

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI
BEFORE SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER
AND
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

ITA No.4380/MUM/2023
Assessment Year: 2016-17

Minaxi Mahesh Pawani (Deceased) through Legal Heir Pratik Mahesh Pawani, 1406, Topaz, L.B.S. Road, Mulund (West), Mumbai – 400 080 (PAN : ARJPP5191R)	Vs.	Income Tax Officer, International Taxation, Ward – 3(3)(1), Mumbai
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Ketan L. Vajani, CA
Respondent by : Smt. Mahita Nair, Sr. DR

Date of Hearing : 09.05.2024
Date of Pronouncement : 28.06.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A)–57, Mumbai, vide order no. ITBA/APL/S/250/2023-24/1056964999(1) dated 11.10.2023 passed against the assessment order by the Income Tax Officer, Ward 3(3)(1), Mumbai, u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 26.12.2018 for AY 2016-17.

2. Grounds taken by the assessee are reproduced as under:

“1. On the facts and in the circumstances of the case, the Commissioner of Income-tax (Appeals), hereinafter referred to as the CIT (A), has erred in confirming the action of the assessing officer in treating the long term capital gains on transfer of right to acquire the property, computed at Rs. 35,33,059/- applying indexation, as short term capital gains of Rs. 64,89,545/-.

2. The CIT (A) has erred in confirming the order of the assessing officer, denying the exemption u/s. 54F of the Act against the long term capital gains on transfer of right to acquire the property for the reason of the failure on the part of the appellant to file a revised return of income to claim the said exemption.

3. The CIT (A) has erred in confirming the addition of Rs. 16,00,100/- made u/s. 69A of the Act in respect of cash deposited by the appellant in her bank account during the financial year 2015-16.”

3. Before us, Ld. Counsel for the assessee did not press ground no. 3. Accordingly, ground no. 3 taken by the assessee is dismissed as not pressed.

4. Ground no. 1 and 2 relates to the issues, as to whether the capital gain reported by the assessee on transfer of right to acquire the property is a long-term capital gain (LTCG) or short-term capital gain (STCG) and as to denial of claim of deduction u/s. 54F for the reason of failure by the assessee to file revised return of income for claiming the said deduction.

5. Brief facts of the case as culled out from records are that assessee was allotted flat no. 1202 on 12th floor in Tower no. 3 known as 'Runwal Anthurium', Mulund (W), Mumbai - 400080 (hereinafter referred to as the 'said flat') vide allotment letter dated 15.02.2010. Total consideration was ₹65,00,100/- out of which 20% advance of ₹13,00,000/- was paid upfront by the assessee, duly acknowledged by the builder in the letter of allotment itself. For the balance payment of ₹52,00,100/-, the said allotment letter described payment schedule based on various milestones to be achieved for completing the construction of flat. The said letter also specified about acceptance by the assessee of all the other charges, taxes and deposits as extra payments. It also mentioned about the stamp duty and registration charges which shall be borne by the assessee. According to this allotment letter, assessee would be entitled to transfer, assign or create any right only after payment of total consideration and other charges as specified in the said letter, by the assessee. With this letter of allotment, assessee got identifiable right in flat no. 1202 in Tower 3 of the building

known as Runwal Anthurium. For setting out the terms of construction of the flat an agreement was executed on 13.05.2014 between the builder and the assessee titled as agreement of sale. As per clause (o) of this agreement, assessee had applied to the builder for allotment of flat on ownership basis. In clause (r), payments made by the assessee viz Rs.69,84,088/- towards the part consideration is acknowledged.

5.1. The terms and conditions stated in the letter of allotment are elaborately recited in the registered agreement to sale dated 13.05.2014 between the builder and assessee. In this agreement which is essentially in relation to the letter of allotment issued by the builder for the identified flat allotted to the assessee, total consideration is stated to be ₹83,34,155/-. In addition to this consideration, assessee had agreed and accepted to pay and discharge the amount towards stamp duty, registration charges and charges for society formation, maintenance charges, charges for electricity connection and metre, legal charges and various other charges as required under this agreement. Further, this agreement states the various milestones and amounts which the assessee is required to pay to the builder against the consideration for the flat so allotted. Time for the payment of each instalment is the essence of the agreement as stated therein. From the recitals as contained in this agreement, they all relate to the execution of the project in which the assessee has been allotted the identified said flat. All these recitals are indeed in future tense, in other words, to be executed in the times to come, based on various milestones agreed between the two parties. Registration of this agreement took place on 15.05.2014 which is pursuant to the letter of allotment issued by the builder to the assessee dated 15.02.2010. There is a time gap between the two events of issue of letter of allotment and registration of the agreement containing the recitals for terms and conditions relating to the allotment of the said flat. For this time gap, it is stated that there

had been certain disputes and delays relating to approvals for the execution of the project at the end of the builder, beyond the control of the assessee.

6. Subsequently, while the said flat was still under construction, assessee entered into an agreement for sale with assessee being the vendor and the other parties being the purchasers for transfer of right held by the assessee to own the said flat for a sale consideration of Rs. 1,55,00,000/-. This agreement was made and entered into on 28.08.2015 and was registered with the office of sub-registrar on 29.08.2015. In this registered sale deed, in clause iii), reference is made to the registered agreement dated 13.05.2014. In this respect, it is stated that assessee has not committed any breach of the terms and conditions of the agreement dated 13.05.2014 and has performed all the obligations thereunder in respect of the said flat. It is important to note that this clause also states that the said flat is still under construction and the purchasers shall be entitled to take possession of the said flat from the builder.

7. Later on, assessee made an investment in buying another flat for a purchase consideration of Rs.1,10,00,000/- along with stamp duty and registration charges of Rs.5,80,000/-. For this investment, registered sale deed was entered into for the flat in the building known as Topaz Cooperative Housing Society Ltd with flat no. 1406 on 14th floor, Mulund West, Mumbai. Thus, assessee had received sale consideration of ₹1,55,00,000/- on transfer of his right to own the flat allotted in the Runwal Anthurium project which was subsequently invested in buying another flat in the Topaz Cooperative Housing Society project with an investment of ₹1,15,80,000/-.

8. In the course of assessment proceedings, Ld. Assessing Officer noted that assessee has sold the right to property conferred on the assessee by the allotment letter and not the property. There is no dispute on what the assessee has transferred giving rise to capital gains. He treated the capital gain on sale of right to own the property as short term capital gain. He computed the said STCG as under:

“4.8 In view of the above, the capital gain on the sale of right to own the property is Short Term Capital Gain and is worked out as below:

<i>Full value of consideration</i>	:	<i>Rs. 1,55,00,000</i>
<i>Less: Agreement value</i>	:	<i>Rs.83,34,155/-</i>
<i>Stamp duty & Regn</i>	:	<i>Rs.6,76,300/-</i>
	:	<i><u>Rs.90,10,455/-</u></i>
<i>Short Term Capital Gain</i>	:	<i>Rs.64,89,545/-</i>

The Short Term Capital Gain of Rs. 64,89,545 is added to the total income of the assessee.”

8.1. Further, since Ld. Assessing Officer noted that the long-term capital gain is not on account of sale of residential house property therefore, claim of deduction under section 54 is not allowable. Also, since capital gain is the short-term capital gain, he disallowed the deduction under section 54 of ₹45,81,300 as claimed by the assessee. For the purpose of not entertaining the claim of assessee made during the course of assessment for deduction under section 54F, Ld. Assessing Officer noted that assessee has not filed any revised return of income and therefore such a claim is not permissible. Assessment was completed, against which assessee went in appeal before the Ld. CIT(A).

9. Ld. CIT(A) noted that despite giving sufficient opportunities to represent the case, assessee did not file any submission or explanation in respect of its claim to treat the capital gain as long-term capital gain. Since nothing was brought on record to controvert the findings noted by the Ld. Assessing Officer in the assessment order, the addition so made was upheld. Similar view was taken by the Ld. CIT(A) in respect of denial

of claim of deduction under section 54F since no revised return was filed by the assessee. Aggrieved, assessee is in appeal before the Tribunal.

10. Before us, Ld. Counsel for the assessee reiterated the facts and submissions made before the authorities below which have been narrated in detail in the above paragraphs and are therefore not repeated to avoid duplicity. Ld. Counsel submitted that Assessing Officer has taken the date of registration of the agreement pursuant to the letter of allotment for the said flat which is 13.05.2014. Registered sale deed for the new flat at Topaz Cooperative Housing Society is dated 28.08.2015. Ld. Assessing Officer computed the capital gain on transfer of right to own the property (the said flat) by taking into account these two dates to arrive at a conclusion that the capital gain is a short-term capital gain against which no deduction u/s. 54 is allowable.

10.1. According to the Ld. Counsel, the period of holding of such a right to own a property should be computed from the date of allotment of the said property. By taking into consideration the date of allotment of flat by which an exclusivity was created to the effect of assessee for whom the said flat was identified, the period of holding exceeds 36 months and therefore transfer is of a capital asset which is a long-term capital asset. According to the Ld. counsel, the right to own the property was created and ever since then held by the assessee when the letter of allotment was issued for the said property that is on 15.02.2010. It was on this date when the property was duly identified and part payment was made. It was submitted that holding period for the assessee starts from the date of issuance of allotment letter. According to him, even if the sale deed or agreement to sell is executed or registered subsequently then also, the assessee always had a right in the property from the date of issuance of allotment letter. Thus, assessee held the right to own property immediately from the date of allotment letter. Ld. counsel thus

asserted that assessee has rightfully computed long-term capital gain on the transfer of the right assessee held for owning a property in terms of the letter of allotment issued on him with an identified flat in the project by the builder.

10.2. However, under a mistaken belief assessee had claimed deduction u/s. 54 instead of section 54F, since it is a case of transfer of right to own a property and not a case of transfer of a house property. From the assessment stage, assessee has claimed the deduction u/s. 54F upon realising the mistake he made in the return but the same was denied since assessee did not file the revised return of income for claiming deduction under the correct section of 54F. To this effect, Ld. counsel placed strong reliance on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT in 284 ITR 323 and CIT vs. Pruthvi Brokers and Shareholders in 349 ITR 336 (Bom) to submit that nothing impinges on the power of the appellate authorities to entertain such a claim of the assessee.

11. Per contra, Ld. Sr. DR referred to para 4.4 of the assessment order to submit that the registered agreement dated 13.05.2014 has created the right or interest in an immovable property which accrued to the assessee and therefore has rightfully computed the capital gain as short-term capital gain as against treatment given by the assessee of long-term capital gain considering the date of letter of allotment that is 15.02.2010. It was also submitted that since no revised return has been filed by the assessee, the deduction claimed u/s 54F has been rightfully not entertained by the Ld. Assessing Officer.

12. We have heard the rival contentions and perused the material on record. The moot point before us is in respect of treating the capital gain as long-term or short-term vis-a-vis the two dates under consideration,

that is, the date of letter of allotment which would result into long-term capital gain or the date of registration of the agreement between the builder and the assessee for the booking of the flat by which Assessing Officer has computed the gain as short-term capital gain. It is an undisputed fact that letter of allotment was issued by the builder to the assessee on 15.02.2010 by which a right to own the flat as identified by the assessee and builder in the project to be undertaken for construction had accrued on the assessee. The right which accrued to the assessee is the booking right, i.e., the right to purchase the flat and obtain the title. The only question that arises for consideration is whether booking right to the flat accrues to the assessee on the date of allotment of the flat by way of issuing the letter by the builder or on the date of execution and registration of the agreement to sell, i.e., the buyer's agreement. In our considered view, only that agreement which intends to convey these rights accruing to parties can be considered as the source of accrual of rights to the assessee.

13. We have already taken note of various terms and conditions from the letter of allotment dated 15.02.2010 which have been subsequently recorded elaborately in the agreement to sell registered on 13.05.2014. It is not in dispute that assessee has not defaulted on the terms and conditions of the letter of allotment. Assessee has made all the payments as required under the letter of allotment which has been duly acknowledged in the subsequent registration of the agreement to sell. Further, assessee has furnished details of payments made in each of the year which is tabulated as under:

<i>Sr. No.</i>	<i>Year of payment</i>	<i>Amount</i>
1	2009-10	13,00,000
2	2010-11	11,25,838
3	2011-12	18,73,980
4	2012-13	19,72,343
5	2013-14	7,14,240

6	2013-14: Stamp Duty and Registration	6,76,300
7	2015-16	13,47,754
		90,10,455

14. In the light of above stated facts and narrations, let us understand the effect of letter of allotment issued by the builder to the assessee for the identified flat in the building project. Consequence of issuance of letter of allotment for the flat signifies a contractual arrangement between the assessee and the builder by which a right *in personam* is created in favour of the assessee. When such a right is created in favour of the assessee, the builder is restrained from selling the said identified flat to someone else because the assessee in whose favour the right *in personam* is created, has a legitimate right to enforce specific performance in terms of the said letter of allotment, if the builder, for some reason is not executing and complying with the terms stated therein. Thus, by virtue of the letter of allotment, some right to own a property is given by the builder to the assessee. In real life, there are events when a person, even after holding such a letter of allotment issued by the builder, tries to sell same property to another person which would not be in accordance with law because once such a contractual arrangement has been agreed upon, the said person gets the right to get the property transferred in his favour by filing a suit for specific performance. Therefore, it can be said that in respect of the said property, though yet to be constructed but identified and allotted to the assessee, some right has been extinguished at the end of the builder and some right had been created in favour of the assessee. A right *in personam* had been created in favour of the assessee in whose favour the letter of allotment had been issued and who has paid 20% of the total agreed consideration as advance. Further, all other payments on various milestones identified in the said letter have been duly met by the assessee on subsequent dates, duly acknowledged by the builder. Undoubtedly, such contractual right arising out of the letter of allotment

can be surrendered or neutralised by the parties through subsequent contract or conduct but such is not a case in hand before us.

15. For the aforesaid understanding, we gainfully rely on the decision of Hon'ble Supreme Court in the case of Sanjeev Lal vs. CIT [2014] 46 taxmann.com 300 (SC) wherein similar observations and findings were given by the Hon'ble Apex Court, though in the context of agreement to sell. In paragraph 23 of the said decision, it is held as under:

“23. Consequences of execution of the agreement to sell are also very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immovable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed.”

15.1. Similar issue had come up before the Hon'ble High Court of Punjab and Haryana in the case of Vinod Kumar Jain vs. CIT in [2012] 344 ITR 501 wherein assessee was allotted a flat on 27.02.1982 on instalments under residential scheme of Delhi Development Authority (DDA). The possession of the said flat was, however, given to the assessee on 15.05.1986 and the letter issued in that behalf indicated the flat number and called upon the assessee-allottee to deposit the balance amount. The assessee sold the said flat on 06.01.1989 and claimed that capital gain arising on sale of said flat was long-term capital gain u/s. 2(29A) and as he had purchased another flat on 31.01.1989, such capital gain is set off u/s. 54. However, the assessing officer disallowed the claim of the assessee by taking the date of possession as 15.05.1986 by treating the capital gain as short-term capital gain. On these set of facts, Hon'ble Court referred to CBDT circular No. 471 dated 15.10.1996 whereby instructions were issued regarding treatment of capital gains tax, in case of a flat purchased

under self financing scheme. In para 3 of the said circular, it was stated that *"it has been decided that cases of allotment of flats under the self financing scheme of the Delhi Development Authority shall be treated as cases of construction for the purpose of capital gains."* In para 2, facts of the case were described according to which *"under the self financing scheme of the Delhi Development Authority the allotment letter is issued on payment of the 1st instalment of the cost of construction. The allotment is final unless it is cancelled or the allottee withdraws from the scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the Delhi Development Authority to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession."*

15.2. Further, Hon'ble High Court dealt with the issue on the meaning to be assigned to the word "held" occurring in section 2(42A) of the Act. For this, the Hon'ble Court relied on another decision in the case of CIT vs. Ved Prakash and Sons (HUF) [1994] 207 ITR 148 wherein, it was observed as under:

"As is clear from a bear reading of section 2 (42A) of the Act, the word "owner" has designly not been used by the legislature. The word "hold", as per dictionary meaning, means to possess, be the owner, Holder or tenant (property, stock, land). Thus, a person can be said to be holding the property as an owner, as a lessee, as a mortgagee or on account of part performance of an agreement, etc. Conversely, all such other persons who may be termed as lessees, mortgagees with possession or persons in possession as part performance of the contract would not in strict parlance come within the purview of "owner". As per the shorter Oxford dictionary, edition 1985, "owner" means one who owns or holds something; one who has the right to claim title to a thing."

15.3. Thus, Hon'ble Court held in para 16 in favour of the assessee, by referring to the date of allotment of the flat and not the date when the

possession was delivered to the assessee for the purpose of computing the period of holding of the property by the assessee.

16. In the present case before us, assessee has been issued a letter of allotment by the builder setting out the terms and conditions for the construction of the flat to be undertaken by the builder and various milestones listed for making payment by the assessee. There are other restrictive covenants for both the parties as stated in the letter of allotment which would result into adverse consequences, if not met.

17. We are also conscious of the proposition that transfer of the property is effective on registration of conveyance deed in view of section 54 of Transfer of Property Act. The absolute legal ownership of an immovable property takes place in terms of various provisions of Transfer of Property Act which needs to be read with provisions of section 2(47) of the Act for the purpose of computing tax liability arising on account of sale or purchase of immovable properties under the Act. However, the issue before us is different. The issue of transfer of ownership is not the issue to be decided here for computing the holding period. Under the present set of facts which have been discussed in detail in above paragraphs and taking into consideration the judicial precedents referred above, we find that holding period should be computed from the date issue of allotment letter. Once this is considered, the holding period becomes more than 36 months and consequently the right to own the property transferred by the assessee would be a long-term capital asset in the hands of the assessee and the gain on transfer of the same would be taxable in the hands of the assessee as long-term capital gain. We direct accordingly. Ground no. 1 taken by the assessee is allowed.

18. Having so held in terms of above discussion and finding, the assessee is eligible to claim deduction u/s. 54F for the investment made by her in another house property being a flat in Topaz Housing co-operative Society by fulfilling the requirements contained in section 54F. The denial for this claim by the Ld. Assessing Officer is on account of assessee not having furnished a revised return for making such a claim since she had claimed a deduction under section 54 of the Act, which is available on long-term capital gain arising out of transfer of a house property. In this regard, assessee has placed reliance on the decisions of Hon'ble Supreme Court in the case of Goetze (India) Ltd (Supra) and Pruthvi Brokers (Supra) according to which nothing impinges on the powers of appellate authorities to entertain a claim made by the assessee before the appellate authorities. Considering these judicial precedents, we find it proper to accept the claim of deduction made by the assessee u/s. 54F of the Act. In this respect, assessee has furnished computation of income by applying deduction u/s. 54F which is reproduced as under:

Minaxi Mahesh Pawani		
Computation of Income applying exemption u/s. 54F		
Particulars	Amt. (Rs.)	Amt. (Rs.)
Long Term Capital Gains		
<u>On Transfer of Right to acquire Flat</u>		
Sale Proceeds		1,55,00,000.00
Less : Indexed Cost (As per Computation)		<u>1,19,66,941.00</u>
		35,33,059.00
Less : Exemption u/s. 54F		
Actual Consideration	1,55,00,000.00	
Amount of Investment in Residential House	1,15,80,000.00	
Exemption Amount		<u>26,39,537.00</u>
Taxable Long Term Capital Gain		8,93,522.00
Income from other Sources		
As Per Computation of Income		<u>38,080.00</u>
		9,31,602.00
Less : Deduction u/s. 80TTA		<u>10,000.00</u>
Taxable Income		<u><u>9,21,602.00</u></u>

19. The veracity of the computation above needs to be verified. Accordingly, for the limited purpose of verification, we remit this matter on claim of deduction u/s. 54F to the file of ld. Jurisdictional Assessing

Officer (JAO), who shall allow the claim, if the verification is found to be in accordance with the provisions of the Act. Accordingly, we set aside ground No. 2 taken by the assessee in this respect and allow it for the statistical purposes.

20. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 28 June, 2024.

Sd/-
(Sunil Kumar Singh)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 28 June, 2024

MP, Sr.P.S.

Copy to :

- 1 The Appellant
- 2 The Respondent
- 3 DR, ITAT, Mumbai
- 4 Guard File
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BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai