

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI “SMC” BENCH: NEW DELHI**

**(THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No.415/Del/2018**

**[Assessment Year : 2009-10]**

Ashish Srivastava, 9/802, Vasundhara, Ghaziabad. PAN-AGQPS7324B	vs	DCIT, Circle-1, Ghaziabad.
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>	Shri R.K.Kalra, CA	
<b>Respondent by</b>	Shri Om Parkash, Sr.DR	
<b>Date of Hearing</b>	21.03.2022	
<b>Date of Pronouncement</b>	05.05.2022	

**ORDER**

**PER KUL BHARAT, JM :**

The present appeal filed by the assessee for the assessment year 2009-10 is directed against the order of Ld. CIT(A), Ghaziabad dated 20.10.2017. The assessee has raised following grounds of appeal:-

1. *“That the ld. Commissioner of Income-Tax (Appeal) erred in law and on facts of the case in confirming the order of the assessing officer giving the benefit of indexation for the purpose of computing Long Term Capital Gain arising from sale of a residential flat from the year of registration of the flat in 2003 and not from the year of execution of sale agreement and taking possession of the flat by the appellant in the year 1997 without appreciating the facts and material available on record.*
2. *That the order of the ld. Commissioner of Income –Tax (Appeals) be set aside.”*

## **FACTS OF THE CASE**

2. Facts giving rise to the present appeal are that in this case, the assessee filed its return of income on 30.07.2009 declaring total income of Rs.23,09,860/- and the same was duly processed u/s 143(1) of the Income Tax Act, 1961 ("the Act"). Subsequently, the Assessing Officer ("AO") noticed that on perusal of computation of capital gain in respect of sale of house, it was noticed that the assessee had claimed indexed cost of acquisition of rs.11,55,741/-. The indexed cost of acquisition was calculated on various payment made on different dates. However, the property was purchased on 24.06.2003 on total payment of Rs.6,86,206/- which gives indexed cost of acquisition only Rs.8,62,574/-. Hence, a sum of Rs.2,93,166/- was shown less capital gain by the assessee. The AO after recording the reasons re-opened the assessment u/s 147 of the Act and issued a notice u/s 148 of the Act. In response to the notice issued u/s 148 of the Act, the assessee stated that return of income filed for the Assessment Year 2009-10 be treated as income tax return filed in response to the notice u/s 148 of the Act. Therefore, the reason of re-opening of assessment was communicated to the assessee. The assessee filed his objections and the AO disposed off these objections vide letter dated 07.11.2016 addressed to the assessee. Thus, the AO assessed the income u/s 147/143(3) of the Act by making addition of the capital gain of Rs.2,93,166/- at Rs.26,03,026/- against the returned income of Rs.23,09,860/-
3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who after considering the submissions, sustained the finding of the AO.
4. Aggrieved against the order of Ld.CIT(A), the assessee is in appeal before this Tribunal.

5. The only effective ground is against the declining the benefit of indexation w.e.f 1997.

6. Ld. Counsel for the assessee reiterated the submissions as made in the written synopsis. The submissions of the assessee are reproduced as under:-

*“It is most respectfully submitted that:*

1. *The appellant is an individual by status and a salaried class person having income from salary, profession, capital gain and other sources.*
2. *The appellant filed his return of income for assessment year 2009-10 declaring income of Rs. 23,09,859/- on 30.07.2009 vide acknowledgement no. 0100027785. Copy of acknowledgement of ITR along with computation of income is enclosed as per Annexure '1'.*
3. *AIR notice dated 15.12.2015 was issued to the appellant for explaining the source of investment of Rs. 5,00,000/- in mutual funds. Copy of notice is enclosed as per Annexure '2'.*
4. *In compliance to the AIR Notice, the appellant submitted his reply vide his letter dated 8th January, 2016. The appellant filed photo copies of his saving bank accounts, pass book along with copy of ITR and computation of income. Copy of reply letter enclosed as per Annexure '3'.*
5. *The case of the appellant was opened for reassessment and a notice u/s 148 of the income Tax Act, 1961 dated 17.03.2016 was issued to the appellant. Copy of notice u/s 148 of the income Tax Act, 1961 enclosed as per annexure '4'.*
6. *The appellant requested for providing the copy of "Reason to Believe" for reopening the case vide his letter dated 23.03.2016. Copy of letter is enclosed as per Annexure '5'.*

7. *The Id. Assessing officer provided the copy of reasons recorded during selection u/s 148 of the Income Tax Act, 1961, vide letter dated 08-06-2016. The reasons recorded were as under:-*

<b>S.No</b>	<b>Particulars</b>	<b>Amount</b>
1.	Gross Salary	21,99,684/-
2.	Net profit from proprietary	1,90,757/-
3.	Proceed from sale of house	14,00,000/-
4.	Interest Income	32,500/-
5.	Dividend Income	1,18,200/-

*However, On perusal of computation of capital gain against sale of house of Rs. 14,00,000/-, it is noticed that assessee has claimed indexed cost of acquisition of Rs. 11,55,741/-. However, The property was originally purchased on 24.06.2003 on total payment of Rs. 6,86,206/- which gives indexed cost of only Rs. 8,62,574/- as per calculation below:*

$$\text{Rs. } 6,86,206 * 582/463 = \text{Rs. } 8,62,574/-$$

*This gives a difference of Rs. 2,93,166.70/- from the index cost adopted by the assessee for calculating the capital gain.*

*Therefore, I have reason to believe that Income of Rs. 2,93,166/- has not been disclosed which has escaped assessment within the meaning of the section 147 of the I. T, Act.*

*Copy of letter is enclosed as per Annexure '6'.*

8. *The appellant filed objection against reasons recorded for issuance of notice u/s 148 of the Income Tax Act, 1961, vide letter dated 27-06-2016. Copy of letter Is enclosed as per Annexure '7'.*
9. *The Id. Assessing officer disposed the objections vide letter dated 07-11-2016. Copy of letter enclosed as per Annexure '8'.*
10. *The appellant filed his submissions on 15-11-2016 in response to the notice u/s 142(1) of the Income Tax Act, 1961 dated 08-11-2016.*
11. *The id. Assessing officer completed the assessment u/s 143(3) of the income Tax Act, 1961 by making addition of Rs. 2,93,166/-. Copy of assessment order is enclosed as per Annexure '9'.*

12. *In this case, the appellant purchased a GDA flat on 03-10-1997. At the time of purchase, a sale agreement and power of attorney was executed between the seller and the appellant. The power of attorney was registered with the Sub Registrar, NOIDA. The possession of the flat was handed over to the appellant. Copy of sale agreement and the power of attorney is enclosed as per Annexure'10*
13. *The assessee started living in the flat in the year 1998. The electricity connection was taken in the name of the appellant in the year 1998. House-tax was also levied on the flat by Nagar Nigam, Ghaziabad with effect from 01-04-1998. These all papers clearly indicated that the appellant had purchased the flat in the year 1997. Copies of Electric Meter sealing certificate and Nagar Nigam House Tax receipt were also issued in the name of the appellant and these papers were submitted before the Id. Assessing officer at the time of hearing of the case. Copy of house tax bill and electric meter sealing certificate is enclosed as per Annexure'11.*
14. *The appellant made payment of remaining installments towards the cost of flat during the period from October, 1997 to June, 2003.*
15. *The flat was registered in the name of the appellant in the year 2003, after making payment of all installments of the flat.*
16. *The assessee sold the flat on 18-02-2009 at sale consideration of Rs. 14,00,000/-. For computing long term capital gain, the appellant calculated the indexed cost of acquisition on the basis of payments made during various years resulting in indexed cost of acquisition of Rs. 11,55,741/- and long term capital gain of Rs. 2,44,259/-.*
17. *The Id. Assessing officer computed the long term capital gain by computing the indexed cost of acquisition on the basis of the year 2003 treating the date of purchase of the property as 24-06-2003 resulting in indexed cost of acquisition of Rs. 8,62,574/- and long term capital gain of Rs. 5,37,426/-.*

18. *While making addition of Rs. 2,93,166/-, the Id. assessing officer mentioned the reason that the indexed cost shall be taken from the year in which actual registry is made in favor of the assessee and he acquires the complete right over the said property.*
19. *As per Section 2(47) (v), "transfer", in relation to a capital asset includes any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of property Act, 1882.*
20. *As per section 53A of the Transfer of Property Act, 1882, where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.*
21. *Following conditions should be complied under section 53A:*
  1. *There should be a contract for consideration in writing and same should be signed by the transferor;*
  2. *The contract should be for transfer of immovable property and from therein the term necessary to constitute transfer should be certainly ascertained ;*

3. *The transferee should has taken possession of the property and has done something for furtherance of the contract;*
  4. *The transferee should be ready and willing to perform his part of the contract; and*
  5. *In this case even without execution of sale deed, the transferee acquires the right in the property and the transferor cannot claim any right in respect of property under consideration other than the rights expressly provided in the terms of contract.*
22. a) *In the present case, a sale agreement was executed between the transferor and the appellant for a consideration of Rs. 3,06,650/- on 03-10-1997. This sale agreement was in writing and was signed by the transferor as well as the transferee, the appellant.*
- b) *The contract was for transfer of a flat i.e. immovable property and all the terms and conditions to constitute transfer were clearly mentioned in the sale agreement.*
- c) *The transferee, the appellant took the possession of the property and had made advance payment of Rs. 5,000/- as token money against purchase of immovable property.*
- d) *The transferee was ready and willing to perform his part of contract i.e. to make the payment against purchase of flat. It is evident from the fact that the transferee immediately made the payment of Rs. 5,000/- and agreed to make the payment of balance amount.*

*Thus, all the above conditions of section 53A are complied and even without registry of sale agreement, the transferee acquired the right in the property and the transfer was complete by virtue of clause (v) of section 2(47) of the Income Tax Act, 1961 read with Section 53A of the Transfer of Property Act, 1882.*

*This sale agreement was duly signed by document writer, advocate, witness and by the notary also. Power of Attorney executed by the*

*seller in favour of the buyer, the appellant was duly registered with Sub-Registrar, Noida.*

23. *The Government has amended Section 17A of the Registration Act, 1908 in the year 2001 in such a manner that the documents containing contracts to transfer for consideration of any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of Registration and other Related Laws(Amendment) Act, 2001 and if such documents are not registered on or after such commencement then they shall have no effect for the purpose of Section 53A of the Transfer of Property Act, 1882, subject to one safeguard that unregistered agreement of sale executed earlier would be taken as a tool to enforce part performance of the contract by the other part. We may conclude that Power of Attorney, Sale agreement, Contracts to sale etc., made should be registered for transfer of valid title of ownership to the transferee. But provisions of section 2(47) (v) are applicable as earlier.*

*The Honorable CIT (Appeals) dismissed the appeal giving the reason that "the appellant failed to evidence that the possession of the said property was taken by the appellant in 1997-98. Thus these grounds of appeal was not maintainable as the property has been registered in the name of the appellant in the year 2003 only. Thus, the benefit of indexing can be avail by appellant in computing LTCG only w.e.f. 2003-04. Thus, the addition made by A.O is upheld accordingly".*

*Copy of the Appellate Order passed by the Id. CIT (Appeals), Ghaziabad is enclosed as per Annexure '12'.*

*The Honorable CIT (Appeals) failed to appreciate the following facts:*

- i) An agreement was executed between the appellant and the seller of the flat on 03-10-1997 i.e. at the time of purchase of flat by the appellant. This agreement was duly notarized.*

- ii) *Power of Attorney was executed between the appellant and the seller of the flat on 04-10-1997. This Power of Attorney was registered with the Sub-Registrar, NOIDA.*
- iii) *The electricity connection was sanctioned in the name of appellant. The meter sealing certificate dated 19-03-1998 was in the name of Mr. Ashish Srivastava, the appellant.*

*All the above mentioned documents clearly indicate that the appellant had taken possession of the flat in the Financial Year 1997-98, whereas the Honorable CIT(Appeals), mentioned, while deciding the appeal, that the appellant failed to evidence that the possession of the said property was taken by the appellant in 1997-98*

*In the view of the above facts and circumstances of the case, it is prayed to your honor that it be held that addition of Rs. 2,93,166/- on account of not allowing the benefit of indexation from the date of purchase of flat by the appellant is totally unwarranted and unjustified.”*

7. Ld. Sr. DR appearing on behalf of the Revenue, opposed the submissions of the Ld. Counsel for the assessee and relied on the impugned assessment order. He submitted that property in question stood transferred in favour of the assessee only when Sale Deed was executed. He contended that benefit of indexation cannot be given to the assessee w.e.f 1997-98.

8. I have heard the rival contentions and perused the material available on record. The solitary issue that needs determination is what would be correct date and year for the computing indexation. I find that the Ld.CIT(A) has decided the issue by observing as under:-

5.1. *“Ground nos. 1, 2 and 3: The appellant has challenged the addition of Rs. 2,93,166/- on account of change in year of purchase of property for the purpose of indexing. During the course of appellate proceedings it has been submitted that appellant purchased the property that is a flat by GDA on 03.10.1997. At the time of purchase a sale agreement and power*

*of attorney was executed between seller and the appellant duly registered with Sub Registrar, Noida. The possession letter issued to the seller by GDA of the flat was handed over to the appellant at the time of purchase by appellant on 03.10.1997. The appellant enclosed copy of electricity connection details and copy of house tax certificate were enclosed. Examination of the possession letter reveals that it is offer of possession given to the previous owners namely Smt. Lajjawati Arora and Shri Sita Ram Arora who were asked by GDA to take possession of property G-187A on 25.12.1997. However, flat was registered in the name of appellant in the year 2003 only after making balance installments. The appellant failed to evidence that the possession of the said property was taken by the appellant in 1997-98 thus these grounds of appeal are not maintainable as the property has been registered in the name of the appellant in the year 2003 only. Thus, the benefit of indexing can be avail by appellant in computing LTCG only w.e.f. 2003-04. Thus the addition made by AO is upheld accordingly.”*

9. From the above finding of Ld.CIT(A), it is evident that the benefit of indexation was declined on the ground that the possession was given to the original owner by Ghaziabad Development Authority (“GDA”) vide letter dated 25.12.1997. However, flat was registered in the name of the assessee in the year 2003 only, after making balance installments. The case of the assessee is that the house was allotted to the original owner and possession was given to the original owner by GDA. However, the original owner by way of Agreement to Sale and registered Power of Attorney transferred the ownership in favour of the assessee, and handed over the possession to the assessee way back in the year 1997. After obtaining the possession, the assessee had installed electric connection provided by the Electricity Department and has been paying house tax to the Ghaziabad Municipal Committee. In my view, the assessee has proved his possession of the property which is evident from the installation of

electricity connection in his name and house tax charged by the local tax authority. Therefore, the Ld.CIT(A) under these undisputed facts, ought to have taken a liberal approach for granting benefit of indexation as requested by the assessee. I therefore, set aside the impugned order on this issue and direct the AO to give benefit of indexation to the assessee as per law treating him in the possession of the flat since 1997. Thus, Ground raised by the assessee is allowed for statistical purposes.

10. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 05<sup>th</sup> May, 2022.

**Sd/-**

**(KUL BHARAT)**  
**JUDICIAL MEMBER**

*\* Amit Kumar \**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, NEW DELHI