

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "I", MUMBAI**

**BEFORE SHRI RAJENDRA SINGH, A.M. AND SHRI VIVEK VARMA, J.M.**

**ITA No. : 6966/Mum/2010**  
Assessment Year : 2007-08

Asstt. Commissioner of Income tax -19(2) Room No.315, 3 <sup>rd</sup> Floor Piramal Chambers, Lalbaug, Parel Mumbai-400 12.	Vs.	Shri Jaimal K. Shah L/H Mannel J. Shah 901, 9 <sup>th</sup> Floor Pratik Apartments, Saraswati Colony, Saraswati Road, Santacruz (W) Mumbai-400 054. <b>PAN No.:AIFPS 4804 F</b>
(Appellant)		(Respondent)

Appellant by : Shri Sanjiv Dutt  
Respondent by : Shri Vijay C. Kothari

Date of hearing	:	19.4.2012
Date of Pronouncement	:	30.5.2012

**ORDER**

**PER RAJENDRA SINGH, AM:**

This appeal by the revenue is directed against the order dated 30.7.2010 of CIT(A) for the assessment year 2007-08. The only dispute raised in this appeal is regarding computation of capital gain from sale of flats by the assessee during the year.

2. The facts in brief are that the assessee who was owner of land since 1962 had entered into development cum sale agreement dated 21.2.2001 with a builder M/s. Bhagtani Property Development Pvt. Ltd. as per which the assessee handed over land to the developer for development and construction of flats against agreed consideration of Rs.61.00 lacs and 55% share in built up area amounting to 6147.52 sq.ft. The builder was also required to provide alternate accommodation to the assessee being 4-bed room hall tenement equivalent to Rs.1.00 lacs per month for 30 months to facilitate family of the assessee to stay during the period of construction. There was also provision for sharing of TDR @ 55% if available in future. Subsequently, as per supplementary agreement dated 9.10.2002, the assessee got a sum of Rs.2.5 lacs in lieu of 55% share in constructed basement. The supplementary agreement also provided that in case assessee was able to get property released from C.R.Z, assessee will have share in the additional FSI including TDR FSI @ 55%. Subsequently the property was released from C.R.Z in 2004, and C.R.Z notification was made effective from 2001. The construction of the building was complete during financial year 2004-05. Due to release of property from C.R.Z control, the total permissible FSI had increased to 26040 sq.ft. and consequently 55% share of the assessee had also increased from 6477.35 sq.ft. to 14322 sq.ft. Out of his share

in the constructed property, the assessee sold two flats on 10.4.2006 and 2.5.2006 of 2850 sq.ft. each on 2<sup>nd</sup> floor and 4<sup>th</sup> floor respectively for consideration of Rs.2.72 crores and Rs.2.66 crores respectively. The total sale consideration thus received by the assessee during the year from sale of flats was Rs.5.38 crores.

2.1 The assessee treated income from sale of flats as long term capital gain treating the flats being held since the agreement dated 21.2.2001. From the sale consideration, assessee reduced the indexed cost of 55% share in the land and indexed cost of construction relating to the flats sold. Since land had been held by the assessee since 1962, the cost of acquisition was taken at market value as on 1.4.1981 as per approved valuer report @ Rs.300 per sq.ft. which came to Rs.18,44,100/- and indexed cost was computed at Rs.95,33,997/-. Similarly cost of construction by the builder was determined @ Rs.1,575/- per sq.ft. which came to Rs.96,81,525/- for the assessee's share of 6147 sq.ft. and indexed cost was computed as Rs.1,17,49,647/-. The total cost of acquisition for assessee's share of 6147 sq.ft. thus came to Rs.2,12,83,641/-. Further, since the share of assessee in FSI had been subsequently increased to 14322 sq.ft. assessee spread the cost over the larger area which gave cost of construction at 1486 per sq.ft. Thus, cost of acquisition of two flats (5700 sq.ft.) was computed by the assessee @ Rs.1,486/- per sq.ft.

which came to Rs.84,70,200/-. The capital gain was thus computed at Rs.4,53,29,800/- (53800000 - 8470200). The assessee had made investment in Rural Electrification Corporation Bonds totaling Rs.3,34,10,000/- and therefore capital gain to the above extent was claimed exempt and net taxable gain was computed at Rs.1,19,19,800/- and after deducting legal expenses of Rs.6.00 lacs assessee declared taxable long term capital gains of Rs.1,13,19,800/-.

2.2 The AO did not accept the computation of capital gain made by the assessee as long term capital gains. The AO observed that the assessee had taken possession of the flats as per full occupation certificate issued by Executive Engineer dated 24.2.2005 and therefore, assessee was holding the said flats from the said date and since flats were sold in April/ May, 2006, the period of holding was less than three years and therefore capital gain had to be treated as short term capital gain . The AO therefore, asked the assessee to explain as to why claim of long term capital gains should not be rejected and assessment be made as short term capital gain. The assessee submitted that as per agreement dated 22.2.2001, the assessee had right of claim in flats which was as asset and which was available to the assessee since 21.2.2001. The assessee argued that he was not claiming flats as an asset. The asset in the hands of the assessee was

right of claim in immovable property which he held since 1962. It was also submitted that expenditure incurred between 2002-05 for construction of building and 55% share of the assessee in the said construction was merely cost of improvement of the property. There was no new asset created. It was also pointed out that right of the assessee in the additional FSI consequent to release of property from C.R.Z was also available since 2001 as C.R.Z notification was effective from the year 2001. The assessee referred to the judgment of Hon'ble High Court of Bombay in case of CIT v. Vijay Flexible Containers (186 ITR 693) in support of the proposition. Assessee also distinguished the decision of the Tribunal in the case of Kishore Kanungo (102 ITD 437) referred to by the AO on the ground that the said decision was relevant, only for adopting fair market value as on 1.4.1981. The AO however did not accept the contentions raised. It was observed by him that the construction had been completed only during financial year 2004-05 and occupation certificate issued only on 24.2.2005. Therefore, the flats sold had not come into existence on the date of agreement. The assessee had sold flats which had come into his possession only on 24.2.2005 and, therefore, period of holding could only be reckoned from the said date. The AO therefore, held that the capital gain had to be computed as short term capital gain. The AO further observed that the assessee had declared income only in

respect of sale consideration of Rs.61.00 lacs in assessment year 2002-03 and additional consideration being in the form of cost of construction by the builder to the extent of 55% had not been quantified and taxed in the hands of the assessee on the date of the agreement. The AO therefore, held that no deduction was required to be allowed regarding cost of construction in the hands of the assessee. He thus, treated the entire sale consideration of flats of Rs.5,38,00,000/- as short term capital gain and added to the income of the assessee.

3. The assessee disputed the decision of AO and submitted before CIT(A) that subsequent to development agreement dated 21.2.2001 the assessee had handed over possession of land in August 2001 and therefore, income from transfer of 45% of share in land had been declared by the assessee as long term capital gains in assessment year 2002-03. The sale consideration for this purpose had been taken by the assessee as cash payment at Rs.61.00 lacs and cost of construction of the 55% share of the assessee by the builder @ Rs.1,575/- per sq.ft. aggregating to Rs.96,81,525/- making gross sales proceeds at Rs.1,57,82,360/-. As the land had been held prior to 1.4.1981, the cost of acquisition had been taken at market value of the land as on 1.4.1981 which was Rs.18,44,100/- and after deducting

the indexed cost of acquisition, the long term capital gain had been computed and declared in the Income tax return for assessment year 2002-03. The AO was, therefore, not correct in stating that the assessee had not declared income in respect of sale of land in the relevant year and that no deduction should be allowed in respect of cost of construction against sale of flats. As regards the period of holding, assessee reiterated the submissions made before AO that the assessee had acquired valuable, exchangeable and legally tenable right on signing the agreement to acquire the flats which was a property within the meaning of section 2(14). In pursuance of the said rights, the builder had delivered flats and, therefore, the assessee was holding the flats since the day of the agreement. The assessee placed reliance on the judgment of Hon'ble High Court of Bombay in the case of H.H. Acharya Swami Ganeshdasji vs. DCIT (119 Taxman 146) and the judgment in case of Hilla J. B. Wadia (216 ITR 376) in support of the proposition. In these cases, it was held that in case allotment letter was issued to an allottee under a scheme for allotment of flat, the allottee gets title to the property on the issuance of allotment letter which has to be treated as date of possession of the property.

3.1 After considering the submissions of the assessee, CIT(A) observed that on signing of the agreement on 21.2.2001 the assessee had acquired right for acquisition of the flats which was a property under section 2(14). The cost of the flats acquired was sale proceeds in respect of the land which had been offered by the assessee in the assessment year 2002-03. The CIT(A) has also held that in view of the judgment relied upon by the Id. A.R, the date of booking of the flat had to be considered as date from which property had been held. He accordingly held that holding period in respect of flats sold had to be reckoned from date of agreement i.e. 4.10.2001 as this was the date on which assessee had right in the flats sold. The CIT(A) also observed that in the immediate proceeding year i.e. A.Y 2006-07, the AO had accepted the claim of long term capital gain on sale of flats on identical grounds. The AO had accepted the working of cost of construction and capital gain declared by the assessee in the order dated 18.12.2008 under section 143(3). CIT(A) however observed that in the working of cost of construction, assessee had not taken stilt area of 625 sq.ft. and held that the same should be added to the area available to the assessee and would reduce the cost per sq.ft. to Rs.1,423.86 against Rs.1,486/- claimed by the assessee. There would be thus enhancement @ Rs.62.14 per sq.ft. Subject to the above



CIT(A) allowed the claim of the assessee of long term capital gain aggrieved by which revenue is in appeal before the Tribunal.

4. Before us, the Id. DR appearing for the revenue assailed the order of CIT(A) and strongly supported the findings given in the assessment order. It was argued that the assessee had sold flats in the relevant year and not the interest in the property which had been acquired by him in the year 2001. The flats had been constructed in financial year 2004-05 and assessee had got possession on 24.2.2005. Since the flats had been sold in the year 2006, obviously the gain from sale of flats had to be treated as short term capital gain. It was further argued that on the date of agreement on 4.10.2001, the assessee had only right of acquisition of flats and that limited right had ceased on getting the possession of the flat. The flat was a new asset which had been sold during the year and, therefore, period of holding in respect of flats has to be reckoned from the date of acquiring possession of the flat. The Id. DR placed reliance on the judgment of Hon'ble High Court of Bombay in case of CIT vs. Dr. D.A. Irani (234 ITR 850). He also referred to the decision of the Tribunal in the case of Mrs. Lata Vasudeva in ITA No.2864/M/2009 dated 7.5.2010 for assessment year 2003-04 in support of the case of the revenue.

4.1 The Id. AR for the assessee on the other hand reiterated the submissions made before lower authorities and strongly supported the findings given by the CIT(A). The Id. AR placed reliance on the following judgments in support of the case of the assessee.

- i) 9(I) ITCL 134 (Guj.-HC) CIT vs. Jindas Panchand Gandhi
- ii) 262 ITR 675 (Guj.) CIT vs. Anilaben Upendra Shah
- iii) 11 SOT 594 (Del.) Jitendra Mohan vs. ITO
- iv) Vinod Kumar Jain vs. CIT 46 DTR (P&H)185
- v) 84 TTJ (Mum.)862 ACIT vs. Smt. Hansaben B. Mehta
- vi) 44 TTJ (Ahd.) 68 ITO vs. Smt. Kashmira M. Parikh
- vii) 15(II) ITCL 62(Luck "B" Trib.) Astt.CIT vs. Sharad Thadani

4.2 The Id. AR argued that the judgments relied upon by the Id. Departmental Representative were distinguishable and were not applicable to the present case. Alternatively, it was argued that, in case, claim of long term capital gain was not accepted, the land and building has to be bifurcated for the purpose of computation of capital gain. For this purpose, he placed reliance on the judgment of Hon'ble High Court of Bombay in case of CIT vs. Hindustan Hotels Ltd. (335 ITR 60) and the judgment in the case of CIT vs. Citibank N.A. (261 ITR 570). The Id. AR also submitted that the assessee had given only 45% interest in the land to the developer and 55% of the land remained with the assessee. It was submitted that the capital gain had to be computed separately in case of land and in case of building being flats. It was also argued that in case of computation of capital gain from

superstructures being flats, short term capital gain should be computed @ 15% of the cost of construction as held in the case of CIT vs. Hindustan Hotels Ltd. (335 ITR 60) (supra).

4.3 In reply, the Id. Departmental Representative submitted that the issue of bifurcation of land and building had not been raised by the assessee before authorities below and, therefore, this issue can not be considered at the level of the Tribunal. It was also submitted that the various cases relied upon by the Id. AR related to the flats being acquired as a member of society or under a scheme of government. It was further submitted that the Id. AR had not referred to any judgment related to development agreement and, therefore, cases cited were distinguishable and not applicable.

5. We have perused the records and considered the rival contentions carefully. The dispute is regarding addition made by AO on account of computation of capital gain from sale of flats. The assessee who was owner of the land since 1962 had sold the land as per development cum sale agreement dated 21.2.2001 to M/s. Bhagtani Property Development P. Ltd., a builder. The consideration agreed was a cash payment of Rs.61.00 lacs and 55% share in the built up area to be constructed by the builder amounting to 6147.52 sq.ft. Subsequently, 55% of the share of the assessee was revised to 14322

sq.ft. in view of the property being released from CRZ control. Thus the consideration receivable by the assessee for transfer of 45% right in the land to the builder was payment of Rs.61.00 lacs and cost of construction of 55% of built up area to the builder. Since the possession of the land had been given in August 2001, the assessee had declared capital gain from the transfer of 45% right in land in the assessment year 2002-03, the details of which have been given in para 2.1 earlier. The building had been constructed during the period 2002-05. The assessee had been given possession of the flats vide full occupation certificate dated 24.2.2005. The assessee sold two flats during the assessment year under consideration for aggregate consideration of Rs.5.38 crores on 10.4.2006 and 2.5.2006 with each flat having built up area of 2850 sq.ft.

5.1 The assessee computed the gain from sale of flats as long term capital gain taking holding period from the date of development cum sale agreement. The AO has not accepted the claim of the assessee and has computed capital gain as short term capital gain as the assessee had taken possession of the flats only on 24.2.2005 and therefore, in his view the flats were held only from that date. The case of the assessee is that it had right of claim in the flats since the date of agreement in the year 2001 which was an asset and therefore, it was right of claim in the flats which was sold by the assessee. It has also

been submitted that the expenditure incurred during 2002-05 for construction of building and 55% share of the assessee in the said construction was merely cost of improvement of the asset held by the assessee since 2001. Thus, in the opinion of the assessee the asset had been held for more than 3 years and, therefore, the gain has to be computed as long term capital gain. The assessee has relied on several decisions of the Tribunal and High Courts in support of the plea. On careful consideration of the entire facts and circumstances, we are, however, unable to accept the claim of the assessee. Right to claim the flat as per agreement in the year 2001 was an asset but the assessee had not sold the right to acquire the flats. The assessee had sold the flats of which he was owner. The right to acquire the flats, no longer subsisted once the assessee acquired the flats and took possession of the same on 24.2.2005. The right to acquire the flats and ownership of the flats are two different assets. The assessee had sold the flats and had not transferred the right to acquire the flat which had extinguished. The capital gain had therefore to be computed in respect of sale of flats and not in respect of right to acquire the flats.

5.2 The above view is supported by the judgment of Hon'ble High Court of Bombay in case of CIT vs. Dr. Irani (234 ITR 850). In that case, the flat had been originally taken by the father of the assessee

on lease at monthly rent of Rs.175/- in the year 1962-63. The father of the assessee died in 1974 and, thereafter, the flat was in occupation of the assessee and his mother. In 1976, the ownership of the building was transferred to a society and the assessee and his mother like any other tenant paid a sum of Rs.46,287/- towards purchase price of the flat and became owner of the flat which was earlier occupied as tenant. In the assessment year 1977-78, the assessee and mother sold the flat for a sum of Rs.1,80,000/- and handed over the possession of the flat. The assessee declared capital gain as long term capital gain taking the holding period since 1962-63. The AO computed capital gain as short term capital gain taking the holding period of the flat since 1976. The Tribunal held that the right of occupation and ownership right had to be taken as a composite estate which could not be bifurcated. The Tribunal also observed that, in case, right of occupation was taken as the main estate then bigger estate has to be considered as cost of improvement and in such a case, the holding period has to be reckoned from the date of holding of the main estate but, in case, the bigger estate was taken as main estate, the holding period has to be reckoned from the date of acquisition of bigger estate. Since, these aspects had not been considered by lower authorities, the Tribunal restored the issue to the file of AO for fresh consideration. The assessee filed appeal against the order of the

Tribunal. The Hon'ble High Court observed that the right of occupation or lease hold right did not subsist on the purchase of the flat and was extinguished on that date. In such a case, there was complete union of lessor and lessee which has also been recognized in section 111(d) of the Transfer of Property Act. The Hon'ble High Court accordingly held that the Tribunal was not correct in holding that right of occupation still subsisted after purchase of flat and accordingly it was held that the capital gain had to be computed as short term capital gain. The case of the assessee is similar. The assessee had earlier right to acquire flats which no longer subsisted after flats were acquired by the assessee. The assessee had sold the flats and not its rights to acquire the flat and, therefore, the capital gain in the present case has to be computed in respect of assets being flats.

5.3 The Id. AR for the assessee has placed reliance on several decisions as mentioned in para 4.1 earlier which are distinguishable. In the case of CIT vs. Anilaben Upendra Shah (supra), the assessee had acquired shares of co-operative housing society and allotted flats in 1979. The possession of the flat was obtained in 1981 and flat was sold in Dec. 1982. The assessee declared income as long term capital gain as shares had been held for more than three years whereas the AO computed capital gain as short term capital gain as the possession of the flat had been taken in Oct. 1981. The Hon'ble High Court held

that the members of the co-operative society owned only shares and right to enjoy the land or building belonging to the society was merely an incidental right flowing from ownership of the shares. The assessee could not sell the flat, without selling the shares. It was accordingly held that the capital gain had to be computed as long term capital gain. Same view has been taken in case of CIT vs. Jindas Panchand Gandhi (supra) and Hansaben B. Mehta (supra). These cases are distinguishable and not applicable to the facts of the present case as the assessee in this case has not acquired and sold the flats as a member of a co-operative society. In case of Vinod Kumar Jain (supra), the issue related to sale of flat under self financing scheme of DDA. The period of holding in that case had been reckoned from the date of allotment in terms of Circular 471 dated 15.10.1986 of CBDT. Similar was the case of Jitendra Mohan (supra), in which the assessee had been allotted industrial shed by Delhi State Industrial Corpn. and period of holding had been reckoned from the date of allotment. In these cases, the allotment had been made under the scheme of government which is not applicable to the facts of the present case. In case of Smt. Kasmira P. Parikh (supra), and in case of Sharad Thadani (supra), the flats had been booked with the builder and later sold on taking possession. The Tribunal in these cases held that the period of holding had to be reckoned from the date of allotment and not from



the date of possession of the flat. The decisions of the Tribunal can not be followed in view of the judgment of the Hon'ble High Court of Bombay in case of CIT vs. Dr. D.A. Irani (supra), in which it has been clearly held that the right to acquire the flat is different from the ownership rights and such right does not subsist on acquisition of ownership rights and, therefore, what the assessee had transferred is not the right to acquire the flat but the flat itself. Therefore, as held earlier, the capital gain has to be computed in respect of sale of assets being the flats and not the right to acquire the flats. The argument based on the claim being allowed by the AO in the earlier year cannot be accepted. Each assessment year is independent and the doctrine of *res-judicata* does not apply in income tax proceedings. Merely because similar claim has been allowed wrongly in the earlier year can not be the sole basis to claim benefits in the subsequent year.

5.4 However, we find substance in the alternate plea of the assessee that the right of the assessee in the flats also included the right in the proportionate part of the land as the assessee had transferred only 45% of right/ interest in the land to the builder and 55% of the right/interest was retained by the assessee. Therefore, sale consideration also included price paid in respect of right in the land in addition to price for super structure. We do not find any merit in the argument of the Id. DR that this being a fresh plea should not be

entertained. The entire issue of computation of capital gain is in dispute before the Tribunal and, therefore, all aspects relating thereto have to be considered. The claim of the assessee to bifurcate the capital gain in two parts i.e. one relating to sale of right in the land and the other relating to sale of super structure is quite reasonable and in fact this view is supported by several judgments including that of Hon'ble High Court of Bombay in the case of CIT vs. Hindustan Hotel (335 ITR 60). In that case, the assessee was constructing a hotel building through a contractor during the period 1990-95. The construction could not be completed due to lack of sufficient funds. Therefore, the assessee sold the incomplete project in June 1995 consisting of land and partly constructed building for a sum of Rs.11.00 crores. The assessee declared income as income from capital gain. The AO computed the capital gain as short term capital gain on the ground that the building was under construction and had not been held by the assessee for a period of three years. The Tribunal however held that out of sale consideration of Rs.11.00 crores, only a sum of Rs.2.15 crores could be attributed to the sale of super structure and balance consideration was towards sale of land. After deducting cost of construction of Rs.1.85 crores, the Tribunal held that the gain of Rs.30.00 lacs in respect of super structure had to be assessed as short term capital gain and the balance gain arising from sale of land had to

be treated as long term capital gain. The Hon'ble High Court of Bombay following the earlier judgment in case of CIT vs. Citi Bank N.A. (261 ITR 570) upheld the view taken by the Tribunal, that land was a different asset from super structure and therefore profit from sale of land which was an independent asset had to be computed separately and accordingly bifurcation of capital gain into long term capital gains and short term capital gain was upheld.

5.5 The situation is identical in the present case. In this case, the assessee along with flats had also sold right of the assessee in the land which was an independent asset and which was being held by the assessee since 1962 as an owner. Therefore, following the judgment of Hon'ble High Court of Bombay (supra), the capital gain in respect of transfer of right of assessee in the land has to be computed separately as long term capital gains and gain in respect of sale of super structure has to be treated as short term capital gain. The Id. AR has argued that in case of CIT vs. Hindustan Hotels & Anr. (supra), the gain in respect of super structure had been taken at about 17% and therefore in this case also while attributing the sale consideration towards price of super structure, a margin of 17% on the cost of construction should be adopted. However, we note that in case of CIT vs. Hindustan Hotels & Anr.(supra), the period of construction was 1990-95 and it had been sold soon thereafter in June 1995 whereas in the present

case the period of construction was 2002-05 and flats had been sold in the year 2006. Considering the facts and circumstances of the case, in our view, it would be reasonable to adopt a profit margin of 25% on the cost of construction of the flats to arrive at the sale consideration pertaining to the super structure. The balance sale consideration of the flats will be appropriated towards the sale price for the transfer of right in the land. The capital gain will thus be computed as long term capital gains in respect of transfer of right in the land and short term capital gain in respect of transfer of super-structure of the flats. The assessee will be entitled to the benefit of investment in the Rural Electrification Corporation Bonds under section 54EC in accordance with law. The AO will re-compute capital gain accordingly.

6. In the result, the appeal of the revenue is allowed partly.

**Order pronounced in the open court on 30.5.2012.**

**Sd/-**  
**(VIVEK VARMA)**  
JUDICIAL MEMBER

**Sd/-**  
**(RAJENDRA SINGH)**  
ACCOUNTANT MEMBER

Mumbai, Dated: 30.5.2012.  
Jv.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT(A) Concerned, Mumbai  
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.