vs Tata Services Ltd. [122 ITR 594]** and also in **CIT Vs Sterling Investment Corporation Ltd. [123 ITR 441]**. Therefore, the conclusion drawn by first appellate authority that the gains were *Long-Term Capital Gains* in nature as counted from 16/03/2005 would require no interference on our part. The appeal stands dismissed to that extent.

5.3 The revenue has relied upon the decision of this Tribunal rendered in *S.Narendrakumar & Co. Vs DCIT [62 Taxman.com 184]* which is factually distinguishable since in that case the nature of the transactions, itself was under doubt and surplus received by the assessee was held to be assessable under the head *Income from other sources*. Similarly, the decision of Hon'ble Kerala High Court in *Lachmandas & Sons Vs DCIT [49 Taxmann.com 387]* deal the situation wherein the terms of the *MOU* indicated that the property would not be transferred in the name of the assessee till entire amount was paid. No such covenant is postulated by reservation of allotment letter in the present case. Similarly, the decision



of Hon'ble Delhi High Court in *Gulshan Malik Vs. CIT [43 Taxman.com 200]* deals with a situation wherein the confirmation letter dated 06/08/2014 specifically stated that no right to provisional / final allotment accrues until the buyer's agreement is signed and returned to the builders and it further stated that no right to claim title / ownership results from the confirmation letter itself. However, such conditions are missing in the present case before us. Therefore, all these case laws, in our considered opinion, are distinguishable on facts.

5.4 Now, the only surviving question that arise for consideration is manner of computation of the gains. It is noted that the assessee has paid upfront payment to the extent of 5% upon allotment and the balance payment has been spread over by way of installment during the year 2005 to 2010. As against the same, the assessee has sought indexation of full cost on the basis of index for 2005, which, in our considered opinion, is not justified. Logically, the indexation was to be done by applying the indexes of the respective years in which the payments were actually made by the assessee which is in line with the decision of this Tribunal rendered in *Lakshman M.Charanjiva Vs ITO [ITA No. 28/Mum/2017 dated 03/10/2018]*, which has been authored by one of us, wherein the matter, after due consideration of various judicial pronouncements, has been concluded in the following manner:-

5. We have carefully heard the rival contentions and perused the relevant material on record including cited judicial pronouncements. We find that Ld. CIT(A) has referred to two decisions of this Tribunal. Upon perusal, it is found that in the case of *Ramprakash Bubna (supra)*, the benefit of indexation has been provided from the date of agreement for acquisition of the property whereas the decision rendered by this Tribunal in *Vikas P.Bajaj (supra)* has primarily drawn strength from the decision of Delhi Tribunal rendered in *Praveen Gupta Vs ACIT 137 TTJ (Del.) 307*. The case of *Vikas P.Bajaj* as well as *Praveen Gupta* dealt with a situation in



ITA No. 4715/Mum/2015
 Monish Kaan Tahilramani
 Assessment Year: 2011-12

which the assessee himself offered capital gains by indexing the actual payments made in the respective AYs by applying the indexes for those years and therefore, is not directly on the issue under hand since the Tribunal, in both the case laws, has confirmed the workings / computations adopted by the assessee.

6. So far as the statutory provisions as contained in Section 48, Explanation (iii) as extracted in the impugned order is concerned, we find that indexed cost of acquisition has been defined to mean 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. 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 allowing the indexation benefit to the assessee. However, the important question that arises for consideration, at this juncture, is that whether the indexation benefit of even the future installments would also be allowable to the assessee from the year in which the asset is first held by the assessee. For this, our attention has been drawn to the decision of Hon'ble Gujarat High Court rendered in *Nirmal Kumar Seth Vs CIT* [17 *Taxmann.com* 127] wherein Hon'ble court has decided the issue as under:-

6. We have heard both the parties at length and gone through the material available on record.

7. From the record, it appears that the land in question was purchased from the Lucknow Development Authority on instalments basis for which registration was made on 01.12.1982 by paying a sum of Rs. 3000/- only. The remaining payment was made in instalments to Lucknow Development Authority, as per the chart given in the AO's order. As per the agreement, the right to get the sale deed registered in favour of the assessee was acquired, though subject to the full and final payment. After making the full and final payment, the assessee got the allotment letter in his favour in the year 1985. On getting the allotment letter, the assessee also obtained the valuable right to have a sale deed in his favour. Thus, the assessee has acquired the capital asset.

8. In the instant case, the plot was sold during the assessment year under consideration. The period is more than 3 years. So, we are in agreement with the observations made by the Tribunal that long term capital gain will have to apply in the assessee's case as per the payment chart.

9. It may be mentioned that the expression "cost of acquisition" is defined in Section 55(2) of the Act. The date of acquisition will have a relevance in determining the cost of acquisition. As per the ratio laid down in the case of *CIT v. Srinivasa Rao* [1987] 166 ITR 593 / 31 *Taxman* 466 (AP) the expression of "cost of acquisition" is exhaustive and the language employed is peremptory. It is not open to the Court to introduce any other facts of meaning to the expression "cost of acquisition".

10. From the record, it also appears that the actual amount was paid from time to time after the date of issuance of allotment letter, which has to be considered for the purpose of indexation with reference to the date of payments. The Tribunal has rightly asked to compute the long term capital gain as per the payment schedule. There is nothing wrong in the Tribunal's



ITA No. 4715/Mum/2015
 Monish Kaan Tahilramani
 Assessment Year: 2011-12

order, which is based on the well established legal position as well as the CBDT Circular, which have already been mentioned in the impugned order passed by the Tribunal.

11. *During the course of argument, we were told that the long term capital gain has already been deposited as per the computation made by the A.O. in the manner claimed by the assessee. When it is so then nothing survives in the appeal.*

12. *Hence, we decline to interfere with the impugned order passed by the Tribunal, which is hereby sustained along with the reasons mentioned therein.*

13. *The answer to the substantial questions of law is in favour of the revenue and against the assessee.*

Respectfully following the wisdom of higher judicial forum, we hold that the indexation benefit against the cost of acquisition shall be available to the assessee on the basis of index of the year in which the payments were actually made by the assessee. The payment made up-to the date of agreement i.e. 18/10/2007 shall be indexed by applying the index for Financial Year 2007-08. Accordingly, subsequent payments made in different financial years shall be indexed by applying the respective indexes of those years. Ground Number-1 stand dismissed.

Therefore, taking the same view, following the higher judicial wisdom of Hon'ble Gujarat High Court rendered in ***Nirmal Kumar Seth Vs CIT [17 Taxmann.com 127]***, we direct Ld. AO to work out the indexed cost after applying indexes of the respective years in which the payments has actually been made by the assessee. Accordingly, Ground No.5 stands allowed.

5.5 Lastly, it is an undisputed position that additional garage has been purchased by the assessee only during November, 2009 which establishes that it was capable of being transacted separately and therefore, constitute a separate capital asset in the hands of the assessee. Therefore, the gain from transfer of this additional garage would be *short-term capital gains* only. Since the sale consideration is composite one, Ld. AO, with assistance of the assessee, is directed to



ITA No. 4715/Mum/2015
Monish Kaan Tahilramani
Assessment Year: 2011-12

bifurcate the sale consideration on some reasonable basis to work out the resultant gains.

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

Order pronounced in the open court on 2nd April, 2019.

Sd/-

(Pawan Singh)

न्यायिक सदस्य / **Judicial Member**

मुंबई Mumbai; दिनांक Dated : 02/04/2019

Sr PS : Jaisy Varghese

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/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.