

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

BEFORE SHRI D.T. GARASIA (JUDICIAL MEMBER)

AND

SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A. No.2291/Mum/2015
(Assessment year: 2011-12)

Anita D Kanjani 22, Orchid Building, 73G Pali Hill Bandra (W), Mumbai-50	vs	ACIT 23(1), Mumbai
PAN No. AACPK0331Q		
(Appellant)		(Respondent)

Appellant by	Shri Viraj Mehta & Shri Nilesh Patel
Respondent by	Shri Omi Ningshen

Date of hearing : 01-02-2017

Date of order : 13-02-2017

ORDER

Per Ashwani Taneja, AM:

This appeal has been filed by the assessee against the order of the Commissioner of Income-tax (Appeals)-32 [hereinafter called CIT(A)]02-0-2015 passed against the assessment order of the AO u/s 143(3) dated 23-12-2013 for A.Y. 201-12 on the following grounds:-

"That the Learned CIT (A) has erred in confirming and upholding the Addition of Income made by the Assessing Officer on account of wrong

consideration of Long Term Capital Gain as Short Term Capital Gain for Rs.4,76,6331/- is unjustified, unwarranted and bad in law.

That the Learned CIT(A) has erred in confirming and upholding the Period of Holding of the Capital Asset as and from the date of Registration of Agreement [24-04-2008] instead of and in place of the date of the Agreement [28-12-2007], and as such in fact and in law the Long Term Capital Asset held by the Appellant was wrongly considered as Short Term Capital Asset and the same is unjustified, unwarranted and bad in law.

That the Learned CIT (A) has erred in not considering the fact that the rights, title and interest in the property was itself acquired and held from the date of Allotment letter dated 11-04-2005 by the Appellant and as such the Period of Holding and indexation cost were not properly considered.”

2. The solitary issue required to be addressed by us in this appeal is that whether the office unit (flat) sold by the assessee during the year on which long term capital gain was shown in the return was a ‘long term capital asset’ or ‘short term capital asset’ as per section 2(42A) of the Income-tax Act, 1961. The assessee claimed that it was a ‘long term capital asset’ and therefore gain arising there-from was long term capital gain whereas AO was of the view that the said property was ‘short term capital asset’ and thus it gave rise to short term capital gain.

3. The brief background as culled out from the orders of the lower authorities is that during the year assessee sold office unit located at Unit No.107, First Floor, Everest Grande, Village Malgaon, Mahakali Caves Road, Andheri (E), Mumbai. According to the assessee, the asset was held for more than 36 months, therefore, it was ‘long term capital asset’ and, therefore, resultant gain was shown in the return as long term capital gain. During the course of assessment proceedings it was noted by the AO that though allotment of the said office unit was done prior to 36 months from the date of sale but the agreement to sale was registered during the period of 36 months only, therefore, he computed the holding period from the date of registration of the agreement and accordingly it was held that the said asset was ‘short term capital asset’. The AO relied upon the judgement of Hon'ble Supreme Court in the case of M/s Suraj Lamps & Industries Pvt Ltd vs State of Haryana 304 ITR 1

(SC) wherein it was held that transfer of an immovable property is effective only from the date on which it is registered with the Sub Registrar, which is competent authority to register the documents for transfer of immovable properties. Accordingly, the AO computed the period of holding of the asset from the date of registration of the agreement with the office of Sub Registrar and found that the said property was 'short term capital asset'. Consequently, the resultant gain was assessed as short term capital gain.

4. Being aggrieved, assessee filed appeal before Ld. CIT(A) and made detailed submissions to argue the point that the impugned property was held for more than 36 months as per law, therefore, it should be held as 'long term capital asset'. Ld. CIT(A) did not agree with the submissions of the assessee and confirmed the action of the AO. Still being aggrieved, assessee filed appeal before the Tribunal.

5. During the course of hearing, the Ld. Counsel of the assessee made detailed arguments. Twofold arguments were made by him before us. It was firstly argued that period of holding should be computed from the date of allotment of the property as per section 2(42A). In support of his claim, reliance was placed on the following judgments:-

1. Madhu Kaul v. CIT (2014) 363 ITR 54 (P&H HC)
2. CIT v. K Ramakrishnan (2014) 363 ITR 59 (Del HC)
3. CIT v. S R Jeyashankar (2015) 373 ITR120 9Mad HC)
4. CIT v. A Suresh Rao (2014) 223 Taxmann 228 (Kar HC)
5. Vinod Kumar Jain v. CIT (2012) 344 ITR 501 (P&H_HC)
6. CIT v. Jitendra Mohan (2007) 165 Taxman 524 (Del HC)
7. CIT v. Panchand Gandhi (2005) 279 ITR52 (Guj HC)
8. CIT v. Anilaben Upendra Shah (2003) 262 ITR 657 (Guj)
9. Lahar Singh Siroya v. ACIT (2016) 138 DTR 331 (Kar-HC)
10. Vijay Harnilapurkar v. DCIT ITA No.6048/M/2013

11. ACIT v. Vandana Rana Roy ITA No.6173/M12011
12. Meena Hernnani vs ITO ITA No.5998/M/2010
13. Sneha Bimal Parekh v. CIT ITA No.5489/M/2015
14. Surnatichand Tolamal Gouti v.DCIT ITA No.2009/M/2013
15. Circular: No. 471, dated 15-10-1986 162 ITR(St)41
16. Circular : No. 672, dated 16-12-1993 205 ITR(St) 47

6. It was alternatively argued by the Ld. Counsel that in case holding period is to be computed from the transfer of the property, in that case, **'date of execution'** of the sale agreement should be taken as date of transfer of the property because the document registered on a subsequent date operates from the **'date of execution'** and not from the **'date of registration'** in view of clear provisions of section 47 of Registration Act, 1908. Reliance was placed in this regard on the two judgments of Hon'ble Supreme Court in the case of Principal Secretary, Government of Karnataka vs Ragini Narayan (Civil Appeal No.8895 of 2012) dated 20th September, 2016 and Gurubax Singh vs Kartar Singh 254 ITR 112 (SC). It was also submitted that if the holding period is to be computed from the date of execution of the agreement, then, the holding period shall exceed the period of 36 months and the impugned property shall be 'long term capital asset' in the hands of the assessee.

7. Per contra, the Ld. DR relied upon the orders of the lower authorities. It was submitted by him that it has been held by the AO relying upon the judgment of Hon'ble Supreme Court in the case of Suraj Lamps & Industries Pvt Ltd (supra) that holding period should be computed from the date of transfer of the property. He requested for upholding the order of the CIT(A).

8. We have gone through the facts and circumstances of the case, orders passed by the lower authorities, submissions made and judgements relied upon before us by both the sides. The chronology of relevant events in this regard is as under:-

- | | | |
|---|---|------------|
| 1. Date of allotment of office unit to the assessee | - | 11-04-2005 |
| 2. Date of signing of the agreement to sell | - | 28-12-2007 |
| 3. Date of registration of the aforesaid property with
the Registrar | - | 24-04-2008 |
| 4. Date of sale of aforesaid property | - | 11-03-2011 |

The AO has computed the holding period from the date of registration, i.e. 24-04-2008 and accordingly it was held that when the property was sold on 11-03-2011 it was held for less than 36 months and, therefore, it was 'short term capital asset'. On the other hand, assessee has claimed that the property was held by the assessee since when allotment letter was issued to the assessee of the said property, i.e. on 11-04-2005; when the property was duly identified and part payment was made. It was alternatively argued that in any case, if the date of transfer of property is to be taken as the beginning point of holding period, then the date of signing of the agreement i.e. 28-12-2007 should be taken into account and not the date of registration of the agreement in terms of section 47 of Registration Act, 1908 as has also been clarified by the Hon'ble Supreme Court in the above mentioned two judgements.

9. With a view to resolve this dispute, we have firstly analysed the provisions of section 2(42A) which defines 'short term capital asset' as under:-

"Section 2(42A) in the Income- Tax Act, 1961

(42A) "short- term capital asset" means a capital asset **held** by an assessee for not more than thirty- six months immediately preceding the date of its transfer":

Perusal of aforesaid definition shows that the legislature has used the expression 'held'. It is further noted by us that in various other allied or similar sections, the legislature has preferred to use the expression 'acquired' or 'purchased' e.g. in section 54 / 54F. Thus, it shows that the legislature was

conscious while making use of this expression. The expressions like 'owned' has **not** been used for the purpose of determining the nature of asset as short term capital asset or long term capital asset. Thus, the intention of the legislature is clear that for the purpose of determining the nature of capital gain, the legislature was concerned with the period during which the asset was held by the assessee for all practical purposes on *de facto* basis. The legislature was apparently not concerned with absolute legal ownership of the asset for determining the holding period. Thus, we have to ascertain the point of time from which it can be said that assessee started holding the asset on *de facto* basis.

10. It is noted that the letter of allotment was issued to the assessee on 11-04-2005, the letter of allotment makes a mention of the identity of the flat as office unit No.107, located at First Floor of Everest Grande. It also makes a mention that total consideration of the said property is a sum of Rs.29,64,000/- out of which a sum of Rs.5 lakhs was paid by the assessee on 04-04-2005 by cheque No.539104 as part payment against the said office unit. It is further noted by us that **Hon'ble Karnataka High Court** in the case of **CIT vs A Suresh Rao 223 Taxmann 228 (Kar)** dealt with similar issue wherein the significance of the expression 'held' used by the legislature has been analysed and explained at length. Hon'ble High Court analysed various provisions of the Act pertaining to computation of capital gain under various situations and also circulars issued by the CBDT on this issue. Relevant portion of the observation wherein the issue before us has been properly analysed is reproduced hereunder:-

*12. "The definition as contained in Section 2 (42A) of the Act, though uses the words, "a capital asset held an assessee for not more than thirty-six months immediately preceding the date of its transfer", for the purpose of holding an asset, **it is not necessary that, he should be the owner of the asset, with a registered deed of conveyance conferring title on him.** In the light of the expanded definition as contained in*

Section 2(47), even when a sale, exchange, or relinquishment or extinguishment of any right, under a transaction the assessee is put in possession of an immovable property or he retained the same in part performance of the contract under Section 53-A of the Transfer of Property Act, it amounts to transfer. No registered deed of sale is required to constitute a transfer. Similarly, any transaction whether by way of becoming a member of or acquiring shares in a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever, which has the effect of transferring, or enabling the enjoyment of any immovable property, also constitutes transfer and the assessee is said to hold the said property for the purpose of the definition of 'short-term capital gain'. In fact, the Circular No.495 makes it clear that transactions of the nature referred to above are not required to be registered under the Registration Act, 1908. Such arrangements confer the privileges of ownership without transfer of title in the building and are common mode of acquiring flats particularly in multistoried constructions in big cities. The aforesaid new sub-clauses (v) and (vi) have been inserted in Section 2(47) to prevent avoidance of capital gains liability by recourse to transfer of rights in the manner referred to above. A person holding the Power of Attorney is authorized the powers of owner, including that of making construction though the legal ownership in such cases continues to be with the transferor. The intention of legislature is to treat even such transactions as transfers and the capital gain arising out of such transactions are brought to tax. Further, the Circular No.471 goes to the extent of clarifying that for the purpose of Income-tax Act, the allottee gets title to the property on the issuance of the allotment letter and the payment of installments is only a follow up action and taking the delivery of possession is only a formality. In case of construction agreements, the tentative cost of construction is already determined and the agreement provides for payment of cost of construction in installments 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 installments does not affect the legal position. Therefore, in construing such taxation provisions, what should be the approach of the courts and the interpretation to be placed is clearly set out by the Apex Court in the case of Smt. Saroj Aggarwal vs CIT 156

ITR 497 wherein it is held as under:

"Facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Where it is possible to draw two inferences from the facts and where there is no evidence of any dishonest or improper motive on the part of the assessee, it would be just and equitable to draw such inference in such a manner that would lead to equity and justice. Too hyper-technical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered.....Courts should, whenever possible unless prevented by the express language by any section or compelling circumstances of any particular case, make a benevolent and justice oriented inference. Facts must be viewed in the social milieu of a country."

Therefore, keeping the aforesaid principles in mind, when we look at Section 48, the language employed is unambiguous. The intention is very clear. When a capital asset is transferred, in order to determine the capital gain from such transfer, what is to be seen is, out of full value of the consideration received or accruing, the cost of acquisition of the asset, the cost of improvement and any expenditure wholly or exclusively incurred in connection with such transfer is to be deducted. What remains thereafter is the capital gain. It is not necessary that after payment of cost of acquisition, a title deed is to be executed in favour of the assessee. Even in the absence of a title deed, the assessee holds that property and therefore, it is the point of time at which he holds the property, which is to be taken into consideration in determining the period between the date of acquisition and date of transfer of such capital gain in order to decide whether it is a short-term capital gain or a long-term capital gain."

Thus, from the aforesaid judgment, it is clear that for the purpose of holding an

asset, it is not necessary that the assessee should be the owner of the asset based upon a registration of conveyance conferring title on him.

11. Similarly, in the case of **Madhu Kaul** (supra), the **Hon'ble Punjab & Haryana High Court** analysed various circulars and provisions of the Act that on allotment of flat and making first installment the assessee was conferred with a right to hold a flat which was later identified and possession delivered on later date. The mere fact that possession was delivered later, would not detract from the fact that assessee (allottee) was conferred a right to hold the property on issuance of an allotment letter. The payment of balance amount and delivery of possession are consequential acts that relate back to and arise from the rights conferred by the allotment letter upon the assessee.

13. In the case of **Vinod Kumar Jain vs CIT 344 ITR 501** it was held by Hon'ble Punjab & Haryana High Court that conjoined reading of section 2(14), 2(29A) and 2(42A) clarifies that holding period of the assessee starts from the date of issuance of allotment letter. Since allottee gets title of the property on the issuance of allotment letter and payment of first installment is only a consequential action upon which delivery of possession flows. Even if the sale deed or agreement to sell is executed or registered subsequently but the assessee always had a right in the property since the date of issuance of allotment letter. Therefore, it can be said that assessee held the property immediately from the date of allotment letter.

14. In the case of **CIT vs K Ramakrishnan** (supra), **Hon'ble Delhi High Court** analysed the provisions of the Act and held that date of allotment is relevant for the purpose of computing holding period and not the date of registration of conveyance deed. Similarly in the case of **CIT vs S.R. Jeyashankar**(supra), **Hon'ble Madras High Court** took a similar view following the aforesaid

judgment and held that holding period shall be computed from the date of allotment. It is noted by us that similar view has been taken by other High Courts in the judgments which have been relied upon by the Ld. Counsel before us and mentioned in earlier part of our order.

15. In the assessment order, the Ld. AO has placed reliance upon the judgment of Hon'ble Supreme Court in the case of Suraj Lamps & Industries Pvt Ltd (supra) for the proposition that transfer of a property shall be effective only on registration of conveyance deed in view of section 54 of Transfer of Property Act. In our view, it is a settled proposition of law and there is no dispute on that. The absolute legal ownership of an immovable property shall take place in terms of various provisions of Transfer of Property Act which needs to be read with provisions of section 2(47) of Income-tax Act, 1961 for the purpose of computing tax liability arising on account of sale / purchase of immovable properties under Income-tax Act. But the issue here before us is different. As discussed earlier, the holding period is to be determined in terms of section 2(42A) of the Act which has been reproduced and discussed above. The issue of transfer of ownership is not the issue to be decided here for computing the holding period. Therefore, we find that application of the ratio of aforesaid judgment would not be appropriate here.

16. Thus, respectfully following the judgements of various High Courts wherein this very issue has been analysed in detail as discussed above at length, we find that holding period should be computed from the date of issue of allotment letter. If we do so, the holding period becomes more than 36 months and consequently, the property sold by the assessee would be long term capital asset in the hands of the assessee and the gain on sale of the same would be taxable in the hands of the assessee as Long Term Capital Gain. We direct

accordingly.

17. As a result, grounds raised by the assessee are allowed in terms of our directions as given above. However, the alternative issue raised by the assessee is not being adjudicated at this stage.

18. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court at the conclusion of the hearing.

Sd/-

Sd/-

(D.T. GARASIA)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 13th February, 2017

Copy to :

The appellant

The respondent

The CIT(A)

The CIT

The Ld. Departmental Representative for the Revenue, H-Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES