

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“B” BENCH, MUMBAI**  
**BEFORE SMT BEENA PILLAI, JUDICIAL MEMBER**  
**AND**  
**SMT RENU JAUHRI, ACCOUNTANT MEMBER**  
**ITA No.3310/M/2024**  
**Assessment Year: 2013-14**

<b>Neptune Enterprises</b> B-3, Prem Sagar Building, Linking Road, Khar (W.), Mumbai- 400052. <b>PAN: AAAFN3167H</b>	Vs.	<b>ITO 16(1)(3)</b> 447, Aayakar Bhavan, M. K. Road, Mumbai- 400020.
<b>Appellant</b>	:	<b>Respondent</b>

**Present for:**

**Assessee by**

: Shri Satish R. Mody

**Revenue by**

: Ms. Sujatha Iyengar, SR. A.R.

**Date of Hearing**

: 21.11.2024

**Date of Pronouncement**

: 20.12.2024

O R D E R

**Per Beena Pillai, JM:**

Present appeal arises out of order dated 30.04.2024 passed by NFAC for assessment year 2013-14 on following grounds of appeal:

“GROUND NO. 1

*The learned CIT(A) erred in upholding the contentions of the AO, considering the gains of Rs.1,28,57,674 as Long Term instead of Short Term though the same was contrary to the facts and circumstances of the case and the evidence available on record.*

GROUND NO. 2



*The learned CIT(A) erred in upholding the gains computed by the learned AO, which are taken without considering the Cost of Acquisition of the asset and the incidental expenses claimed by the appellant. This is contrary to the facts of the case and provisions of the Act.*

**GROUND NO. 3**

*The learned CIT(A) erred in upholding the contentions of the learned AO, in not allowing set off of Long-Term losses brought forwarded against the gains of the appellant. The same is contrary to the facts of the case and applicable provisions of the Act.*

*The appellant craves leave to add, to alter or amend the aforesaid Grounds of Appeal, if called for, before the disposal of the appeal.”*

**Brief facts of the case are as under:**

**2.** Assessee is a firm engaged in the business of trading, distribution, and export of Cinematography Films. Assessee filed its return of income for year under consideration declaring total income at Rs.15,09,800/-. The case of selected for scrutiny and notice u/s. 143(2) alongwith 142(1) of the act was issued. The Ld.AO on verification of the details noticed that, assessee shown Long Term Capital Gain on sale flats after setting off of brought forwards losses from A.Y. 2012-13 at Rs.14,58,747/-.

**2.1.** The Ld.AO noted that, the flats was sold on 30.05.2012, within period of less than 3 years. Considering the fact that, the registration for purchase of the flat by assessee was on 13.09.2011, the Ld.AO treated the sale proceeds of flat by assessee as Short Term Gain. The Ld.AO relied on the various decision tabulated in the assessment order in support of the view taken, thereby making addition in hands of assessee at Rs.1,28,57,674/-.

Aggrieved by the order of Ld.AO, assessee preferred appeal before the Ld.CIT(A)

**3.** Before the Ld.CIT(A), the assessee once again reiterated that, the date of acquisition of flat was on 20.10.2006, as per the letter of allotment issued by the builder M/s. Oberoi Construction Pvt. Ltd. The assessee filed details of the payment made towards the purchase of the flat that started from assessment year 2007-08 and the final payment made by the assessee during assessment year 2012-13. He submitted that, in the meantime the registration of the flat by the developer in the name of the assessee was on 13.09.2011. The assessee thus contended that, it had acquired the capital asset as on 20.10.2006 relevant to A.Y. 2007-08 and upon sale of such property on 30.05.2012, the sale proceeds would be treated as Long Term Capital Gain.

**3.1.** The Ld.CIT(A) rejected the submissions of the assessee observed and held as under:-

*“It has been held above at para 4, that the capital gains arising out of the transfer of the flat are short term capital gains. The set off of losses is to be applied as per law as per provisions contained in chapter VI of the IT Act. Therefore, the action of the AO in disallowing setting off the STCG of the current year with the earlier years brought forward losses of LTCG is upheld.”*

Aggrieved by the order of the Ld.CIT(A), assessee preferred appeal before this Tribunal.

**4.** The Ld.AR submitted that, the assessee purchased residential flat under construction being Flat No. 1503 on the 15<sup>th</sup> Floor, A wing, in the building known as Oberoi Splendor, having built up



area of 987sq.ft. along with two car park for sale consideration of Rs.90,50,225/-. He submitted that, the builder issued allotment letter on 20.10.2006 and assessee made payment of Rs.27,15,070/- upon issuance of the allotment letter.

**4.1.** It is submitted that, subsequently the balance payment was made by the assessee towards of purchase of said flat over the period of construction as mentioned in the allotment letter which is scanned and reproduced as under:-



Ref. No. A080  
20 October 2006  
Neptune Enterprises  
3-B, Prem Sagar, 1st floor  
Linking Road  
Khar (West)  
Mumbai - 400052



Dear Sir/Madam,

**Re:** Premises admeasuring 987 square feet (built-up area) bearing No.1503 on 15<sup>th</sup> floor, in the building called Oberoi Splendor proposed to be constructed on a plot of land bearing CTS Nos. 1(Part), 375A (Part), 16A (Part) and 32A (Part) of Village Majas, Taluka Andheri

1. You are aware that we are entitled to develop residential buildings called "Oberoi Splendor" on a plot of land bearing CTS Nos. 1(Part), 375A (Part), 16A (Part) and 32A (Part) of Village Majas, Taluka Andheri, Mumbai Suburban District, ("said property").
2. You being desirous of acquiring a flat admeasuring 987 square feet (built-up area) bearing No.1503 on 15<sup>th</sup> Floor Building - 1 of Wing - "A" ("said flat") in the building proposed to be constructed along with 2 (Two) Car Parking Spaces Tandem Configuration on the said property (the said flat and the said car parking spaces being together hereinafter referred to as the "said premises"), approached and requested us to reserve the said premises for allotment of the same to you.
3. As desired by you, and pursuant to your request, we hereby inform you that we are agreeable to reserve the said premises for allotment of the same to you, subject to the plans for construction of the building, being sanctioned by MCGM, and subject to the terms and conditions contained herein.
4. The sale price of the said premises shall be Rs.9,050,225/- (Rupees Ninety Lakhs Fifty Thousand Two Hundred and Twenty Five Only) in addition to other payments as mentioned in clause 8 herein below and you shall pay the sale price of Rs.9,050,225/- (Rupees Ninety Lakhs Fifty Thousand Two Hundred and Twenty Five Only) to us, in the following manner:

- (a) Rs.905,023/- (Rupees Nine Lakhs Five Thousand Twenty Three Only), being the initial booking amount including the earnest money, which has been paid, prior hereto receipt whereof is acknowledged at the foot of this writing.

CERTIFIED TRUE COPY  
For Akhilesh P. Bhargava & Co.  
Chartered accountants

*Akhilesh P. Bhargava*  
jr (Akhilesh P. Bhargava  
MEMBERSHIP NO. 412





- (b) Rs.905,023/- (Rupees Nine Lakhs Five Thousand Twenty Three Only) being further amount paid on or before the date of this letter, receipt whereof is acknowledged at the foot of this writing.
- (c) Rs.905,023/- (Rupees Nine Lakhs Five Thousand Twenty Three Only) being further amount to be paid within 7 (seven) days from the date hereof.
- (d) Rs.452,511/- (Rupees Four Lakhs Fifty Two Thousand Five Hundred and Eleven Only) to be paid on Commencement of Construction.
- (e) Rs.452,511/- (Rupees Four Lakhs Fifty Two Thousand Five Hundred and Eleven Only) to be paid on completion of plinth of the building in which the said premises is situated.
- (f) Rs.3,982,098/- (Rupees Thirty Nine Lakhs Eighty Two Thousand Ninety Eight Only) to be paid in 24 equal installments on completion of each of 24 slabs of the building in which the said premises is situated.
- (g) Rs.362,009/- (Rupees Three Lakhs Sixty Two Thousand Nine Only) to be paid on completion of the brick-work of the building in which the said premises is situated.
- (h) Rs.362,009/- (Rupees Three Lakhs Sixty Two Thousand Nine Only) to be paid on completion of the plastering of the building in which the said premises is situated.
- (i) Rs.362,009/- (Rupees Three Lakhs Sixty Two Thousand Nine Only) to be paid on completion of flooring and tiling of the building in which the said premises is situated.
- (j) Rs.362,009/- (Rupees Three Lakhs Sixty Two Thousand Nine Only) being the balance consideration amount to be paid on a notice being issued to you by us that the said premises is ready for use.

In case you propose to commence furnishing of the said flat prior to the notice being issued to you by us as mentioned in clause 4 (j) above that the said flat is ready for use, we may grant permission to commence furnishing only after receiving from you all amounts mentioned herein including the amounts mentioned in clause 4 (a) to (j) above.

5. It has been agreed that the time for payment of each installment is of essence of contract. You have further confirmed to us that an intimation forwarded by us to you that a particular stage of construction is commenced or completed shall be sufficient proof that a particular stage of construction is commenced or completed. However, it is agreed by you that the failure to receive notice

**CERTIFIED TRUE COPY**  
**For Akhilesh R. Bhargava & Co.**  
**Chartered Accountants**

*A. R. Bhargava*  
Akhilesh R. Bhargava  
MEMBER





from us, requiring such payment shall not be a plea, or an excuse for non-payment of any amount or amounts on their respective due dates.

6. It has been agreed that all taxes, duties, cesses (whether applicable/payable now or become applicable/payable in future) including service tax on any amount payable on the transaction contemplated herein shall be borne and paid by you alone and we shall never be liable, responsible and/or required to bear and/or pay the same or any part thereof.
7. It is further agreed that you shall make payments due to us, immediately on receipt of the demand notice and if payment is not made pursuant thereto then we shall give you 7 (Seven) days notice within which you shall be required to pay the amount demanded with interest on outstanding payment at 2% (Two percent) per month, from the due date till the date of actual payment and if you fail to do so then this allotment shall automatically come to an end. It has also been agreed that in case of any delay in the payment of any installments, we shall be entitled to an additional charge of Rs.500/- (Rupees Five Hundred Only) as administrative fee for every installment delayed.
8. In addition to the sale price of Rs.9,050,225/- (Rupees Ninety Lakhs Fifty Thousand Two Hundred and Twenty Five Only), you shall pay to us the following amounts on or before you taking possession of the said premises.

Particulars	Amount (RS.)
Club House charges (One time non-refundable)	100,000/-
Corpus Fund	60,000/-
Share Application Charges	520/-
Development Charges	50,000/-
Formation and registration of the society	3,000/-
Electric/Water meter charges	15,000/-
Mahanagar Gas connection	7,000/-
Legal Charges	10,000/-
Proportionate share of municipal taxes for the premises	50,000/-
Proportionate share of outgoing for the premises.	50,000/-
<b>Total</b>	<b>3,45,520/-</b>

The payment towards the additional amounts shall be made on or before the date you are intimated to occupy the said premises. It is hereby clarified that the list of charges mentioned hereinabove is only indicative and not exhaustive and that you agree to pay such other and increase in additional charges as we may indicate.

9. We shall have full right and absolute authority and shall be entitled to, at any time hereafter to change, alter and amend the lay out, plans, designs, elevation etc. of Oberoi Splendor and you shall not have any objections in this regard.

**CERTIFIED TRUE COPY**  
For Akhilesh R. Bhargava & Co  
Chartered Accountants

*Akhilesh R. Bhargava*  
(Akhilesh R. Bhargava)  
MEMBERSHIP NO. 11111





from us, requiring such payment shall not be a plea, or an excuse for non-payment of any amount or amounts on their respective due dates.

- 6. It has been agreed that all taxes, duties, cesses (whether applicable/payable now or become applicable/payable in future) including service tax on any amount payable on the transaction contemplated herein shall be borne and paid by you alone and we shall never be liable, responsible and/or required to bear and/or pay the same or any part thereof.
- 7. It is further agreed that you shall make payments due to us, immediately on receipt of the demand notice and if payment is not made pursuant thereto then we shall give you 7 (Seven) days notice within which you shall be required to pay the amount demanded with interest on outstanding payment at 2% (Two percent) per month, from the due date till the date of actual payment and if you fail to do so then this allotment shall automatically come to an end. It has also been agreed that in case of any delay in the payment of any installments, we shall be entitled to an additional charge of Rs.500/- (Rupees Five Hundred Only) as administrative fee for every installment delayed.
- 8. In addition to the sale price of Rs.9,050,225/- (Rupees Ninety Lakhs Fifty Thousand Two Hundred and Twenty Five Only), you shall pay to us the following amounts on or before you taking possession of the said premises.

Particulars	Amount (Rs.)
Club House charges (One time non-refundable)	100,000/-
Corpus Fund	60,000/-
Share Application Charges	850/-
Development Charges	50,000/-
Formation and registration of the society	3,000/-
Electric/Water meter charges	15,000/-
Mahanagar Gas connection	7,000/-
Legal Charges	10,000/-
Proportionate share of municipal taxes for the premises	50,000/-
Proportionate share of outgoings for the premises.	50,000/-
Total	3,45,520/-

The payment towards the additional amounts shall be made on or before the date you are intimated to occupy the said premises. It is hereby clarified that the list of charges mentioned hereinabove is only indicative and not exhaustive and that you agree to pay such other and increase in additional charges as we may indicate.

- 9. We shall have full right and absolute authority and shall be entitled to, at any time hereafter to change, alter and amend the lay out, plans, designs, elevation etc. of Oberoi Splendor and you shall not have any objections in this regard.

**CERTIFIED TRUE COPY**  
For Akhilesh R. Bhargava & Co  
Chartered Accountants

*Akhilesh R. Bhargava*

(Akhilesh R. Bhargava)

MEMBERSHIP NO. (M)





10. It may be noted, that upon termination/cancellation of the allotment of the said premises we will be entitled to retain as cancellation charges, such amount as stated hereinbelow:
- a. a minimum of 5% of the sale price, or all such losses and damages suffered in the sale of the said premises to the new purchaser, whichever is more.


Or

- b. a minimum of 6% of the sale price, or such losses and damages suffered in the sale of the said premises to a new purchaser, whichever is more, in case of any brokerage being paid with respect to the allotment of the said premises.


The balance if any due shall be refunded to you without interest only after a new purchaser has been found for the said premises. However, any profits arising from the sale of the said premises to the new purchaser shall be to our credit. On termination of this allotment, you shall have no right, title, interest, claim, lien or demand or dispute of any nature whatsoever either against us or against the said premises and we shall be entitled to deal with and dispose of the said premises to any other person/s as they deem fit without any further act or consent from you.

11. It may be further noted, that it has been agreed that for every sale or transfer of the said premises to a third party who have purchased the said premises or who have become owners of the said premises, as the case may be, the third party shall be liable to pay to the developer a transfer fee charges of 1% (one percent) of the total consideration value of the said premises. For every sale or transfer of the said premises or any part thereof after the immediate first sale, the then owner of the said premises shall be liable and shall pay to the developer transfer fees/charges calculated at 1% (One percent) of total consideration value of the said premises and subsequent third parties who have purchased the said premises from the then owner shall also be liable and shall pay to the developer transfer fees/charges calculated at 1% (One percent) of the total consideration value of the said premises. To clarify, in respect of all sales after the immediate first sale, the developer shall be entitled to transfer fees/charges calculated at 2% (Two percent) of the total consideration value of the said premises.
12. We are agreeable to reserve the said premises for allotment of the same to you on the bases of your following representations and warranties:

- a. you have not been declared and/or adjudged to be an insolvent, bankrupt etc. and/or ordered to be wound up, as the case may be;

by  no receiver and/or liquidator and/or official assignee or any person is appointed in your case or for all or any of your assets and/or properties:

**CERTIFIED TRUE COPY**  
For Akhilesh R. Bhargava & Co  
Chartered Accountants

  
(Akhilesh R. Bhargava)  
MEMBERSHIP NO. 41407





- c. none of your assets/properties are attached and/or no notice of attachment has been received under any rule, law, regulation, statute etc.;
- d. you have not received any notice from any Government in India (either Central, State or Local) and/or from abroad for your involvement in any money laundering or any illegal activity and/or declaring you to be a proclaimed offender and/or no warrant is/has been issued against you;
- e. no execution or other similar process is issued and/or levied against you and/or against any of your assets and properties;
- f. you are not of unsound mind and/or have not been adjudged to be of unsound mind;
- g. you have not compounded payment with your creditors;
- h. you are not convicted of any offence involving moral turpitude and/or sentenced to imprisonment for any offence for a period of not less than six months.

The Developers consider the accuracy of the representations and warranties to be an important and integral part of this transaction and the said premises have been reserved for allotment to you in reliance of the same.

- 13. All the terms and conditions mentioned in the agreement for sale shall be binding on you and you confirm that this allotment is the basis of your actual understanding between us.
- 14. The stamp duty and registration charges on all documents to be executed with respect to the said premises, between us shall be borne and paid by you alone.
- 15. This letter is subject to the terms and conditions of the Premises Ownership Agreement.

Yours truly,

For Oberoi Constructions Pvt. Ltd.

Vikas R. Oberoi  
Director

We Confirm,  
  
**PARSHVI**  
 Neptune Enterprises

CERTIFIED TRUE COPY  
 For Akhilesh R. Bhargava & Co.  
 Chartered accountants

jr (Akhilesh R. Bhargava)  
 MEMBERSHIP NO. 41471





Receipt

Received from Neptune Enterprises, Rs.2,715,070/- (Rupees Twenty Seven Lakhs Fifteen Thousand Seventy Only) being the amount due out of the sale price mentioned in clause 4 in connection with the said premises in Oberoi Splendor, vide following cheques:

<u>Cheque No./ dated</u>	<u>Drawn on</u>	<u>Amount</u>
164690 / 26-09-2006	HSBC Bank Ltd., Mumbai - 26.	905,025/-
172110 / 17-10-2006	HSBC Bank Ltd., Mumbai - 26.	1,810,045/-

Dated 20<sup>th</sup> day of October 2006.

We say Received  
For Oberoi Constructions Pvt. Ltd.

  
Vikas R. Oberoi  
Director

Note: Receipt issued subject to realization of cheques.

CERTIFIED TRUE COPY  
For Akhilesh R. Bhargava & Co  
Chartered Accountants  
  
MEMBERSHIP NO. 41471.



**4.2.** The Ld.AR submitted that, these documents were available before this authorities below for consideration but was overlooked to determine the date of acquisition of said property. He submitted that, the authorities below wrongly proceeded on the basis of the date of registration of said flat in the name of assessee to be the date of acquisition, as a consequence of which, the said property is treated as a Short Term Capital Asset for the year under consideration.



**4.3.** The Ld.AR placed reliance on the decision of *Hon'ble High Court* in case of *Ld.PCIT vs. Vembu Vaidyanathan* in ITA no. 1459/2016 vide order dated 22.01.2019, wherein the *Hon'ble Court* held that, the allotment letter issued would be in relevant date for the purpose of capital gain taxes to determine the date of acquisition. He placed reliance on the following observation of *Hon'ble high court*:

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

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

*"2. The Board has considered the matter and has decided that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions are similar to those mentioned in para 2 of Board's Circular No.471, dated 15-10-1986, such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act."*

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



**4.4.** The Ld.AR placed reliance on the decision of *Hon'ble Bombay high court* in case of *Ld.PCIT vs. Tata Services Ltd. reported in 122 ITR 594* and *CBDT Circular No. 471 dated 15.10.1986* that clarified this position. *Hon'ble Court* in *Ld.PCIT vs. Tata Services Ltd. (supra)* held that when an assessee purchases flat under construction for which an allotment letter is issued the date of such allotment would be relevant date for the purposes of capital gain taxes, as date of acquisition.

**4.5.** On the contrary the Ld.DR placed reliance on the order passed by authorities below.

We have perused the submissions advanced by both sides in light of records placed before us.

**5.** It is noted that, in the allotment letter dated 20.10.2006 the payment schedule to be followed towards the sale consideration is specifically mentioned, which has been adhered to by the assessee. It is noted that, assessee had paid sum of Rs.9,05,023/- as initial booking amount on 26.09.2006 and a sum of Rs.18,10,045/- was paid on 17.10.2006 through banking channels. It is noted that, subsequently payments made by the assessee to the builder has not been objected by the authorities below.

**5.1.** On perusal of the allotment letter, it is noted that it is only upon the termination of the allotment the assessee would not have right or interest claim of any nature whatsoever, either against the builder or against the said premises. Further, we place reliance on



CBDT Circular No. 627 dated 16.12.1993 wherein it has been decided as under:

*"2. The Board has considered the matter and has decided that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions are similar to those mentioned in para 2 of Board's Circular No.471, dated 15-10-1986, such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act."*

**5.2.** As observed by *Hon'ble Bombay High Court in case of Ld.PCIT vs. Vembu Vaidyanathan (Supra)*, there is nothing on record brought by the revenue suggest that, allotment in the construction scheme promised by the builder to the assessee in present case is materially different from the case of the allotment as clarified by the CBDT in Circular No. 471 dated 15.10.1986 and 16.12.1993.

**5.3.** Respectfully following the ratio laid down by *Hon'ble Bombay High Court (Supra)*, we hold that the assessee acquired the property as on the date of allotment from the builder dated 20.10.2006. Thus, the capital gain earned by the assessee upon sale of said flat is to be construed to be a Long Term Capital Gain.

**Accordingly Ground No. 1 raised by the assessee stands allowed.**

**6. Ground No. 2** is on computing the capital gains without considering the cost of acquisition of asset and other incidental expenses claimed by assessee.

**6.1.** It is noted that Ld.AO has not verified or called upon any details of the expenses as observed in Para 5(a) of the assessment order.



**6.2.** We, therefore, remand this issue back to the Ld.AO for necessary verification of the payment made by the assessee towards the acquisition by the assessee which forms part of the cost of acquisition for the purpose of computing Long Term Capital Gain in the hands of assessee. The assessee is directed to furnish all relevant details in respect of the same.

**Accordingly Ground No. 2 stands partly allowed for statistical purposes.**

**7. Ground no. 3** is an alternate claim raised by the assessee which becomes academic at the stage as we have considered the primary issue raised by assessee in favour hereinabove.

**Accordingly the grounds raised by the assessee stands allowed as indicated herein above.**

**In the result, appeal filed by the assessee stands allowed as indicated herein above.**

**Order pronounced in the open court on 20.12.2024.**

**Sd/-  
RENU JAUHRI  
ACCOUNTANT MEMBER**

**Sd/-  
BEENA PILLAI  
JUDICIAL MEMBER**

Place: Mumbai,

Dated: 20.12.2024

*Snehal C. Ayare, Stenographer/ Dragon*

**Copy of the order forwarded to :**

1. The Appellant
2. The Respondent
3. Ld.DR, ITAT, Mumbai



4. Guard File
5. CIT

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**