

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” Bench, Mumbai**

**Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No.553/Mum/2016
(Assessment Year: 2011-12)**

M/s Suresh Brothers
511, Panchratna, 14,
Mama Parmanand Marg,
Opera House, Mumbai 400004

Vs.

Asstt. Commissioner of Income
Tax-16(3), Income-tax Office,
Matru Mandir, 2nd Floor,
Tardeo Road, Mumbai – 400007

PAN – AAAFS3651F

(Appellant)

(Respondent)

**ITA No.1320/Mum/2016
(Assessment Year: 2011-12)**

Asstt. Commissioner of Income
Tax-16(3), Matru Mandir,
2nd Floor, Tardeo Road,
Mumbai – 400007

Vs.

M/s Suresh Brothers
511, Panchratna,
Opera House,
Mumbai 400004

PAN – AAAFS3651F

(Appellant)

(Respondent)

Appellant by:

Shri Rahul Hakani &
Shri Apurva Shah, A.Rs

Respondent by:

Shri Amit Pratap Singh, D.R

Date of Hearing : 10.10.2019

Date of Pronouncement: 18.10.2019

ORDER

PER RAVISH SOOD, JM

The present cross appeals are directed against the order passed by the CIT(A)-30, Mumbai, dated 10.12.2015, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 25.03.2014 for A.Y. 2011-12. As a common issue is involved in the captioned appeals, therefore, the same are being taken up and disposed off together by way of a consolidated order. The assessee assailing the impugned order has raised before us the following grounds of appeal:

"The Commissioner of Income Tax (Appeals)-30, Mumbai erred:-

In not holding that the appellant was the owner of the premises at Bharat Diamond Bourse since 1991 when it had made an application for the same and in allowing indexation accordingly.

The appellant craves leave to add, alter or amend the ground as may be advised."

2. On the other hand the revenue had challenged the order passed by the CIT(A) on following grounds:

1. Whether on the facts and in the circumstances of the case and as per law, the Ld. CIT(A) has erred in treating the capital gains as Long Term Capital Gain which was assessed as Short Term Capital Gain by the Assessing Officer?
2. Whether on the facts and in the circumstances of the case and as per law, the Ld. CIT(A) has erred in holding the Capital Gain as Long Term Capital Gain without appreciating the fact that the property in question was in possession of the original transferor (i.e. Bharat Diamond Bourse) vide Lease Deed dated 31.3.2010, as such any right over the property before 31.3.2010 could not arise in the case of the assessee ?
3. Whether on the facts and in the circumstances of the case and as per law, the Ld. CIT(A) has erred in accepting the date of allotment of area in the proposed structure in Bharat Diamond Bourse as the date of vesting of rights in that proposed premise without appreciating that on that particular date, i.e. on 3.12.1999, no property which could be categorized as "capital asset" as per Section 2(14) of the Income -Tax Act was into existence?
4. Whether on the facts and in the circumstances of the case and as per law, the Ld. CIT(A) has erred in equating the part performance in the payment. of proposed structure to that of the "property of any kind" and subsequently to "Capital Asset" as defined under Section 2(14) of the Income - Tax Act ?
5. Whether on the facts and in the circumstances of the case and as per law, the Ld. CIT(A) has erred in not appreciating the fact that what was transferred by the assessee was a premise whose conveyance was bestowed upon it vide the Allotment Letter dated 2.8.2010, which is clearly mentioned even in the Sale Deed cum Transfer Agreement signed by the assessee on 16.12.2010.
6. Whether on the facts and in the circumstances of the case and as per law, the Ld. CIT(A) has erred in not following the ration applied by Hon'ble Bombay High Court in the case of CIT Vs. Smt. R.R. Sood [1986] 161 ITR 92.?
7. The appellant craves leave to amend alter any ground or add a new ground which may be necessary.

8. The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.”

3. Briefly stated, the assessee firm which is engaged in the business of manufacturing, import and export of diamonds had e-filed its return of income on 30.09.2011, declaring its total income at Rs.4,46,087/-. The return of income filed by the assessee was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2) of the Act.

4. During the course of the assessment proceedings it was observed by the A.O that the assessee had transferred the occupancy rights of its office premises i.e EE6011, Bharat Diamond Bourse (alongwith parking space) for an aggregate consideration of Rs.9,72,00,000/-, and had offered for tax Long Term Capital Gain (for short 'LTCG') of Rs.10,97,125/- in its return of income. On a perusal of the details, it was observed by the A.O that the assessee had acquired the occupancy rights in the aforesaid property, vide a registered document as on 02.08.2010. In the backdrop of the aforesaid facts, the A.O called upon the assessee to explain as to why the transaction may not be brought to tax under the head Short Term Capital Gain (STCG). In reply, it was submitted by the assessee, that as it had applied for the office premises at Bharat Diamond Bourse in the year 1991, and had along with the application made a payment of Rs.43,12,500/-, therefore, the subsequent transfer transaction was rightly brought to tax under the head LTCG. In sum and substance, it was the claim of the assessee, that as it had applied for the allotment of the property way back in the year 1991, therefore, its acquisition was to be related to the said point of time. A.O observed, that the assessee had worked out the total cost incurred for acquisition at Rs.4,05,45,078/-. After indexing the payments made for the premises and the parking space, the assessee had arrived at an indexed cost of acquisition of Rs.9,32,81,766/-. Also, it was observed by the A.O, that a provisional allotment of the property i.e EE6011, Bharat Diamond Bourse (alongwith parking space) admeasuring 5,750 sq. ft. was made to the assessee on 03.12.1999.. Apart there from, it was noticed by him that Bharat Diamond Bourse i.e the company which had allotted the occupancy rights to the assessee in itself had acquired the leasehold rights from MMRDA on 31.03.2010. A.O was of the view, that now when Bharat Diamond Bourse i.e the granter of the occupancy rights to the assessee itself had acquired the leasehold rights from MMRDA on 31.10.2010, therefore, the date of acquisition of the occupancy rights of the property by the

assessee could not be related to a date prior to 31.03.2010. Further, it was observed by him, that the allotment of occupancy rights and shares of the Sec.25 company in favour of the assessee were made on 02.08.2010 and 12.08.2010, respectively. On the basis of his aforesaid observations, the A.O was of the view that the occupancy rights of the property were acquired by the assessee only in the year 2010. Accordingly, the A.O treated the occupancy rights of the assessee in the Office premises No. EE6011, Bharat Diamond Bourse, as a 'Short Term Capital Asset', and worked out STCG on the transfer of the same at Rs.1,67,63,555/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). After perusing the facts, the CIT(A) was not persuaded to subscribe to the claim of the assessee that it had acquired the occupancy rights of the office premises i.e EE6011, Bharat Diamond Bourse, as on the date on which it had applied for allotment of the same in the year 1991. At the same time, the CIT(A) also did not find favour with the view taken by the A.O that the acquiring of the rights in the property could not have taken place prior to the date of the letter of allotment of the occupancy rights issued by Bharat Diamond Bourse in the year 2010. As a final and binding allotment of the office premises i.e EE6011, Bharat Diamond Bourse was carried out on 03.12.2009, therefore, the CIT(A) was of the view, that the assessee on the said date could safely be deemed to be vested with the ownership of the specific area in the constructed building. Accordingly, the CIT(A) not finding favour with either the observations of the A.O or the claim of the assessee, therein concluded that the acquisition of the occupancy rights of the office premises EE6011, Bharat Diamond Bourse, had taken place on the date on which final and binding allotment of the specific area (5750 Sq. ft) in the building was done in favour of the assessee. As such, the CIT(A) directed the A.O that 03.12.1999 be taken as the date from which the assessee was to be deemed to be the owner of the office premises.

6. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Departmental Representative (for short 'D.R') took us through the facts of the case. It was submitted by the Id. D.R, that as the occupancy rights of the property were allotted to the assessee vide a registered document by Bharat Diamond Bourse on 02.08.2010, therefore, the said date was rightly adopted by the A.O as the of acquisition of the occupancy rights of the office premises under consideration. It was submitted by the Id. D.R, that the CIT(A) was in error in dislodging the well reasoned observations of the A.O.

7. Per contra, the Id. Authorized Representative (for short 'A.R') for the assessee submitted, that as the assessee had applied for allotment of the office premises with Bharat Diamond Bourse in the year 1991, and along with its application had also paid an amount of Rs.43,12,500/-, therefore, a right in respect of the property under consideration got vested with the assessee on the said date itself. Accordingly, it was submitted by the Id. A.R, that the assessee rightly adopting the date of booking of the property as the date of acquisition of the occupancy rights of the property, had thus rightly worked out the LTCG on transfer of the same. Alternatively, it was submitted by the Id. A.R, that the CBDT vide its Circular No. 471, dated 15.10.1996 had clarified that when an assessee purchases a flat to be constructed by Delhi Development Authority (D.D.A) for which allotment letter is issued, date of such allotment would be the relevant date for the purpose of capital gain tax as the date of acquisition. It was further averred by the Id. A.R, that the aforesaid CBDT Circular No.471 had thereafter been looked into by the Hon'ble High Court of Bombay in PCIT-3, Mumbai Vs. Vembo Vaidyanathan (2019) 261 taxman 376 (Bom). The Id. A.R drew our attention to the details of the payments which were made by the assessee for acquisition of the property under consideration. It was submitted by the Id. A.R, that the assessee since the year 1991 (from the date of application) had paid substantial amount prior to the date of allotment on 03.12.1999. Also, in order to fortify his claim that the property under consideration i.e EE6011, Bharat Diamond Bourse (built up area: 5,750 sq.ft.) was identified on the date of final and binding allotment i.e on 03.12.1999, the Id. A.R had drawn our attention to Page 11 of the assessee's 'Paper Book' (for short 'APB'). Also, reliance was placed by the Id. A.R on the order of the ITAT, Mumbai Bench "H" in the case of Anita D. Kanjani Vs. ACIT-23(1), Mumbai (2017) 163 ITR 451 (Mum). The Id. A.R drawing support from the aforesaid order submitted, that it was observed by the Tribunal, that the holding period of the property has to be computed from the date of issuance of the allotment letter and not from the date when the 'agreement to sell' was registered. It was submitted by the Id. A.R, that the Tribunal in the aforesaid case had deliberated upon the judgment of the Hon'ble Supreme Court in the case of Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana (2012) 340 ITR 1 (SC). It was averred by the Id. A.R, that the Tribunal while disposing off the aforesaid appeal had observed, that as the transfer of ownership was not the issue to be decided in the case before them, therefore, the application of the ratio of the aforesaid judgment of the Hon'ble

Apex Court would not be appropriate for adjudicating the issue as regards the period of holding of the property under consideration.

8. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them. Admittedly, the assessee had way back in the year 1991 applied for allotment of office premises at Bharat Diamond Bourse. Along with the application, the assessee had also made a payment of Rs. 43,12,500/-. Subsequently, on the basis of lottery system a final and binding allotment of premises identified as Office No. EE6011 (built up area 5,750 sq. ft.) was allotted to the assessee. As observed by us hereinabove, the allotment of occupancy rights and shares of the Sec. 25 company in favour of the assessee were made on 02.08.2010 and 12.08.2010, respectively. It is the claim of the assessee that the date on which it had applied for allotment of the office premises at Bharat Diamond Bourse was to be reckoned as the date of acquisition of the property under consideration. On the contrary, it is the claim of the revenue, that the assessee had acquired the occupancy rights only pursuant to the registered document dated 02.08.2010. Rejecting the aforesaid view, the CIT(A) had concluded that the acquisition of the property under consideration was to be reckoned from the date of the final and binding allotment of the premises which had taken place on 03.12.1999. Assailing the view of the CIT(A), both the assessee and the revenue have carried the matter in appeal on the said solitary issue before us.

9. We have given a thoughtful consideration to the issue before us in the backdrop of the facts available on record and the contentions advanced by the authorized representatives for both the parties. As regards the claim of the assessee, that the acquisition of the rights in the property was to be related to the year 1991 i.e the year when it had applied for allotment of office premises at Bharat Diamond Bourse along with payment of certain amount, we are afraid that the said claim of the assessee does not find favour with us. As rightly observed by the CIT(A), that as no premises were identified or allotted to the assessee in the year 1991, i.e when it had applied for allotment of office premises at Bharat Diamond Bourse, therefore, it is beyond comprehension as to on what basis it is claimed by the assessee that it had been holding the rights in the aforesaid office premises since the year 1991.

10. We shall now advert to the claim of the revenue that the date of acquisition of the occupancy rights in the property were to be reckoned from 02.08.2010 i.e the date on which occupation rights were vested with the assessee, vide a registered document. As is discernible from the records, the revenue in order to fortify its aforesaid claim, had observed, that as Bharat Diamond Bourse itself had acquired the leasehold rights from MMRDA on 31.03.2010, therefore, the date of acquisition of the occupancy rights in the aforesaid property could not be related to a date prior to the same. We are unable to accept the aforesaid misconceived view of the revenue. Although the 'lease deed' between Bharat Diamond Bourse and MMRDA was formerly registered on 31.03.2010, but the construction of the property was in progress much before that date. On a perusal of the records, it stands revealed that Bharat Diamond Bourse had entered into two lease agreements in the months of March, 1993 and May, 1993 with MMRDA, on the basis of which it had acquired two pieces of the land on lease, on which construction was subsequently carried out. On the basis of the aforesaid facts, it can safely be concluded, that the A.O is not correct in observing that Bharat Diamond Bourse had acquired the leasehold rights of the land only on 31.10.2010. In the backdrop of the aforesaid facts, the claim of the A.O that Bharat Diamond Bourse had acquired the leasehold rights only on 31.10.2010 falls to ground. As regards the view of the A.O that as equity shares and occupancy rights in relation to the property were allotted in August 2010, therefore, the acquisition of rights in the property were bestowed on the assessee only from the said date, we are afraid does not find favour with us. In our considered view, for determining the holding period of the property, the date on which the valid title of the property was conferred upon the assessee would not be relevant. Admittedly, a valid title towards the aforesaid property was vested with the assessee on the basis of the registered document, dated 02.08.2010, however, the same would not be conclusive for determining the holding period of the property under consideration. On the basis of our aforesaid observations, we are unable to persuade ourselves to subscribe to the claim of the revenue that the acquisition of the property under consideration was to be reckoned from 02.08.2010 i.e. the date on which the valid title of the rights in the property got vested with the assessee on the basis of a registered document and equity shares were allotted in its favour.

11. As pursuant to the final and binding allotment carried out by lottery system, the assessee vide allotment letter dated 03.12.1999 was allotted the property under consideration

i.e Office No. EE6011, Bharat Diamond Bourse (built up area of 5,750 sq. ft.), therefore, it can safely be concluded that a right towards the aforesaid property got vested with the assessee from the said date. Also, as is discernible from the records, the assessee as on the date of allotment had parted with substantial portion of consideration towards the cost of acquisition of the property under consideration. Our aforesaid view is further fortified from the observation of the CIT(A), wherein he had observed, that a transfer application dated 22.11.2000 filed by a different concern for transfer of its property was allowed by Bharat Diamond Bourse from the beginning. As such, the aforesaid fact in itself evidences that the said transferor concern on 22.11.2000 was vested with a right which could be transferred in favour of a third party. On the basis of our aforesaid deliberations, we are of the considered view that as the case of the assessee is no different from the aforesaid concern, therefore, it can safely be concluded that pursuant to the final and binding allotment of the office premises i.e EE6011, Bharat Diamond Bourse (built up area of 5,750 sq. ft.) on 03.12.1999, the assessee got vested with the ownership of the rights in respect of the property under consideration. Our aforesaid view is supported by the judgment of the **Hon'ble High Court of Bombay** in the case of **PCIT-3, Vs. Vembo Vaidyanathan (2019) 261 taxman 376 (Bom)**. Issue raised by the revenue in its appeal before the Hon'ble High Court was, as to whether the Tribunal was justified in reckoning the acquisition of the property from the date of letter of allotment which though did not lead to creation of any proper and effective right over the capital asset, and not from the date on which the 'agreement' which spelled out the exact terms and conditions for acquisition was executed. It was observed by the Hon'ble High Court, that the CBDT vide its Circular No. 471, dated 15.10.1996 had clarified that when an assessee purchases a flat to be constructed by Delhi Development Authority (D.D.A) for which allotment letter is issued, date of such allotment would be the relevant date for the purpose of capital gain tax as the date of acquisition. Further, referring to the clarification issued by the CBDT, vide its Circular No. 672, dated 16.12.1993, it was observed by the Hon'ble High Court, that the Board had clarified that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions were similar to the terms of allotment and construction by D.D.A, then on the same basis the acquisition of the property was to be related to the date on which the allotment letter was issued. On the basis of its aforesaid observations, the Hon'ble High Court had dismissed the appeal of the revenue. In the backdrop of our aforesaid deliberations, we are of the

considered view that as no infirmity emerges from the order of the CIT(A), who we find had rightly concluded that the date of acquisition of the property under consideration was to be reckoned from the date of the allotment letter i.e 03.12.1999, therefore, we uphold his order.

12. Resultantly, both the appeals of the assessee and the revenue viz. ITA No.553/Mum/2016 and ITA No.1320/Mum/2016 are dismissed.

Order pronounced in the open court on 18.10.2019

SD/-
(G.Manjunatha)
ACCOUNTANT MEMBER

SD/-
(Ravish Sood)
JUDICIAL MEMBER

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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai