



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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI AMARJIT SINGH, JM

**ITA No1070/Mum/2015
(Assessment Year :2010-11)**

Bhagwan J Tahiliani HUF 61, Park View, 10 th Road, Khar (W) Mumbai – 400 052	Vs.	ITO 19(1)(3) Piramal Chambers, 3 rd Floor, Room No.314 Lalbaug, Parel Mumbai – 400 012
PAN/GIR No.AABHB9249P		
Appellant)	..	Respondent)

Assessee by	Shri P.J. Pardiwalla & Shri J.K. Kamdur
Revenue by	Shri T.A. Khan
Date of Hearing	09/07/2018
Date of Pronouncement	27/09/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by assessee against the order of CIT(A)-34, Mumbai dated 29/01/2015 for A.Y.2010-11 in the matter of order passed u/s.143(3) r.w.s. 147 of the IT Act.

2. Following grounds have been taken by the assessee:-

1. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in confirming the action of the Assessing Officer in reopening the case by issuing notice u/s.148 and passing the order u/s.143(3) r.w.s. 147 of the I.T.Act and thereby dismissing the claim of the appellant that the reassessment is not tenable in law and also not warranted on the facts of the case. ,,

2. On the facts and in the circumstances of the case, the learned Commissioner of Income tax (Appeals) erred in holding that the capital gain on sale of flat at Juhu is a "short term capital gain" as against appellant's claim that the capital gain is a "long term capital gain". The appellant submits that the appellant has held the rights in the said flat for more than 36 months and therefore the capital gain falls in the category of long term capital gain.

3. Your appellant craves leave to add to, amend, alter, delete and/or modify the above grounds of appeal on or before the final date of hearing of this appeal petition.

3. Rival contentions have been heard and record perused. The facts of the case, as discussed in the order are that on the basis of information received from the Addl. CIT-19(2), Mumbai, the AO reopened the case on the ground that the assessee had shown Long Term Capital Gain of Rs.19,71,149/- as exempt on sale of property during the asst. year under consideration. The date of acquisition of the property had been taken by the assessee as 01.06.05 and the date of sale as 22.04.2009 and sale consideration amount of Rs.71,25,000 was assessee's share @ 25% from the total sale consideration of Rs.2,85,00,000, However, there was no registered document for purchase of the property nor, was there any development agreement between the owners and M/s. P. R. Investments, and the builder had not commenced the construction at the time when advances were made by the parties and even after getting the plan approved, no agreement was entered into between P.R. Investments and D.M. Ramesh (Director of Grey Investments Pvt. Ltd.) and the assessee. The A.O. has further recorded that initial payment of Rs.2.5 lac only had

been made and other payments had been staggered over a period of 3 years, whereas, the sale agreement dtd. 23.04.09 is a Tripartite Sale Agreement between M/s. P.R. Investments of one part, Shri D.M. Ramesh (Director of Grey Investments Pvt. Ltd.) and the assessee of the second part and Mr. Dilip S. Coulagi & Mrs. Nayana D. Coulagi being of the third part and on going through the Development Agreement it was also seen that it had been registered on 26.04.2006 and the occupation certificate was obtained by the developer on 15.10.08 and possession was handed over in December 2008. The A.O., therefore, observed that by no stretch of imagination, the date of purchase can be taken as 01.06.2005 under the head 'Long Term Capital Gain'. On the contrary, A.O. has held that the sale consideration received by the assessee is nothing, but Short Term Capital Gain. The A.O. has also recorded that the amount of Rs. 19,71,149 declared by the assessee as Long Term Capital Gain has been deposited in a Capital Gain account.

4. During the course of assessment proceedings, the A.O. asked the assessee to submit the details with respect of the property sold and from the details filed by the assessee, found that Sale Agreement dtd. 23.04.09 is a Tripartite Sale Agreement between M/s. P.R. Investments of one part, Shri D.M. Ramesh (Director of Grey Investments Pvt. Ltd.) and the assessee of the second part and Mr. & Mrs. Coulagi being of the third part. The Development Agreement was registered on 26.04.06. The Occupation Certificate obtained by the Developer is dtd. 15.10.2008. A.O.,

therefore, issued a show-cause to the assessee as to why date of purchase be taken as 01.06.05 and not as December 2005, when he got possession of the flat. After considering the assessee's reply reproduced in para 8.5 of the order, the A.O. held that the same is not acceptable for the reason that the terms, as mentioned in the letter dtd. 1.4.05 to M/s. P. R. Investments is in letter form and it is not a registered document and there is no registered document for purchase of the property. Further, the intimation of disapproval was obtained by the developer on 19.10.05 only and the builder had not commenced the project at the time when the advances were made by the party and even after getting the plan approved, no agreement was entered into between M/s. P.R. Investments and the assessee. The A.O., therefore, concluded that date of acquisition of the rights would depend upon facts of each case and the documents executed/provided by the developer to the intended buyers and in case of initial advance if there is no commitment or allotment by the developer, the same would not amount to acquisition of rights in the property, which is acquired only when an allotment letter specifying the project, etc. has been issued by the developer to the buyer. The A.O. also rejected the argument of the assessee that rights were created when advances were given on the ground that the above amount which passed hands towards property that was to be conveyed in the near future and the same cannot be treated ownership of the property. The A.O. therefore, took the date of acquisition of the flat, as to the date of possession of the flat by owner,

i.e. December 2008 and, alternately, held that even if the date of development agreement, i.e. 26.4.06 is taken as the date of acquisition of right in the property, capital asset has been held for less than 36 months and falls in the category of 'short term' as it was sold on 23.04.09. The assessee's 25% share being Rs.71.25 lac out of total consideration of Rs.2,85,00,000 has, therefore, been held by the A.O. as taxable under the head 'Short Term Capital Gain'.

5. Against the above order of AO, assessee approached to the CIT(A) and challenged reopening as well as merit of the addition so made by the AO.

6. By the impugned order, CIT(A) upheld the reopening and also addition so made by the AO after observing as under:-

6.1 The first ground of appeal taken by the appellant is against reopening of the case by issue of notice u/s.148 of the Act. The appellant in his written submissions has relied upon the decision dtd. 17.01.2013 of the Delhi High Court in the case of Simka Hotels & Resorts in support of his argument that he has in his case made proper disclosure of income and not suppressed any material facts and under assessment, if any, is due to a controversy as to classification of the capital gain as short or long term which has been decided in his favour u/s. 143(1) of the Act, and the same is proposed to be decided against him vide notice u/s. 148 of the Act, and, it cannot be presumed to be failure on his part to disclose the income. The appellant's argument is that the above facts are same as in the case of Simka Hotels & Resorts before the Delhi High Court.

6.2 I have duly perused the submissions of the appellant and find that in the case of M/s. Simka Hotels & Resorts, a writ petition was filed by the petitioner seeking set aside of the order dtd. 29.03.2012 passed by the CIT. In the case of the said assessee, the DCIT had passed an order dtd. 14.12.10 stating that income of Rs.5.05 crs. earned by the petitioner on account of transfer of capital asset was not capital gain, but income from other sources, against which appellant preferred an application u/s.264 of the Act, seeking revision of the said order. But,

on 29.03.2012 the Commissioner rejected its application and refused to interfere with the A.O's order dtd. 14.12.2010. The petitioner, therefore, aggrieved by the order dtd. 14. 12. 10 and 29.03. 12 preferred proceedings under Article 226 for quashing of the re-assessment proceedings. In the case of the appellant, there has been no order passed u/s, 143(3) or 264 of the Act and, the appellant has himself admitted that his return was processed u/s. 143(1) of the Act only. Hence, I do not find any merit in the above submissions of the appellant and reject the same. Further, as there as been no order u/s. 143(3) of the Act, there cannot be any change of opinion, as argued by the appellant, and though Gujarat High Court vide order dtd. 23.8.2012 in Special Civil Application No.858 of 2006 in Inductotherm (India) Pvt. Ltd. has held that intimation u/s, 143(3) of the Act, cannot be re-opened u/s. 147 of the Act in absence of "tangible material" and the said decision is being followed by the ITAT, Mumbai, I have in para 3.2 of the order discussed at length the tangible material for re-opening of the assessment. The appellant had also requested for a copy of reasons recorded for re-opening of the assessment, which was duly provided by the A.O. vide letter dtd. 21,08.2012. Thus, in the case of the appellant not only tangible material was there, but reasons for re-opening were also duly provided to the appellant.

6.3 The first ground of appeal is therefore dismissed.

7. The second ground of appeal is against the treatment given by the A.O. to the Long Term Capital Gain declared by the appellant, as Short Term Capital Gain.

7.1 The basic facts, as given in the reasons for reopening of the assessment is as follows:

1. The date of acquisition of the impugned property is 01.06,05.
2. The date of sale of the impugned property is 22.04.09.
3. There is no registered document for purchase of the property .
4. There is no development agreement between the owners and M/s. P.R. Investments.
5. Builders had not commenced the project when advances were made by the parties. Even after the plan was approved, no agreement was entered into between P.R, Investments and Shri D.M. Ramesh (Director of Grey Investments Pvt. Ltd.) and Bhagwan J. Tahiliani HUF (the appellant).
6. The sale agreement dtd. 23.04.09 is a triparte agreement between M/s. P.R. Investments ofn one part, D.M. Ramesh, Director of Grey Investments Pvt. Ltd. and Bhagwan J. Tahiliani HUF of the second part

and Shri Dilip S. Coulagi and Mrs. Nayana D. Coulagi of the third part.

7. The Development Agreement was registered on 26.04.06. The Occupation Certificate was obtained by the developer on 15.10.08.

8. Possession of the impugned property was handed over in December 2008.

7.3 The issue therefore, is as to whether the date of purchase of the impugned property/capital asset is to be reckoned from 09.07.05 and, accordingly, to be treated as long term capital gain.

7.3.1 The appellant has during the course of appellate proceedings furnished copy of documents furnished before the A.O. which include letter of purchase of option dtd.01.04.05 from D.M. Ramesh and the appellant Bhagwan J. Tahiliani HUF to M/s. P.R. Investments. In the said letter, the appellant and Shri D.M, Ramesh stated that Ajay D. Goel and his brothers Jyotin and Sunil owned the leasehold interest in plot no.48 of Nutan Laxmi CHS Ltd. bearing CTS No.656, together with the bungalow standing thereon, situated at N.S. Road No.9, J.V.P.D. Scheme, Vile Parle (W), Mumbai-400 009 and the owners of the said property are members of the above society and hold shares therein. The appellant and D.M. Ramesh acknowledged that M/s. P.R. Investments is negotiating with the owners for entering into a Memorandum of Agreement (MOAT) under which M/s. P.R. Investments will obtain development rights to develop the leasehold land (utilizing not only the primary FSI of the above mentioned plot, but also the TDRs as may be available under the Development Control Regulations). The appellant also stated that if P.R. Investments enters into the above agreement, they will have to construct on the above leasehold plot a residential building of stilt and six upper floors and part of the 7th upper floor utilizing FSI 1 along with TDR 1 (i.e. FSI 2) and also avail of open space concessions available as on date and in such proposed building retain to themselves the ownership of the residential flats on the 4th, 5th and 6th upper floors, as well as ownership of the leasehold land and the shareholding/membership of the said society and, P.R. Investments would have the right to sell/dispose of the residential flats on the first, second and third floors of the proposed building, but with no right in or to the leasehold land or in or to the shares of the said society. The appellant and D.M. Ramesh also stated that they are interested in booking with P.R. Investments, for purchase of a residential flat on the 3rd floor of the proposed building and requested P.R. Investments to allow them first option to purchase for them such residential flat on the 3rd upper floor of the proposed building and the proposed consideration payable by the appellant and D. M. Ramesh was recorded as Rs. 1,49,20,000 starting from payment of earnest money of

Rs.10 lacs by 02.04.05 and the balance, Rs. 1,39,20,000 in installments of Rs.15 lac, 25 lac, 30 lac and 30 lac on 28.5.2005, 9.6.2005, on completion of 4th slab, on completion of last slab and the balance amount of Rs.39,20,000 at the time of handing over possession of the residential flat on the third floor.

7.4 A Memorandum of Agreed Terms (MOAT) between Mr. Ajay D. Goel, Jyotin D. Goel and Mr. Sunil D. Goel (Owners) of the one part and M/s. P.R. Investments (Developers) consisting of three partners, of the other part agreed that owners of the plot of land belonging to Nutan Laxmi Co.op. Housing Society Ltd. together with the Bungalow named 'Garwa' shall shortly make declaration setting out the devolution of the title to the said immovable property confirming the absolute proprietorship of the owners of the leasehold interest of the said plot of land and the ownership of the said bungalow stated thereof and it shall be the responsibility of the owners to vacate and get all the members of the family and their servants to vacate the respective portion of the said immovable property and the owners also agreed to grant the development rights in respect of the said immovable property to the developer and the developer agreed to demolish the said main bungalow and other structures, if any, and construct on the plot a new multi - storeyed building having stilt-area and 7 upper floors with an open terrace-area on part of the 7th upper floor with a lift-room, water-tank and open terrace area on the 7th upper floor and the owners shall retain the primary FSI of the said plot and the developer shall be entitled to full and exclusive development rights to develop the above mentioned plot of land by the developer to the full extent permissible by the BMC by utilizing not only the primary FSI which is the plot but also the TDR with total FSI2 (two) under the Development Control Regulations for Greater Mumbai, 1991, which is to belong to and shall be available for disposal by the developer. The developer also estimated that the new building to be constructed by the Developer on the said plot will have (6) six upper floors plus a part of 7th upper floor and the residential accommodation and residential accommodation to be made available to the owners and which are to be on the top upper floors; hence residential accommodation for the owners is stated to entire 4th, 5th, 6th upper floors and part of the 7th upper floor with an open terrace at the 7th upper floor and the owners would be eligible to use part of such residential accommodation for commercial purposes. It was also agreed that after all the said conditions specified in clause 3 of the MOAT are fulfilled, a Development Agreement will be entered and executed by and between the owners on the one hand and the Developer on the other hand, containing not only the basic terms and conditions in the MOAT, but the other usual terms and conditions which are contained in a Development Agreement and as would be agreed by and between the parties thereto. The monetary consideration to be paid by the developer to the owners for the grant of full and

exclusive development rights in favour of the developer in respect of the said immovable property was agreed at a lumpsum of Rs. 1,52,00,000 (to be shared by the three owners in equal shares) to be paid by the developer to the owners, Rs. 15 lac on the date of MOAT, as earnest deposit and Rs. 70,00,000 and the balance Rs.67 lac on the appointed dates.

7.5 In the letter dtd. 15.07.05, the appellant and D.M. Ramesh wrote to M/s. P.R. Investments that as per point 3 of the letter dtd. 1.4.05, they have expressed their interest in booking for purchase of the residential flat on the 3rd floor of the proposed new building and that they should be given the first option to purchase the said flat and in accordance with the above letter they have already paid earnest money in installments aggregating to Rs.50,000 and the balance outstanding amount of Rs.99.20 lac is payable by them. The appellant also requested to confirm this letter as token of acceptance.

7.6 The Development Agreement dtd. 26.04.06 between Ajay D. Goel, Jyotin D. Goel and Shri Sunil D. Goel being the owners, of plot no.48 and referred to as of one part and M/s. P. R. Investments, referred to as the developer and of the second part was executed and as per the same, the owners agreed to grant development rights in respect of the above property to construct on the above plot a new multi-story building of 7 floors, at an agreed lumpsum amount of 7.7 Subsequently, an agreement dtd. 21.04.09 was executed between M/s. P.R. Investments of the first part and Grey Investments Pvt. Ltd. and the appellant referred to as "Investors" of the second part and Shri Dilip S. Coulagi and Mrs. Nayana S. Coulagi of the third part and referred to as the "Purchasers", wherein it is recorded that the investors (the appellant) had to invest Rs. 1,49,20,000 in one residential flat of carpet area of 1388.5 sq.ft. (equivalent to 129 sq.mts.) on the third floor of the building to be constructed by the developer in the JVPD Scheme, Vile Parle and the above "Investors", that is the appellant and Grey Investments Ltd. paid to the developer Rs.10 lac on 02.04.05. It is further recorded that the "Investors" also desired to acquire two car parking spaces for Rs. 12,80,000, i.e. total amount aggregating to Rs. 1,62,00,000, for flat and parking spaces. Further, it is recorded that investment of Rs. 1,62,00,000 was made partly by the appellant, that is 25% and the balance 75% by D.M. Ramesh, Director of Grey Investments Pvt. Ltd. "Investors" also informed the developers that they have negotiated with the "Purchasers" to sell the said premises for a lumpsum consideration of Rs.2.85 crs, to be paid by the purchasers to the "Investors", out of which 25%, i.e. Rs.71,25,000 is to be received by the appellant and the balance 75%, i.e. Rs.2,13,75,000 to be received by Shri D.M. Ramesh in the name of Grey Investments Pvt. Ltd.

7.8. A careful analysis of the above documents filed by the appellant, therefore, clearly point out that there is no evidence on record to show M/s. P. R. Investments ever confirmed booking of a flat on the third floor of the building to be constructed by them in the name of the appellant and Shri D.M. Ramesh. There is only signature of one Ajay C. Wadhwani, partner signing for M/s. P. R. Investments which has not been authenticated, and there is no letter from M/s. P.R. Investments issued to the appellant to this effect. It is only in Sale Agreement dtd. 21.04.2009, that it is mentioned that appellant had paid to M/s. P. R. Investments Rs.10 lac only on 2.4.2005 [Para (h)(vi) on page 4 of the Sale Agreement dtd. 21.4.2009], whereas, from the copy of receipt of Rs.10 lac issued by the M/s P.R. Investments to the appellant, it is seen that it is dtd. 7.7.2005. In the ground of appeal filed by the appellant also it is stated by the appellant that earnest money deposit had been paid on 9/7/2005. Thus, if Rs.10 lac was received on 2.4.2005 by M/s. P.R. Investments, why receipt was issued on 7.7.2005 and if the receipt was issued on 7.7.2005 then it should mention that amount of Rs.10 lac was received on 2.4.2005, which is not the case. Therefore, there being no evidence of receipt of Rs.10 lac paid on 2.4.2005, being the initial booking amount, it cannot be considered that the appellant had any Capital asset in the form of right of booking of an immovable property. It is also seen that in the letter dtd.1.4.2005, the appellant himself on his own accord, when nothing has been finalized between owners of the plot of land and the developer shown his interest in booking with the developer for purchase of a residential plot on the 3rd floor. This letter is, thus, nothing but evincing an interest for the purchase of flat in the proposed building and the authenticity of this document as to the actual date when it is written is always doubtful. In the letter dtd. 15/07/2005 too the appellant has stated that he has expressed his interest in booking a residential flat and seeks permission of the developer to give him first option to purchase. This letter too has been merely confirmed by the partner of M/s. P.R. Investments and the same does not establish that the developer has granted the appellant the first option to purchase. Moreover, para (j) (Page 4) of the Sale Agreement dtd. 21.4.2009 also records that the appellant along with D. M. Ramesh has decided to exercise their option to purchase from the Developer (M/s. P.R. Investments), the aforesaid residential flat (located on 3rd floor) for the agreed lumpsum of Rs.1,49,20,000/-. Thus, in any case, the appellant had a mere right to exercise an 'option' to purchase from the developer, which 'option' converted into a capital asset only after it was exercised on 21.4.2009 and not before that. This position is also crystal clear from the reading of para (v) (Page 4 of the Sale Agreement dtd. 21.4.2009). Therefore, because of the peculiarities of the negotiations between the "Owners" and the "Developers", the right to purchase a flat on 3rd Floor was to materialize with effect from the date when the "Option" to purchase the flat had been exercised by the appellant, which is 21.4.2009. In the light of the above stated facts, the case laws

cited by the appellant are neither relevant nor applicable. I, therefore, hold that the A.O. has rightly taken the appellant's share of Rs.71,25,000 in the total sale consideration amount of Rs.2.85 cr. as short term Capital gain and brought it to tax under the said head of income. The Order of the A.O. is upheld on this issue and ground of appeal no.2 dismissed.

7. Rival contentions have been heard and record perused. So far as reopening of assessment is concerned we are inclined to agree with the findings of CIT(A) and uphold the same. So far as merit of addition is concerned, we found that during the year under consideration assessee has sold his flat and earned capital gain of Rs.20,50,000/- which was invested in specified securities u/s.54EA. Assessee had booked a flat in a new building being Flat on 3rd floor in a building of Nutan Laxmi Cooperative Housing Society situated at N.S. Road No.9, JVPD Scheme, Vile Parle (W), Mumbai-400 049 for a total consideration of Rs. 1,49,20,000/-. The assessee's share in this property is 25% and the other 75% share in the property belongs to Grey Investments Pvt. Ltd. through its director Mr. D.M. Ramesh. For the purpose of booking and allotment of flat the assessee and other co-owner has written a letter on 01.04.2005 to the Builder/Developer P.R. Investments stating that they are interested in booking a flat on 3rd Floor in the proposed building for a consideration of Rs. 1,49,20,000/- plus charges for car parking. With this letter, earnest money cheque of Rs. 10,00,000 was also given to the developer/builder. The balance amount totaling Rs. 1,39,20,000 was payable by assessee to builder/developer by installment as under:

- (i) Rs. 15,00,000 on or before 28.05.2005*
- (ii) Rs. 25,00,000 on or before 09.06.2005*
- (iii) Rs. 30,00,000 on completion of 4th slab*
- (iv) The balance amount namely Rs.39,20,000 would be payable by assessee to you against and simultaneously with your handing over to us possession of such residential flat on the 3rd floor.*

8. However, AO held that the flat was not held by assessee for more than 36 months, therefore, capital gain so earned was short term capital gain. Facts in brief are that the assessee had acquired the right in the property on 15.07.2005 when the assessee has exercised its option to purchase the flat on the 3rd floor of the proposed new building as per the terms and conditions mentioned in the Letter of Purchase Option dated 1st April 2005. Letter of Confirmation of purchase of flat dated 15.07.2005 together with Letter of Purchase Option dated 01.05.2005 is an Allotment Letter for sale of residential flat on 3rd Floor in the proposed new building at Juhu.

9. However, the Assessing Officer has held that the capital gain is short term capital gain. According to him the date of acquisition has to be the date of possession of the flat by the owner i.e. December 2008. Alternatively, the date of acquisition be taken as of the date of development agreement i.e. 26.04.2006, then too, it can be seen that the capital asset was held for less than 36 months and therefore the capital asset falls in the category of short term as the property was sold on 23.04.2009 as per the sale agreement. We do not find any merit in the action of the AO in so far as the assessee had acquired the right in the

property on 15.07.2005 when the assessee has exercised its option to purchase the flat on the 3rd floor of the proposed new building as per the terms and conditions mentioned in the Letter of Purchase Option dated 1st April 2005. Letter of Confirmation of purchase of flat dated 15.07.2005 together with Letter of Purchase Option dated 01.05.2005 is an Allotment Letter for sale of residential flat on 3rd Floor in the proposed new building at Juhu. Therefore, the date of purchase/ acquisition of flat is 15.07.2005. The Sale Agreement is dated 21.04.2009. Hence, the resulted gain on sale of flat is a long term capital gain as the period of holding the flat is more than 36 months in the hands of the assessee.

10. We further observe that in para 6 of the letter it is stated that assessee would be entitled to exercise his option in writing for purchase of flat latest by 31st December 2006. The builder/developer confirmed the terms and conditions of the intended purchase of new flat. The builder/developer M/s. P.R. Investments have entered into Memorandum of Agreed Terms with the Owner of bungalow and land for the purpose of development of new building on 24th June 2005. When the Memorandum of Agreed Terms was signed between the land owner and Developer, assessee immediately exercised his option and gave a letter of confirmation of purchase of flat on 3rd floor in the proposed new building on 15.07.2005 which was confirmed by the Developer/Builders P.R. Investments. The builder/developer has also deposited the earnest money

cheque into their bank account on 07.07.2005. Assessee has made further payments as under:

Sr.No	Date	Amount
1.	07.07.2005	10,00,000
2.	07.07.2005	2,50,000
3	14.08.2007	7,50,000
4	11.12.2007	7,50,000
5	20.10.2008	10,00,000
6.	11.11.2008	3,00,000
	Total	40,50,000

11. Thus, the payments have been made as per the agreed terms of allotment of the flat. The flat was sold vide Sale Agreement dated 21.04.2009 to Mr. Dilip S. Coulagi and Mrs. Nayana D. Coulagi for a total consideration of Rs. 2,85,00,000 out of which assessee's share is only 25% i.e. Rs.72,25,000/-. We do not find any merit in the contention of Assessing Officer that the right in property would have come into existence if the developer would have confirmed the booking and have issued necessary allotment letter to the intended buyers after the project have been properly described. The Assessing Officer further pointed out that in case of initial advance if there is no commitment or allotment by the developer, same may not amount to acquisition of rights in the property. Property rights may generally be acquired by the intended buyer only when an allotment letter specifying the project etc. has been

issued. In this case no allotment letter was issued by the developer to the buyer. The Letter of Confirmation of purchase of flat dated 15.07.2005 together with Letter of Purchase Option dated 01.05.2005 constitute the allotment letter for allotting flat on 3rd floor in the proposed new building giving complete terms and conditions of the allotment such as purchase price, flat details, details of payment of installment, details of payment of stamp duty, registration etc. Both the letters were signed and confirmed by the assessee as well as the Developer/Builder. Hence, the Assessing Officer's observation that there is no commitment or allotment of flat by the developer to the assessee is not correct. Both the letters dated 01.04.2005 and 15.07.2005 are signed and confirmed by the developer and they are for the purpose of allotment of particular flat for a consideration mentioned therein. Hence, the date of acquisition of the right in the property should be taken when the option was exercised for purchase of flat i.e. 15.07.2005.

12. Furthermore, CBDT Circular No.471 dated 15/10/1996 has clarified the position in regard to flat booked by an assessee under self finance scheme of DDA. It has been clarified by the CBDT that the period of holding of the property will be counted from the date of issuance of allotment letter by the DDA pursuant to which the installments have been paid by the assessee and construction has been made by DDA. The aforesaid Circular of CBDT is equally applicable in the case of booking of flats with the builder wherein also the construction is made by the builder

pursuant to payments made by the buyers. Irrespective of the fact whether the agreement with the builder may have certain clauses which may not make the buyer owner of the flat as such, the intention of the builder as well as of the buyer in all these cases is that the buyer will make payment to the builder and builder will construct the flat and hand over the same to the buyer. Accordingly, the clarification given by the CBDT is equally applicable to the booking of the flats with the builders and period of holding will be counted from the booking of the flats.

13. In view of the above, we direct the AO to compute period of holding from 15/07/2005, which works out to be more than 36 months, accordingly, assessee is entitled for long term capital gain benefits. We direct accordingly.

14. In the result appeal of the assessee is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 27/09/2018

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 27/09/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai