

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

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER**

**ITA NO. 3133/MUM/2019 (A.Y. 2014-15)**

Chandrashekher Ramraj Singh 22-A, House No.4 Sherley Rajan Road, Bandra (W) Mumbai – 400050  <b>PAN: AANPS7840R</b>	v.	Income Tax Officer – 23(1)(3) 108, Matru Mandir Tardeo, Nana Chowk Grant Road, Mumbai – 400 007
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	:	<b>Shri Prakash Jhunjhunwal &amp; Shri Hemant Bahedia</b>
<b>Department by</b>	:	<b>Shri R.A. Dhyani</b>
<b>Date of Hearing</b>	:	<b>22.02.2022</b>
<b>Date of Pronouncement</b>	:	<b>20.05.2022</b>

**ORDER**

**PER S. RIFAUH RAHMAN (AM)**

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)-32, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 05.03.2019 for the A.Y. 2014-15.
2. Brief facts of the case are, assessee filed return of income declaring total income of ₹.1,56,640/- filed on 30.09.2015. The return was

processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act"). The case was selected for scrutiny under CASS and notice u/s. 143(2) and 142(1) of the Act were issued and served on the assessee along with the questionnaire. In response, authorized representative of the assessee attended and filed the relevant information as called for.

**3.** During this assessment year, the assessee has sold an immovable property i.e. Flat No. A-Wing, 2<sup>nd</sup> Floor, Kaatyayai Enclave, Santacruz (East), Mumbai for a sale consideration of ₹.1,49,00,000/- on 24.02.2014 and claimed exemption u/s. 54 of the Act. The relevant chronological events date wise are given below:

<b>Sr.No.</b>	<b>Date</b>	<b>Events</b>
1.	14.10.2006	<i>Date of acquisition of a plot of land situated at village Kole-Kalyan, Andheri, Mumbai for Rs. 16,00,000/-. The assessee acquired part rights in the property.</i>
2.	12.04.2007	<i>Date of Tripartite Development agreement where assessee is a confirming party and transfer of above rights in favour of the developer/ builder M/s Dhawan Builders and Developers. The assessee sold his rights in the property. As per Para 6 of the agreement, in consideration of the assessee granting his undivided share in the property, the developer will allot ,a new flat having 1000 Sq.ft. area in the new building to be put up by the developer on the3 said property.</i>
3.	23.05.2013	<i>Date of Occupation Certificate issued by the local authority. -</i>

<b>Sr.No.</b>	<b>Date</b>	<b>Events</b>
4	10.07.2013	Acquisition of the new property. Assessee has obtained the possession of the flat in lieu of development agreement entered earlier on 12.04.2007 being Flat No. 201- A, wing Kaatyayni enclave.
5	26.02.2014	Assessee sold the above flat No. 201- A, wing Kaatyayni enclave, for Rs. 1, 49,00, 000/-
6.	02.05.2014	The consideration from sale of the flat has been re-invested in the new flat and the assessee claimed exemption u/s 54 of the Act.

4. From the above, Assessing Officer observed that assessee has sold residential flat after seven months from its acquisition, therefore, it is a short term capital gain. Accordingly, assessee was asked to explain why the above sale should not be treated as short term capital gain and exemption claimed u/s. 54F of the Act should not be denied.

5. In response assessee filed relevant explanation vide letter dated 11.11.2016 and 24.11.2016 and further vide letter dated 05.12.2016, the relevant portion of the same are reproduced below: -

*"5.2. During the course of assessment proceedings and in response to the show cause notice, the AR of the assessee has furnished his explanation vide letter dated 11.11.2016 and 24.11.2016 and further vide letter dated 05.12.2016. The relevant portion of the same is reproduced as under:-*

*"Our client had purchased land on 14.10.2006 for Rs. 16,00,000/-. The same land was given to M/s. Dhawan Builders for development. The developer has not given any consideration for the land but promises our client to provide three bedroom flat having a carpet area of 1000 sq.ft. in the*

*newly constructed building. Thus instead of consideration the flat has been given by the developer to our client in 2013 which was sold on 26.2.2014 for Rs. 1.49 crores. Thus land of Rs. 16 lacs purchased on 14.10.2006 was sold for Rs. 1.49 crores on 26.2.2014 in the form of flat'. Our client has correctly accounted for long term capital gains and also invested in the flat on 02.05.2014"*

5.3. Further, the AR of the assessee vide his letter dated 24.11.2016 has stated as under:-

*"The deed of transfer cum allotment of dated 10.07.2013 and registered on 16.07.2013 between our client Shri Chandrashekhar Singh and Developer M/ s. Starwing Developers P Ltd is enclosed for your kind perusal. As per the development agreement dated 12.4.2007, the developer has agreed to give our client a 3 bedroom hall kitchen flat of 1000 carpet area free of cost in lieu of grant of development rights.*

*The above mentioned flat received in lieu for the development rights was sold on 26.02.2014 for Rs. 1,49,00,000/-. The deed of transfer cum allotment dated 10.07.2013 is only the agreement made in confirmation of the free of cost flat and our client has correctly taken the dates for long term capital gains i.e. 2006-07 and 2013-14. Therefore, the capital gains is long term and not short term thereby we request your honour to allow the exemption claimed u/ s. 54/54F on the ground that asset sold is land/flat and being long term capital gains. The right of the flat is therefore already created when our client has entered into the development agreement on 12.4.2007. The same is later transferred/ allotment by the Deed of Transfer cum allotment on 10.07.2013."*

*The assessee has also relied on many case laws, few of them are enumerated as under:*

- 1) *VasaviPratap Chand vs DCIT (2004) 89 ITD 73 (Delhi Trib)*
- 2) *D.L. Nandagopal Reddy Vs ITO ward 7(2)*
- 3) *34 JCIT(Asst) (spl. Range 6) vs. Dr. T.K. Dayaklu (ITA 610)/Bang/2001 dated 23.06.2005*
- 4) *Dnyaneshwar N. Mulikvs.ACIT (ITAT Pune\_ (2005) 98 TTJ (Pune) 179*
- 5) *(2012) 6 Taxcorp(A.T) 28907 (Hydrabad) URO*
- 6) *ITA No.448/Ind/2013 A.Y. 2009-10, ACIT 2(1), Indore vs. Shri Sanjay Kamath, Indore*
- 7) *ITA No.6120/Mum/2010 A.Y.2007-08, Shri Vikas P Bajaj Vs ACIT 14(3), Mumbai.*

**6.** After considering the submissions of the assessee, Assessing Officer observed that the possession of the new residential flat in lieu of the surrender of right of 1/5 share of 1/3 share in the property under the development agreement dated 12.04.2007 was taken by execution and registration agreement dated 10.07.2013. He observed that from 14.10.2006 (date of acquisition) to 10.07.2013 the assessee was merely having "specia of right" by way of intangible property which ceased on execution and registration of agreement for flat dated 10.07.2013 that is to say, right to acquire the property is lapsed and then new asset, a residential flat being the capital asset has been purchased. The assessee had only the right of acquisition of the said flat and the said right was ceased on getting the possession of the flat. Since assessee has sold the property on 24.02.2014 after taking possession on 10.07.2013, the flat was the new asset which was sold. Therefore, the period of holding in respect of the flat has to be reckoned from the date of acquiring of the possession of the flat. Accordingly, he treated the above transaction as short term capital gain and denied the exemption claimed by the assessee u/s. 54 of the Act.

7. Aggrieved assessee preferred an appeal before the Ld.CIT(A). After considering detailed submissions of the assessee, Ld.CIT(A) partly allowed the appeal filed by the assessee with the following observations:-

*"4.3.2 I find that there is a clear finding of the jurisdictional ITAT, in the context of a development agreement, that the right to acquire the flats and ownership of the flats are two different assets. The ITAT has also distinguished the cases like Vinod Kumar Jain 195 Taxman 174 (Punjab & Haryana) and similar cases, in which the assessee had entered into a transaction of purchase of flat, under SFS scheme of DDA or similar schemes. The facts in such cases are different from the fact of the present case where the appellant has entered into a development agreement to get 1000 sq ft of built up area by giving up its development rights, title etc on the land owned by him. The appellant has also submitted that the case of Jaimal K Shah (supra) is, distinguishable on facts because of its complexity of transaction involved. The same is found to be without any merit as the basic nature of the transaction involved in both the cases are same, i.e. a transaction involving development agreement wherein rights in land is given up to get certain built up area of the constructed building on such land. In the present case also, the appellant entered into a development agreement in 2007, gave up its development rights in land in lieu of its right to get a flat and got the constructed flat of .1033.88 sq.ft. in FY 2013-14. The appellant has subsequently sold the flat and had not transferred the right to acquire the flat which had got extinguished on getting the possession of flat in FY2013-14. Thus, capital gain on the transfer of development rights along with the land would be taxable in AY2014-15 as long term capital gain, since the appellant acquired the land on 14.10.2006 and held it for more than 3 years. The long term capital gain would be the difference of the indexed cost of purchase of land and the cost of construction of the flat having built up area of 1033.88 sq.ft. Further, the capital gain on the sale of said flat i.e. right, title and interest in the said flat on 24.02.2014 would result in short term capital gain in AY 2014-15, as the period of holding is only about 7 months. I find that the AO has relied on the decision in the case of Jaimal K Shah (supra), but has not followed the said decision in its entirety. In the said decision, the Tribunal has also held that the capital gain will be computed as long term capital gains in respect of transfer of right in the land and short term capital gain in respect of transfer of super-structure of the flats, by making following observations:-*

*"5.5 The situation is identical in the present case. In this case, the assessee along with flats had also sold right of the assessee in the land which was an independent asset and which was being held by the assessee since 1962 as an owner. Therefore, following the judgment in Hindustan Hotels Ltd. (supra), the capital gain in respect of transfer of right of assessee in the land has to be computed separately as long term capital gains and gain in respect of sale of super structure has to be treated as short term capital gain. The id. AR has argued that in case of Hindustan Hotels Ltd. (supra), the gain in respect of super structure had been taken at about 17% and therefore in this case also while attributing the sale consideration towards price of super structure, a margin of 17% on the cost of construction should be adopted. However, we note that in case of Hindustan Hotels Ltd. (supra), the period of construction\* was 1990-95 and it had been sold soon thereafter in June 1995 whereas in the present case the period of construction was 2002-05 and flats had been sold in the year 2006. Considering the facts and circumstances of the case, in our view, it would be reasonable to adopt a profit margin of 25% on the cost of construction of the flats to arrive at the sale consideration pertaining to the super structure. The balance sale consideration of the flats will be appropriated towards the sale price for the transfer of right in the land. The capital gain will thus be computed as long term capital gains in respect of transfer of right in the land and short term capital gain in respect of transfer of super-structure of the flats. The assessee will be entitled to the benefit of investment in the Rural Electrification Corporation Bonds under section 54EC in accordance with law. The AO will re-compute capital gain accordingly."*

*4.3.3 In view of the finding and observations in the case of Jaimal K Shah (supra), as noted above, I am of the considered opinion that the short term capital gain is to be estimated @ 25% of the sale consideration of Rs. 1,49,00,000/- at Rs.37,25,000/-, being the profit component of the cost of construction of the said fiat and the long term capital gain is to be computed on the balance sale consideration of Rs.1,11,75,000/-, by reducing the same with the indexed cost of acquisition of the land. The AO is directed to recompute the total income of the appellant accordingly, and allow benefit of deduction u/s 54 of the Act, in respect of the long term capital gain, in accordance with law. The ground no. 1 is partly allowed."*

**8.** Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

"1) The "Learned CIT(A) has erred in treating short term capital gain of Rs.37,25,000/-, being 25% of the sale consideration of flat sold at Rs.1,49,00,000/-.

2) The "Learned CIT(A)" has erred in law and on the facts and in the circumstances of the case in subjecting to tax "A Long Term Capital Gain" allegedly treating as "Short Term Capital Gain" thereby also denying/rejecting claim of Exemption u/s.54/54F of the Income Tax Act 1961 in respect of "Sale of Rights to/in Flat received pursuant to a Development Agreement in lieu of Plot/Land.

3) The Long Term Capital Gain and Exemption u/s.54/54F be allowed in Full as claimed.

4) The Appellant craves leave to add to, amend, alter or delete the above grounds of appeal."

**9.** Before us, Ld. AR brought to our notice the relevant facts and chart mentioned in Page No. 2 of the Assessment Order and submitted that assessee gave the land for development of the flats and in return assessee was allotted 3BHK flat measuring 1000 Sq.ft. in exchange of the above said right. He submitted that assessee was promised the flat and what is relevant is the date of allotment of flat in view of the transfer of the above said rights. Therefore, for the purpose of calculating the capital gain the relevant date should be the date of allotment of flat and not the possession of the flat. In this regard he relied on the following cases: -

- (i). Pr.CIT v. Vembu Vaidyanathan [101 taxmann.com 436 (HC-BOM)
- (ii). Madhu Kaul Vs. CIT [43 taxmann.com 417 (HC – P&H)]

**10.** On the other hand, Ld. DR submitted that in the joint development agreement there was no specific flat allotment to the assessee and it is only a right for the above said flat, since the assessee has relinquished the right once the flat was occupied by the assessee. Further he submitted that Ld.CIT(A) has considered the facts in detail and gave a proper relief to the assessee. He relied on the finding of the Ld.CIT(A).

**11.** Considered the rival submissions and material placed on record, we observe that assessee has entered into a joint development agreement with the builder to surrender of right of 1/5<sup>th</sup> share of 1/3<sup>rd</sup> share in the land in exchange for 3BHK flat measuring 1000 Sq.ft. in the newly proposed development in the above said land on 12.04.2007. This fact was clearly disclosed in the joint development agreement. Assessee acquired the property in the above said building identified as Flat No. 201 on 10.07.2013, subsequently assessee sold the above said flat on 24.12.2014. The Assessing Officer considered the above facts and treated the above transaction as short term capital transaction considering the fact that assessee has acquired the property on 10.07.2013 and subsequently sold the same on 24.02.2014. The assessee has raised grounds of appeal and pleaded before us that the assessee was allotted flat based on the joint development agreement entered with the developer

dated 12.04.2007. The fact remains that assessee has promised and allotted the flat in the new proposed building in lieu of the right on the land which was subject matter of the development. Assessee surrendered the right on the land based on the allotment of the flat, may not be a specific flat but having a legal promise that assessee will get a flat of 3BHK measuring 1000 Sq.ft. and accordingly, builder has allotted Flat No. 201. Therefore, as held in the case of Pr.CIT v. Vembu Vaidyanathan (supra) it was held that for computing capital gain tax the date of allotment would be the date on which purchase of residential unit can be stated to have acquired property. The relevant ratio is reproduced below: -

*"4. Having heard learned counsel for the parties, we notice that the CBDT in its circular No.471 dated 15th October, 1986 had clarified this position by holding that when an assessee purchases a flat to be constructed by Delhi Development Authority ("D.D.A." for short) for which allotment letter is issued, the date of such allotment would be relevant date for the purpose of capital gain tax as a date of acquisition. It was noted that such allotment is final unless it is cancelled or the allottee withdraw from the scheme and such allotment would be cancelled only under exceptional circumstances. It was noted that the allottee gets title to the property on the issue of allotment letter and the payment of installments was only a follow-up action and taking the delivery of possession is only a formality.*

*5. This aspect was further clarified by the CBDT in its later circular No.672 dated 16th December, 1993. In such circular representations were made to the board that in cases of allotment of flats or houses by co-operative societies or other institutions whose schemes of allotment and consideration are similar to those of D.D.A., similar view should be taken as was done in the board circular dated 15th October, 1986. In the circular dated 16th December, 1993 the board clarified as under:*

*"2. The Board has considered the matter and has decided that if the terms of the schemes of allotment and construction of flats/houses by the cooperative societies or other institutions*

*are similar to those mentioned in para 2 of Board's Circular No.471, dated 15101986, such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act."*

*It can thus be seen that the entire issue was clarified by the CBDT in its above mentioned two circulars dated 15th October, 1986 and 16th December, 1993. In terms of such clarifications, the date of allotment would be the date on which the purchaser of a residential unit can be stated to have acquired the property. There is nothing on record to suggest that the allotment in construction scheme promised by the builder in the present case was materially different from the terms of allotment and construction by D.D.A.. In that view of the matter, CIT appeals of the Tribunal correctly held that the assessee had acquired the property in question on 31st December, 2004 on which the allotment letter was issued.*

6. *Learned counsel for the revenue has also argued that in any case the assessee was not entitled to exemption under Section 54F of the Income Tax Act, 1961 ("the Act" for short). Since the assessee had held multiple residential units which would disqualify the assessee from claiming the exemption on it as was held by the Assessing Officer. From the record we notice that before the CIT appeals the assessee had produced additional evidence to suggest that the other units previously held by the assessee were discarded earlier and that at the relevant time the assessee did not hold any other residential unit. Quite apart from it being a pure question of fact, we do not find any indication in the impugned judgment of the Tribunal though the revenue had argued such a contention in its appeal before the Tribunal."*

**12.** Similar view was expressed by Hon'ble High Court of Punjab and Haryana in the case of Ms. Madhu kaul v. CIT (supra) observing as under:-

*"We find no distinction between the opinion recorded in the aforesaid judgment and the controversy in the present case. Admittedly, the flat was allotted to the appellant on 07.06.1986, vide letter conveyed to the assessee on 30.06.1986. The assessee paid the first installment on 04.07.1986, thereby conferring a right upon the*

*appellant to hold a flat, which was later identified and possession delivered on a later date. The mere fact that possession was delivered later, does not detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter. The payment of balance installments, identification of a particular flat and delivery of possession are consequential acts, that relate back to and arise from the rights conferred by the allotment letter."*

**13.** Respectfully following the above said decisions, we are of considered view that assessee has transferred the property with the promise of allotment of flat. Therefore, the date of acquisition should be the date of allotment of flat, in this case the date of entering into the joint development agreement. Therefore, the claim made by the assessee is proper and justified and accordingly, we direct the Assessing Officer to allow claim made by the assessee u/s. 54F of the Act and accordingly, ground raised by the assessee is allowed.

**14.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 20.05.2022.

Sd/-  
**(PAVAN KUMAR GADALE)**  
**JUDICIAL MEMBER**  
Mumbai / Dated 20.05.2022  
Giridhar, Sr.PS

Sd/-  
**(S. RIFAUH RAHMAN)**  
**ACCOUNTANT MEMBER**

**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.

//True Copy//

BY ORDER  
(Asstt. Registrar)  
**ITAT, Mum**