

IN THE INCOME TAX APPELLATE TRIBUNAL  
"SMC-I" BENCH, MUMBAI

SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 1718/MUM/2019  
(ASSESSMENT YEAR: 2013-14)

M/s Mitchell Associates  
F/12 Everest Bldg,  
7<sup>th</sup> Floor, 156 Tardeo Road,  
Tardeo, Mumbai-400 034  
[PAN: AAAFM7512K]

..... Appellant

Vs

Income Tax Officer-19(2)(3), Mumbai,  
2<sup>ND</sup> Floor Matru Mandir, Tardeo Road,  
Mumbai- 400007

..... Respondent

Appearances

For the Appellant/ Assessee : Shri K Gopal  
For the Respondent/Department : Shri Nishant Somaiya

Date of conclusion of hearing : 22.02.2022  
Date of pronouncement of order : 20.05.2022

**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. By way of the present appeal the Appellant/Assessee has challenged the order, dated 11.01.2019, passed by the Ld. Commissioner of Income Tax (Appeals), [hereinafter referred to as 'the CIT(A)'] under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] in appeal [CIT(A) 59/IT-06/[IT-505 (Apl.-30)]/2017-18] pertaining to the Assessment Year 2013-14.

2. The Appellant, a partnership firm, has raised the following grounds of appeal:

*"1. The learned CIT (A) erred in confirming the action of the Assessing Officer in treating a net sum of INR 44,16,000/- as revenue receipt and taxing the same as Income from other sources as against Long term capital gains as offered by your appellants. Your appellant submit that they have correctly*

*offered INR 15,94,000/- as Long Term Capital gains and the same ought to be allowed as claimed in the Return of Income filed.*

- 2. The learned CIT (A) erred in confirming the action of the Assessing Officer in not granting exemption under section 54EC of INR 15,94,000/- as claimed by your appellants. Your appellants submit that they have correctly claimed the exemption under section 54EC as per the provisions of the Income Tax Act, 1961 and the same ought to have been allowed as claimed."*
3. The brief facts relevant to the issues before us are that the Appellant filed return of income for Assessment Year 2013-14 on 18.02.2014 declaring total income of INR 58,900/-. The case of the Appellant was selected for scrutiny and notice under Section 143(2) dated 03.09.2014 was issued to the Appellant. During the course of assessment proceedings the Assessing Officer noticed that the Appellant has shown Long Term Capital Gains (LTCG) of INR 15,94,000/- and has claimed exemption under Section 54EC of the Act having invested INR 16,00,000/- in bonds issued by National Highway Authority of India (NHAI) on 06.03.2013. The Appellant was asked to justify the aforesaid claims. In response to the same, the Appellant filed reply letter dated 20.01.2016. During the assessment proceedings the Appellant explained that the Appellant had entered into an Agreement for Purchase, dated 06.03.2002, with M/s Vora Estate Developers (hereinafter referred to as 'the Developer') whereby the Appellant had agreed to purchase Flat No. 501, Vora Classic, Marve Road, Malad (West), Mumbai 400092 (hereinafter referred to as 'the Flat') for a consideration of INR 15,84,000/-. The Agreement for Purchase, dated 06.03.2002, (hereinafter referred to as 'the PA') was registered on 13.03.2002. Since the Developer failed to give possession of the Flat in terms of PA, the Appellant was constrained to file a suit for specific performance (Suit No. 1456 of 2008) against the Developer before the Hon'ble Bombay High Court. During the pendency of the aforesaid suit, a settlement was reached between the Appellant and the Developer. According to the consent

terms, dated 24.03.2012, the Appellant was to receive a payment of INR 60,00,000/- for relinquishing/terminating the right, title, claim and/or interest in the Flat. A Cancellation Deed, dated 11.09.2012, was executed by the Appellant pursuant to the consent term which was registered on 12.09.2012. According to the Appellant the aforesaid transaction resulted in LTCG. The Appellant offered LTCG of at INR 15,94,000/- to tax computed after claiming the benefit of indexation in relation to the cost of acquisition of the Flat and the provisions of Section 54EC having invested INR 16,00,000/- in bonds issued by NHA on 06.03.2013. However, the Assessing Officer, not being satisfied with the explanation/submission of the Appellant, concluded that the compensation of INR 60,00,000/- received by the Appellant from the Developer was in the nature of Income from Other Sources and therefore, the Assessing Officer computed the Income from Other Sources at INR 44,16,000/- (INR 60,00,000 – INR 15,84,000). The relevant extract of the assessment order, dated 30.03.2016, reads as under:

*“4.5. As mentioned above, in all the submissions made on various dates, the assessee has stated & agreed that builder has never provided the possession of the property to the assessee, hence, it has to be held that there exists no rights to the assessee on the said property throughout the said period. Any rights on the property will be conferred on the assessee, only after receipt of possession of the property, before taking over possession/occupation the assessee will not have any right on the property. In support of this view, there are various judicial decisions, where in it is decided that only on receiving the possession of the property, the assessee will acquire any rights on the property. In the instant case, even though the purchase agreement was registered, the rights on the property were not transferred to the assessee.*

*4.6. As per the terms and conditions of the agreement, the builder has not handed over the possession to the assessee, and hence, the agreement has automatically become null and void. The payment made by the assessee remained as advance for acquiring property. Since, the property has not become a*

capital asset in the hands of the assessee, the said transaction cannot be termed as sale and purchase of immoveable property and resultant gain/loss also cannot be treated as capital gains. Builder has compensated the assessee for not performing the specific contract with in the specified time and not for purchasing the property from the assessee.

4.7. In view of the above, the compensation received by the assessee from the builder in lieu of non performance of specific contract is treated as income of the assessee earned from other sources. Accordingly, an amount of Rs. 44,16,000/-(60,00,000 15,84,000) is added to the total income of the assessee. Penalty Proceedings U/s. 271(1)(c) are separately initiated for furnishing inaccurate particulars, leading to concealment of chargeable income.” (Emphasis Supplied)

4. Despite concluding that the income earned by the Appellant was in the nature of Income from Other Sources, the Assessing Officer went on to adjudicate upon the claim of exemption under Section 54EC made by the Appellant. The Assessing Officer noted that two cancellation deeds were executed by the Appellant. The first un-registered cancellation deed was executed on 24.03.2012 while the second registered cancellation deed was executed on 11.09.2012. Taking the date of the un-registered cancellation deed (i.e. 24.03.2012) the Assessing Officer concluded that the investment in bonds of NHAI was made on 06.03.2013. According to the Assessing Officer, the investment was made after a gap of 11 months and therefore, the benefit of section 54EC was denied to the Appellant since the requirement of making investment within a period of six months from the date of transfer of asset was not satisfied.
5. Being aggrieved, the Appellant preferred an appeal before the CIT(A) who confirmed the order of Assessing Officer holding INR 44,16,000/- as Income from Other Sources. However, the CIT(A) allowed the alternative ground and permitted additional deduction of INR 2,74,310/- under Section 57(iii) of the Act. The ground relating to

claim of exemption under Section 54EC of the Act was disposed of as being academic in nature.

6. Aggrieved by the order dated 11.01.2019 passed by CIT(A) the Appellant has preferred the present appeal.
  
7. The Ld. Authorised Representative for the Appellant appearing before us relied upon the replies/submissions filed before lower authorities. He submitted that as per consent terms, 24.03.2012 the Developer agreed to pay a compensation of INR 60,00,000/- for relinquishment/ extinguishment of right in the Flat. The payment of INR 60,00,000 was to be made by the Developer as follows – INR 15,00,000/- on or before filing the consent terms before the Hon'ble Bombay High Court, and balance INR 45,00,000/- in three installments of INR 15,00,000/- each out of which the first installment was to be paid on or before 30.04.2012 and the last installment to be paid on or before 30.06.2012. The unregistered Cancellation Deed, dated 14.03.2012, wherein the amount of INR 60,00,000/- was mentioned, was signed to ensure that the Developer makes the agreed payment of INR 60,00,000/-. However, the same was not registered as the Appellant was not sure whether the payment would be made by the Developer since a cheque issued by the Developer on 24.03.2012 for INR 15,00,000/- was returned unpaid on account of insufficient funds. It was only after receipt of substantial payment of INR 45,00,000/- on/by 03.09.2012, that the Appellant agreed for registration of a cancellation deed. Accordingly, Cancellation Deed, dated 11.09.2012, was registered on 12.09.2012 leading to extinguishment of rights in the Flat. Accordingly, the Appellant had offered to tax LTCG of INR 15,94,000/- as income for the Assessment Year 2013-14. The investment of INR 16,00,000/- in bonds issued by NHAI was made on 06.03.2013 which is within a period of six months from the end of the month in which extinguishment of rights by virtue of Cancellation Deed registered on 12.09.2012 took place making the Appellant eligible for claiming exemption under section 54EC of the Act. The Ld.

Authorised Representative for the Appellant submitted that if the Appellant had no rights whatsoever in the Flat as was held by the Assessing Officer and the CIT(A), the Developer would not have agreed to the consent term, dated 24.03.2012 and the payment of compensation of INR 60,00,000/- The Ld. Authorised Representative for the Appellant further submitted that the differential sum received on relinquishment of right in the Flat has been correctly offered to tax as LTCG by the Appellant and that the Assessing Officer has erred in treating INR 44,16,000/- as income from other sources. He relied upon the following decisions/judgments to support his case – CIT vs. Tata Services Ltd. (1980) 122 ITR 594X(Bom), Kartick Chandra Mondal vs. Pr.CIT (2020) 113 taxmann.com 586 (Kolkata-Trib), and Mr. Yahya E. Dhariwala vs. DCIT: ITA No. 5501/Mum/2009 decided on 25.11.2011.

8. Per contra, Ld. Departmental Representative relied upon the Assessment Order and the order passed by the CIT(A). He submitted that the Appellant neither had any rights in the Flat nor did the Appellant have any intention to acquire any rights in the Flat. Referring to various clauses of the PA, the Ld. Authorised Representative for the Assessee contended that there was no evidence that a legally enforceable right got vested in the Appellant by virtue of the PA. He submitted that Clause 8 of the PA clearly provided that in case the Developer fails to deliver possession, the Appellant would be entitled to receive back only the money paid by the Appellant along with interest thereupon. Further, Clause (12) of the PA clarified that nothing contained in the PA shall be construed to confer upon the Appellant any right or interest of any kind whatsoever in the Flat till the transfer of land and premises to a co-operative society or an incorporated body to be formed by the purchasers of different flats. Further, Clause 39 of the PA prohibited the Appellant from letting, sub-letting, selling, transferring etc. or dealing with or disposing the Flat or part with the interest therein. Relying upon the aforesaid, the Ld. Departmental Representative submitted that there was no 'capital asset' visible within the meaning of Section 45 of the

Act. He further submitted that the registered Cancellation Deed dated 11.09.2012 did not make a reference to the sum of INR 60,00,000/-. The payments made by the Appellant were in the nature of advance and did not have the character of cost of acquisition of the 'right' as claimed by the Appellant. He submitted that the findings of the Assessing Officer that there was no LTCG arising within the meaning of Section 45 of the Act which were confirmed by the CIT(A) need to be upheld.

9. We have considered the rival submissions and perused the material on record. In our view, the both the Assessing Officer and the CIT(A) have failed to appreciate the statutory protection/rights available to the Appellant under the provisions of Maharashtra Ownership Flat Act, 1963 and Maharashtra Ownership Flat Rules, 1964. The relevant extract of Clause 45 of the PA read as under:

*“45 The Agreement shall always be subject to the provisions contained in the Maharashtra Ownership Flat Act, 1963 and the Maharashtra Ownership Flat Rules, 1964 or the Companies Act, 1956, or the Maharashtra Apartment Ownership Act as the case may be or any amendments or re-enactment thereof for the time being in force or any other provisions of law applicable thereto. ....” (Emphasis Supplied)*

10. As per Section 4(1A)(a)(ii) of the Maharashtra Ownership Flat Act, 1963 (hereinafter referred to as 'MFA') an agreement for sale between the developer/promoter and the purchaser of flat must specify the date by which the possession of the flat is to be handed over to the purchaser. Section 8 of MFA provides that if the developer/promoter fails to give possession in terms of the agreement for sale then promoter shall be liable to refund the amount received from the purchases along with interest, however, this is without prejudice to any other remedies as may be available to the purchaser. Section 8 also provides that till the date the aforesaid amount along with interest is refunded, such amounts and the interest shall constitute a charge on the land and the construction, if any, thereon in which the

flat is or was to be constructed. As per Section 11 of MFA a promoter/developer is under obligation to take necessary steps to complete his title and conveyed to the organization of persons who have taken the flats. In case the promoter fails to execute the conveyance as aforesaid, the association of the owners can make application to the competent authority for issuance of a certificate enabling execution of unilateral deemed conveyance in the favour of the society or association of persons who have taken the flats. From the aforesaid, it is clear that provision contained in MFA give certain rights to persons purchasing flats and casts certain obligations of the promoters/developers. It is settled legal position that statutory rights cannot be curtailed by way of a contract. Even Clause 9 of the PA, on which reliance has been placed by Assessing Officer/CIT(A), provides that provision of Clause 9 shall be subject to what is provided in Section 8 of MFA.

11. It is admitted fact that PA is a registered document whereby the developer has agreed to sale the flat to the Appellant. The Appellant has paid fully consideration of INR 15,84,000/-. Despite this, the Assessing Officer as well as CIT(A) have held that the Appellant had no right/interest in the Flats because possession was not granted to the Appellant and on the ground that the Appellant never intended to acquire any rights/interest in the Flat. In our view the approach adopted by the Assessing Officer and CIT(A) cannot be countenanced. In our view, the consideration that weighed with the authorities below were relevant for determining the issue of title of the Flat and not the rights/interest in the same. We are unable to agree with the conclusion drawn by Assessing Officer/CIT(A) that the Appellant has no right/interest in the Flat. Even the CIT(A), while concluding in paragraph 4.18 (reproduced herreinbelow), has observed that "*it was a simple flat purchase deal that went bad*":

*"4.18 It also needs to be noticed that while the first payment was made by the appellant to the Developer on 02.08.1996, the Agreement for Purchase was signed after a long hiatus on*

*06.03.2002 and was eventually cancelled through the registered Cancellation Deed after another long hiatus on 11.09.2012. The appellant made the last of its 10 installment payments to the Developer on 01.01.1998, which is soon after the Developer got the notice dated 11.06.1997 from the Municipal authorities about the illegality of the ongoing construction, as discussed ante. The totality of circumstances show that it was a simple flat purchase deal that went bad and the appellant obtained a sum of Rs. 60 lakhs from the Developer. The deal had nothing to do with acquiring a 'right' and then selling it back to the Developer for a commercially determined gain. The tax treatment accorded by the appellant, therefore, seems unnatural, forced and has infirmities as delineated above.” (Emphasis Supplied)*

12. In the case of CIT vs. Tata Services Ltd.: 122 ITR 594X (Bom), relied upon by the Ld. Authorised Representative for the Appellant, it has been held by the Hon’ble Bombay High Court has held as under:

*“What is a capital asset is defined in section 2(14) of the Income-tax Act, 1961. Under that provision, a capital asset means property of any kind held by assessee, whether or not connected with his business or profession. The sub-clauses which deal with what property is not included in the definition of capital asset are not relevant. Under section 2(47), a transfer in relation to a capital asset is defined as including the sale, exchange or relinquishment of the asset or the extinguishment of any right therein or the compulsory acquisition thereof under any law. The word "property", used in section 2(14) of the Income-tax Act, is a word of the widest amplitude and the definition has re-emphasised this by use of the words "of any kind". Thus, any right which can be called property will be included in the definition of "capital asset". A contract for sale of land is capable of specific performance. It is also assignable. (See Hochat Kizhakke Madathil Venkateswara Aiyar v. Kallor Illath Raman Nambudhri, AIR 1917 Mad 358). Therefore, in our view, a right to obtain conveyance of immovable property, was clearly "property" as contemplated by section 2(14) of the Income-tax Act, 1961. (Emphasis Supplied)*

13. In view of the above, we hold that the Appellant had right/interest in the Flat which constituted the capital asset in terms of Section 2(14) of the Act. With the registration of Cancellation Deed on 12.09.2012

the aforesaid right/interest in the Flat were extinguished leading to transfer of capital asset in terms of Section 2(47) of the Act. The Cancellation Deed was executed as per the consent terms, dated 24.03.2012, drawn by the Appellant and Developer during the pendency of suit for specific performance (Suit No. 1456 of 2008) which were approved by the Hon'ble Bombay High Court vide order dated 25.04.2012. Since the consent terms clearly recorded that the Developer would be under obligation to pay INR 60,00,000/- to the Appellant, there was no reason for Assessing Officer/CIT(A) to doubt the veracity/validity of Cancellation Deed, dated 11.09.2012 which was a registered document merely for the reason that the amount of INR 60,00,000/- was not stated therein. Accordingly, we hold that payment of INR 60,00,000/- received by the Appellant from the Developer is the consideration from transfer of capital asset resulting in income chargeable to tax as Capital Gains (and not Income from Other Sources) in the hands of the Appellant.

14. We note that the Assessing Officer had denied the benefit of Section 54EC of the Act to the Appellant holding that the investment in the bonds issued by NHA was made after a period of 11 months taking the date of execution of unregistered Cancellation Deed, dated 24.03.2012. The conclusion of the Assessing Officer in this regards are as under:

*"5. Without prejudice to the above, the claim of Long term capital gains and allowability of exemption claimed by the assessee u/s. 54EC, is discussed as under:*

*5.1. With regards to receipt of compensation from the Builder, the notice U/s. 133(6) was issued to M/s. Vora Estate Developers. In reply, M/s. Vora Estate Developers has submitted the details of payments made to the assessee along with copy of cancellation deed dated 24.03.2012. On perusal of the same, it is seen that the assessee has invested in capital bonds well beyond the due date for investment. The assessee has to invest the sale proceeds within six months of the receipt of the same for claiming exemption U/S. 54EC. In this case, the cancellation*

deed was executed on 24.03.2012 and the investment in NHA/  
Bonds was made on 06.03.2013 i.e., after a gap of 11 months.”  
(Emphasis Supplied)

15. The PA, which created rights/interest in the Flat being immovable property, was a registered document and therefore, the extinguishment such rights/interest could only be achieved only by way of a registered document. Thus, we find merit in the contention of the Appellant that date of registered Cancellation Deed (i.e. 11.09.2012) should be taken as the date of transfer of capital asset. In order to claim benefit of Section 54EC, investment must be made within six month from the transfer of the capital asset. In the case of Kartick Chandra Mondal vs. Pr.CIT (2020) 113 taxmann.com 586 (Kolkata-Trib), it has been held that term month means calendar months (and not a period of 30 days), which should be applied for the purpose of Section 54EC of the Act. Same view has been taken by Mumbai Bench of the Tribunal in the case of Mr. Yahya E. Dhariwala vs. DCIT: ITA No. 5501/Mum/2009 decided on 25.11.2011. Respectfully, following the aforesaid decisions of the Tribunal we hold that the investment of INR 16,00,000/- made by the Appellant in bonds issued by NHA on 06.03.2013 falls with the period of six calendar months and thus, meets the requirement of Section 54EC of the Act. Accordingly, we are of the view that the Appellant is entitled to benefit of section 54EC of the Act in respect of amount of INR 16,00,000/- invested in bonds issued by NHA.
16. In view of the above, Ground No. 1 and 2 are allowed in favour of the Appellant.
17. In result, the present appeal is allowed.

Sd/-  
(Gagan Goyal)  
Accountant Member

Sd/-  
(Rahul Chaudhary)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 20.05.2022  
Alindra Kumar, PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai