

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

SHRI M. BALAGANESH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 267/MUM/2022
(Assessment Year: 2014-15)

Akshay Janak Shah,
302, Matru Chhaya, Gulmohar,
Cross Road No. 6, Near Laheri House,
JYPD Scheme, Ville Parle,
Mumbai - 400056
[PAN: AALPS8056P]

..... Appellant

CIT (Appeal),
Income Tax Department,
National Faceless Appeal Centre,
(NFAC), Delhi

Vs

..... Respondent

Appearances

For the Appellant/Assessee : Shri Rajesh Shah
For the Respondent/Department : Shri Tejinder Pal Singh Anand

Date of conclusion of hearing : 04.11.2022
Date of pronouncement of order : 24.01.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 15.12.2021, passed by the Ld. Commissioner of Income Tax (Appeals)-, National Faceless Appeal Centre (NFAC), Delhi, [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2014-15 whereby the Ld. CIT(A) had dismissed the appeal against the Assessment Order, dated 09.12.2016, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Appellant has raised the following grounds of appeal:
 - "1. The Learned CIT(A) erred in law and on facts in upholding

the contention of the Learned Assessing Officer that gain on sale of property by the Appellant was in the nature of Short Term Capital Gains amounting to Rs. 29,00,000/- as against Long Term Capital Gains considered by the Appellant to Rs. 24,50,926/-

2. *The Learned CIT(A) erred in law and on facts in determining the holding period from the date of registration of the property purchased and not the date of allotment letter and payment of full consideration.*

Consequentially, the period of holding was considered as 33 months as against 67 months. Hence, the asset was wrongly classified as Short Term Capital Asset as against Long Term Capital Asset.

3. *The Learned CIT(A) erred in not considering the judicial decisions relied by the Appellant which are directly covering the facts of the Appellant.*

The judicial decision CIT VS. Balbir Singh Maini (2017) [398 ITR 531 (SC)] on which the Learned CIT(A) has based his judgment is not relevant to the facts of the Appellant as it relates to Joint Development Agreement and hence cannot be applied to the Appellant.

4. *Without prejudice to the above, in case it is held that the gain as long term in nature, the exemption claimed by the Appellant under Section 54F of the Income-tax Act, 1961 be allowed as the same is not disputed by the Learned Assessing Officer.*
5. *Without prejudice to all the above, the Learned CIT(A) (being NFAC), erred in not providing an opportunity of hearing to the Appellant, thereby violating principles of natural justice."*

3. The Appellant has also raised the additional grounds of appeal:

- 1) *"The appellant request your honours to admit the additional grounds of appeal which goes to the roots of the matter.*
- 2) *On the facts and circumstances of the case and in law, the Department having accepted on the very same fact that there*

is a long term capital gain in the case of Co-owner of the property, who was holding 50% share in the property, the AO cannot treat the very same transaction as a short term transaction.

3) On the facts and circumstances of the case and in law, in the case of Mr. Ashish Janak Shah, Co-owner in the property, the jurisdictional AO has accepted the transaction of sale of property as a long term capital gain and hence the learned AO erred in treating the transaction of sale of the same property as short term capital gain. The AO ought not to have taken different view of the very same transaction. The appellant submits that the transaction of sale of property is long term capital gain and the addition made may be deleted.”

4. We have heard both sides on admitting the additional grounds and are of the view that the additional grounds raised by the Appellant are in the nature of additional submission not requiring examination of new facts. The Tribunal can, in any case, take judicial notice of the Assessment Order, dated 09.12.2016 for the Assessment Year 2013-14 passed in the case of other co-owner. Accordingly, in view of the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT: 229 ITR 383, the additional grounds raised by the Assessee are admitted. Accordingly, we proceed to adjudicate the grounds (including the additional grounds) raised by the Appellant. Since all the grounds are connected, the same are being taken up together.
5. The relevant facts, in brief, are that the Appellant is an individual engaged in the business of trading in diamond under the name and style of Universal Gems. The return filed by the Appellant for the Assessment Year 2014-15 was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant had sold his 50% share along with the other joint

owner in the commercial property being office premises (bearing No. FW3150) at Bharat Diamond Bourse, BKC [hereinafter referred to as the 'Capital Asset'] for a consideration of INR 76,96,000/- by way of documents registered on 25.04.2013. However, the gains arising from the same were not offered to tax in the return of income for the Assessment Year 2014-15. Therefore, vide, letter dated 22.12.2016, the Appellant was asked to show cause why amount of INR 29,00,000/- should not be added to the total income of the Appellant under the head short-term capital gains. In response thereto, the Appellant filed reply vide, letter dated 23.12.2016, stating that the Appellant was acquired on 17.07.2007 when the Letter of Allotment of Capital Asset was issued and was sold on 30.09.2012 when entire sale consideration was received. Since, the Capital Asset was held for a period of more than 36 months, long term capital gain arose on transfer of Capital Asset. The Appellant had purchase of residential house within a period of one year before the date of sale of the Capital Asset (i.e., on 17.08.2012). The purchase consideration for the residential house was more than the Appellant's share in the sale consideration arising from sale of Capital Asset and therefore, the Appellant had claimed exemption from long term capital gains under Section 54F of the Act. Disclosure in this regard was made in the return of income filed by the Appellant for the Assessment Year 2013-14 which has been accepted on processing under Section 143(1) of the Act. However, the Assessing Officer was not satisfied with the explanation furnished by the Appellant and made addition of short term capital gains of INR 29,00,000/- in the hands of the Appellant. While doing so the Assessing Officer took the date of registered documents as date of purchase and sale of the Capital Asset. Documents related to purchase of Capital Asset

were registered on 19.07.2010 while documents related to sale of Capital Asset were registered on 25.04.2013. Therefore, the Assessing Officer concluded that the transfer took place on 25.04.2013 which fell within the previous year relevant to the Assessment Year 2014-15. Taking the aforesaid dates of registration of documents, the Assessing Officer computed the period of holding of Capital Asset as 33 months and concluded that short term capital gain accrued to the Appellant. The Assessing Officer rejected the claim of exemption under Section 54F of the Act as the same was available in respect of long term capital gains. Thus, the Assessing Officer brought to tax INR 29,00,000/- as short term capital gains income of the Appellant for the Assessment Year 2014-15.

6. Being aggrieved, the Appellant preferred appeal before the CIT(A) who dismissed the appeal vide order dated 15.12.2021.
7. Now the Appellant is before us in appeal against the order dated 15.12.2021 passed by the CIT(A) confirming addition of INR 29,00,000/- made by the Assessing Officer holding the same to be short term capital gains chargeable to tax for the Assessment Year 2014-15. All the grounds raised are connected and are therefore, taken up together hereinafter.
8. We have heard the rival submissions. Both the sides reiterated the contentions raised before the Assessing Officer and the CIT(A). The Learned Counsel for the Appellant took us through the paper-book dated 07.07.2022 and additional paper-book filed on 08.07.2022. He also placed reliance on the judgment of Hon'ble Bombay High Court in the case of Principal Commissioner of Income Tax Vs. Vembu Vaidyanathan: (2019) 413 ITR 248. He submitted that the Capital Asset was held by

the Appellant for more than 36 months and therefore, the capital gains arising on transfer of such Capital Asset were in the nature of long-term capital gains. The transfer of the Capital Asset took place on 30.09.2012 during the previous year relevant to the Assessment Year 2013-14. The long terms capital gains arising transfer of capital was exempt under Section 54F of the Act as the Appellant had purchases a residential property within a period of one year before the sale of the Capital Asset. The return for the Assessment Year 2013-14 wherein disclosure was made to this effect was processed under Section 143(1) of the Act and has been accepted. Further, no additions have been made in the hands of the other co-owner. He further submitted that the CIT(A) has misconstrued the provisions of Section 53A of the Act and misplaced reliance on the judgment of the Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Mainni: 398 ITR 531 (SC) which related to the joint development agreement.

9. On the other hand, the Learned Departmental Representative relied upon the order passed by the Assessing Officer and CIT(A). There is no dispute regarding the date of registration of documents for purchase and sale of Capital Asset. Thus, the Capital Asset transferred by the Appellant was held by the Appellant only for a period of 33 months and therefore, was a short-term capital asset. The capital gains arising from sale of the Capital Asset were in the nature of short term capital gains in respect of which exemption under Section 54F of the Act is not available. The documents relating to sale of Capital Asset were registered during the previous year relevant to the Assessment Year 2014-15, and therefore, the short-term capital gains were liable to tax in the hands of the Appellant during the

Assessment Year 2014-15.

10. We have considered the rival submission. The issue at the core of the present dispute is the period of holding of the Capital Asset. The Appellant contends that the period of holding is more than 36 months whereas the Revenue contends that the same is only 33 months. The difference is on account of Revenue taking the date of registration of purchase/sale documents as the relevant date for transfer, whereas the Appellant contends that the transfer took place before the registration of documents.
11. We have perused the material on record including the paper-books filed by the Appellant. We find that the original investment in the Capital Asset was done by Sh. Janak Shah the father of the Appellant in 2004. Perusal of the copy of account maintained by the Bharat Diamond Bourse in respect of Capital Asset shows that till 15.02.2007 an amount of INR 18,09,600/- was paid by Sh. Janak Shah towards allotment office bearing number FW3150 having area of 300 Sq. Ft. in respect of Application No. 5213. The rights and obligations in respect of the aforesaid Application No. 5213 were transferred to the Appellant and Sh. Ashish Janak Shah by Bharat Diamond Bourse on 10.07.2007 and a new application number 4443 was allotted. The contention of the Appellant is that on acquiring the rights/obligations are aforesaid, the Appellant acquired the Capital Asset. We note that through letter dated 28.03.2008, the Appellant was asked by the Bharat Diamond Bourse that for the purpose of allotment applicants on record as on 30.04.2008 would be considered. Further, the Appellant was also asked to complete the interior work by 30.09.2008. Vide Letter, dated 27.01.2009, the Appellant filed the office plan with the Bharat

Diamond Bourse for submission with the Municipal Authorities. The final registration of documents related to purchase of the Capital Asset took place on 19.07.2010. We are not inclined to accept the contention of the Revenue that the period of holding the Capital Asset would commence only from the date of registration of documents. We are also not inclined to accept the contention of the Appellant that the period of holding the Capital Asset should be computed from 10.07.2007 as by that date the allotment was only provisional in nature. The Applicants on record as on 30.04.2008 were considered for allotment. In our view, the period of holding must be counted from 27.01.2009, as by this date the consideration was paid in full and the Appellant had the possession of the Capital Asset.

12. The period of 36 months from the aforesaid date expired in January, 2012. The transfer of the Capital Asset as per Revenue took place on 25.04.2013 and per the Appellant took place on 30.09.2012. Thus, the capital gains which arose to the Appellant on the transfer of the Capital Asset were in the nature of long term capital gains.
13. The fact that the Appellant has fulfilled the requirements to claim exemption under Section 54F of the Act were not disputed either by the Assessing Officer or the CIT(A). The contention of the Appellant before the CIT(A) was that everything except the registration of sale documents took place by 30.09.2012. Within one year before 30.09.2012 (i.e., 17.08.2012), the Appellant has purchased a residential house with purchase price more than his share of consideration for sale of the Capital Asset. The contention of the Revenue was limited to the date of transfer of Capital Asset which according to the Revenue was 25.04.2013

(the date of registration of documents of sale). In this regard it would be pertinent to refer to Section 2(47)(v) of the Act which provides that 'transfer' in relation to 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. A perusal of Section 53A of the Transfer of Property Act, 1882 shows that the aforesaid section protects the transferee for consideration in a situation where the instrument of transfer is not registered provided (a) there is a contract in writing from which the terms necessary to constitute transfer can be inferred with reasonable certainty, (b) the transferee has, in part performance of contract, taken possession of such immovable property, (c) transferee has done some act in furtherance of the contract, and (d) the transferee has performed his part of the contract. We find merit in the contention of the Appellant that the CIT(A) has misconstrued the provisions of Section 53A of the Transfer of Property Act, 1882 and had incorrectly placed reliance on the judgment in the case of Balbir Singh Maini (supra) which does not advance the case of the Revenue in the facts of the present case. From a co-joint reading of Section 2(47)(v) of the Act and Section 53A of the Transfer of Property Act, 1882, it is clear that the taxable event of 'transfer' need not wait from the registration of documents in cases where the possession of the immovable property is taken in part performance of the contract as per the provisions of Section 53A of the Act. In the present case, the contention of the Appellant before the CIT(A) was that everything except the registration of sale documents took place by 30.09.2012. Entire sale consideration was received by the aforesaid date, and therefore, transfer of Capital Asset took place in the previous

year relevant to the Assessment Year 2013-14. The Appellant had claimed exemption under Section 54F of the Act, and thus, offered 'Nil' capital gains income to tax. The aforesaid contentions of the Appellant went uncontroverted as the Revenue adopted the date of registration of sale documents as the date of transfer.

14. In view of the above, we hold that in terms of Section 2(47(v) of the Act, the transfer of Capital Asset took place on 30.09.2012, which fell within the previous year relevant to the Assessment Year 2013-14. The Appellant had purchased residential property on 17.08.2012 which fell within the specified period of one year before the sale of the Capital Asset. The Appellant was, therefore, entitled to claim exemption under Section 54F of the Act. We note that even in the case of co-owner, during the assessment framed under Section 143(3) of the Act for the Assessment Year 2013-14 vide order dated 09.12.2016, no addition has been made on account of transfer of Capital Asset. Thus, the addition of INR 29,00,000/- made by the Assessing Officer holding the same to be short term capital gains is deleted.
15. Since we have held that the transfer of Capital Asset took place in the previous year relevant to the Assessment Year 2013-14 in terms of Section 2(47(v) of the Act, no addition could be made, in any case, in the hands of the Appellant on account of transfer of the Capital Asset during the Assessment Year 2014-15.
16. In terms of the paragraph 13 and 14 above, Ground No. 1, 2 and 3 raised by the Appellant are allowed whereas Ground No. 4 to 5, and the additional grounds raised by the Appellant are disposed off as being infructuous.

17. In result, the present appeal by the Assessee is allowed.

Order pronounced on 24.01.2023.

Sd/-
(M. Balaganesh)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 24.01.2023
Alindra, 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,

सत्यापित प्रति //True Copy//

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