IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : D : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.2145/Del/2023
Assessment Year: 2020-21

Ashish, E-138, Kalka ji, New Delhi – 110 019.	Vs	ACIT, Circle Int. Taxation 1(3)(1), New Delhi.

PAN: AHIPG5987B

(Appellant) (Respondent)

Assessee by	:	Ms Chinu Bhasin, CA & Shri Sagar Rajpoot, Advocate
Revenue by	:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing	:	25.04.2024
Date of Pronouncement	:	27.07.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the Assessee against the order dated 09.06.2023 of the Commissioner of Income Tax (Appeals), Delhi-42, (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.CIT(A), Delhi-42/10626/19-20 arising out of the appeal before it against the order passed u/s 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 (hereinafter referred as 'the

Act'), by the ACIT, Circle Int. Taxation 1(3)(1), New Delhi (hereinafter referred to as the Ld. AO).

2. On hearing both the sides it comes up that admittedly the assessee is a resident of USA. During the year under consideration, the assessee earned rental income, interest income and capital gain/loss from sale of property in India and filed his return of income declaring income of Rs.52,45,610/- and claiming the refund of Rs.58,57,820/-. The Ld. AR has filed a synopsis, on conclusion of the hearing and Ld. DR has primarily relied the findings of Ld. Tax Authorities below.

2.1 During the year under consideration, the assessee had sold two properties, i.e., one, Flat No. 301, Jasmine at Project Omaxe, Forest Spa, Sector-43, Faridabad, ("Faridabad Flat") for sale consideration of Rs.1,95,00,0000/- and second an Apartment No. T-10/412, Project Park Square, Rohtak Road, New Delhi ("Delhi Flat") for sale consideration of Rs.72,36,552/-

2.2 The case of assessee was selected for scrutiny under CASS and the e-assessment was completed whereby the Long term capital loss (LTCL) declared by the Assessee amounting to Rs.70,19,601 was recomputed as short term capital gain of Rs.1,22,72,900, thereby assessing the income at Rs.l,75,18,505. In computing the same, the AO further did not allow credit of certain payment towards cost of acquisition and considered the sale value as Fair Market Value (FMV) computed by the DVO instead of the actual consideration received by the appellant.

2.3 The CIT(A) granted partial relief to the Assessee in terms of allowing the benefit of payments not considered by the Ld.AO towards cost of acquisition as

well considering the actual sale value instead of the FMV (since the sale consideration was as per the stamp duty value and also the variation with FMV was less than 10%). However, the CIT(A) upheld the action of the AO in treating the LTCL as STCG.

3. The assessee is now in appeal before us raising the following grounds:-

> *"On the facts of the case and as per law, The Ld. CIT(A) erred in upholding the nature of Capital Gain as short term without judicially appreciating the facts of the case and the Law.*
>
> *2. The Ld CIT(A) did not appreciate the fact that the appellant was holding right to acquire the property "PureEarth Infrastructure Limited" since 1989 for the purpose of Computing Capital Gain and the same has to be considered as Long Term Capital Gain.*
>
> *3. The Ld. CIT(A) did not appreciate that the fact that the appellant was holding right to acquire the property " Omaxe Azorim Developers Private Limited" since 07.03.2011 till the date of sale dated 23.07.2019 for the purpose of Computing Capital Gain and the same has to be considered as Long Term Capital Gain.*
>
> *4. That the Orders of the Assessing Officers & CIT (A) is highly arbitrarily, capricious, unwarranted and are not based on the facts of the case & as per law and consequently therefore not sustainable as per Law.*
>
> *That the appellant craves leave to add, amend or alter any of the grounds of the appeal."*

4. As with regard to **Faridabad Flat,** the Ld. AR has submitted that the Faridabad Flat was booked in the year 2010 in the name of Ashish Gupta and Sushma Gupta (mother of the Assessee). On 21.02.2011, Mrs. Sushma Gupta assigned all her rights in the favour of Mrs. Shakuntala Gupta (grandmother of the Assessee) and the Assessee. Copy of the endorsement form is enclosed at Paper

Book page 99-100. Subsequently, on 07.03.2011, the developer, 'Omaxe' executed the allotment letter in favour of Sushma Gupta and Ashish Gupta. Copy of the allotment letter is enclosed at Paper Book page 102-120. The allotment was endorsed in favour of Shakuntala Gupta and Ashish Gupta. The Possession was given to Mrs. Shakuntala Gupta (grandmother) and Ashish Gupta (assessee) on 25.09.2017. Copy of the certificate of acknowledgement of Possession is enclosed at Paper Book Page 121-122. On 27.07.2018, Mrs. Shakuntala Gupta got deleted her name from the property and gifted it to Assessee (Ashish Gupta). Copy of the name deletion form is attached at Paper Book page 123-124. Accordingly, Ashish Gupta (Assessee) became the 100% owner of the property since his family members gifted the same to him. The Assessee sold the property to third party on 22 July 2019 for a consideration of Rs.1.95 Cr.

4.1 The Assessee claimed long term capital loss on the said property on the basis that same was held by him and his mother/grandmother from FY 2010-11 who subsequently assigned their rights in favour of the Assessee. The entire assignment of property from his mother/grandmother were from his blood relationship out of natural love and affection, hence the period of holding as well as cost of the previous owner ought to be considered. Ld. AR has submitted that in case of gift the price paid by the donor as well as the holding period of the previous owner is considered for the purpose of computing the capital gain. Reliance is placed on Explanation 1(b) to section 2(42A) of the Act, to submit that same provides that in the case of a capital asset which becomes the property of the assessee in the

circumstances mentioned in sub-section (1) of section 49 [i.e. in case of gift], there shall be included the period for which the asset was held by the previous owner referred to in the said section. Thus, where an asset is acquired by gift, the period of long term capital asset shall be reckoned from the date when the previous owner acquired such asset and the indexation shall be allowed accordingly from the year of acquisition by the previous owner. .Further reliance is placed on section 49(1) of the Act, also provides that in such cases the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it. Thus, the cost of acquisition of the donor shall be considered in case of gift. Reliance in this regard is placed on the following judicial precedents:

- **DCIT Vs. Manjula J.Shah 318 ITR (AT) 417 (Mumbai, Special Bench)**
- **ADIT vs. Charanjit Kaur Bawa I.T.A .No.4226/Del/2011 (Delhi IT AT)**

4.2 The AO however was view that the Certificate of Acknowledgement of Possession clearly states the name of purchasers as Shakuntala Gupta and Ashish Gupta. Thus, as per documentary evidence submitted by the assessee himself, as on 25.09.2017 the property is held by both Shakuntala Gupta and Ashish Gupta. Thus, any transfer of the said share of property/ rights in the property would only have been done after 25.09.2017. Thus, the transfer of the said share in the property under consideration to the assessee could only have happened after 25.09.2017. Ld. AO also observed that as the details regarding the nature of the said transfer have not been shared by the assessee and hence, the date of acquisition of the said share of property in the hands of the assessee cannot be ascertained but as per the

discussion above, it can only be after 25.09.2017. Thus, the gain arising from sale of said share was treated as short term capital gains. The Ld.CIT(A) observed, that the possession of the flat was obtained in 2018 and the flat was sold on 23.07.2019. and as it is trite that before possession, it was only a booking thus, only a right to receive the flat. However, what the appellant has transferred is the flat which he possessed only from 2018. Thus, the property has to be considered as acquired on the date of possession and thus, is a short-term asset not entitled for indexation of cost of acquisition while computing capital gain.

5. We are of considered view that the transaction of gift is not regarded as transfer and accordingly capital gain arising from such transfer is not made chargeable to tax u/s 45. However, this capital gain by implication is brought to tax at second stage when capital asset becoming the property of the assessee under gift is subsequently transferred by him by adopting the date and cost of acquisition of the capital asset of the previous owner as the date and cost of acquisition of the assessee. This precisely is the scheme of the Act as laid out in the relevant provision. Under similar circumstances, Special Bench of Mumbai in the case of **Manjula J. Shah (supra)** has held that for the purpose of calculation of indexed cost, the index cost will be taken from the previous year in which the previous owner had become the owner of the property. The AO has placed only on the document disclosing the possession and ignoring the gift altogether.

6. As with regard to **Delhi Flat,** Ld. AR has submitted that the Assessee made booking of a flat in his name with Ansal DCM Properties in the year 1989. Copy of

receipt of booking made in 1989. Subsequently the project was stopped by the builder and later the other builder, Purearth Infrastructure, by the order of the High Court took it over in 2005 restarting the project. In 2014, Assessee's sister, Purnima Gupta transferred her booking to the Assessee. Copy of the letter issued by the builder Purearth changing the registrant name from Purnima Gupta to Ashish Gupta is enclosed at PaperBook page 71-72. The Assessee paid Rs.8,25,000 to her sister in 2014 and considered the indexation from 2014 when the amount was paid to her sister. Thus, the Assessee got booking/provisional allotment in two units 13-002 and 13-003 one which belonged to him and the other one from her sister. Since the Assessee got two bookings in small flats after transfer from her sister, he swapped the same with booking in one bigger unit. In the year 2018, the Assessee changed the booking of two small units (13-002 and 13-003) to booking in one bigger unit (110-412). Copy of the letter issued by the builder Purearth dated 15.09.2018 changing the booking of flats is enclosed at PaperBook Page 73. The amount paid towards the cost of the two units Rs.40 Lacs was adjusted towards the value of the new unit of Rs.58 Lacs and the balance payment was asked to be deposited.

7. Ld. AR has submitted that the swapping of booking amount paid in two smaller units with another bigger unit with the same builder did not result in any transfer of capital asset as the rights in the said flats (capital assets) were not 'held" by the Assessee by that time. The Assessee merely has done a booking in the under- construction flats and made proportionate payments. It is only after the

letter of allotment dated 15.09.2018 was executed vesting the rights in the Assessee in the new flat i.e. T10-412, the rights actually vested in the flat.

8. It was submitted that pursuant to the allotment on 15.09.2018, the builder buyer agreement for flat T10- 412 was registered on 29.10.2018. Copy of the agreement is enclosed at PaperBook page 76-80. It was submitted that no such allotment or builder buyer agreement was executed before that for the two smaller units, thus, the booking in the two units was just provisional allotment wherein no rights ever were vested with the Assessee for those two units and hence, no transfer of capital asset was affected in 2018 when the two small units were swapped for the bigger unit.

9. It is submitted by Ld. AR that the capital asset came into existence only after the unit T10-412 was 'held' by the Assessee i.e. the allotment was done in favour of the Assessee in 2018. Accordingly, the Assessee reflected the transaction of sale in its return of income only in 2019 when it sold the allotment in unit T10-412 which was actually allotted to him. In this context it was submitted that the provisional allotment of the two smaller units were cancelled and as such that should not be considered as allotment finalized but only the allotment of the unit T10-412 which was actually executed be considered as the date of allotment and the capital asset actually held by the Assessee. The assessee did not affect the transfer in 2018 since the provisional allotments two smaller units were cancelled and the allotment in one bigger unit T10-412 identified by the Assessee was finalised and the agreement was executed to this effect vesting the right with him. That is the time

when the capital asset was actually held by him. Thus, the Assessee held the property only after allotment of unit T10-412 when his rights became finalized post entering into the allotment 28.10.2018, The cancellation was not considered as transfer as at that time the capital asset was not held by the Assessee since the two smaller units were merely provisional allotment. Ld. AR has submitted that since the cost of the two units was adjusted with the new unit and the Assessee was asked to pay the balance amount, it was considered a continuing transaction of purchase of the new unit wherein the Assessee cancelled his provisional two units and finalized one bigger unit. Accordingly, the Assessee offered the capital gain to tax after the final allotment made to him was sold to the third party in 2019. Ld. AR submitted that the Assessee claimed the period of holding and indexation from the payment date since the Assessee was making payments from a long time since 1989 however he has claimed the indexation from FY 2008-10 and the subsequent years when the payments were actually made by him. Thus Ld. AR submitted that benefit of indexation ought not to be denied to the Assessee merely because the allotment was finalized in 2018 as substantial payments were made by the Assessee before that time.

10. Ld. AR also relied the various judicial precedents to claim long term capital gain claiming indexation on payment basis and we consider it relevant to mention decision in **Praveen Gupta vs ACET (ITA No.2558/Del/2010) Delhi ITAT,** where too claim was of indexation from the date of payments. Relevant extract as under:

"Therefore, it has to be seen that whether by entering into an agreement vide which the assessee was allotted a particular flat by allotment letter whether the assessee has held any asset or not? By entering into an agreement to allot a flat, the assessee has identified a particular property which he is intended to buy from the builder and the builder is also bound to provide the applicant with that property by accepting certain advance amount and making agreement for balance payment as scheduled in the agreement. Thus, going into the provisions, it is not necessary that to constitute a capital asset the assessee must be the owner by way of a conveyance deed in respect of that asset for the purpose of computing capital gain. The assessee had acquired a right to get a particular flat from the builder and that right of the assessee itself is a capital asset. The word 'held' used in Section 2 (14) as well as Explanation to Section 48 clearly depicts that assessee must have some right in the capital asset which is subject to transfer. By making the payment to the builder and having received allotment letter in lieu thereof, the assessee will be holding capital asset and, therefore, the benefit of indexation has to be granted to the assessee on the basis of payments made by him for acquiring the said asset and the assessee has rightly claimed the indexation benefit from the dates when he has made the payments to the builder. Therefore, we see force in the claim of the assessee. The Assessing Officer is directed to provide the be the benefit of indexation to the assessee in the manner in which the assessee has claimed"

11. We have taken into consideration the above facts and what we observe from the order of the CIT(A) is that the swapping of two units T3-002 and T3-003 for one unit of T10-412 is considered as an exchange and, accordingly, in paras 10.1 to 10.6, the CIT(A) has observed as follows:-

"10.1 The appellant has contended that the previous owner Mrs. Sushma Gupta (mother) had booked the property at Faridabad on 21.02.2011. The same was transferred to the appellant on 25.09.2017. The appellant contends that the property should be considered as acquired on the date of booking and thus, should be considered as

long-term asset entitled for indexation of cost of acquisition while computing capital gain.

10.2 It is observed that the possession of the flat was obtained in 2018 and the flat was sold on 23.07.2019.

10.3 It is trite that before possession, it was only a booking thus, only a right to receive the flat. However, what the appellant has transferred is the flat which he possessed only from 2018. Thus, the property has to be considered as acquired on the date of possession and thus, is a short-term asset not entitled for indexation of cost of acquisition while computing capital gain.

10.4 Similarly, initially two flats were booked in 1989 in Project Park Square, New Delhi. These two units were cancelled on 15.09.2018 and a bigger unit was purchased in lieu of the same. The builder adjusted all the payments of the old units towards the new flat. This flat was sold on 10.09.2019.

10.5 It is undisputed that the flat subject matter of capital gain was acquired on 15.09.2018. In 2018, the appellant had exchanged this flat for two previously booked flats. However, no capital gain arising on exchange of flats was offered for taxation. What the appellant has transferred is the flat which he acquired only in 2018. Thus, the same is a short-term asset not entitled for indexation of cost of acquisition while computing capital gain.

10.6 In view of above discussion, it is concluded that the capital gain arising on transfer of two flats was short-term capital gain. No indexation is to be allowed on cost of acquisition."

12. In this context, if we consider the letter dated 15.09.2018 issued by the builder Pureearth Infrastructure Ltd., it comes up that the request of the assessee for change of apartment, location and size/area was considered under some discussions and subsequently T10-412 was allotted the value of which was Rs.47,63,378/- for the unit, Rs.6 lakh for one car parking and Rs.5 lakh for the club membership. The builder had adjusted Rs.40,36,702/- received earlier for the units

T3-002 and T3-003. Then, as we take into consideration the agreement dated 29.10.2018 by which the builder Pureearth Infurastructure Ltd. along with promoter Basant Projects Ltd., had entered into agreement to sell, it comes up that consequent to a settlement agreement executed between DCM, Pureearth and Flat owner association on 10th May, 2003 before the Hon'ble Delhi High Court, Pureearth had acquired development rights and Pureearth had further entered into a join development agreement with Basant Projects Ltd. and DCM for development and construction of the said land. The agreement has reference to earlier allotted apartments which meant 'the booking of space or area or unit or apartment already made to old flat buyers through erstwhile builders, DCM and Pureearth in the project'. It further comes up that the amount of Rs.40,36,702/- already paid were adjusted as a consideration.

13. Thus, we are of the considered view that Pureearth, was a successor in interest of Ansal-DCM properties and the builder-buyer agreement dated 29.10.2018 as executed was not a fresh agreement of allotment or an exchange deed, but, the assessee as a vendee and the Pureearth and Basant as promoters had only redefined and fortified their respective rights and corresponding liablites, arising from the booking of a flat initiated with Ansal-DCM properties in the year 1989.

14. The CIT(A) had fallen in error in considering the acquisition of flat T10-412 as an exchange without appreciating that for a transaction to fall into the category of exchange, there should be in existence properties which is not established and

further builder-buyer agreement specifically mentions that due to change in the area and location, the consideration amount is increased and the amount already paid for erstwhile units were adjusted. So, the transaction is not at all of nature of exchange.

15. Thus, we are of the considered view that date of acquisition of property has to be reckoned from the date of allotment by Ansal-DCM properties in the year 1989. Thus, the tax authorities have fallen in error in considering the income as short-term capital gain.

16. In the light of the aforesaid, the grounds raised are allowed and the appeal of the assessee is allowed with consequential effects.

Order pronounced in the open court on 27.07.2024.

Sd/-	Sd/-
(G.S. PANNU) VICE PRESIDENT	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated:27th July, 2024.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi