

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.2914/Del/2019
Assessment Year: 2014-15

Sriwant Wariz,
C/o Kapil Goel, Advocate,
F-26/124, Sector-7,
Rohini,
Delhi.

Vs. ACIT,
Circle-3,
Noida.

PAN: AAOPQ3886G

(Appellant)

(Respondent)

Assessee by	:	Shri Kapil Goel, Advocate
Revenue by	:	Shri Saras Kumar, Sr.DR
Date of Hearing	:	09.12.2019
Date of Pronouncement	:	18.12.2019

ORDER

This appeal by the assessee is directed against the order dated 29.11.2018 of the CIT(A)-1, Noida, relating to Assessment Year 2014-15.

2. Although a number of grounds have been raised by the assessee, they all relate to the order of the CIT(A) in not considering the date of agreement as the date of purchase for computation of capital gain u/s 48 of the IT Act.

3. Facts of the case, in brief, are that the assessee is an individual and filed his return of income on 29th March, 2015, declaring a taxable income of Rs.25,89,000/-. The AO, during the course of assessment proceedings, noted that the assessee has sold residential property situated at H.No.B, 8th Floor, Tower No.8, Ozone Park Apartment, Sector-86, Faridabad, Haryana, vide sale deed dated 12th April, 2013. While computing the capital gain arising out of the aforesaid sale, the assessee has taken the date of purchase of the above property as 31.01.2009 and claimed indexation accordingly. However, the AO noted from the documents submitted that the aforesaid property was purchased by the assessee vide sale deed dated 21.03.2013. Therefore, he held that the transaction comes under long-term capital gain as the period of holding is less than 36 months as per section 2(42A) of the IT Act. After deducting the cost of acquisition from the sale consideration, the AO made addition of Rs.15,80,350/- being the short-term capital gain earned by the assessee.

4. Before the CIT(A), the assessee challenged the action of the AO in considering the date of purchase as the date of acquisition as against the date of agreement to purchase. However, the Id.CIT(A) was also not satisfied with the arguments advanced by the assessee and upheld the action of the AO in considering the date of acquisition of the property as the date of purchase which is 21.03.2013.

5. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

6. The Id. Counsel for the assessee, referring to page 1 to 10 of the paper book, drew the attention of the Bench to the copy of the agreement dated 31st January, 2009 according to which the cost of the property was Rs.34,10,500/- and the assessee had already paid a sum of Rs.2,20,000/-. Referring to the copy of the sale deed, copy of which is placed at paper book pages 54 to 69, he drew the attention of the Bench to clause I, in which the reference to the agreement has been made. Referring to the Ahmedabad Bench of the tribunal in the case *Nilam R. Kataria vs. ACIT (OSD)*, vide *ITA No.3427/Ahd/2014*, order dated 18th June, 2019, he submitted that the Tribunal, after considering the various decisions came to the conclusion that the period of holding of the asset has to be considered from the date of allotment of the property and not from the date of actual sale. Referring to the recent decision of the Honøble Gujarat High Court in the case *Kishorbhai Harjibhai Patel vs. ITO*, vide *ITA No.1378 of 2018*, order dated 8th July, 2019, the Id. Counsel drew the attention of the Bench to para 14 & 15 of the order and submitted that the Honøble High Court in the said decision has also held that the date of agreement to sell the property shall be considered as the date on which the property has been transferred for the purpose of computation of capital gain. He accordingly submitted that this being a covered matter in favour of the assessee by various decisions, the CIT(A) was not justified in treating the gain as short-term capital gain as against long-term capital gain as treated by the assessee.

7. The Id. DR, on the other hand, heavily relied on the orders of the AO and the CIT(A).

8. I have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions relied on by the Id. Counsel for the assessee. I find the assessee, in the instant case, has sold the residential property on 12th April, 2013 and there is no dispute of the same. For the computation of the capital gain arisen out of the aforesaid sale, the assessee has taken the date of purchase of the above property as 31.01.2009 which is the date of agreement to purchase as against the actual date of purchase i.e., 21.03.2013. I find the AO treated the date of purchase of the property as 21.03.2013 and determined the gain arising on sale of the property as short-term capital gain whereas, according to the assessee, the property is a long-term capital asset since the holding period is more than 36 months if the date of agreement to purchase the property is considered as the date of acquisition. I find identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of *Nilam R. Kataria (supra)*. I find the Tribunal, after considering the various decisions, came to the conclusion that the period of holding of the asset has to be considered from the date of allotment of the property and not from the date of actual registration. The relevant observation of the Tribunal from para 4 onwards read as under:-

õ4. We have heard the rival contentions made by the parties, we have also perused the relevant materials available on record and the judgment relied upon by the Learned Counsel appearing for the assessee. The letter of allotment dated

15.02.2007 as appearing at Page 35/A clearly states the following "... land shall be allotted to you after being converted in NA and after execution of sale deed in favour of association and on payment of decided amount which may please be noted" Page 29A to 29AC of the Paper Book contained the sale deed against the sale consideration of said Rs.9,00,000/- in respect of the property in question. Page 29/A/A of the Paper Book gives the details of the payment made by the assessee wherefrom it is evident that the assessee has paid the total amount of Rs.9,00,000/- by way of two cheques both drawn with the Bank of Baroda dated 15.03.2005; Cheque No 886512 Rs.6,00,000/- and Cheque No.885613 of Rs. 3,00,000/- to the vender of the said property. Thus we are of the view that in terms of the allotment letter the possession of the property was acquired by the assessee upon such payment made on 15.03.2005, though, the deed of sale was ultimately executed before the office of the registrar on 04.08.2010, the holding period thereof should reckon from the date of such allotment being 15.03.2007 and since the same was ultimately sold off on 04.08.2010, the holding period admittedly exceeds 36 months which does not come under the purview of [section 2\(42A\)](#) of the Act in determining as short term capital asset for holding the same for less than 36 months immediately preceding the date of its transfer. Consequently, the ultimate claim under [section 54F](#) for exemption on capital gain arising out of such Long Term Capital asset needs to be allowed.

In this respect we are also inspired by the judgment passed by the Bombay Tribunal in the case of Anita D Kanjani in holding that for the purpose of holding asset it is not necessary that the assessee should be the owner of the asset based upon a registered conveyance confirming title on him. The Hon'ble Tribunal observed as follows :

"10. It is noted that the letter of allotment was issued to the assessee on 11-04- 2005, the letter of allotment makes a mention of the identity of the flat as office unit No.107, located at First Floor of Everest Grande. It also makes a mention that total consideration of the said property is a sum of Rs.29,64,000/- out of which a sum of Rs.5 lakhs was paid by the assessee on 04-04-2005 by cheque No.539104 as part payment against the said office unit. It is further noted by us that Hon'ble Karnataka High Court in the case of [CIT vs A Suresh Rao](#) 223 Taxmann 228 (Kar) dealt with similar issue wherein the significance of the expression 'held' used by the legislature has been analysed and explained at length. Hon'ble High Court analysed various provisions of the Act pertaining to computation of capital gain under various situations and also circulars issued by the CBDT on this issue. Relevant portion of the observation wherein the issue before us has been properly analysed is reproduced hereunder:-

12. "The definition as contained in [Section 2 \(42A\) of the Act](#), though uses the words, "a capital asset held an assessee for not more than thirty-six months immediately preceding the date of its transfer", for the purpose of holding an asset, it is not necessary that, he should be

the owner of the asset, with a registered deed of conveyance conferring title on him. In the light of the expanded definition as contained in ITA No.2291/Mum/2015 [Section 2\(47\)](#), even when a sale, exchange, or relinquishment or extinguishment of any right, under a transaction the assessee is put in possession of an immovable property or he retained the same in part performance of the contract under [Section 53-A](#) of the Transfer of Property Act, it amounts to transfer. No registered deed of sale is required to constitute a transfer. Similarly, any transaction whether by way of becoming a member of or acquiring shares in a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of any immovable property, also constitutes transfer and the assessee is said to hold the said property for the purpose of the definition of 'short-term capital gain'. In fact, the Circular No.495 makes it clear that transactions of the nature referred to above are not required to be registered under the [Registration Act](#), 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are common mode of acquiring flats particularly in multistoried constructions in big cities. The aforesaid new sub- clauses (v) and (vi) have been inserted in [Section 2\(47\)](#) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above. A person holding the Power of Attorney is authorized the powers of owner, including that of making construction though the legal ownership in such cases continues to be with the transferor. The intention of legislature is to treat even such transactions as transfers and the capital gain arising out of such transactions are brought to tax. Further, the Circular No.471 goes to the extent of clarifying that for the purpose of [Income-tax Act](#), the allottee gets title to the property on the issuance of the allotment letter and the payment of installments is only a follow up action and taking the delivery of possession is only a formality. In case of construction agreements, the tentative cost of construction is already determined and the agreement provides for payment of cost of construction in installments subject to the condition that the allottee has to bear the increase, if any, in the cost of construction. Therefore, for the purpose of capital gains tax the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in installments does not affect the legal position. Therefore, in construing such taxation provisions, what should be the approach of the courts and the interpretation to be placed is clearly set out by the Apex Court in the case of [Smt. Saroj Aggarwal vs CIT](#) 156 ITA No.2291/Mum/2015 ITR 497 wherein it is held as under:

"Facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Where it is possible to draw two inferences from the facts and where there is no evidence of any dishonest or improper motive on the part of the assessee, it would be just and equitable to draw such inference in such a manner that would lead to equity and justice. Too hyper-technical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered.....Courts should, whenever possible unless prevented by the express language by any section or compelling circumstances of any particular case, make a benevolent and justice oriented inference. Facts must be viewed in the social milieu of a country."

Therefore, keeping the aforesaid principles in mind, when we look at [Section 48](#), the language employed is unambiguous. The intention is very clear. When a capital asset is transferred, in order to determine the capital gain from such transfer, what is to be seen is, out of full value of the consideration received or accruing, the cost of acquisition of the asset, the cost of improvement and any expenditure wholly or exclusively incurred in connection with such transfer is to be deducted. What remains thereafter is the capital gain. It is not necessary that after payment of cost of acquisition, a title deed is to be executed in favour of the assessee. Even in the absence of a title deed, the assessee holds that property and therefore, it is the point of time at which he holds the property, which is to be taken into consideration in determining the period between the date of acquisition and date of transfer of such capital gain in order to decide whether it is a short-term capital gain or a long-term capital gain."

Thus, from the aforesaid judgment, it is clear that for the purpose of holding an ITA No.2291/Mum/2015 asset, it is not necessary that the assessee should be the owner of the asset based upon a registration of conveyance conferring title on him.

11. Similarly, in the case of Madhu Kaul (supra), the Hon'ble Punjab & Haryana High Court analysed various circulars and provisions of the Act that on allotment of flat and making first installment the assessee was conferred with a right to hold a flat which was later identified and possession delivered on later date. The mere fact that possession was delivered later, would not detract from the fact that assessee (allottee) was conferred a right to hold the property on issuance of an allotment letter. The payment of balance amount and delivery of possession are consequential acts that relate back to and arise from the rights conferred by the allotment letter upon the assessee.

13. In the case of [Vinod Kumar Jain vs CIT](#) 344 ITR 501 it was held by Hon'ble Punjab & Haryana High Court that conjoined reading of [section 2\(14\)](#), [2\(29A\)](#) and [2\(42A\)](#) clarifies that holding period of the assessee starts from

the date of issuance of allotment letter. Since allottee gets title of the property on the issuance of allotment letter and payment of first installment is only a consequential action upon which delivery of possession flows. Even if the sale deed or agreement to sell is executed or registered subsequently but the assessee always had a right in the property since the date of issuance of allotment letter. Therefore, it can be said that assessee held the property immediately from the date of allotment letter.

14. In the case of [CIT vs K Ramakrishnan](#) (supra), Hon'ble Delhi High Court analysed the provisions of the Act and held that date of allotment is relevant for the purpose of computing holding period and not the date of registration of conveyance deed. Similarly in the case of [CIT vs S.R. Jeyashankar](#)(supra), Hon'ble Madras High Court took a similar view following the aforesaid ITA No.2291/Mum/2015 judgment and held that holding period shall be computed from the date of allotment. It is noted by us that similar view has been taken by other High Courts in the judgments which have been relied upon by the Ld. Counsel before us and mentioned in earlier part of our order.

15. In the assessment order, the Ld. AO has placed reliance upon the judgment of Hon'ble Supreme Court in the case of Suraj Lamps & Industries Pvt Ltd (supra) for the proposition that transfer of a property shall be effective only on registration of conveyance deed in view of [section 54](#) of Transfer of Property Act. In our view, it is a settled proposition of law and there is no dispute on that. The absolute legal ownership of an immovable property shall take place in terms of various provisions of [Transfer of Property Act](#) which needs to be read with provisions of [section 2\(47\)](#) of Income-tax Act, 1961 for the purpose of computing tax liability arising on account of sale / purchase of immovable properties under [Income-tax Act](#). But the issue here before us is different. As discussed earlier, the holding period is to be determined in terms of [section 2\(42A\)](#) of the Act which has been reproduced and discussed above. The issue of transfer of ownership is not the issue to be decided here for computing the holding period. Therefore, we find that application of the ratio of aforesaid judgment would not be appropriate here.

16. Thus, respectfully following the judgements of various High Courts wherein this very issue has been analysed in detail as discussed above at length, we find that holding period should be computed from the date of issue of allotment letter. If we do so, the holding period becomes more than 36 months and consequently, the property sold by the assessee would be long term capital asset in the hands of the assessee and the gain on sale of the same would be taxable in the hands of the assessee as Long Term Capital Gain. We direct ITA No.2291/Mum/2015 accordingly.

17. As a result, grounds raised by the assessee are allowed in terms of our directions as given above. However, the alternative issue raised by the assessee is not being adjudicated at this stage.

18. In the result, the appeal of the assessee is allowed."

The issue again came up before the Hon'ble Jurisdictional Gujarat High Court in the case of Anilaben Upendra Shah. In that case the assessee had become the member of a Co-operative Society by acquiring share therein on 15.11.1979. Possession of the flat was delivered to the assessee in October 1981 which was subsequently sold on 04.12.1982. The question came as to whether the assessee had held shares and allotment of flat in the said society for a period of more than 36 months reckoned from 15.11.1979. The order was passed in affirmative by the Hon'ble Tribunal itself holding the capital gain as long term capital gain and the benefit under [section 80T](#) was extended to the assessee which was confirmed by the Jurisdictional High Court. While doing so, the Hon'ble Jurisdictional High Court observed as follows:

"8. It is thus clear that the member of a co-operative housing society only owns the shares in that society. The right to enjoy or derive from any land or building belonging to the co-operative housing society is merely an incidental right flowing from the ownership of the shares. A member of a co-operative housing society cannot sell all his shares in a co-operative housing society and still retain any interest in any property, whether land or building, belonging to a co-operative housing society and allotted/let out to the member. Similarly, a member of a co-operative housing society to whom a flat or land is allotted cannot transfer such land or building without selling the shares held by him. Hence, when the question comes up for consideration as to which is the relevant date, while computing the capital gain tax in case of transfer of his shares by a person who is a member in a co-operative housing society, the relevant date would be the date on which the member acquires the shares in the co-operative housing society and the date on which the member had sold his shares in the said cooperative housing society.

In the facts of the instant case, it is clear that the assessee acquired shares in the co-operative housing society and allotted the flat on 15- 11-1979 and she transferred those shares on 4-12-1982. Thus, the assessee had held the shares and allotment of the flat in the said co-operative housing society for a period of more than 36 months. Accordingly, the capital gain in question was rightly held by the Tribunal to be a long-term capital gain. Therefore, the assessee was rightly entitled to the benefit of section SOT of the Income-tax Act, 1961.

9. In view of the above discussion, we answer the question referred to us in the affirmative i.e. in favour of the assessee and against the revenue.

10. The reference accordingly stands disposed of with no order as to costs."

In view of the ratio laid down by the Jurisdictional High Court in favour of the assessee for holding the asset for more than 36 months from the date of allotment of the property, we find no justification in the order passed by the authorities below in such capital gain as short term capital gain by considering the holding period from

the date of registration of the property as on 30.09.2009 instead of date of allotment on 15.02.2007. In our considered opinion the assessee held the property for more than three year w.e.f 15.02.2007 when the allotment letter was issued in the name of the assessee till the date of subsequent sale of the said property on 04.08.2010. In that view of the matter, the capital gain is to be treated as long term capital gain arising out of the sale of the said long term capital asset and the assessee is entitled to the exemption under [section 54F](#) of the Act as claimed in her return. We, therefore, find no merit in such addition made by the authorities below. The addition is therefore, deleted.

5. In the result, assessee's appeal is allowed.ö

9. The various other decisions relied on by the Id. Counsel for the assessee also support his case to the proposition that for the purpose of considering the period of holding, the date of allotment is relevant. In view of the above discussion, I set aside the order of the CIT(A) and direct the AO to consider the date of agreement to sell as the date of acquisition and accordingly compute the long-term capital gain. The grounds raised by the assessee are accordingly allowed.

10. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 18.12.2019.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 18th December, 2019

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi