

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

BEFORE SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)
AND
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)

I.T.A No.5083/Mum/2019
(Assessment year: 2013-14)

Anjan Shivraju Prakash A-42, 4 th Floor, Maimoon Apartments CHS, Plot No.78, Palkhi Lane, Prabhadevi, Mumbai-400 025 PAN : ADDPA7615H	vs	Income-tax Officer-16(1)(1) Mumbai
APPELLANT		RESPONDENT

Assessee represented by	Shri Kumar Kale
Department represented by	Shri Chandra Vijay, CIT-DR

Date of hearing	16/02/2022
Date of pronouncement	28/03/2022

ORDER

Per: Gagan Goyal (AM):

This appeal has been filed by the assessee against the order dated 29/05/2019 passed by the Commissioner of Income-tax (Appeals)-4, Mumbai for the assessment year 2013-14 raising the following grounds of appeal:-

“Being aggrieved by the order dated 29.05.2019 passed by the Ld. Commissioner of Income Tax (Appeals)-4, Mumbai ["Ld. CIT(A)"] u/s 250 of the Income-tax Act, 1961 ("Act"), your appellant prefers this appeal, among others, on the following grounds of appeal, each of which is without prejudice to, and independent of, the other:

1.1 On the facts and in the circumstances of the case, and in law, the Ld. CIT (A) erred in confirming the Ld. AO's action of treating the car parking spaces as separate, distinct and independent assets *de hors* the residential flat, and thereby holding the same as short term capital asset, even though the residential flat, to which the same are related, is admittedly long term capital asset, which has been accepted by the Ld. AO. Your appellant submits that the car parking spaces be treated as an integral part of the flat, being the cost of improvement thereof, and sale thereof should be considered as part of the sale of the flat itself for the purpose of computation of capital gains.

1.2 The Ld. CIT(A) thus erred in confirming bifurcation of the capital gain arising on sale of the flat into long term capital gains and short term capital gains, and in confirming assessment of short term capital gains qua the parking spaces. Your appellant, therefore, prays that the addition of Rs. 10, 38, 130/- made as short term capital gains on sale of car parking spaces be deleted.

2. Without prejudice, the appellant further submits that the Ld. CIT (A) erred in not considering the appellant's Ground No. 2. 4 (before him) that dealt with the issue of the Ld. AO taking full consideration of Rs.2,65,00,000/- while computing LTCG of the flat, without deducting there from the amount of Rs. 18, 13,1 30/- being consideration attributed to the car parking spaces, which effectively amounted to double taxation. The appellant, therefore, prays

without prejudice, and in alternative, that the sale, consideration of the flat be reduced by Rs. 18, 13, 130/- in computing LTCG.”

2. The assessee, an individual, derives income from professional receipts, rent, interest and capital gain. For the assessment year under consideration, assessee filed his return of income on 19/08/2013 declaring total income of Rs.12, 23,730. In the course of assessment proceedings, the assessing officer noticed that during the year assessee sold residential flat being Flat No.2001, A-Wing, Sky Flama, Dosti Flamingos, Parel, Sewri, Mumbai (hereinafter called “the flat”) for a consideration of Rs.2,65,00,000/- along with three car parking spaces. The said flat was acquired by the assessee in the year 2007, and thus, admittedly, it is a long term capital asset about which there is no dispute. Further, the assessee had purchased three car parking spaces from the developer, M/s Dosti Corporation; one podium parking was purchased on 15th July, 2010 for Rs.2,50,000/- and two basement parking spaces were purchased on 5th July, 2011 for Rs.5,25,000/-. The payment of Rs.5, 25,000/- is, reportedly, made from the partnership firm, M/s Brown Skin, in which the assessee is a partner. The partnership firm, instead of debiting the capital account of the assessee, accounted the same under the head ‘Car Parking Space at Sewree A/c’ and necessary rectification entry was made in the financial year 2012-13. Thus, the assessee sold the flat along with the aforesaid 3 car parking spaces for an indivisible consideration of Rs.2,65,00,000/-. The assessee computed long term capital gain of Rs.53,47,405/- which was claimed as exempt u/s 54 of the Act as the assessee had purchased another flat for Rs.55,27,120/-. The assessing officer, however, considered the three car parking spaces as short term capital asset since, according to the assessing officer,

the car parking spaces were held by the assessee for less than 36 months before the sale. By doing so, the assessing office made an addition of Rs.10,38,130/-.

3. On appeal, the Ld.CIT (A), on finding that the car parking spaces were purchased independently, upheld the action of the assessing officer.

4. The learned counsel for the assessee before us copy of judgment of Hon'ble Delhi High Court in the case of The Nav Nirman Cooperative Group Housing Society Ltd & Ors vs A.K. Murarka & Ors. In WP(C) No.588/2009 judgment dated 01st October, 2010 to buttress the point that the parking spaces are incidental to the flat. He also relied upon the decision of the co-ordinate bench in the case of ACIT vs Smt. Usha B Madan in ITA No.4528/Mum/2011 dated 13th June, 2012 and submitted that the parking spaces in question is attached with the flat in the society, therefore, should not be considered separately for computation of exemption under section 54F.

5. The Ld. DR, on the other hand put heavy reliance on the orders of authorities below and submitted that the assessee parking spaces under consideration were purchased by a separate instrument. Therefore, it is not right to say that the parking spaces in question are attached with the flat in the society. He prayed that the order of the authorities below may be upheld.

6. We have considered the rival submissions and perused the materials placed on record. The undisputed fact in the present case is that the assessee bought a flat in question was purchased for Rs.1,29,15,665/- whereas the balance-sheet for the year under consideration reflected it at Rs.1,23,90,665/-. When enquired, the assessee explained that the difference of Rs.5, 25,000/- pertains to the cost of two basement car parking sold along with the flat. However, as per the assessee, the partnership firm in which the assessee is a partner debited the amount under the head 'Car Parking Space at Sewree A/c' instead of debiting the account of the assessee. Now, the assessee sold the flat along with the car parking spaces for a consideration of Rs.2, 65, 00,000/- and claimed exemption under section 54F of the Act. The only dispute of the authorities below is that the parking spaces were held by the assessee for less than 36 months; therefore, the profit on sale of the assets would be assessed under 'Short Term Capital Gain' as against the claim of the assessee as Long Term Capital Gain.

7. Be that as it may, we find that the assessee purchased the impugned flat on 22/02/2007 and sold the same on 03/03/2012. The only issue dispute in this appeal is whether the capital gain arose in respect of sale of three car parking spaces could be treated as long term capital gain. The assessing officer held the same as short term capital gain as, in his opinion, the car parking spaces are independent of the flat in question and the assessee sold all three car parking spaces within 36 months of their purchase.

8. It would be relevant to go through facts of the case thoroughly and in that we find that the assessee entered into an agreement dated 15th July, 2010 with M/s Dosti Corporation from whom the assessee purchased flat at Lawrence & Mayo House, 1st Floor, 276, Dr D.N. Road, Mumbai-400 001. The clauses (A) & (B) in the agreement read as below:-

(A) WHEREAS by a Registered Agreement for Sale dated 20.02.2007 (“the said Agreement”), the Purchaser/s has / have agreed to purchase one flat bearing No., 2001 on the 20th floor in the building called Sky Flama (hereinafter referred to as “the said flat”) in “Dosti Flamingos” Project at Sewree, Mumbai at or for the price upon the terms and subject to the conditions more particularly set out in the said Agreement.

(B) AND WHEREAS The Flat Purchasers are desirous of getting the facility of One Car Parking space as facility attached to the said Flat as additional benefit/s attached to it, being use of car parking space Nos. 176 situated under the podium (shortly called “Parking Space”) and has / have offered to give a onetime lump sum fee of Rs.2, 50,000/- (Rupees Two lakhs & Fifty thousand only) to the Promoters to which the Promoters have agreed.”

From a close reading of the above clauses in the agreement entered into by the assessee with the builders, M/s Dosti Corporation makes it clear that the sparking

space No.176 was attached to the flat and therefore, for all purposes, it is part and parcel of the flat in question. So there is no question of treating the parking space No.176 independent of the flat and as a natural corollary, capital gain on sale of flat is long term capital gain which equally applies to the parking space No.176 also. So treating the parking space as distinct from the flat so as to treat the capital gain on sale as short term capital gain is totally unjustified. The objection of the assessing officer that the partnership firm in which the assessee is a partner has, has instead of debiting the account of the assessee, shown the amount under the head 'Car Parking Space at Sewree A/c' has been explained by the assessee that it was an accounting mistake which was subsequently rectified in FY 2012-13.

9. The Hon'ble Delhi High Court in The Nav Nirman Cooperative Group Housing Society Ltd vs A.K. Murarka & Ors (W(PC) No.588/2009, judgment dated 01/10/2009 held that car parking space is incidental to the flat and not independent thereof. The Hon'ble Court also held that enjoyment of the garage can only be an owner / occupant of the flat and not by any third party.

10. Therefore, respectfully following the judgment of the Hon'ble Delhi High Court in the case of The Nav Nirman Cooperative Group Housing Society Ltd vs A.K. Murarka & Ors (supra), **we hold that the capital gain arose on sale of parking space No.176 is a long term capital gain in the form of improvement of asset.**

11. However, in respect of the other two car parking areas, we find that the assessing officer has recorded a clear finding that the assessee himself has accounted the assets in different entities; therefore, the assets are independent of the flat and is distinguishable from the cost of improvement. Further, the parking spaces can be sold and purchased to and from the members of the society independently. Further, as per the books of the firm in which the assessee is a partner, the car parking spaces were transferred to the assessee in the financial year 2012-13 only. Therefore, in our considered opinion, the capital gain arising from the sale of these two car parking spaces is only 'Short Term Capital Gain'. In this view of the matter, we have to necessarily uphold the finding of the learned CIT(A) that the parking spaces are independently identifiable asset on different dates, the capital gain arose from sale of these two parking spaces is 'Short Term Capital Gain'. The assessing officer has rightly assessed the gain as Short term capital gain in the case of other two parking spaces. This ground of appeal is partly allowed.

12. Ground 2 is an alternative ground, as per which, the assessee claims that once the gain arising out of car parking spaces is held as Short Term Capital Gain, then the amount of Rs.18,13,130/-being consideration attributable to the car parking spaces be reduced from the sale consideration of the flat for computing long term capital gain. We find merit in the argument of the assessee. The assessing officer is directed to exclude the amount pertaining to; two other parking spaces from the sale value of the asset for computation of long term capital gain. Ground 2 of the assessee is allowed.

12. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 28th March, 2022.

Sd/-

(SANDEEP SINGH KARHAIL)

JUDICIAL MEMBER

Mumbai, Dt: 28th March , 2022

Pavanan

Sd/-

(GAGAN GOYAL)

ACCOUNTANT MEMBER

/True copy/

Assistant Registrar / Senior Private Secretary
ITAT, Mumbai Benches