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आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI

श्री शक्तिजीत दे,न्यायिक सदस्य एवं
श्री मनोज कुमारअग्रवाल, लेखा सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ I.T.A. No.6710/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2013-14)

ACIT-25(2) Room No.508, C-10, 5th Floor Pratyakshkar Bhavan Bandra Kurla Complex Bandra (E), Mumbai-400 051	**बनाम**/ Vs.	**Shri Keyur Hemant Shah** 2nd Floor, 15 Jaihind Society 12th Road, JVPD Scheme Juhu-Vile Parle (W) Mumbai-400 049.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AXJPS-8653-D**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Manoj Kumar Singh-Ld. DR
प्रत्यर्थीकीओरसे/**Respondent by**	:	V. Chandrashekhar and Harshad Shah-Ld.ARs.

सुनवाईकीतारीख/ **Date of Hearing**	:	07/03/2019
घोषणाकीतारीख / **Date of Pronouncement**	:	02/04/2019

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member):-

1. Aforesaid appeal by revenue for Assessment Year [in short referred to as 'AY'] 2013-14 contest the order of Ld. Commissioner of Income-Tax (Appeals)-37, Mumbai, [in short referred to as 'CIT(A)'], Appeal No. CIT(A)-

37/IT-886/ACIT-25(2)/15-16 dated 27/09/2017 on following grounds of appeals: -

> *"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition on account of Short-Term Capital Gain stating that the right in a property is created once its title is allotted to the purchaser and more so, if full consideration is paid. As the assessee had received an allotment vide letter dated 26.02.2008 and paid full consideration by 24.07.2008. Therefore, the assessee got the title to the property on the issuance of the allotment letter by the builder / seller."*
> *2. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing the deduction claimed u/s.54F of Rs.l,09,40,072/-, stating that the house was purchased within two years of sale, as required u/s 54F"*
> *3. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the addition was made by the AO because it was clearly mentioned in the 2nd para of the allotment letter that the documents regarding allotment would be executed after the same was stamped by the buyers. As the assessee entered into an agreement for sale (for purchasing the under construction flat) on 25.03.2010 and the period of holding of rights from 25.03.2010 to 04.04.2012 is less than 36 months, thereby making the gain on transfer of rights as Short Term Capital Gain".*
> *4. "On the facts and in the circumstances of the case and in law, the Ld.-CIT(A) has erred in not considering that the allotment letter did not contain the flat number nor any unconditional rights to dispose of the property. It is clear that the allotment letter was only an offer and the right or interest in property was to accrue only on signing and stamping of the agreement. Only the agreement dated 25.03.2010 conveyed the right to acquire the property which was under construction on the date of agreement."*
> *5. "On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in not considering that the assessee had not purchased the new property claimed u/s. 54F, but just made an advance payment to the builder. The assessee had not entered into any agreement with the buyer."*
> *6. On the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in not appreciating the decision of Hon'ble Delhi High Court in the case of Gulshan Malik Vs. CIT in ITA No.55/2014, CM Appl 2383/2014 & 2384/2014 (2014) 43 Taxmann. Com 200 (Delhi)' wherein it was held that a right or an interest in an immovable property can accrue to a buyer only by way of an agreement."*
> *7. "The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

2.1 Facts in brief are that the assessee being *resident individual* was assessed in *scrutiny assessment* u/s 143(3) for impugned AY on

12/02/2016 wherein the assessee's income was determined at Rs.401.78 Lacs after certain adjustments as against returned income of Rs.185.33 Lacs filed by the assessee on 31/07/2013. As evident from grounds of appeal, the subject matter of present appeal is to determine the nature of certain *capital gains* earned by the assessee in the impugned AY and the assessee's eligibility to claim deduction u/s 54F.

2.2 During assessment proceedings, it transpired that the assessee sold a duplex apartment *Flat No.1201 with 4 car parking in the building Natura of Tapovan Cooperative Society Ltd., Santa Cruz (W), Mumbai [flat]* on 04/04/2012 for a sale consideration of Rs.1200 Lacs, the assessee's share being 50% in the same. The assessee after adjusting the indexed cost of acquisition worked out *Long-Term Capital Gains [LTCG]* for Rs.288.73 Lacs and after claiming deduction u/s 54F for Rs.109.40 Lacs against the same, offered balance *LTCG* of Rs.179.33 Lacs to tax.

2.3 It transpired that the said flat was purchased by the assessee vide Registered *Agreement for Sale* on 25/03/2010 and counted from this date, the assessee's holding period was less than 36 months which led to Ld. AO to treat the resultant gains as *short-term capital gains [STCG].* The assessee defended the same by submitting that the said flat was purchased vide *allotment letter* dated 26/02/2008 and substantial payment of Rs.185.50 Lacs was already made by 24/07/2008 and therefore the holding period, as counted from the date of allotment letter, was more than 36 months and therefore the resultant gains were *Long-Term Capital Gains.*

2.4 However, upon perusal of allotment letter as extracted on *para 4.4* of the quantum assessment order, Ld. AO noted that the same did not contain the specific flat number and it mentioned the fact that documents regarding allotment will be executed after the same is stamped by the buyer and therefore, the assessee did not have unconditional right to dispose of the property. Reliance was placed on the decision of Hon'ble Delhi High Court rendered in *Gulshan Malik Vs. CIT [43 Taxman.com 200]* while arriving at the conclusion that it was only the agreement dated 25/03/2010 which conveyed the right to acquire the property in favor of the assessee. It was also noted that the flat was at under construction stage on the date of agreement. Therefore, the resultant gains, in the opinion of ld. AO, were short-term in nature.

2.5 Proceeding further, as a logical consequence to above conclusion, deduction u/s 54F as claimed by the assessee was also denied. Another fact noted by Ld. AO to deny the same was that the assessee merely advanced certain sum of money towards purchase of the new property and did not actually purchased the property. Finally, the gains were treated as *STCG* and the indexation benefit was denied to the assessee. Also, deduction u/s 54F was denied to the assessee.

3.1 Aggrieved, the assessee agitated the same with success before Ld. first appellate authority vide impugned order dated 17/09/2017 wherein it was, *inter-alia,* held that right in the property was created once the title was allotted to the purchaser and the payment of instalment as well as delivery of possession was mere formality. Reliance was placed on *CBDT circular*

No. 471 & 672 to draw the said conclusion. The ratio of the following judicial pronouncement was also considered while forming such an opinion: -

No.	***Case Law***	***Judicial Authority***	***Citation***
1.	*Vinod Kumar Jain Vs. Ld. CIT*	*Hon'ble Punjab & Haryana High Court*	*244 CTR 346*
2.	*Sanjeev Lall Vs CIT*	*Hon'ble Supreme Court*	*365 ITR 389*
3.	*CIT Vs. Vijay Flexible Containers*	*Hon'ble Bombay High Court*	*186 ITR 693*
4.	*CIT Vs Ram Gopal*	*Hon'ble Delhi High Court*	*ITA 70/2015 09/02/2015*
5.	*Snehabimal Vs PCIT*	*Mumbai Tribunal*	*ITA 5489/M/2015*
6.	*Seeta Prabhu Vs ITO*	*Mumbai Tribunal*	*ITA 1020/M/2015*

The case law of *Gulshan Malik Vs. CIT [supra]* was held to be distinguishable on facts since in that case the confirmation letter specifically provided that no right to provisional / final allotment accrues until the buyers' agreement is signed, which was not the case here. Finally, convinced with factual matrix, Ld. first appellate authority, vide *para nos. 5.4 to 5.10* of the impugned order, came to a conclusion that the resultant gains were *Long-Term Capital Gains* in nature, against which benefit of progressive indexation was available to the assessee.

3.2 Regarding assessee's claim u/s 54F, it was noted that the investment in new flat was made on 14/04/2012 which was well within the stipulated time period as envisaged by Section 54F and therefore, the assessee was eligible to claim the said deduction in terms of *CBDT circular No. 471* dated 15/10/1986. Reliance was placed on several judicial pronouncements also to arrive at the said conclusion, which has already been discussed in the impugned order in *para nos. 6.5* to 6.8 of the impugned order. Accordingly, Ld. AO was directed to allow the claim of Rs.109.40 Lacs u/s 54F as claimed by the assessee.

Aggrieved, the revenue is in further appeal before us.

4. The Ld. DR, placing reliance on the cited decision of Hon'ble Delhi High Court in *Gulshan Malik Vs. CIT [43 Taxman.com 200]* supported the stand of Ld. AO by submitting that this decision has already attained finality by way of dismissal of *Special Leave Petition* by Hon'ble Apex Court on 26/10/2015 vide *SLP No. 30670/2014.* On the other hand, Ld. Authorized Representative for Assessee [AR] submitted that the issue stood squarely covered in assessee's favor by catena of binding judicial pronouncements and the cited case law of Hon'ble Delhi High Court was distinguishable on facts. Reliance has been placed on the recent decision of Hon'ble Bombay High Court rendered in *PCIT Vs. Vembu Vaidyanathan [ITA No. 1459 of 2016 dated 22/01/2019],* a copy of which has been placed on record.

5.1 we have carefully heard the rival submissions and perused relevant material on record. Upon perusal, the undisputed facts that emerges are that the assessee has acquired the rights in a duplex flat on 12th & 13th floor front facing the road *admeasuring 1961.75 Square Feets & terrace measuring 881.5 Square Feets* as per the attached layout plan along with 4 car parking in building known as *Tapovan* vide *Allotment Letter dated 26/02/2008* issued by *DSD Builders & Developers Pvt. Ltd.* for total consideration of Rs.371 Lacs. The said allotment is not a conditional allotment and do not envisages cancellation of the allotted property, in any manner. Therefore, the assessee has acquired right in a specific property which is clearly earmarked in the layout plan. The full payment of the same has been made by the assessee by 24/07/2008 which is evident from

assessee's letter containing payment details as placed on page no. 4 of the *paper-book.* Subsequently, agreement of sale has been executed by the builder in assessee's favor on 25/03/2010 which was nothing but mere improvement in assessee's existing rights to acquire a specific property and part & parcel of the same transaction. This being the case, the case laws being relied upon by the revenue do not apply to the factual matrix of the case and therefore, rightly, distinguished by the Ld. first appellate authority.

5.2 We find that the factual matrix of the present case is squarely covered by the recent decision of Hon'ble Bombay High Court rendered in ***PCIT Vs. Vembu Vaidyanathan [ITA No. 1459 of 2016 dated 22/01/2019],*** wherein the issue has succinctly been clinched by Hon'ble Court in the following manner: -

> **2.** This question arises in following background. The respondent-assessee is an individual. The assessee had filed the return of income for the assessment year 2009-10 and claimed long term capital gain arising out of capital asset in the nature of a residential unit. During the course of assessment, the Assessing Officer examined this claim and came to the conclusion that the gain arising out of sale of capital asset was a short term capital gain. The controversy between the assessee and the revenue revolves around the question as to when the assessee can be stated to have acquired the capital asset. The assessee argued that the residential unit in question was acquired on the date on which the allotment letter was issued by the builder which was on 31st December, 2004. The Assessing Officer however contended that the transfer of the asset in favour of the assessee would be complete only on the date of agreement which was executed on 17th May, 2008.
>
> **3.** CIT appeals and the Tribunal held the issue in favour of the assessee relying on various judgments of different High Courts including the judgment of this Court in case of **CIT v. TATA Services Ltd.** [1980] 122 ITR 594/[1999] 1 Taxman 427. Reliance was also placed on CBDT circulars.
>
> **4.** Having heard learned counsel for the parties, we notice that the CBDT in its circular No.471 dated 15th October, 1986 had clarified this position by holding that when an assessee purchases a flat to be constructed by Delhi Development Authority ("D.D.A." for short) for which allotment letter is issued, the date of such allotment would be relevant date for the purpose of capital gain tax as a date of acquisition. It was noted that such allotment is final unless it is cancelled or the allottee withdraw from the scheme and such allotment would be cancelled only under exceptional circumstances. It was noted that the allottee gets title to the property on the issue of

allotment letter and the payment of installments was only a follow-up action and taking the delivery of possession is only a formality.

5. This aspect was further clarified by the CBDT in its later circular No.672 dated 16th December, 1993. In such circular representations were made to the board that in cases of allotment of flats or houses by co-operative societies or other institutions whose schemes of allotment and consideration are similar to those of D.D.A., similar view should be taken as was done in the board circular dated 15th October, 1986. In the circular dated 16th December, 1993 the board clarified as under:

> "2. The Board has considered the matter and has decided that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions are similar to those mentioned in para 2 of Board's Circular No.471, dated 15-10-1986, such cases may also be treated as cases of construction for the purposes of sections 54 and 54F of the Income-tax Act."

It can thus be seen that the entire issue was clarified by the CBDT in its above mentioned two circulars dated 15th October, 1986 and 16th December, 1993. In terms of such clarifications, the date of allotment would be the date on which the purchaser of a residential unit can be stated to have acquired the property. There is nothing on record to suggest that the allotment in construction scheme promised by the builder in the present case was materially different from the terms of allotment and construction by D.D.A.. In that view of the matter, CIT appeals of the Tribunal correctly held that the assessee had acquired the property in question on 31st December, 2004 on which the allotment letter was issued.

Respectfully, following the same, we confirm the stand of Ld. first appellate authority to the extent that the resultant gains were *Long-Term Capital Gains* in nature.

5.3 The only surviving issue is assessee's eligibility to claim deduction u/s 54F. The undisputed fact, in that respect, are that the assessee has made the payment within stipulated time as envisaged by Section 54F and the allotment in a specific property has been obtained by the assessee on 14/04/2012 which is evident from allotment letter as placed on *page nos. 186 to 190* of the *paper-book.* Therefore, since all the conditions of Section 54F was fulfilled by the assessee, there could be no occasion to deny the benefit of deduction to the assessee. Therefore, no infirmity could be found in the impugned order.

6. Finally, the appeal stands dismissed.

Order pronounced in the open court on 02nd April, 2019.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांकDated : 02nd April, 2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि अग्रेषित/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

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उप/सहायकपंजीकार (Dy./Asstt.Registrar)
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