



**IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH
MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAVISH SOOD, JM**

**ITA No.3563/Mum/2018
(Assessment Year :2012-13)**

Shri Mohammed Sohail Bhamla 53,54, 1 st Floor Ashoka Shopping Centre L.T. Marg, G.T. Hospital Compound, Mumbai – 400 001	Vs.	Assistant Commissioner of Income Tax – 17(2), Mumbai
PAN/GIR No.AAAPB9490K		
(Appellant)	..	(Respondent)

Assessee by	Shri Kamlesh Kapadia
Revenue by	Ms. R. Kavitha
Date of Hearing	13/03/2019
Date of Pronouncement	27/03/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

This appeal in ITA No.3563/Mum/2018 for A.Y.2012-13 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-58, Mumbai in appeal No. Mumbai/10400/2017-18 dated 27/03/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 12/03/2015 by the Id. Assistant Commissioner of Income Tax -17(2), Mumbai (hereinafter referred to as Id. AO).

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in upholding the disallowance of claim of exemption u/s.54F of the Act amounting to Rs.22,05,340/- in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is an individual engaged in the business of bathroom fittings and furniture through its proprietary concern under the name and style of M/s. Satelite as well as trading in equities. The assessee filed his return of income for the A.Y.2012-13 of 28/09/2012 declaring total income of Rs.Nil after claiming set off of brought forward business loss of A.Y.2011-12 of Rs.29,27,587/- against the business income of Rs.26,10,421/- and profit from trading activities of Rs.3,17,166/-. During the year under consideration, the assessee sold his two shops for Rs.18,50,000/- each on 01/11/2011.

3.1. The assessee also made reinvestment in purchase of residential house property for which purpose he entered into an agreement on 08/09/2010 and started making first instalment payment on 16/12/2010 and the last instalment was paid on 13/01/2011 for purchase of new residential property. Pursuant to the payment of this last instalment, the assessee was handed over the possession of the new residential property on 13/01/2011. The assessee took the date of possession of the property as the relevant date and claimed benefit of exemption u/s.54F of the Act in respect of long term capital gains derived from sale of two shops on the ground that reinvestment in new residential property had been made within one year prior to the date of sale of shops. The Id. AO denied the claim of exemption u/s.54F of the Act on the ground that the assessee had entered into an agreement for purchase of new residential property on 08/09/2010 and had acquired a right thereon. Only the possession of the said property was handed over to the assessee on 13/01/2011. Hence, the reckoning date for determining the fact of investment in new property should be construed to be the date of agreement i.e., on

08/09/2010. In such a scenario, the assessee had not complied with the investment in new property before one year from the date of sale of two shops and accordingly not eligible for exemption u/s.54F of the Act. With these observations, the Id. AO brought the long-term capital gains of Rs. 22,05,340/- to tax by denying exemption u/s.54F of the Act. This action of the Id. AO was upheld by the Id. CIT(A).

4. Aggrieved, the assessee is in appeal before us.

5. We have considered rival submissions. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. The only issue to be decided is with regard to the specific date of making investment in new residential property in order to make the assessee eligible for exemption u/s.54F of the Act. Admittedly, the assessee sold a commercial property in the form of two shops and had made investment in new residential house property. In the instant case, the investment in new residential housing property pursuant to the agreement for purchase had been made on 08/09/2010 which is beyond the period of one year prior to the date of sale of two shops by the assessee. The Id. AR submitted that on combined reading of provisions of Section 8 and Section 54 of transfer of Property Act, it suggests that though on execution and registration of sale deed, ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embedded in the deed indicating the intention of the parties. It follows that on execution and registration of a sale deed, the ownership, title and all interests in the property pass to the purchaser only on fulfilment of all the terms and conditions mentioned in the agreement. The Id. AR argued that only on payment of final instalment on 13/01/2011, the assessee was entitled to get possession of the property as per the terms of agreement of purchase dated 08/09/2010. Hence, according to him, the relevant date would only be the date of handing over of possession i.e., 13/01/2011, which when considered, would be

falling prior to one year before the date of transfer by the assessee and hence the assessee would be eligible for exemption u/s.54F of the Act.

5.1. The Id. DR on the contrary placed on record the copy of the recent decision of the Hon'ble Bombay High Court in the case of DCIT vs. Vembu Vaidyanathan in ITA No.1459/Mum/2016 dated 22/01/2019. He drew our attention to the question framed before the Hon'ble Bombay High Court which is reproduced as under:-

“Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in treating the gain arising from the sale of capital asset as Long Term Capital Gain without appreciating the fact that mere letter of allotment does not lead to creation of proper and effective right over the capital asset sought to be acquired, but only on execution of an agreement spelling out all the exact terms and conditions for acquisition?”

5.2. The facts narrated in the said order as well as the decision rendered by the Hon'ble Bombay High Court are reproduced hereunder for the sake of convenience.

2. *“This question arises in following background. The respondent- assessee is an individual. The assessee had filed the return of income for the assessment year 2009-10 and claimed long term capital gain arising out of capital asset in the nature of a residential unit. During the course of assessment the Assessing Officer examined this claim and came to the conclusion that the gain arising out of sale of capital asset was a short term capital gain. The controversy between the assessee and the revenue revolves around the question as to when the assessee can be stated to have acquired the capital asset. The assessee argued that the residential unit in question was acquired on the date on which the allotment letter was issued by the builder which was on 31st December, 2004. The Assessing Officer however contended that the transfer of the asset in favour of the assessee would be complete only on the date of agreement which was executed on 17th May, 2008.*
3. *CIT appeals and the Tribunal held the issue in favour of the assessee relying on various judgments of different High*

Courts including the judgment of this Court in case of Commissioner of Income-Tax, Bombay City I Vs. TATA Services Limited. Reliance was also placed on CBDT circulars.

4. *Having heard learned counsel for the parties, we notice that the CBDT in its circular No.471 dated 15th October, 1986 had clarified this position by holding that when an assessee purchases a flat to be constructed by Delhi Development Authority ("D.D.A." for short) for which allotment letter is issued, the date of such allotment would be relevant date for the purpose of capital gain tax as a date of acquisition. It was noted that such allotment is final unless it is cancelled or the allottee withdraw from the scheme and such allotment would be cancelled only under exceptional circumstances. It was noted that the allottee gets title to the property on the issue of allotment letter and the payment of installments was only a follow-up action and taking the delivery of possession is only a formality."*
5. *This aspect was further clarified by the CBDT in its later circular No.672 dated 16th December, 1993. In such circular representations were made to the board that in cases of allotment of flats or houses by co-operative societies or other institutions whose schemes of allotment and consideration are similar to those of D.D.A., similar view should be taken as was done in the board circular dated 15th October, 1986. In the circular dated 16th December, 1993 the board clarified as under:*

"2. The Board has considered the matter and has decided that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions are similar to those mentioned in para 2 of Board's Circular No.471, dated 15-10-1986, such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act."

It can thus be seen that the entire issue was clarified by the CBDT in its above mentioned two circulars dated 15th October, 1986 and 16th December, 1993. In terms of such clarifications, the date of allotment would be the date on which the purchaser of a residential unit can be stated to have acquired the property. There is nothing on

record to suggest that the allotment in construction scheme promised by the builder in the present case was materially different from the terms of allotment and construction by D.D.A.. In that view of the matter, CIT appeals of the Tribunal correctly held that the assessee had acquired the property in question on 31st December, 2004 on which the allotment letter was issued.

6. Learned counsel for the revenue has also argued that in any case the assessee was not entitled to exemption under Section 54F of the Income Tax Act, 1961 (“the Act” for short). Since the assessee had held multiple residential units which would disqualify the assessee from claiming the exemption on it as was held by the Assessing Officer. From the record we notice that before the CIT appeals the assessee had produced additional evidence to suggest that the other units previously held by the assessee were discarded earlier and that at the relevant time the assessee did not hold any other residential unit. Quite apart from it being a pure question of fact, we do not find any indication in the impugned judgment of the Tribunal though the revenue had argued such a contention in its appeal before the Tribunal.

7. In the result, the Income Tax Appeal is dismissed.”

5.3. We also find that the Co-ordinate Bench of this Tribunal in the case of Richa Bagrodia vs. DCIT reported in (2010) 103 taxmann.com 73(Mumbai Tribunal) dated 22/04/2014 had held that in case of sale of flat, it is the date of allotment of flat and not date of giving possession of flat which has to be considered as the date for computing the holding period of 36 months which would have a bearing on the determination as to whether the gains received there from would be long term or short term capital gains as the case may be. The relevant operative portion of the said judgement is reproduced hereunder:-

“6. We heard both the parties and perused the orders of the Revenue Authorities as well as the judgments of the Hon’ble High Court and the decisions of the Tribunal cited by learned representatives of both

the parties. The only issue that is to be decided is whether the date of allotment of the flat or the date of possession of the flat by the assessee should be considered as the date for computing the holding period of 36 months. On perusal of the cited orders of the Tribunal (supra), we find that an identical issue came up for adjudication before the Tribunal in the case of Meena A Hemnani (supra), order dated 17th January, 2014 wherein one of us (AM) is a party and the issue was decided in favour of the assessee by relying on various decisions of the Tribunal as well as the judgment of the Hon^{ble} Gujarat High Court in the case of CIT vs. Anilaben Upendra Shah (2003) 262 ITR 657 (Guj). Relevant discussion is given in paras 3 & 4 of the said order of the Tribunal which read as under:

*“ 3. There are couple of issues raised in this appeal. Rest of the grounds raised in the appeal are either consequential or general in nature. Accordingly, they are dismissed as general or consequential. The issues, which need to be adjudicated in this appeal are (i) if the capital gains earned by the assessee are in the nature of the short term as held by the AO or long term capital gains as offered by the assessee in the return. At the outset, Ld Counsel for the assessee mentioned that the assessee purchased a flat vide the allotment letter dated 9.9.2003 from the builder namely Prestige Estates Projects Pvt. Ltd. There was a construction agreement between the parties dated 1.12.2003 and the registered deed of the same was dated on 22.9.2006. The said flat was sold by the assessee to Bennet Coleman & Company on 10.11.2006. The assessee earned capital gains on this transaction and offered the same as long term capital gains reckoning the date of allotment i.e., 9.9.2003 for the purpose of determining the holding period of three years relevant for the long term capital gains. However, in the assessment proceedings, AO considered the date of registration i.e., 22.9.2006 the date of registration and determined the short term capital gains. Therefore, now the issue to be decided by the Tribunal relates to if the date of allotment should be considered for the purpose of computing the said long term capital gains. In this regard, Ld Counsel filed various decisions to suggest that the **date of allotment** must be considered for the purpose of computing the long term capital gains instead of date of registration. Ld Counsel filed the order of the Tribunal in the case of ACIT vs. Smt. Vandana Rana Roy vide ITA No.6173/M/2011 (AY 2007-2008) dated 7.11.2012, wherein one of us (AM) is a party, and stated that the “date of allotment” should be reckoned as relevant date for computing the holding period for the purpose of computing the capital gains. In this regard, Ld Counsel brought our attention to para 7 and 8 of the said order of the Tribunal to support his case. The said*

judgment was decided considering the judgment of the Gujarat High Court in the case of CIT vs. Anilaben Upendra Shah (2003) 262 ITR 657 (Guj) apart from other decisions of the Tribunal in the case of Jitendra Mohan vs. ITO (2007) 11 SOT 594 (Del) and also another decision of the ITAT in the case of Pravin Gupta vs. ACIT and the relevant propositions are extracted in para 7 of the Tribunal's order dated 7.11.2012. The said paras 7 and 8 from the order of the Tribunal in the case of Smt. Vandana Rana Roy read as under:

"7. We have heard both the parties, perused the cited decisions and we find that there is no dispute on the facts. The only issue that is to be decided is whether date of allotment of the flat or the date of possession of the flat by the assessee should be considered as date of holding for computing the holding period of 36 months. In alternative, the "date of registration" should be the relevant date. On perusal of the said decisions relied upon by the Ld Counsel, we find that the decisions are relevant and applicable to the facts of the present case. The conclusion of the Hon'ble Gujarat High Court judgment in the case of CIT vs. Jindas Panchand Gandhi reads as under:

"Assessee having sold the flat allotted to him by a co-operative housing society after a period of 36 months from the date of allotment, capital gains arising to him were long-term capital gains despite the fact that the physical possession of the flat was given to the assessee much later and, therefore he was entitled to deduction from such gains as per law."

7.1 The conclusion of the Hon'ble Gujarat High Court judgment in the case of CIT vs. Anilaben Upendra Shah reads as under:

"Assessee having held the shares and allotment of a flat in a co-operative housing society for a period of more than 36 months the capital gain arising from sale of said flat was long-term capital gain and assessee was entitled to benefit of section 80T irrespective of the fact that the assessee did not get possession of the flat in question at the time of allotment and it was constructed later on."

7.2. The conclusion of **Hon'ble ITAT, Delhi Bench in the case of Jitendra Mohan vs. ITO** reads as under:

“On the facts of the case, assessee held the capital asset (shed) allotted to it on installment basis from 28th December, 1994, the date of payment of second installment and sale thereof on 15th December, 2000, gave rise to long term capital loss even though possession of shed was handed over by DSIDC to assessee on 28th May, 1998.”

7.3. The conclusion of **Hon'ble ITAT, Delhi Bench in the case of Praveen Gupta vs. ACIT** reads as under:

“Assessee can be said to have held the flat when he made the payment to the builder and received the allotment letter, and therefore, benefit of indexation of cost of acquisition of the flat has to be granted to the assessee from the date (1995) when he started making payment to the builder and not from the date of execution of conveyance deed in 2001.”

8. All the above decisions are uniform in concluding that the **“date of allotment”** is reckoned as the date for computing the holding period for the purpose of capital gains. The date of allotment in this case being 19.11.2001 and the date of sale is 23.8.2006, therefore, the holding period is much more than 36 months. In this case, the gains earned by the assessee on the sale of flat have to be computed as capital gains. Without prejudice, even if the date of possession, being 14.8.2003, is considered; the assessee is still entitled to the benefits of the Long Term Capital Gains. Therefore, in our opinion, order of the CIT (A) does not call for any interference. Accordingly, the grounds raised by the Revenue are dismissed.”

4. Considering the above settled nature of this issue, we are of the opinion that the assessee must succeed on this issue. Accordingly, the relevant grounds of appeal are allowed.”

7. From the above settled position of the issue, it can be safely concluded that the **“date of allotment”** should be reckoned as the date for computing the holding period for the purpose of capital gains. In the instant case, the date of

*allotment is 11.04.2003 (FY 2003-2004) and the date of sale of the property is 14.10.2007, therefore the holding period is more than 36 months. Therefore, the capital gains earned by the assessee on the sale of the flat have to be treated as „long term capital gains“. The assessee paid the first installment on 11.4.2003, thereby conferring a right to hold a flat, which was later identified and possession delivered on later date. The Hon'ble Punjab & Haryana High Court in the case of Mrs. Madhu Kaul vs. CIT vide Income Tax Appeal No.89 of 1999, dated 17th January, 2014 held that the mere fact that possession was delivered later, does not detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter. Thus, the Id DR's arguments on non-existence of the flat at the time of issuing of allotment letter stands answered by the said judgment of the Hon'ble High Court of Punjab & Haryana (supra). The same view was supported by various decisions of the Tribunal as well as the judgments of the Hon'ble Gujarat High Court and the relevant conclusions were already extracted in the above paragraphs of this order. Regarding the judgments of the Hon'ble jurisdictional High Court relied on by the Ld DR are distinguishable on facts. Therefore, considering the above settled nature of the issue as well as the following the principle of consistency, we are of the considered opinion that the ground no.1 raised by the assessee should be allowed. Accordingly, ground no.1 is **allowed**.*

5.4. We find that the aforesaid judgment was rendered in the context of identifying specified date for reckoning the holding period of 36 months. The principle and analogy drawn thereon need to be followed and applied to the facts of the instant case. Respectfully following the aforesaid decision of this Tribunal and the decision of Hon'ble Jurisdictional High Court we hold that assessee had entered into agreement of purchase of new property on 08/09/2010 on which date the assessee had been allotted the flat and hence, the reckoning period even for the purpose of claim of exemption u/s.54F would commence from that date. When viewed from 08/09/2010, it is apparent that the assessee had made investment in new property beyond the period of one year prior to the date of sale of two shops. Hence, the assessee is not eligible for exemption u/s.54F of the Act. This fact had been properly appreciated by the Id. CIT(A) and we do not find any infirmity in the order thereof. Accordingly, the ground raised by the assessee before us is dismissed.

6. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on this 27/03/2019

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 27/03/2019
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai