

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

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4255/MUM/2018
Assessment Year: 2012-13**

Mukesh Sohanraj Vardhan,
101, Commerce House, 140,
Nagindas Master Road, Fort,
Mumbai-400023.

Income Tax Officer-17(2)(4),
Vs. Aayakar Bhavan, Mumbai-
400020.

PAN No. AAAPV3856F
Appellant

Respondent

Assessee by : Mr. Shubham Rathi, AR
Revenue by : Mr. Akhtar H. Ansari, DR

Last Date of Hearing : 18/08/2020
Date of Pronouncement : 28/08/2020

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-58, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in confirming the denial of exemption u/s. 54 of the Act and consequently adding Long term capital gain of Rs.22,75,000/-- treating the same as "Income from Other Sources".

2. On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in not accepting the letter of allotment, ignoring the fact that the appellant acquired the right of ownership in the flat, which came into existence by virtue of allotment letter dated 10.01.2005 and also by the receipts of payments of Rs.10,00,000/- and Rs.20,00,000/- both dated 10.01.2005, issued by the builder viz., Vardhaman Estate Corporation.
3. On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in confirming the 'Income from Other Sources' at Rs.22,75,000/-, instead of Rs.18,75,000/- by adopting the compensation received against cancellation of the allotment of flat at Rs.52,75,000/-, in place of correct amount of Rs.48,75,000/-.
4. On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in forming opinion that the appellant has repaid excess compensation of Rs.4,00,000/- after 3 months of receipts of compensation against cancellation of the allotment of flat. Details of compensation received/repaid are as under:

S/No.	Date of receipt/repaid of compensation	Amount of Compensation	
1.	13.09.2011	Rs.25,00,000/-	
2.	16.09.2011	Rs.10,00,000/-	
3.	26.11.2011	Rs.17,75,000/-	Rs.52,75,000/-
Less : Excess compensation received is repaid to the builder within 20 days i.e. on 16.12.2011			Rs.4,00,000/-
Total			Rs.48,75,000/-

3. Briefly stated, the facts of the case are that the assessee/appellant filed his return of income for the assessment year (AY) 2012-13 on 19.07.2012 declaring total income of Rs.3,10,322/-. During the year under consideration, the appellant had acquired a flat (Flat No. A-803 in building Vardhaman Heights, Mumbai) for a total consideration of Rs.30,00,000/- from M/s Vardhaman Estate Corporation (referred to as Builders hereinafter). The said Builders had issued an allotment letter on their letter head along with receipts

both dated 10.01.2005, stating therein the terms and conditions for sale of the said flat to the appellant. At the time of the allotment letter issued by the said builder, the appellant had paid Rs.10,00,000/- and Rs.20,00,000/- as earnest money towards purchase of the said flat. Subsequently, the appellant paid full consideration of the flat as agreed to in the allotment letter viz. in two cheques of Rs.10,00,000/- and Rs.20,00,000/- vide Cheque No.256619 and 256620 both dated 07.01.2005. The builders have issued receipts of the same to the appellant.

Thereafter, the appellant sold his aforesaid flat for a total consideration of Rs.48,75,000/- on 12.09.2011. On the basis of the fact that he had invested Rs.75,53,469/- (total consideration to be paid Rs.1,01,95,357/- as per agreement for sale dated 23.12.2011) in purchase of new flat 2704 at Apollo Mill, Lodha Primerro, Mumbai, the appellant claimed exemption u/s 54 of the Act, after availing indexation benefit for cost of the flat paid in installments.

During the course of assessment proceedings, the Assessing Officer (AO) asked the appellant to explain why the benefit received on cancellation of deal with the builder i.e. Vardhaman Estate Corporation with respect to property at Vardhaman Heights, Byculla, Mumbai should not be treated as income from other sources, instead of long term capital gains, as no purchase as well as sale agreement has been entered into by the assessee with the builder. In response to it, the appellant *vide* letter dated 20.03.2015 explained to the AO that a capital asset in the form of interest in the flat came into existence by virtue of allotment letter issued by the builders, M/s Vardhaman Estate Corporation, when payment was made of Rs.10,00,000/- on 08.01.2005.

However, the AO was not convinced with the above explanation of the assessee and came to a finding that the gain which the appellant received from the builder on cancellation of deal has resulted in benefit of compensation of Rs.18,75,000/- and the same is nothing but income from other sources. Further on analysis of the bank account of the appellant, the AO noticed that the assessee has actually received from the said builder total amount of Rs.52,75,000/- on the following dates :

1.	On 13/09/2011	Rs.25,00,000/-
2.	On 16/09/2011	Rs.10,00,000/-
3.	On 26/11/2011	Rs.17,75,000/-
	Total	Rs.52,75,000/-

Thus the AO brought to tax Rs.22,75,000/- (Rs.52,75,000/- minus Rs.30,00,000/-) on account of benefit of compensation received by the appellant from the builder in respect of Vardhaman Heights Property, Byculla, Mumbai under the head "Income from other sources".

4. Aggrieved by the order of the AO, the appellant filed an appeal before the Ld. CIT(A). In order dated 15.05.2018, the Ld. CIT(A) observed that the letter dated 10.01.2005 cannot be called as an allotment letter for the reason that (i) the same is a plain letter with no details of commencement certificate issued by the Municipal Corporation, (ii) the land details are not recorded, (iii) authenticity of address of builder not established - telephone number/PAN/Registration Number etc. not recorded in the document, (iv) paragraph 3 of the allotment letter spells out certain conditions, it is not met

which includes execution of agreement, (v) in the course of hearing details of such agreement arising out of paragraph 3 of the purported allotment letter was sought to which it was stated as not available, (vi) the details of flat (area, amenities, specifications etc. are not recorded, (vii) the total sum payable is not mentioned, (viii) the document is not registered; there is no registration of any allotment agreement at any time, (ix) the assessee has not signed the purported letter of allotment, (x) it is the assessee who signed in his capacity as partner of the builder firm.

Thus the Ld. CIT(A) arrived at a finding that the incomplete, non-registered "letter of allotment" cannot be treated as an "allotment letter" for deciding ownership of capital assets. Further, it is observed by him that the above documentary evidence does not establish ownership of capital assets and hence the question of assessment of capital gains does not arise.

Further, the Ld. CIT(A) held that the AO has rightly brought to tax the incremental receipt as income from other sources.

5. Before us, the Ld. counsel for the appellant submits that the assessee had booked the residential flat during the FY 2004-05 from the builder for a consideration of Rs.30,00,000/-. The allotment letter dated 10.01.2005 was issued by the builder. Full payment was made through cheques. It is further stated that during the year under consideration, the appellant cancelled the booking of the aforesaid flat *vide* cancellation letter dated 12.09.2011. Against the cancellation of booking of the flat, the appellant received consideration of Rs.48.75 lakhs from the builder and since the period of holding of the appellant's rights in the said flat exceeded 36 months, the assessee treated the

gain on surrender of the rights in the said flat as long term capital gains. Further, it is stated that the appellant purchased a residential flat at Lodha Primerro for Rs.1,01,95,357/- and claimed exemption u/s 54/54F of the Act and therefore, no capital gain is chargeable to tax.

The Ld. counsel further submits that the AO has incorrectly computed compensation at Rs.52.75 lakhs instead of Rs.42.75 lakhs, the details of which are as under :

1.	On 13/09/2011	Rs.25,00,000/-
2.	On 16/09/2011	Rs.10,00,000/-
3.	On 26/11/2011	Rs.17,75,000/-
	Total	Rs.52,75,000/-
Less :	Receipt of excess amount returned to the Builder on 16.12.2011	(Rs.4,00,000/-)
	Net Consideration received	Rs.48,75,000/-

Also it is explained that in the light of provisions of section 2(14) of the Act, "capital asset" means "a property of any kind" held by the assessee and the term "property" includes any rights in a property and therefore, the right to obtain conveyance of the immovable property is clearly a capital asset as contemplated u/s 2(14) of the Act. Further, it is stated that the exemption from capital gains u/s 54/54F of the Act can be claimed if long term capital gains accrued on transfer of a specified long term capital asset is invested in a residential flat within the specified period. It is stated that the appellant purchased a new flat within the specified period and, as such, denial of the exemption is unwarranted and legally unsustainable. In this regard, reliance is placed by him on the decision in *CIT v. Vijay Flexible Containers* – [(1990) 186

ITR 693 (Bom)], *Geeta Rasik Shah v. ACIT* – [ITA No. 4202/Mum/2015, Order dated 01.09.2016, (Mum Trib.)], *Subhas Chandra Parmanandka v. ITO* – [ITA No. 1614/Kol/2010, Order dated 16.01.2014, Kolkata – Trib.]].

The Ld. counsel relies specifically on the order of the Tribunal in *ACIT v. Ashwin S. Bhalekar* (ITA No. 6822/Mum/2016) for AY 2012-13 and files a copy of it.

6. On the other hand, the Ld. Departmental Representative (DR) relies on the order of the Ld. CIT(A) and submits that in the facts of the case, correct conclusion has been drawn that the incomplete, non-registered “letter of allotment” cannot be treated as an “allotment letter” for deciding ownership of capital asset. It is stated that the Ld. CIT(A) has rightly confirmed the order passed by the AO.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decision are given below.

We find no infirmity in the allotment letter once it is examined along with the bank statement, ledger account and letter of cancellation.

Similar issue arose before the Tribunal in *Ashwin S. Bhalekar* (supra). In that case, the assessee was allotted a flat on the 7th floor of the proposed building known as “Shubh Residency” *vide* allotment letter dated 20.06.2008. The assessee had paid advance amounting to Rs.50,00,000/- on the allotment of the said flat. By virtue of the said allotment, the assessee had acquired right to the proposed flat. 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 Rs.1,10,00,000/- on account of surrender of such flats. In addition to the above, the builder transferred the initial advance of Rs.50,00,000/- to the new flat in the same project which the assessee agreed to buy. The assessee then invested the said money to acquire a flat in the same project on the 3rd floor for Rs.1,53,03,800/- vide agreement dated 28.02.2012 registered on 29.02.2012. The AO did not accept the claim of the assessee and treated the compensation on surrender of flats amounting to Rs.1,10,00,000/- as income from other sources. On appeal by the assessee, the Ld. CIT(A) accepted his claim. On appeal by the Revenue, the Tribunal held as under :

“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 admeasunng 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 built 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 capital 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 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.”

7.1 Facts being identical, we follow the above order of the Co-ordinate Bench and allow the appeal. As the appeal is allowed, the additional ground “that the compensation received from the builder on cancellation of flat is a capital receipt and not chargeable to tax” becomes infructuous.

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

Order pronounced in the open court on 28/08/2020.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 28/08/2020
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai