



ITA No.2583/Mum/2018
Mr. Raju Dayal Shahani
Assessment Year :2011-12

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.2583/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2011-12)

Mr. Raju Dayal Shahani C/o. Hari S. Raheja 206, Neelkanth Bldg. 98, Marine Drive Mumbai- 400 002.	बनाम/ Vs.	ITO-Ward 4(2)(1) Air India Building Mumbai- 400 021.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AAZPS-3528-E		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Hari Raheja-Ld.AR
Revenue by	:	Ms. Jyothilakshmi Nayak-Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	17/02/2020
घोषणा की तारीख / Date of Pronouncement	:	20/02/2020

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year [in short referred to as ‘AY’] 2011-12 contest the order of Ld. Commissioner of Income-Tax (Appeals)-58, Mumbai, [in short referred to as ‘CIT(A)’], Appeal No. CIT(A)-58, Mumbai/10036/2014-15 dated 12/03/2018 on following grounds: -



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1. On the facts and in the circumstances of the case and in law, the learned CIT (Appeals) has grossly erred in holding that the appellant has held the asset for a period of less than 36 months thus determining capital gains on sale of rights to a flat as "Short Term" disregarding the explanation given by the appellant.
2. On the facts and in the circumstances of the case and in law the CIT (Appeals) was not justified in holding that the period of holding the asset was to be calculated from the date of registration and not from the date of allotment totally disregarding the decision of the Supreme Court in the case of Gurbax Singh v. Kartar Singh and other reported in 254 1TR 112 (SC), wherein the Hon. Court has held that a document on subsequent registration will take effect from the time when it was executed and not from the date of registration which in this case is the date of booking i.e. 14.10.2006
3. The appellant submits that the date of booking is 14.10.2006, and the date of allotment is 25.11.2006 and the date of sale is 18.10.2010, and hence the CIT (Appeals) has erred in upholding the date of ownership as 06.08.2010.
4. The appellant prays that the gain is a long-term capital gain and the appellant be allowed the benefit of indexation and reinvestment in the new flat as claimed.

2. We have carefully heard the arguments advanced by both the representatives and perused relevant material on record including documents placed in the paper book. We have also deliberated upon the judicial pronouncements as relied upon during the course of hearing. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

3.1 Facts on record would reveal that assessee being non-resident individual was assessed for year under consideration u/s.143(3) on 18/03/2014 wherein income of the assessee was determined at Rs.82.36 Lacs after certain adjustments as against returned income of Rs.1.11 Lacs e-filed by the assessee on 30/03/2012.

3.2 During the course of assessment proceedings it transpired that the assessee sold one residential flat bearing No.504, Oberoi Splendor, Village Majas, JVLR, Jogeshwari (E), Mumbai, for a sale consideration of Rs.165.00 Lacs. It was stated by the assessee that the said flat was



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allotted by way of allotment letter dated 25/11/2006 for a total sum of Rs.83.74 lacs. It was further stated that said flat was booked on 14/10/2006 upon payment of Rs.7.96 Lacs. Thereafter, the builder vide allotment letter dated 25/11/2006 allotted said flat to the assessee. However, the agreement was registered only on 06/08/2010. In its computation of income, the assessee claimed indexed cost of acquisition by applying cost inflation index for financial year 2006-07 and worked out Long-Term Capital Gain (LTCG) of Rs.51.80 Lacs. Against the same, the assessee claimed deduction u/s. 54 in view of purchase of another *flat bearing No.1601 at Octarest, Lokhandwala Township, Akurli Road, Kandivali (E), Mumbai*, which was registered for a sum of Rs.122 Lacs on 22/10/2010. Accordingly, assessee reflected *Nil* LTCG on transfer of flat.

3.3 However, upon noticing that the agreement was registered only on 06/08/2010, Ld. AO opined that the resultant gains would be short-term capital gains in nature. The said conclusion was arrived at in terms of Explanation (iii) to Sec.48 of the Act which define the expression *indexed cost of acquisition*. According to this explanation, the indexation benefit would be available only from the year in which the asset was first held by the owner. Since the assessee acquired the property only on 06/08/2010, the index for financial year 2010-11 would only apply. Further, the letter of allotment would become reductant by the documents registered on 06/08/2010. Since the property was sold within a period of 41 days on 18/09/2010, the nature of capital gains would be short-term capital gains as per definition provided in Sec. 2(42A) and



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therefore, the benefit of indexation would not be available to the assessee. Consequently, deduction u/s 54 was also denied since the same would apply only in case of LTCG. Finally, short-term capital gains were computed at Rs.81.25 Lacs which was added to the income of the assessee.

4. The learned CIT(A), upon perusal of terms of allotment letter dated 25/11/2006, opined that the said letter envisaged only reserve of an allotment and the same was a conditional allotment. Therefore, the letter was not an allotment letter having legal validity to establish rights over the property. Therefore, the allotment letter would not fall into the category of documents which proves that the property was *held* by the assessee. Consequently, the action of Ld. AO was upheld. Aggrieved, the assessee is under further appeal before us.

5. We have carefully perused the documents, as placed on record, concerning property transactions carried out by the assessee. Upon perusal of letter dated 14/10/2006 as issued by the builder, it is evident that the assessee has booked a flat in *specie* i.e. *flat bearing No.504, Tower-I, Wing B in a project namely Oberoi Splendor, Village Majas, JVLR, Jogeshwari (E), Mumbai* (in short 'Property') at agreed consideration of Rs.79.62 Lacs. The terms of the letter postulates termination / cancellation of booking as well as transfer of right upon certain terms and conditions. The perusal of the same would lead us to conclude that the assessee had acquired certain transferable right in a property *in specie*.



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6. Subsequently, another letter dated 25/11/2006 has been issued by the builder which recognizes the right of the assessee in the said property and the builder agree to reserve the property for allotment subject to certain stipulations and conditions including payment terms. Upon perusal of the terms, we find that the said letter create right in favor of the assessee to get the allotment of the property in his name subject to certain terms and conditions as agreed upon between the assessee and the builder. This letter has been issued subject to premises ownership agreement which was has subsequently been executed on 22/06/2010. As per Recital-Y of this agreement, the developer has agreed to allot to the purchasers and the purchasers agree to acquire the said property from the developer. This recital recognizes that fact that the said property is under construction stage which fact is again recognized in clause-1 of the agreement. The assessee has subsequently entered into agreement of transfer dated 18/09/2010. Recital C of the said agreement read as under: -

The transferee/s have evinced interest in purchase of the said premises, hence, after discussions and negotiations the transferor/s have agreed to sell, transfer and assign their right, title and interest in the said premise under the said principal agreement and all the benefit incidental thereto.

Upon combined reading of all these documents, it would transpire that the assessee has acquired certain rights of allotment in a specific property. These rights were created in assessee's favor, by the letter of builder issued on 14/10/2006. The subsequent letter dated 25/11/2006 as well as *premises ownership agreement* was nothing but improvement in the said rights of the assessee which were already created vide letter



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dated 14/10/2006. The assessee has sold these rights vide agreement dated 18/09/2010. Therefore, what was acquired by the assessee and what has ultimately been sold by the assessee is pari-materia the same. This being the case, there would be no occasion to consider the date of acquisition of the said right as 22/06/2010. The assessee, in our opinion, acquired the right on 14/10/2006 which was ultimately sold on 18/09/2010. Therefore, since the holding period of the same is more than 36 months, the resultant gains would be long-term capital gains in nature. Consequently, the benefits of indexation would be available since financial year 2006-07. The Ld. AR submitted that the assessee's deduction claim would fall u/s 54F and not u/s 54 since what has been sold is merely a certain right in the property. We find that the said facts were brought to the notice of Ld. CIT(A) also. Therefore, the alternative claim as made by the assessee u/s 54F would be admissible. The Ld. AO is directed to verify assessee's claim u/s 54F and recompute the income in terms of this order.

7. The appeal stands allowed in terms of our above order.

Order pronounced in the open court on 20th February, 2020.

Sd/-
(Mahavir Singh)

उपाध्यक्ष / **Vice President**

Sd/-
(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 20/02/2020
Sr.PS, Jaisy Varghese



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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**