

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

**BEFORE SMT BEENA PILLAI, JUDICIAL MEMBER
AND
SHRI PRABHASH SHANKAR, ACCOUNTANT MEMBER**

**ITA No.3701/M/2024
Assessment Year: 2013-14**

Mr. Sushil P. Shah 15, Salila Friends Co. Op. Soc. N.S. Road No. 6, JVPD Scheme, Juhu, Vile Parel (West), Mumbai - 400056 PAN: AACPS1522R	vs.	Income Tax Officer- 34(3)(5),(Ass. CIT, Circle17(3)) Income tax Officer – 34(3)(5), Room No. 126, 1 st Floor G-Block, Kautilya Bhawan, BKC, Bandra East, Mumbai - 400051
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Rajesh Shah & Abhishek Bhandari,CAs
Revenue by : Shri B.P.Ramesh,Sr.DR

Date of Hearing : 24.10.2024

Date of Pronouncement : 28.10.2024

ORDER

Per : Prabhash Shankar, Accountant Member:

The present appeal has been filed by the assessee which emanates from the appellate order passed by the Ld. CIT(A)/National Faceless Appeal Centre (NFAC), Delhi, with

regard to the assessment order passed under section 143(3) of the Income Tax Act 1961, (in short 'the Act') A.Y. 2013-14.

2. The Assessee has raised following grounds of appeal :

- "1. On the facts and under the circumstances of the case and in law, the Ld. CIT(A) erred in passing the Order u/s 250 and confirming the additions made in the Assessment Order is bad in law.*
- 2. On the facts and under the circumstances of the case and in law, the Ld. CIT(A) erred in confirming Long-Term Capital Gains on Sale of Office Premises as Short-Term Capital Gains by considering the date of allotment when the property was ready and ignored the date of provisional allotment of the property, date of booking, payment made over the years to the builder towards acquisition of immovable property and the period of construction of the property.*
- 3. On the facts and under the circumstances of the case and in law, the Ld. CIT(A) erred in not allowing exemption of Rs. 56,14,425/- u/s 54F as claimed by the Appellant on the Long-Term Capital Gains incurred by him on the sale of his office premises even though all the conditions of Section 54F were satisfied.*

3. Brief facts of the case are that in the course of assessment proceedings, it was noticed by the Ld. Assessing Officer (AO) that assessee had shown Long Term Capital Gains in the computation of income amounting to Rs. 56,14,425/- and deduction u/s 54 of the Act had been claimed in respect of the same. He observed that the asset transferred by the

appellant was office property and short term capital asset and therefore, the appellant was not eligible for claimed deduction u/s 54 of the Act. Further, since the property transferred was commercial property the AO also asked appellant to explain how exemption u/s 54 was applicable on the same. In response, the appellant submitted that there was a typing error in computation of income and the deduction claimed may be considered u/s 54F. The AO further noted that transferred office property was allotted to assessee on 30.07.2010 and was transferred by him on 12.05.2013 as per "Sale deed cum transfer". Since he held the asset for a period of less than 36 months, the asset transferred was held to be short term capital asset and exemption u/s 54 & 54F were denied being not applicable for short term capital asset. Accordingly, he disallowed the deduction claimed of appellant of Rs. 56,14,425/- and added the same to the income of the appellant.

4. In subsequent appeal filed by the assessee, the learned CIT(A) observed that *the moot point in the ground was the treatment of capital gain on sale of Office Premises in Bharat Diamond Bourse (BDB), Mumbai as STCG while appellant contended that the gain was LTCG. During the year under consideration, the appellant had sold his immovable office property located in BDB on 12.03.2013. The AO treated the capital gain arising on transfer of asset on the basis of allotment letter dated 30.07.2010 from BDB to the appellant.*

The appellant on the other hand submitted that the said premise was allotted much earlier and he had been making payments for the said premises since F.Y.1991-92 till F.Y.2006-07. However, the CIT(A) noted that the appellant was granted occupancy right and possession of the said property vide letter dt. 30.7.10 only and the appellant admitted that allotment of office premises made in the year 2000 was on provisional basis only. Legally, the allotment letter issued by the developer for under construction properties did not transfer ownership and was primarily a confirmation and payment receipt. Its elements were project and unit details, price and payment schedule, date of possession, delivery obligation & termination clauses. Therefore, allotment letter could not be the basis of holding period for the purpose of date of acquisition for computing capital gain. Moreover, in the case of the appellant, allotment letter was issued only on 30.07.2010 and before that, only provisional allotment letter was issued which could not be construed as date of acquisition. Further, the appellant contended that office was initially allotted to him on provisional basis and confirmed in year 2005. In this regard, it is important to mention letter received by the appellant from BDB on 10.02.2010, in which BDB asked the appellant to confirm in writing the acceptance for office premises to be finally allotted having actual area of (287 sqft) as against provisional allotment area proposed to him earlier (300 sqft), which meant that till 10.02.2010, the appellant had not got even the allotment of the office premise in BDB and in the above letter,

nowhere, the BDB has specified office no., wing etc proposed to be allotted to the appellant. Hence, it was clear that the appellant was not having any right in any property till that time. Further, vide letter dt. 23.6.10 addressed to BDB, the appellant undertook to sign the allotment letter and other relevant documents including taking possession of the stipulated premises and execute the documents before sub registrar. From the above letter also, it was clear that till 23.6.10 also, allotment letter was not signed and possession was not given. Even in this letter, office no. and wing etc were not mentioned which was proposed to be allotted after 23.6.10 which made it further clear that till that time, appellate was not having any type of right in any property. It was further observed that on perusal of point no.6 of the letter dated 30.07.2010 issued by BDB to the appellant, it was clear that BDB has executed the lease deed with MMRDA only on 31.03.2010 in respect of the land on which the stipulated premises is situated and in the said lease deed, appellant had been shown as one of the proposed allottee that meant the BDB has received the rights to transfer the stipulated premises only on 31.03.2010 itself. Also in point No.8 of the aforesaid letter, it was stated that we hereby deliver and hand over to you vacant, quiet and peaceful possession of the stipulated premises which now onwards you are entitled to peacefully possess, occupy, use and enjoy as rightful allottee thereof, but subject however, to the provisions of the articles of association of the company and as per the terms and conditions of the

lease deed dated 31 March, 2010. Consequently, the Id.CIT(A) dismissed the appeal and upheld the action of the AO.

5. Further, w.r.t. the ground no.2 which pertained to the issue of not allowing deduction u/s 54F of Rs. 56,14,425/- by the AO, it was observed that as per provisions of the Act, deduction u/s 54 or 54F is available only in case of transfer of Long term Capital asset. Therefore, he held that the AO had rightly disallowed the claim of the appellant.

6. Before us, the learned DR supported and relied on the orders of lower authorities. Per contra, the Id.Authorised representative vehemently argued against the orders. He also referred to detailed submissions made before the authorities in this regard claiming that the same were not properly considered. It is submitted Bharat Diamond Bourse (BDB) is the world's largest diamond bourse (exchange) and is located in Mumbai, India. Spread over a 20-acre plot, the Complex is home to some 2,500 small and large diamond traders in addition to the Custom House, banks and other service providers who cater to the gems and jewelry trade. In 1984, the project was started by a group of Mumbai-based diamond traders. Mumbai Metropolitan Region Development Authority gave 20 acres on an 80 years lease. The project initially involved the public sector Minerals and Metals Trading Corporation. It withdrew from the project later and BDB took it over from there. Then it was restarted in 1992. But disputes between the BDB committee, its architects and contractors and

payment defaults by members during the 1995-99 property slump put the project on hold in 1998. It was restarted in 2001. The construction cost of an estimated INR 11 billion (US\$170 million) was collected from members.

6.1 The appellant also invested in the said BDB by purchasing an office premise in Bharat Diamond Bourse, BKC, Mumbai for which he had made payments over years from 1992. He was provisionally allotted space in the proposed Diamond bourse to be constructed in Bandra Kurla Complex. As regards departmental stand that the asset sold was a short term capital asset as the occupancy rights were provided within the period of 36 months, it is contented that the payment for purchase of property has been made by the assessee for the period more than 10 years and specific identification of the unit allotment in the property under construction was also provided to the assessee beyond 7 years. The assessee has made payment for installments for the office space in the proposed complex from the year 1992 as below:

Financial Year when payment made	Amount Paid (Rs.)
FY 1991-92	1,87,500
FY 1192-93	3,54,500
FY 1993-94	1,23,000
FY 1994-95	1,08,000
FY 1995-96	1,62,000
FY 1996-97	1,08,000

FY 1997-98	90,000
FY 1998-99	75,000
FY 1999-00	36,000
FY 2000-01	37,500
FY 2002-03	54,000
FY 2003-04	2,23,500
FY 2004-05	3,90,000
FY 2005-06	1,84,500
FY 2006-07	22,390
Total	21,55,890

The above mentioned office was sold by the assessee on 12.03.2013 at Rs. 1,14,80,000/-, after holding for period of 15 years.

6.2 It was further submitted that the assessee is already a senior citizen of 69 years of age and with no lineal decedent into diamond business. Further assessee felt no need to travel and operate from BKC and hence he decided to sell the said premises. The assessee offered the gain on sale of the office as Long Term Capital Gain while filing his return of income for AY 2013-14. As per allotment letter dated 30.07.2010, it was mentioned that BDB has entered into lease agreements with MMRDA in year 1993. It was only in year 2010, the certain documents were registered. The OC (Occupancy Certificate) was received vide dated 6.09.2009.

6.3 With regard to Office number, it is stated that it is clearly mentioned in 2005 statement of BDB that appellant was allotted Office no. DE8032, which is same as in Share certificate and sale agreement by appellant. Thus, the contention of the AO, that there was no allotment and identification of office prior to 2010 does not hold merit and without application of mind and only on surmises and conjectures. He also enclosed a letter from BDB dated 02.04.1992 which mentions allotment of 250 Sqft area in proposed BDB complex. It also mentions in the last para that *allotment letter duly signed be returned. We hereby also enclose letter dated 26.08.2000 for additional floor deposit which states "As desired....., the allotment of offices has been completed for all applicants...."* Thus, it is proved that allotment was not made in 2010 but was made much prior to that on payment of installments.

6.4 The AO tried to justify the gains as short term capital gains on following points:

Sr No	AO's Contention	Our Comments
1	AD referred to letter from Bharat Diamond Bourse (BDB) dated 10.02.2010 and interpreted that BDB has asked assessee whether he will accept the shorter office area proposed to be allotted to him, which means till that the	In the same letter referred by the AO, it is mentioned (also forming part of order). The managing committee seeks

	<p>assessee was no allotted any office premises in BDB. Hence it is clear that assessee was not having any right in any property till that time. (Page 4 of AO)</p>	<p>your confirmation for office premises to be finally allotted to you.</p> <p><i>Thus, there was provisional allotment already done before the project commencement and the right of assessee was created in the proposed structure from the first payment of installment itself.</i></p>
2	<p>AO further relied on letter of the assessee to BDB dated 23.06.2010, where assessee has accepted the possession and admitted to execution of registration of documents in respect of stipulated premises.</p> <p>AO was of the opinion that the letter did not mention the office</p>	<p>The contention of the AO that the assessee was not having any right in the property till that time is incorrect.</p> <p>The AO himself has provided on Page 4 of his order extract</p>

	<p>number or wing etc which was proposed to be allotted and hence he concluded that the assessee was not having any right in the property till that time.</p>	<p>of correspondence wherein provisional allotment of 300 Sqft of space is mentioned.</p> <p>Thus there was always allotment of space agreed between the parties.</p> <p>The payment installments were made towards the same. Infact the statement from BDB dated 04.6.2005 did mentioned office no DE8032 in its schedule of payments which was issued much prior to 2010.</p>
3	AO has further referred to letter dated 30.07.2010 whereby it	BKC was formed by MHADA & all plots

	<p>was informed to the appellant that BDB has executed and registered Lease deed with MMRDA in respect of said plot.</p>	<p>are leased by MHADA. Infact the recent Reliance Convention Centre & Godrej plots are also leased by MHADA.</p>
	<p>AO concluded that lease deed was executed only on 31.3.2010 with MMRDA for the land where BDB received rights to transfer stipulated premises. Thus appellant acquired rights in the office premises on or after 30.07.2010; which means asset transferred is Short term and not long term.</p>	<p>The letter referred by AO was towards provisioning of information with regard to lease rights finally acquired by BDB from MMRDA.</p> <p><i>The AO ignored the fact that in allotment letter dated 30.07.2010, it was clearly mentioned about two original leases with MMRDA in 1993.</i></p> <p>The appellant was</p>

		<p>already having rights in the proposed structure to be developed by BDB.</p> <p>The payment were made for the office from 1992, the asset which was finally acquired in 2010 was of long term nature and cannot be termed as short term capital asset.</p>
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It has been emphasised that the assessee has regularly paid his installments towards purchase of this property from 1992 to 2006 i.e. 15 years. Last of such payment was made in FY 2006-07. Although the premises have been received by the appellant only in year 2010, the investment has been made by him in the same since 1992 when the booking was done. The AO ignored the construction period altogether. The Id.Sr.AR has also placed reliance on **DCIT vs Deepak S.Bhushan 96 Taxmann.com 648(Mum-ITAT), K.Ramakrishnan 225 Taxman 123(Del) and Anita Kanjnani 163 ITD 451(Mum-**

Trib) in support of the contention wherein date of allotment has been considered the crucial date for the purposes of working out the holding period.

7. We have given a careful thought to all the relevant facts and the circumstances of the case. It is evident from the contents of the assessment order as also from the appellate order that both the authorities have based their conclusions treating the said property as short term asset without appreciating the totality of facts and completely ignoring the truth that the assessee had made all the payments much before the stated the possession letter. Moreover, they have completely glossed over the fact that provisional allotment was given much earlier and as evident from subsequent development the designated premises remained the same as well. These facts fortify the grounds that all the essential ingredients of a constructive possession were already met long before.

7.1 The letter of allotment is a crucial document as it outlines the terms and conditions of a sale. It serves as proof of the payment made to the seller or developer and the remaining balance that must be cleared. It assures buyers that the property in question will be completed by the promised date. Since the allotment letter of a property is a contract between the buyer and the seller, it is considered a legally binding agreement under Section 10 of the Indian Contract Act. Therefore, if the seller is not able to hold on to their part of the deal, buyers can hold them legally responsible for not

delivering the house on time. effective from the date of agreement to sale.

7.2 In the case of **Richa Bagrodia v. DCIT (2019) 175 ITD 552 (Mum.)(Trib.)**, on a similar issue, it was held by the coordinate bench that date of allotment of flat and not date of giving possession of flat which has to be considered as date for computing holding period of 36 months. Further, the Indore Tribunal in the case of **Sanjay Kumath V ACIT (2014) in ITA NO.448/Ind/2013** that the period of holding of a flat reckoned from the date of allotment letter as it extinguished the right of the builder in the flat. Mr. Sanjay had acquired all rights in said flat on the date of allotment thus, the holding period being more than 36 months, exemption under section 54F was admissible to him.

7.3 It was held by the **Hon'ble Supreme Court of India in the case of Sanjeev Lal v CIT (2014)** that the agreement to purchase is to be considered as a date on which the property i.e., the residential house had been acquired (transferred). It is stated that by looking at the provisions of Section 2(47) of the Act, which defines the word "transfer" in relation to a capital asset, one can say that if a right in the property is extinguished by execution of an agreement to sell, the capital asset can be deemed to have been transferred.

7.4 Even seen in the light of consideration paid, as per details narrated in para 6.1 above, it is evident that the assessee paid the entire amount much earlier. It was held by the **Delhi Tribunal** in the case of **Rajiv Madhok v ACIT**

(2020) ITA No.2291/Del./2017 Assessment Year: 2012-13 that the relevant date is when the petitioner paid the full consideration amount on the flat becoming ready for occupation and obtained possession of the flat. The Tribunal has looked at the clause of the agreement deed and concluded that the purchase was substantially affected when the agreement of purchase was carried out by payment of full consideration and handing over of possession of the flat.

7.5 We note that any capital asset held by the assessee for more than a period of thirty-six months is in the nature of Long Term Capital Asset. Further, the word "held" used in Section 2(14) of the Act implies right over a capital asset. In the instant case of the assessee, the right over the property was held by the assessee for the period of 36 months, therefore, on transfer of these properties the 'long term capital gain' has been offered by the assessee. The assessee further paid the entire consideration of Rs 21.55 lakh in the year 2006 itself.

7.6 In the case of **Smt. Jennifer Chakraborty ITA No.400/Kol/2016 & ITA No.514/Kol/2016** it was observed that the **letter of provisional allotment** issued by the builder on 11.04.2007, is to be considered as date of acquisition of right in the property. The tribunal relied further on the judgment of the Coordinate Bench in the case of **M/s. Anindya Dutta in ITA No.473/Kol/2012, for Assessment Year 2008-09, order dated 29.11.2013** wherein similar facts were discussed and it was held as under: "9. Further,

Board's Circular No. 471 dated 15-10-1986, has also been considered by Hon'ble Bombay High Court in the case of CIT v. Hilla J.B. Wadia 216 ITR 376 (Bom), it was held that Section 54 of the Act has to be construed in the context of the manner in which residential properties are now being constructed in a city like Bombay where, looking to the cost of the land, co-operative housing societies are being formed for constructing a building in which flats are allotted to members. This must also be viewed as a method of constructing residential tenements. What we have to see is whether the assessee has acquired a right to a specific flat in such a builder which is being constructed by the society and whether he has made a substantial investment within the prescribed period which will entitle him to obtain possession of the flat so constructed and in which he intends to reside. The material test in this connection is domain over the flat and investment in it.

7.5 The Central Board of Direct Taxes Circular No. 471, dated October 15, 1986, deals with investment in flats under the self-financing scheme of the Delhi Development Authority. The Board has stated in the circular that when an allotment letter is issued to an allottee under this scheme on payment of the first instalment of the cost of construction, the allotment is final unless it is cancelled. The allottee, thereupon, 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 delivery of possession is only a formality.

7.6 Similar issue came up for consideration before the coordinate Bench of ITAT, Mumbai in the case of **Minaxi Mahesh Pawani (Deceased) through Legal Heir Pratik Mahesh Pawani (ITAT Mumbai) Appeal Number : ITA No. 4380/MUM/2023 Date of Order : 28/06/2024** wherein it was held that the holding period shall be computed from the date of the allotment letter and not the date of registration of sale agreement. It was held by the Mumbai Branch of ITAT that where the assessee sold right to an under-construction flat conferred by an allotment letter by a builder, the holding period should be computed from the date of allotment letter and not date of registration of agreement of sale between assessee and builder. It is an undisputed fact that a letter of allotment was issued by the builder to the assessee by which a right to own the flat 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. It is not in dispute that the 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, the assessee has furnished details of payments made in each of the years. *The consequence of the issuance of a letter of allotment for the flat signifies a contractual arrangement between the assessee and the builder by which a right in persona is created in favor of the assessee. When such a right is created in favor of the assessee, the builder is*

*restrained from selling the said identified flat to someone else because the assessee in whose favor the right in persona 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. A **right in personam** had been created in favor of the assessee in whose favor the letter of allotment had been issued and who has paid 20% of the total agreed consideration as advance.*

7.7 Based on the facts and circumstances mentioned above, we are of the view that the sale of the above stated premises is in the nature of long term asset resulting in long term capital gains on which the assessee is also eligible to deduction in terms of section 54F. The addition made is accordingly deleted and claim of the assessee is LTCG is restored. Since the applicability of section 54F was not examined by the lower authorities, the same would be examined by the Assessing officer in the light of the relevant provisions of the Act and subject to fulfilment of requisite conditions therein, the AO would allow the claim as well.

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

Order pronounced in the open court on 28.10.2024.

Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER

Sd/-
(PRABHASH SHANKAR)
ACCOUNTANT MEMBER

Poonam Mirashi,
Stenographer

Copy to: The Appellant
The Respondent
The Pr. CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.