

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

BEFORE SHRI PRASHANT MAHARISHI, AM

ITA No. 1687/MUM/2022
(Assessment Year 2014-15)

Dilshad Ahmed Rangrej
E2 Building No. 11, Sai Mahal Chs Ltd,
Sector 48, Seawood, Nerul, Navi
Mumbai-400 706

Vs.

CIT,
National Faceless Appeal Centre,
Delhi

(Appellant)

(Respondent)

PAN No. AFVPR0207E

Assessee by : Sh. Shahank Mehta
Revenue by : Sh. Ujjawal Chavan, SR AR

Date of hearing: 22.09.2022
Date of pronouncement : 19/12/2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee for A.Y. 2014-15 against the appellate order passed by the National Faceless Appellate Centre [The learned CIT (A)] dated 13/03/2022 wherein assessee preferred an appeal against Assessment order passed by the Income Tax Officer 28(1) (3) Mumbai [the Id AO] under Section 143(3) of the Income Tax Act [The Act] dated 20/12/2016 was dismissed. The assessee has preferred appeals on following grounds :

"Being aggrieved by the order of the Assessing Officer, your appellant submits herewith the following grounds of appeal (which are taken up without prejudice to each other) for your sympathetic consideration:

On the facts and circumstances of the case and in law, the learned Assessing Officer has erred in denying deduction u/s 54 to the Appellant by treating the Long Term Capital Gain arising on sale of old property as Short Term Capital Gain without properly appreciating the documents and submissions made by the Appellant during the assessment proceedings.

On the facts and circumstances of the case and in law, the learned Assessing Officer has erred in carrying out addition of ₹31,14,00/- as



Short Term Capital Gain by refusing to consider the holding period of the old property from the date of booking of the said property till the date of its sale without realizing and appreciating that the purchase agreement is nothing but mere confirmation of the terms and conditions of the allotment letter which is issued at the time of booking and hence the period of holding is to be reckoned from the date of the allotment of the property and the said view is judicially recognized by various decisions of Courts and Tribunals.

The Appellant craves leave to (i) add any new ground of appeal and/or (ii) amend, alter or delete any of the above grounds of appeal.”

2. The brief facts of the case shows, that assessee is an individual engaged in the business of Fruit Merchants and Commission Agents. He filed return on 29/11/2014 declaring total income of ₹ 4,99,990/-. Return was picked up for scrutiny.
3. The Assessing Officer noted that during the year assessee has made sale and purchase transaction with respect to the property. He sold a property being flat no. 203 at Laxmi Apartment 04/01/2014 for ₹45,00,000/- stamp duty value of the same was ₹51,91,500/-. The property was acquired by assessee on 23/12/2011 for ₹20,77,200/-. Assessee further purchased a property at flat no E11, Sai Mahal on 20/02/2014 for ₹ 53,30,000/-. While computing the capital gain, assessee has shown long term capital gain of ₹ 9,21,907/- and claimed deduction under Section 54 of the Act. The assessee was examined to justify an applicability of the Section 56 of the Act for the sale of old property and further the claim of the assessee of deduction under section 54 of the Act.
4. Assessee submitted that computation of long term capital gain has been erroneously made and correct tax liability may be determined by applying provisions of Section 50C and deduction under Section 54 may be granted.
5. The Assessing Officer found that the property sold by the assessee is a short term capital gain for the reason that purchase agreement was executed on 23/12/2011, project commencement certificate issued by the municipal Corp. On 12/12/2011. The allotment letter submitted shows that assessee was allotted the property on 2/7/2009, same is the date of purchase of the property taken by the assessee. On that date asset was not at all in existence. Therefore, the property sold by the assessee is not held for 36 months and therefore the gain arising therefrom was a short term capital gain. Hence, the gain is also not entitled for deduction u/s 54 of the act. Further according to the LD AO on 23/11/2011 only Agreement to sale was executed. Assessing Officer examined the relevant documents and found that purchase of property was not in existence on 23/12/2011. The assessee further stated that the builder has given an allotment letter dated 20/07/2009. The learned



Assessing Officer noted that as the property was not existence on that date the allotment letter is meaningless. Therefore, he issued a show caused notice stating that as the property sold is short term capital assets as the deduction under Section 54 is not allowed. The assessee replied on 05/12/2016. He stated that the purchase agreement is registered on 23/12/2011 and allotment letter is dated 20/07/2009. As per the decision of the Hon'ble Punjab and Haryana High Court in Vinod Kumar Jain versus CIT-344 ITR 501 and CBDT Circular No. 471 dated 15/10/1986 the property sold by the assessee is a long term capital gain. The learned Assessing Officer found that the project of construction was commenced only on 12/12/2011; therefore, on 23/12/2011 the above property was not in existence. He also rejected the allotment letter issued by the builder. Accordingly, he computed the short term capital gain of ₹ 31,14,300/- and disallowed deduction under Section 54 of the Act. Thus, assessment order was passed on 20/12/2016 determining the total income of the assessee at ₹ 36,14,219/-.

6. Assessee aggrieved with that order preferred the appeal before learned CIT (A) who confirmed the action of the Assessing Officer by appellate order dated 30/03/2022. Therefore, assessee is aggrieved by the appellant order.
7. The learned authorized representative vehemently submitted that issue is squarely covered in favor of the assessee by the decision of the Hon'ble Bombay High Court in ITA No. 1459 of 2016 dated 22 January, 2019 in case of Principle Commissioner of Income Tax-3, Mumbai versus Vembu Vaidynathan. The learned Departmental Representative vehemently submitted that the same do not applying the case of the assessee as on the date of allotment the property was not in existence at all.
8. We have carefully considered the rival contention and perused the orders of the lower authorities. The only issue in this appeal is whether the date of acquisition of the property is to be considered from the date of allotment issued by the builder. In this case, the fact shows that the letter of allotment was issued to the assessee on 20/7/2009, the project was commenced on 12/12/2011, agreement to sale, was entered on 23/12/2011, therefore, what should be the date of acquisition of the property for the purpose of considering whether the property transferred is a long-term capital asset or Short term capital asset. The claim of the assessee is that date of allotment letter i.e. 20/7/2009 should be the date of allotment/acquisition of the property. The claim of the AO is that the property was not in existence on 20/7/2009, but the construction commenced only on 12/12/2011. Therefore, the date of acquisition of the property cannot be considered of 20/7/2009. Therefore, the learned that AO considered the date of acquisition of property at 23/12/2011 and as the property is sold on 04/01/2014, it was considered as transfer of a short-term capital asset. Accordingly, the deduction u/s 54 on account of purchase of new property on 20/2/2014 was also denied. We find that the issue squarely covered in the favour of the assessee by the decision of the honourable Bombay High Court in



case of principal Commissioner of income tax vs Vembu Vedhyanathan in ITA number 1459 of 2016 dated 22 January 2019[2019] 101 taxmann.com 436 (Bombay) wherein the honourable High Court after considering the circular issued by the central board of direct taxes has held that the allotment letter by the builder is the date of acquisition of the property as the period of holding for the purpose of determining whether the asset is a long-term capital asset or a short-term capital asset, is to be taken therefrom. Honourable Supreme Court has dismissed the special leave petition filed by the by the revenue in [2019] 108 taxmann.com 339 (SC)/ [2019] 265 Taxman 535 (SC). Therefore, we direct the learned assessing officer to consider the date of acquisition of the property sold on 4/1/2014 from the date of allotment letter i.e. 20/7/2009 and consider the asset transferred as a long-term capital asset. Accordingly, the assessee is also eligible for deduction u/s 54 of the act. Hence, allowing ground number 3 - 5 of the appeal, we set aside the issue of computation only to the file of the learned assessing officer.

9. Accordingly, appeal filed by the assessee is allowed.

Order pronounced in the open court on 19/12/2022

Sd/-

(PRASHANT MAHARISHI)

(ACCOUNTANT MEMBER)

Mumbai, Dated: 19/12/2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai