आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

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

BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 4608/Mum/2015

(**निर्धारण वर्ष /** Assessment Year : 2010-11)

Asstt. Commissioner of Income Tax – 8(3)(2), Room No. 615, 6th floor, Aayakar Bhavan, M.K. Road, Mumbai – 400 020.	**बनाम**/ v.	M/s Yogesh Agencies & Investments Pvt. Ltd., 420, Crerative Industrial Estate, 72 N.M. Joshi Marg, Lower Parel, Mumbai – 400 011.
स्थायी लेखा सं./PAN :AAACY1568L		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by :	Shri V. Vidhyadhar
Assesseeby :	Ms. Usha Gopalan

सुनवाई की तारीख **/Date of Hearing : 17.08.2017**
घोषणा की तारीख /**Date of Pronouncement :23.08.2017**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue, being ITA No. 4608/Mum/2015, is directed against the appellate order dated 29.05.2015 passed by learned Commissioner of Income Tax (Appeals)- 14, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2010-11, appellate proceedings before learned CIT(A) had arisen from the assessment order dated 28th December, 2012

passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") .

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> "(i) The Learned CIT(A) has erred on facts and in law in deleting the addition of Rs.33,08,740/- in relation to STCG on sale of two residential flats without properly appreciating the factual and legal matrix as clearly brought out by the AO in the assessment order.
>
> (ii) The Learned CIT (A) has erred on facts and in law in deleting the addition of Rs. 33,08,740/- in relation to STCG without appreciating the fact that the assessee acquires complete or substantial rights in these two flats only when agreement was executed as has been held in ITAT's decision in the case of Mrs. Lata vs Addl. CIT, in (2011) 10 taxmann.com96 (Mum) in IT Appeal No.2864 and 2968 of 2009, where facts were similar.
>
> 2. The Ld. CIT(A)'s order is contrary to law and on facts and deserves to be set aside and A.O's order may be restored."

3. The brief facts of the case are that the assessee company is engaged in the business of investment and finance. During the course of assessment proceedings is] s 143(3) r.w.s. 143(2) of the 1961 Act, the A.O. observed that the assessee had sold two flats No. 504 and 604 situated at Cygna Buildibng, Zircon Venture CHS Ltd, Vinman Nagar, Pune for a consideration of Rs. 32,50,000/- each. The assessee had offered long term capital of HRs. 19,29,577/- in respect of sale of above said two flats. The A.O. observed that the assessee had claimed long term capital gains on sale of the above two flats on the premise that it had paid advance payment for purchase of flat in the year 2005, hence, the holding period of the above two flats were taken from the year 2005 and the profit arising on sale of above flats were taken as

long term capital gain as the said flats were sold in October 2009. The A.O. observed that the assessee had made only advance payment for purchase of these two flat in the year 2005 and had claimed the profit arising as long term capital gain although the assessee entered in to registered purchase agreement on 14.3.2008 with the builder. Thus, the view of the AO is that the assessee became owner of the flats only on 14-03-2008 when the assessee entered into registered purchase agreement with the Builder and since the flats were sold in October 2009, the assessee had earned income from short term capital gain (loss) on transfer of these two flats which were short term capital assets held by the assessee. Without prejudice, the AO held that what the assessee transferred was the flat and not the allotment letter or right to acquire the property in the form of allotment letter. The AO refers to various clauses of the registered purchase agreement dated 14-03-2008 to come to above conclusion. In-fact it is undisputed that what is transferred by the assessee in October/December 2009 were the flats while the ·assessee was allotted flats in 2005. The AO observed that the immovable property has bundle of rights and when one acquires rhe right to buy property and later take the possession of property, inferior right in the form of right to acquire gets merged with the superior right in the form of possession of property. The AO observed that the assessee had entered into an registered purchase agreement on 14-03-2008 and sold the same capital assets in October 2009 , therefore the asset was held for less than thirty six months and it shall be construed as short term capital asset within the meaning of Section,2(42A) of the 1961 Act. Thus, in this appeal, the issue is in the very narrow compass. It was also observed by the AO that in the instant case, even the allotment letter is not issued by the Builder. The AO relied upon decision of Mrs. Lata v. Addl. eIT reported in (2011) 10 taxmann.com 96(Mum.). Thus, the AO observed that it is clear that the character of capital assets transferred is flat and not allotment letter or right to acquire the property and hence the A.O. computed the short term capital gain as under:-

	Flat No. 504	Flat No. 604	Total
Sales consideration	32,00,000	32,50,000	64,50,000
Stamp duty valuation (A)	39,75,451	39,04,824	78,80,275
Cost of acquisition	20,58,925	20,98,750	
Stamp duty and registration charges	2,05,580	2,09,080	
Total cost of acquisition (B)	22,63,705/-	23,07,830/-	45,71,535/-
Short term capital gain (A+B)	17,11,746/-	15,96,994	33,08,740/-

Thus, the A.O. brought to tax an income to the tune of Rs. 33,08,740/- to tax as short term capital gain(STCG), vide assessment order dated 28th December, 2012 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 28-12-2012 passed by the A.O., the assessee carried the matter in appeal before the Id. CIT(A) vide appellate order dated 29-05-2015 , who allowed the appeal of the assessee by holding as under:-

> "3.2. I have gone through the same. The AO has observed that by obtaining the allotment letter in respect of both these two flats, the assessee got only the right to acquire the flats and not the flat themselves. Thus the right to acquire flat was separate and distinct from holding right on the flat itself. The right to own the flat only came into existence on the date of registration which happened on 14/03/2008 and thus holding of the asset being only from 14/03/2008 to October, 2009, period being less than 3 years, the flats remained short term assets and consequently the gains on sale of the same has to be taxed as short term capital gain. I have considered the same and I am partly in agreement with the AO that both these rights i.e. right to purchase the flat and right in the flat itself are different. Same is evident from instances where allotment letter themselves are sold for transferring the right to acquire the flat by a person i.e. allottee. In such a case holding period is considered for calculation of capital gains of holding of allotment letter itself. However, coming to the instant case where the allotment letter given by the builder

was subsequently followed by payments in instalments as per terms and conditions in the same and the registration was done also for handing over the possession finally; on these given facts, where thus the allotment created right to acquire the property finally culminated into acquiring of flat itself, the right to possess capital asset i.e. flat cannot be segregated . now for the reason that as per section 53A of Transfer of Property Act also, the transfer has taken place and the same is not to be determined from the date of registration only as has been concluded by A.O. In the case of Shirish Agarwal while considering this issue i.e. date of transfer with reference to Section 53A of Transfer of Property Act, the Hon'ble ITAT, Delhi has discussed this issue as under:-

> "Thus from the above two decisions, it becomes absolutely clear that for the purpose of the Income Tax Act the ground reality has to be recognized and if all the ingredients of transfer have been completed, then such transfer has to be recognized. Merely because the particular instrument of transfer has not been registered will not alter the situation. This position is further strengthened by the fact that legislature itself has inserted clause (v) to section 2(47) and while referring to the provisions of section 53A, reference has been made by stating that contracts in the nature of section 53A should also be covered by definition of "transfer". Therefore, in our humble view, the amendment to sec. 53A of the Transfer of Property Act whereby the requirement of the documents not being registered has been omitted will alter the situation for holding the transaction to be a transfer u / s 2 (4 7)(v) if all other ingredients have been satisfied."

3.3. In a case like this, where the asset which came to possession as per terms and conditions mentioned in the allotment letter, it is clear that the contract for purchase of flat was in existence, which was in writing and same was followed by willing parties of the contract on these two specified both the sides by making payment of instalments from time to time by one and registration of the documents alongwith bringing into existence of flats and handing over of possession of the flat itself. On these given facts i.e. having done part performance in terms of section 53A of Transfer of Property Act, the contract having come into existence on the date of allotment letter for the said flats and thus period of

> holding in the case being more than 3 years before sale of same in October, 2009, both these flats have to be treated as long term capital assets and consequently gain on sale of the same is long term capital gain. In view of this the appellant's calculation of long term capital gain already offered to tax has to be accepted. The ground no. 2 taken by the appellant is allowed".

5. Aggrieved by the appellate order dated 29-05-2015 passed by the Id. CIT(A), the Revenue is in appeal before the tribunal.

6. The Id. D.R. relied on the assessment order of the A.O. and the decision of the Hon'ble Delhi High Court in the case of Shri Gulshan Malik v. CIT in ITA No.55/2014, C.M. APPL 2383/2014 & 2384/2014 ,judgment dated 14.03.2014 and submitted that the assessee had entered into an agreement for purchase of the said flat No. 504 and 604 only on 14.3.2008 , whereby two flats were purchased by the assessee. Prior to that the assessee had made payment in installments from time to time and no right or title was created in the flats, till the flats were registered in the name of the assessee on 14-03-2008. It was submitted that the; said flats were sold in October/December 2009 and hence the AO rightly brought to tax gains arising from sale of flats as short term capital gains.

7. The Id. Counsel for the assessee submitted that the assessee had purchased two flats bearing No. 504 and 604 in project Cygna Building, Zircon Venture CHS Ltd. It is submitted that these flats were allotted by the builder in the year 2005 and our attention was invited to communication with the builder which are placed in the paper book /page 22 to 35. Our attention was also drawn to page 1/paper book wherein details of payments made to the builder in installments are in place. Thus, it is submitted that the flats were booked on September, 2005, wherein the advances were given of Rs. 1 lac for each flat. It was submitted that thereafter payments were made from time to time by installments by the assessee to the Builder. Thus, it is submitted

that the period of holding of flats is more than three years as the flats were sold in October/December 2009 and the long term capital gain were earned by the assessee on sale of both the flats and the assessee has rightly declared the long term capital gains earned on these two flats after claiming benefit of indexation.

8. We have considered rival contentions and also perused the material available on record. We have observed that the assessee company is engaged in the business of investment and finance. The assessee had sold two flats bearing No. 504 and 604 situated at Cygna Buildibng, Zircon Venture CHS Ltd, Vinman Nagar, Pune for a consideration of Rs. 32,50,000/- and Rs. 32,50,000/- respectively, vide agreements to sale entered into on 15th October, 2009 and 30th December 2009 respectively which is not in dispute. The dispute has arisen between the rival parties mainly with respect to the date of acquisition of these two aforesaid flats and whether the resultant gains/loss on the sale of these two flats is long term capital gain or short term capital gain. We have observed that the assessee booked two flats in September, 2005 with the Builder, booking documents w.r.t. both the flats are placed in paper book page 22/29, whereby advance were given of Rs. 1 lac each by the assessee to the Builder vide cheque No. 52 and 53 , HDFC Bank respectively for the' aforesaid two flats. This booking advance was followed by assessee making payments to the Builder in installments from time to time w.r. t. these two flats. The communications with the builder w.r. t. both the flats are placed in paper book/page 22-35, wherein builder is asking the assessee to clear dues including registration/ stamp duty charges as well to get registration of flat in its name. The Revenue is contending that the date of registration of the agreement of sale w.r.t. both the flats is 14.3.2008 which is the relevant date for computing the period of holding of capital asset in the form of flats as the assessee acquired title, interest, rights as well possession m the flats w.e.f. 14-03-2008 as prior to that date it was me right in

booking of the flat which was there , which entitled the assessee to seek registration and possession of the flat. As per Revenue, no title, interest and right is created in the flat in favour of the assessee prior to registration of flat in favour of the assessee on 14-03-2008 and that is the relevant date for computing capital gains chargeable to tax, by relying on decision of Gulshan Maliktsupra). In our considered view, the assessee had made booking on 10th September, 2005 whereby cheque' of Rs. 1 lac each was given w.r.t. booking of both the flats to the Builder and thereafter the payments were made from time to time by the assessee to the Builder which is not in dispute by the Revenue. The assessee had made the following payments:-

Sr No.	Date of payment	Flat No. 504	Date of payment	Flat No. 604
1	10.09.2005	1,00,000	10.09.2005	1,00,000
2	01.12.2005	6,20,345	06.12.2005	6,34,560
3	03.05.2006	6,17,440	10.05.2006	4,19,750
4	31.07.2006	2,09,880	18.07.2006	2,09,880

In our considered view, it is clear that the tile ,interest and rights in the flats is created wherein specific flat was earmarked and allotted by the builder in favour of the assessee in September 2005 , hence, the period of holding in these case W.r. t. flats being held by the assessee for more than three years before the same were sold by the assessee in October/December, 2009. However, we would like to clarify that for claiming indexation for computing long term capital gain, the actual date of payment of the installments towards flat will taken into account for computing long term capital gain. The CBDT vide Circular No. 471 dated 15-10-1986 and circular no 672 dated 16-12-1993 stipulates that in case of allotment of flat under self financing scheme of Delhi Development Authority (DDA) , similar scheme of co-operative society and other institutions, the date of allotment shall be the date of construction for the purpose of Section 54/ 54F of the Act. Thus, we hold that the assessee

has sold two flats wherein the p~riod of holding was more than three years (date of allotment September, 2005 and date of sale October/December, 2009) and hence gains arising from sale of two flats shall be brought to tax as long term capital gains. Thus, we do not find any infirmity in the order of the Id. CIT (A) which we are inclined to uphold/ affirm. However, The assessee is entitled for the benefit of cost inflation index based on actual payments made to the Builder vis-a-vis date of payment for computing indexation of cost of acquisition for computing long term capital gains.

The decision in the case of Mr Gulshan Malik(supra) is clearly distinguishable as in that case the builder has specifically stated that allotment letter will not create any title, interest in the flat. The relevant portion of the decision is reproduced hereunder:

> *"The confirmation letter dated 6.8.2004 (Annexure 3) specifically states first, that no right to provisional! final allotment accrues until the Buyer's Agreement is signed and returned to the builders and second, that no right to claim title/ownership results from the confirmation letter itself. Thus, it is clear that the Builders do not intend to convey any right of provisional! final allotment or any right to claim title/ ownership under the confirmation letter. There being no intention to convey rights in this document, it would be impermissible for this Court to find that the right to obtain title/ "booking rights" emanated from the confirmation letter. These rights may only be located in the Buyer's agreement, and thus, the date of acquisition of the capital asset must be considered the date of signing of said agreement i.e. 4.11.2004."*

We may also mention here that the co-ordinate Bench of this tribunal in the case of Ashutosh Gurunath Haldipur v. ITO in ITA No. 5134/Mum/2014 for A.Y. 2007-08 vide orders dated 8th November, 2016 had dealt with similar issue wherein the tribunal allowed the claim of the assessee. The relevant part of the tribunal decision if reproduced below:-

8. We have heard the ld. D.R. and also perused the material available on record. We have observed that the assessee along with his wife Mrs. Malini Rao had purchased the fiat for which payments have been made by the assessee and his wife. The assessee and his wife had also jointly raised bank loan for the acquisition of the said fiat . The assessee is claiming that he acquired the fiat from the date of letter of allotment by the builder i.e. 27-01-2003 while the A.a. has considered the date of agreement to sell which is 30th December, 2003 as the date of acquisition of the fiat. We have observed that the CBDT Circular No. 471 dated 15th October, 1986 relating to allotment of fiat under self financing scheme of Delhi Development Authority shall be applicable as we do not see any reason why the said circular shall not be applicable to a private builder, and date of letter of allotment i.e. 27-01-2003 shall be deemed to be date of acquisition of fiat and hence since the fiat was sold on 24-11-2006, the gains accrued to the assessee are long term capital gains as the asset is held for a period of more than thirty six months. The said CBDT Circular No. 471 dated 15th October, 1986 is reproduced hereunder:

74. Capital gains from long-term capital asset - Investment in a flat under the self-financing scheme of the. Delhi Development Authority - Whether to be treated as construction for the purposes of capital gains

1. Sections 54 and 54F provide that capital gains arising on transfer of a long-term capital asset shall not be charged to tax to the extent specified therein, where the amount of capital gain is invested in a residential house. In the case of purchase of a house, the benefit is available if the investment is made within a period of one year before .or after the date on which the transfer took place and in case of construction of a house. the benefit is available if the investment is made within three years from the date of the transfer.

2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under the Self-Financing Scheme (SFS) of the D.D.A. amounts to purchase or is construction by the D.D.A. on behalf of the allottee. Under the SFS of the D.D.A., the allotment letter is issued on payment of the first 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 D.D.A. 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.

3. The Board have been advised that under the above circumstances, the inference that can be drawn is that the, D. D.A. takes up the construction work on behalf of the allottee and that the transaction involved is not a sale. Under the scheme the tentative, cost of construction is already determined and the D.D.A. facilitates the payment of the cost of construction in instalments subject to the condition that the allottee has to bear the increase, if any, in the cost of construction. Therefore, for the purpose of capital gains tax the cost of the new asset is the tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position stated above. In view of these facts, it has been decided that cases of allotment of flats under the Self-Financing Scheme of the D.D.A. shall be treated as cases of construction for the purpose of capital gains.
Circular: *No. 471 [F. No. 207127/85-IT(A-II)], dated 15-10-1986.*

We would like to also make it clear that the assessee will be entitled for cost inflation index(CII) based on the actual payments made and date of payment, accordingly CII will be worked out with reference to amount of payment and date of payment, on progressive payments."

Thus, keeping in view the above said discussions and reasoning, the claim of the assessee is hereby allowed by us by holding that the assessee transferred long term capital asset being flats on October/December 2009 which were acquired in September 2005 i.e. period of holding is more than thirty six months in the case of both the flats. We would like to also make it clear that

the assessee will be entitled for cost inflation index(CII) based on the actual payments made and date of payment, accordingly CII will be worked out with reference to amount of payment and date of payment, on progressive payments. We order accordingly.

9. In the result, appeal of the Revenue in ITA No. 4608/Mum/2015 for A.Y. 2010-11 is dismissed.

Order pronounced in the open court on 23rd August, 2017.
आदेश की घोषणा खुले न्यायालय में दिनांकः 23-08-2017 को की गई ।

Sd/-	sd/-
(JOGINDER SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 23-08-2017

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व.नि.स./ R.K., Ex. Sr. 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)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "G" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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