

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

**BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER**

**ITA No.6516/Mum/2018  
(Assessment Year: 2011-12)**

Bupendra Chhaganlal Patel, B-503, Green Park, Building No. 5, Gokulvillage, Shanti Park, Mira Road (E), Thane- 401107.	Vs.	I.T.O.-30(1)(2), Mumbai
<b>PAN/GIR No.BFOPP 3054 B</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Ms. Rupal Vora
Revenue by	Shri Kumar Padmapani Bora (Sr.DR)
<b>Date of Hearing</b>	<b>05/12/2019</b>
<b>Date of Pronouncement</b>	<b>09/12/2019</b>

**आदेश / O R D E R**

**PER: R.C. SHARMA, A.M.**

This appeal by the assessee is directed against the order dated 20/08/2018 of Id. CIT(A)-41, Mumbai for the A.Y. 2011-12 in the matter of order passed u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (in short, the Act).

2. In this appeal, the assessee is aggrieved for not allowing the benefit of long term capital gain on the sale of residential flat.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee, alongwith his mother and brother, Mr. Jayesh C Patel, purchased flat no. 11 in Vasudev Apartment Cooperative

Society Ltd. After the assessee's mother death in 2006, the said flat was transferred in the joint names of the assessee and his brother, Mr. Jayesh C Patel, making the two brothers 50% owners of the said flat.

4. Subsequently the said Society VACHSL entered into a development agreement with a developer, M/s Sadguru Realty Pvt. Ltd., for the redevelopment of the building consisting of 19 flats, as the building was more than 40 years old and not in sound condition. As per clause 9 at page 11 of the said agreement, the developers confirm and declare that the society will be the sole and exclusive owner of the building. Further, the said agreement states that the Society shall grant license to the developers to enter upon the said property and commence the work of development.

5. Thereafter, on 25.09.2008, the members of VACHSL, including the assessee and his brother, entered into an agreement for Permanent Alternative Accommodation (PAA) with the developer. The possession of the new Flat No. 301 in the redeveloped building was handed over by the developer on 03.10.2010.

6. The said new Flat No. 301 was sold by the assessee and his brother to Mrs. Meena Atul Shah and Mr. Atul Premji Shah vide agreement dated 11.10.2010 for a consideration of Rs. 42,00,000/-. Thereafter, the assessee purchased another residential flat in Green Park

building, Thane for a consideration of Rs. 15,11,000/- vide agreement dated 27.10.2010, out of his share of capital gains arising on the sale of the Flat No. 301 in VACHSL. However, the A.O. declined the assessee's claim of deduction U/s 54F of the Act and held that the new flat so sold was short term capital asset for which deduction U/s 54F of the Act cannot be given. By the impugned order, the Id. CIT(A) confirmed the action of the A.O., against which the assessee is in further appeal before the ITAT.

7. The Id AR appearing on behalf of the assessee has drawn our attention towards clause (12) at page 8 of the agreement, according to which the assessee and his brother are not surrendering or relinquishing their rights and interest in any manner whatsoever and they continue to be a member and shareholder, entitled to the allotment of the new flat. Further at page 9 clause (16) of the PAA agreement, it was stated that for all purposes, VACHSL will continue to be in possession of the property and the developer will have only a license to enter upon the property for the purpose of development/construction of new building as a mere licensee. Our attention was also invited to clauses (11) & (12) at page 4 of the agreement, according to which the assessee and his brother are in occupation and possession of flat No. 11 admeasuring 571.1 sq.feet carpet area and they will be allotted Flat No. 30`1

admeasuring 571.1 sq.feet in the proposed new building, in lieu of the old flat No. 11.

8. As per the Id AR when the assessee and his brother receive the developed flat from the developer, no transfer takes place and hence there is no resultant capital gains in 2010. The possession of the old flat at all times remains with the assessee and his brother as has been culled out from the PAA agreement, and the developer has only a license to enter and develop the property. The old flat is not transferred to the developer in exchange for the new flat. The ownership and the possession of the old flat has at all times been with the assessee and his brother and it is not transferred to the developer as contended by the Assessing Officer (AO). This fact is also substantiated by the Share Certificate No. 16 which is the same Share Certificate bearing the same distinctive numbers 76 to 80 and having all the endorsements at its back pertaining to the change of ownership of the old fiat as well as the new developed flat.

9. The Id AR has further argued that after receiving the developed flat from the developer, when the assessee and his brother sell the developed flat to Mr. and Mrs. Shah, a transfer takes place, resulting in capital gains. For the purposes of the computation of the capital gains the cost or the purchase price to be considered will be the

cost of the old flat which is Rs. 4,50,000/- and the date of purchase will be 20.06.1991, being the date of purchase of the old flat. The value of the redeveloped flat and the date of getting the redeveloped flat cannot be taken into consideration for the purposes of computation of the capital gains.

10. As per the Id AR since the assessee has invested his share of capital gains in the purchase of a new residential flat in Green Park, Thane, thus claiming the benefit of Section 54 of the Income Tax Act and hence the resultant long term taxable capital gains is NIL.

11. On the other hand, the Id DR has stated that the said flat was transferred to the developer for the purpose of constructing new building and after new building was constructed, the developer again transferred all the rights in the flat to the assessee in lieu of old flat surrendered by him. Thus, the Id DR has stated that the long term capital gain arose to the assessee when the old flat was handed over for demolition in consideration of the new flat. Thus, the assessee had already availed benefit of holding the old flat for more than 36 months and now what is sold is a new flat allotted to the assessee on 11/10/2010. Thus, the capital asset so sold was a short term capital asset. Since it was actually sold on 27/10/2010 i.e. after holding for 16 days only. Accordingly, he justified the action of the lower authorities for declining the claim of exemption U/s 54 of the Act.

12. I have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the assessee has sold flat which was allotted to him on the construction of new building after all the residents of the society had surrendered that building to the developer. The crux of the argument of the Id AR was that the assessee and other residents did not transfer their flat to the developer and for the first time flat was transferred on its will on 11/10/2010. It appears that the various clauses of the agreement 'permanent alternate accommodation' (PAA) with the developer was not properly appreciated by the A.O. while declining the assessee's claim of holding the flat for more than 36 months before transfer. Therefore, in the substantial interest of justice, we restore the matter back to the file of the A.O. for examining the various clauses of the PAA to find out if there was any transfer of old flat in favour of the developer and for deciding the issue afresh on merit as per law.

13. In the result, appeal of the assessee is allowed in part for statistical purposes only.

Order pronounced in the open court on 09<sup>th</sup> December, 2019.

**Sd/-**  
**(R.C.SHARMA)**  
**ACCOUNTANT MEMBER**

Mumbai; Dated 09/12/2019  
\*Ranjan

**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**