

आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM

आयकर अपील सं./ ITA No. 6822/Mum/2016

(निर्धारण वर्ष / Assessment Year 2012-13)

The Asst. Commissioner of Income Tax, Central Circle 16(2), Room No. 440, 4 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	Vs.	Ashwin. S. Bhalekar Beamon Chambers, Nagindas Master Road, Fort, Mumbai-400 001
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AEBPB5505Q		

अपीलार्थी की ओर से / Appellant by	:	Shri Ajay Kumar, DR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Madhur Agarwal, DR

सुनवाई की तारीख / Date of hearing:	15-05-2019
घोषणा की तारीख / Date of pronouncement :	21-05-2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

This appeal filed by the Revenue is arising out of the order of Commissioner of Income Tax (Appeals)-5, Mumbai [in short CIT(A)], in appeal No. IT/163/15-16/96/16-17 vide dated 16.08.2016. The Assessment was framed by the Asst. Commissioner of Income Tax,



Central Circle-16(2), Mumbai (in short ACIT/ITO/ AO) for the A.Y. 2012-13 vide even date dated 20.03.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of Revenue is against the order of CIT(A) accepting the claim of the assessee that extinguishment of rights in the capital asset is a transfer of capital asset and directing the AO to assessee the same as capital gains and consequent allowance of claim of deduction under section 54 of the Act. For this Revenue has raised the following grounds: -

“a. Whether the Ld. CIT(A) has erred on facts and in law in allowing the appeal of the assessee by accepting the claim of the assessee that there involved a transfer of a Capital Asset, without appreciating that for creating any right in a Capital Asset, the Asset should first be in place, which is not the case here as at no point of time, the asset was allowed to be built or even permitted to be built by the appropriate authorities.

b. Whether the Ld. CIT(A) has erred on facts and in law in allowing the appeal of the assessee by accepting the claim of the assessee that it had got a booking right in some of the flats in a project by M/s Shree Shubh Enterprise, without realizing that a mere allotment letter confirming therein the advance received from the assessee, cannot create any right in the flats in the absence of a binding legal agreement to that effect.



c. *Whether the Ld. CIT(A) has erred on facts and in law in allowing the appeal of the assessee by accepting the claim of the assessee that the Capital Gain accrued to it on account of compensation received by it from the Developer, without realizing that the so called compensation had actually paid to the assessee by the sister concern of the assessee- M/s Shubh Enterprise, who has never confirmed the purpose for which the said amount was paid.*

d. *Whether the Ld.CIT(A) has erred on facts and in law in allowing the appeal of the assessee by accepting the claim of the assessee that the Capital Gain accrued to it on account of compensation received by it from the Developer, without appreciating that the assessee vide a letter dated 22.1.2012 has already surrendered the so called rights in the said flats and the developer subsequently wrote a letter to the assessee on 14.2.2012, treating the amount paid by its sister concern as the compensation for the said flats, when there was no necessity or legal requirement to pay any such compensation as the rights, if any, had already been surrendered by the assessee without seeking any compensation for the same.*

e. *Without prejudice to the above, whether the Ld.CIT(A) has erred on facts and in law in allowing the appeal of the assessee by accepting the claim of the assessee u/s 54 of the Act, without realizing that provisions of section 54 applies to the transfer in a non-existing asset.*



f. Whether the Ld. CIT(A) has erred on facts and in law in allowing the appeal of the assessee and thereby failing to consider the substance of the case wherein the assessee has advanced loan to the Developer and once this loan was returned back through its sister concern alongwith the applicable interest, the form of asset acquisition and surrender of rights was given to the entire transaction.”

3. The assessee is an Advocate by profession. The assessee was allotted Flat No. 1703/1704/1705 admeasuring 4200 sq. ft. in the B-Wing on the 17th floor of the proposed Building known as "Shubh Residency" vide Allotment letter dated 20.06.2008. The assessee had paid advance amounting to ₹ 50,00,000 on the allotment of said flat. By virtue of the said allotment the assessee has acquired right to the proposed flats. The construction of the building was yet to commence on the date of allotment. Due to various delay in regulatory approvals, the builder could not obtain permission to construct the building upto 17th floor. Under such circumstances, the assessee surrendered the right to receive the flats and the builder cancelled the allotment of the above flats and agreed to pay the compensation for an amount of ₹ 1,10,00,000/- on account of surrender of such flats. The amount was paid as below: -

Date of payment Amount ()

27.08.2011 30,00,000

02.10.2011 30,00,000

14.02.2012 50,00,000



In addition to the above, builder has transferred the initial advance of ₹ 50,00,000/- to new flat in the same project which the assessee agreed to buy. The assessee then invested the said money to acquire Flat No. 301/305 in the same project at 3 floor in the 8-Wing of Shubh Residency admeasuring 1500 sq. ft. @ 10200/sq. ft. at ₹ 1,53,03,800/- vide agreement dated 28.02.2012 registered on 29.02.2012. The above facts result in extinguishment of assessee's right in Flat No. 1703/1704/1705. As per Sec 2(47) of the Act, extinguishment of any right in relation to capital asset falls in the definition of transfer and hence will result in the Capital Gain chargeable to tax under section 45 of the Act. Since the above right was held for more than 3 years the assessee has treated the gain on extinguishment of right as long term. The AO has not accepted the claim of the assessee and treated the compensation on surrender of flats amounting to ₹ 1.10 crores as income of the assessee under the head of income from other sources. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) accepted the claim of the assessee vide Para 3.3 and deleted the addition by observing as under: -

“3.3 I have considered the appellant's submissions. Appellant was allotted 3 flats in B-wing of Shubh Residency, D.N. Nagar, Andheri, on 20.6.2008. Appellant had acquired right to the above 3 flats admeasuring 4200 sq.ft. and allotment date was 20.6.2008. As the builder could not construct the flats, appellant had surrendered - these flats to the builder @ 8833/sq.ft and appellant earned the differential amount of Rs.1,10,00,000/-. As from the date of allotment to the date of surrender of flat 3 years had elapsed, appellant claimed capital gain and also claimed exemption u/s 54F as appellant



had acquired new flat admeasuring 1500 sq.ft @ 10200/sq.ft. for Rs.1,53,03,800/- vide agreement dated 28.02.2012. However, AO in the assessment order was of the opinion that as builder had not even built the flats then it cannot be considered as extinguishment of right and assessed the capital gain under income from other sources and added to the total income. In the appellant's submission appellant states that by paying the advance for the flats and obtaining allotment letter on 26.6.2008 they have acquired the right to the property and right to property is capital asset and when it is transferred and if any surrender amount is received it has to be assessed under capital gain. Appellant is of the view that AO's observation that as builder has not build the flats it does not come under the purview of extinguishment of rights u/s 2(47)(ii) of the act is erroneous and according to the appellant as he has paid advance for the flats and acquired right to the proposed flats, this will come under the purview of acquiring right to the property. Appellant has relied on CBDT Circular No.471 dated 15.10.1986 where it is held that property acquired by allotment letter was considered as capital asset for the purpose of exemption from capital gains. Further appellant had relied on Delhi High Court decision in the case of CIT vs Ram Gopal [2015] 55 taxmann.com 536 (Delhi) in which it is held as under

Section 2(14), read with sections 2(47) and 54, of the Income tax Act, 1961 - Capital



gains - Capital asset (Immovable property) - Assessment year 2009-10 - Whether even booking rights or rights to obtain title of property is also capital asset - Assessee sold capital assets - Assessee claimed that he acquired another property out of sale consideration and also claimed cost of improvement u/s 54 - Assessing Officer held that in absence of an agreement to sell, rights acquired by provisional booking of property was not acquisition of new capital asset and cost of improvement was not deductible - Whether since right of acquiring of property by assessee amounted to capital asset, improvement cost was eligible for exemption alongside cost of investments - Held, yes [in favour of assessee].

In the above CBDT circular and also in the above case it is held that surrendering of allotment of flat has to be considered as a right in property which is a capital asset and any capital gain arising from that capital asset and if appellant purchases new flat then appellant is eligible for exemption u/s 54. Here in this case appellant had already obtained allotment letter for the 3 flats in Shubh Residency. Later, after 3 years it was surrendered and appellant had earned a differential surplus amount of Rs.1,10,00,000/- after indexation of capital gain by the appellant of Rs.92,56,014/- and after surrendering the first property appellant purchased



another property on which appellant had claimed exemption u/s 54 for Rs.92,56,014/-. In view of the above Delhi High Court decision, appellant is eligible for claiming of exemption u/s 54 of the Act. Hence, AO is directed to compute the surplus amount received from surrender of flat as capita' gain and also allow exemption claimed by the appellant u/s 54 in view of the above case Law and CBDT's circular. Hence, AO's addition of Rs.1,10,00,000/- is deleted. Grounds of appeal are allowed."

Aggrieved, now Revenue is in appeal before us.

4. We have heard rival contentions and gone through the facts and circumstances of the case. We have noted that the above narrated facts are undisputed. The facts clearly show that the extinguishment of assessee's right in Flat No. 1703, 1704 and 1705 proposed building known as "shubh Residency" allotted vide allotment letter dated 20.06.2008 is actually extinguishment of any right in relation to capital asset in view of the provisions of section 47 of the Act and falls in the definition of transfer and hence, result in capital gain chargeable under section 45 of the Act. It is a fact that assessee held this right for more than 3 years for a reason that this flats were subject to allotment vide allotment letter dated 20.06.2008 and assessee received compensation of ₹ 1.10 crores and in lieu of that acquired flat No. 301 and 305 in the same project vide agreement dated 28.02.2012, which period is more than three years. The assessee has made payment of ₹ 1.10 crores on various dates mentioned above and this is eligible for the claim of deduction under section 54 of the Act also. We find that the CIT(A) has



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rightly deleted addition made by the AO in regard to disallowance of the claim of the assessee disallowing deduction of long term capital gain under section 54 of the Act on the premise that the compensation received is income from other sources. We noted that the CIT(A) has rightly allowed the claim of the assessee and we confirm the same.

5. In the result, the appeal of Revenue is dismissed.

Order pronounced in the open court on 21.05.2019.

Sd/-

(एन. के. प्रधान/ NK PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 21.05.2019.

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai