**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"A" BENCH, MUMBAI**

**BEFORE SHRI KULDIP SINGH, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO. 645/MUM/2022 (A.Y: 2013-14)**

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| M/s. Sumit Export<br>DW-5030, 5th Floor<br>D.Tower, Bharat Diamond Bourse<br>Bandra Kurla Complex<br>Bandra (E), Mumbai -400051<br><br>**PAN: AACFS3599Q** | *v.* | ACIT – 19(3)<br>Matru Mandir, Tardev Road<br>Mumbai – 400 007 |
| **(Appellant)** | | **(Respondent)** |

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|---|---|---|
| **Assessee Represented by** | **:** | **Shri Rahul Sarda** |
| **Department Represented by** | **:** | **Shri Manoj Sinha** |
| | | |
| **Date of Hearing** | **:** | **29.08.2022** |
| **Date of Pronouncement** | **:** | **10.11.2022** |

**O R D E R**

**PER S. RIFAUR RAHMAN (AM)**

**1.** This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax, National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 11.03.2022 for the A.Y. 2013-14.

**2.** Brief facts of the case are, assessee filed its return of income on 28.09.2013 declaring total income of ₹.1,67,34,250/-. The return was

processed u/s. 143(1) of Income-tax Act, 1961 (in short "Act"). Subsequently case was selected for scrutiny under CASS and notice u/s.143(2) and 142(1) of the Act were issued and served on the assessee. In response AR of the assessee attended and submitted the relevant information as called for.

**3.** Assessee is engaged in the business of manufacturing and trading in Cut and polished diamonds. During the assessment proceedings, Assessing Officer observed that vide Sale Deed dated 19.05.2012 assessee entered with M/s. Veer Gems and sold the office premises bearing No. BC4021 in Bharat Diamond Bourse, Bandra Kurla Complex for a consideration of ₹.1.93 crores. He observed that assessee has declared the computation of income under the head Capital gain relating to above sale transaction as under: -

| Transfer Price | 1,93,00,000 |
|---|---|
| Indexed cost of acquisition (32,91,000*852/351) [1998-99] | 79,88,410 |
| Indexed cost of improvement (1,62,000*852/447) [2002-03] | 31081779 |
| Indexed cost of improvement (2,43,000*852/463) [2003-041 | 447,162 |
| Indexed cost of improvement (4,86,000*852/480) (2004-05) | 862,650 |
| Indexed cost of improvement (3,97,000*852/497) [2005-061 | 509,143 |
| Indexed cost of improvement (9,64,800*852/519) 12006-07] | 1,583,834 |
| Indexed cost of improvement (1,35,000*852/389) (1999-2000] | 295,681 |
| Long Term Capital gain | 73,04,341 |

**4.** Assessing Officer observed that as per the working submitted by the assessee, assessee has shown acquisition of property in Financial Year

1998-99 and in subsequent few years assessee has carried out improvement in the property. However, he observed that when pursing the sale agreement, he observed that the assessee had received allotment of the above said premises only on 29.07.2010 as such the asset so transferred becomes short term capital asset on the date of transfer i.e.,19.05.2012. Therefore, the capital gain on sale of this asset would constitute short term capital gain. Accordingly, the assessee was asked to why the premises so transferred should not be treated as short term capital gain. In response, assessee vide letter dated 15.03.2016 submitted as under: -

> *"5. During the year under consideration your assessee had sold the office premises in Bharat Diamond Bourse, Bandra Kurla Complex, Bandra (East), Mumbai-400051 for Rs. 1,93,00,000/ The Booking of the same was done in the year 1998-99 for Rs.32,91,000/- and right to have office premises was created. There after instalments were paid on various dates and cost of improvements were done to that right. As the right in the asset was created in the year 1998-99 and the question arises that weather night to own property is a capital asset or not? The answer to this question has been given by Hon'ble Mumbai High court with reference to capital asset as defined u/s. 2(14) of the IT Act in the case of CIT vs Tata Teleservice Ltd 1221TR 594 and has held as follows:*
>
> *What is a capital asset is defined in section 2(14) of the IT. Act, 1961. Under that provision, a capital asset means property of any kind held by an assessee, whether or not connected with his business or profession. The other sub-clauses which deal with what property is not included in the definition of capital asset are not relevant. Under section 2(47), a transfer in relation to a capital asset is defined as including the sale, exchange or relinquishment of the asset or the astonishment of any night therein or the compulsory acquisition thereof under any law. The word "property", used in section 2(14) of the I.T. Act, is a word of the widest amplitude and the definition*

*has re-emphasised this by use of the words "of any kind. Thus, any right which can be called properly will be included in the definition of "capital asset". A contract for sale of land is capable of specific performance. It is also assignable. (See Hochat Kizhakke Madathil Venkateswara Aivar v. Kallor Illath Raman Nambudhri, AIR 1917 Mad 358). Therefore, in our view, a right to obtain office premises, was clearly "property" as contemplated by section 2(14) of the I.T. Act, 1961. Other case law on the same issue favoring the above views of Bombay High Court are as follows*

1. *CIT v. Sterling Investment Corpn. Ltd. [1980) 103 ITR 441 (Bom.).*
2. *ITO v. Smt. Kashmiralien M. Parikh (1993) 66 Taxman 31 (Ahd.) (Mag.*
3. *Tribunal order in ITA No. 3923 (Mum) of 2002 for assessment year 1995-96 in the case of Mrs. Manju Agarwal v. Asstt. CIT, Mumbai C Bench order dated 16-9-2004*
4. *Jitendra Mohan v. ITO [2001] 11 SO 1 594 (Dell).*
5. *CIT vs Jindas Parchand Gandhi (2005) 279 ITR 552 (Guj)*

*In our case as allotment letter issued by the BDB in the year 1998-99 gives us the right to obtain office premises so it become an assets under section 2 (14) of the Income Tax Act. 1% 1.*

*Whether Gain on sale of Flat will be short Term or Long Term?*

*An asset which is held for 36 months is a long term asset.*

*Whether it is held for 36 months?*

*Once the right to purchase (ie obtain office premises) proved to be an asset, it is to be seen when was this right vested in the purchase.*

*Hon'ble Andhra Pradesh High Court in the case of M. Syamala Rao v. CIT/1998/234 ITR 140 held that registration of a document related back to the day on which the agreement of sale was executed, hence, when the builder executed the agreement of sale on 7-8-1993, the assessee was to he deemed to be owner of property from that dale and accordingly, the capital gain was to be worked out.*

*The date of allotment is the date when the right of conveyance get tested. So if there is difference of 36 months in this date and date of sale, then it can be considered that the said asset was a long term asset and gain on sale of such asset was "Long Term Capital Gains In our case, the allotment year was 1998-99 and as such on the date of sale, this right was held tor more than 36 months so gain on sale of Flat will be Long term Only.*

*How Indexation is to be done?*

*The issue gets settled by Mumbai Tribunals decision in case of Suit, Lata G. Rohra v. Deputy Commissioner of Income-tax, C.C. 39, Mumbai 12008 21 SOT 541 (Mum.) where is the facts of the case were as under*

*FACTS*

*The assessee vide unregistered agreement with a developer purchased a flat in 1993 which was constructed in the year 1997 and registered in the year 1998. During the relevant year, the assessee sold said flat and after claiming the indexed cost at Rs. 18.74 lakhs showed long-term capital gain at Rs. 39.42 lakhs. The Assessing Officer worked out indexed cost of acquisition on the basis of purchase price from 1993 and completed the assessment. However, the Commissioner was of the view that the assessee had not tiled any evidence with respect to various payment made towards the purchase price and the indexed cost of acquisition worked out on the basis of financial year 1993 was incorrect and, hence, the assessment order was erroneous and prejudicial to the interest of revenue. Accordingly, he initiated revision proceedings under section 263.*

*The Commissioner, however, set aside the order of Assessing Officer and directed the Assessing Officer to compute the correct long-term capital gain by adopting the indexed cost of acquisition on the basis of the date on which the property was held after registration of the conveyance deed.*

*In instant appeal, the assessee contended that she was deemed to be owner for property from 7-8-1993 and accordingly, the capital gain was to be worked out from that date as per Explanation (Hi) to section 48. and since the asset had been held for the first time in 1993 cost inflation index of that year was to be applied on the total purchase consideration pavable by the assessee as per agreement regardless of the dates of the actual amount paid by her.*

***HELD***

*As per section 2(14), read with section 2(14)(i), the rights in flat, acquired by the assessee on execution of agreement on 7-8-1993, came within the purview of the term capital asset. From the perusal of language used in Explanation (i) to section 48, which provides for manner of computation of indexed cost of acquisition, it is apparently clear that it refers only to date of cost of acquisition of the asset and not actual payments made by the assessee. Hence, there was no merit in the contention of the revenue that the benefit of indexation should he gen on the basis of dates of actual payments made by the*

*assessee. Thus, on merits, the issue was covered in favour of assessee. However, regarding jurisdiction for invoking the provisions of section 263, it was found that the assessee fled necessary details before the Assessing Officer and the Assessing Officer had passed assessment order after taking into consideration the same. Hence, merely for the reason that no specific findings had been given in the assessment order, the same could not be said have been passed without application of mind. In his view of the mutter, the order under section 263 passed by the Commissioner was to be set aside. [Para 9) In the result, the appeal filed by the assessee stood allowed. Para 1 Of*

*So in our case we will take the index of the year in which Assessee receives allotment letter of the Flat ie 2007-08. In respect of Stamp Duly, Registration Charges, Society Deposits we will take index of the year of payment. If Assessee has incurred any other expenses in respect of Purchase of property in addition to these in respect of those expense also toe take index of the year of expense for calculation of Long Term Capital Gain as what tribunal has staled above is cost of acquisition i.e. Rs. 42.16 lakh which should be taken to compute the long term capital gains as the word used in Explanation to section 48 mentions "Cost of acquisition and not the actual payments.*

*Here we would also like to refer judgment of Delhi ITAT in the case of Praveen Gupta vs ACITITA No. 2558/Del/2010: Asst. Year 2007-08 in which Honourable ITAT has taken indexation on the basis of Payment made by the Assessee but since Assessee is based in Muhu so for us ITAT Mumbai Judgment is more relevant and at the same time same is more beneficial to us too.*

*All the relevant documents to prove our contention was filed before your good self kindly take into consideration the above facts and various judgments by Hon'ble high courts and tribunals and allow the long term capital gain and allow the claim of your assessee."*

**5.** After considering the submissions of the assessee, Assessing Officer rejected the same by observing as under: -

*"8. To summarize the matter, the assessee had transferred an office and 892 equity shares allotted to it by Bharat Diamond Bourse on 19.5.2012. This office and also the shares were allotted to him by Bharat Diamond Bourse only On 29.7.2010. Although the assessee has contributed to the funds of Bharat Diamond Bourse against which a provisional allotment of office space was made to it, it must*

*be borne in mind that no right was created in any office space primarily because no office space was into existence at the time of contribution of funds by the assessee and secondarily because the office complex so built up by Bharat Diamond Bourse was itself taken on lease by them from MMRDA on 31st March, 2010. Thus, the rights cannot be created in a property which is to be constructed in future or which is not even owned by the original transferor. The only right which could generate in respect of payment made for such property is the right to receive back the said payment. This right is the personal right of the assessee over the money it advanced to Bharat Diamond Bourse and not the right over any property as such. The assessee's right over the property came on the date of its allotment by Bharat Diamond Bourse, or at best at the time when the complex was leased by MMRDA to Bharat Diamond Bourse. In any event, the sale of the office space and also the sale of Shares BKC were made by the assessee before the lapse of 3 years from their Allotment to the assessee. Hence, the sale consideration thereof would constitute Short Term Capital Gain as against the Long Term Capital Gains as held by the assessee. Moreover, it is also seen that two parking spaces and 200 equity shares were also allotted to the assessee as against the contribution paid by it to Bharat Diamond Bourse. These Parking Spaces and corresponding 200 shares were not transferred by the assessee to M/s. Veer Gems. However, at the time of computation of Capital Gain, entire payments made to BKC has been taken as cost of acquisition. Hence, the corresponding cost of parking equivalent to 200 equity shares will not be allowed. This cost would come to (200*5578800/1092=) 10,21,758/-, which is disallowed from the total cost of acquisition of Rs. 55,78,800/- as taken by the assessee. Penalty proceeding u/s 271(1)(c) is being initiated separately hereby for concealment of particulars of income and for filing inaccurate particulars of income."*

**6.** Aggrieved assessee preferred an appeal before the Ld.CIT(A) and before the Ld.CIT(A) assessee filed detailed submissions before him. For the sake of clarity, it is reproduced below: -

*"Your appellant is a partnership firm carrying on the business of manufacturing and trading of cut & polished diamonds during the year under consideration. The appellant filed his return of income declaring total income of Rs. 1,67,34,250/- on 28/09/2013. The case was selected for scrutiny under CASS Subsequently, Notice u/s.143(2) of the Income Tax Act. 1961 ACIT-19(3), Mumbai (Hereinafter referred as "Assessing Officer") dated 03/09/2014 was*

*issued and Order under section 143(3) of the Income Tax Act, 1961 passed determining the Total Taxable Income at Rs.2.41,72,865/- on 28/03/2016*

*While completing the assessment, the assessing officer had made addition of Rs. 74,38.617/-ie.(1.47.42.958-73,04,341) which constitutes difference in the nature of capital gain from long term to short term on office premises sold during the year under consideration.*

*GROUND NO. 1: ADDITION OF CAPITAL GAIN AMOUNTING TO RS. 74,38,617/*

*1) Your appellant is engaged in the manufacturing and trading of cut & polished diamonds during the year under consideration. Your appellant had sold the office premises Bearing No. BC-4021 in Bharat Diamond Bourse. BKC for consideration of Rs. 1,93,00,000/- to M/s Veer Gems on 19/05/2012*

*2) The addition was made on the basis that your appellant had shown the acquisition of the property in FY 1998-99 & over the next years has carried out improvements in the property. As per sale agreement pursued the allotment of said premises on 29/07/2010. Therefore, the asset so transferred becomes short term capital asset on the date of its transfer and capital gain on sale of the same asset would constitute short term capital gain.*

*3) Genuineness of the Long Term Capital Gain: The entire relevant documents to prove the genuineness of long term capital gain such as sale agreement, installment ledger, bank statements, computation of Income which shows the working of LTCG were submitted during assessment proceedings.*

*According to the Installment ledger the total payment made of Rs.62,78,800/- from which the payment of Rs. 55,78,800/- is related to the office premises & Rs 7,00,000/- is related to the parking area Your appellant takes the indexation cost of acquisition by considering the amount of Rs 55,78.800/- which is related to the office premises.*

*Now the question arises as to what else is further required to prove the Long term capital gain in view of the Learned Assessing Officer. There is no tangible material with the income tax department in support of treating such capital gain as short term capital gain instead of long term capital gain.*

*In this regards, the appellant has relied upon the following case laws.*

*1) Honourable High Court Bombay vide IT Appeal NO. 1459 of 2016 in the case of Pr. Commissioner of Income Tax V/s. Vembu Vaidyanathan (2019-LL-0122-55)*

*2) Honourable ITAT Mumbai "C" Bench in the case of Shri Sanjaykumar Footermal Jain vis. ITO WD 20(3)(2) Wd. 20(3)(2), ITA No.4853/Mum/2016. (2018-LL-814-8)*

*3) Honourable ITAT Mumbai "D" Bench in the case of ITO 30(2)(3) v/s. Smt. Meeta Bhavesh Ganatra, ITA No. 5149/Mum/2017. (419 Taxpundit261)*

*4) Honourable High Court, New Delhi in the case of CIT. Xvi vis. K. Ramakrihnan, ITA No. 114 of 2014 & CMA No. 4959 of 214 (2014-LL-0318 42, 363 ITR 59)*

*4) Your appellant hereby produces several judgments to support the claim of your appellant of allowing the addition made regarding nature of capital gain.*

*a) The decision pronounced by Bombay High Court in the case Pr.Commissioner of Income Tax, Mumbai V/s. Vembu Vaidyanathan - Income Tax Appeal No.1459 of 2016 [2019-LL-0122-55]*

*In the given judgment pronounced by the High Court the assessee is an individual. The assessee had filed the retum 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*

*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 Commissioner of Income Tax, Bombay City | Vs. TATA Services Limited Reliance was also placed on CBDT circulars*

*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.*

*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 cooperative 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*

*b) The decision pronounced by ITAT, C Bench, Mumbai in case of Sanjaykumar Footermal Jain vs. ITO WD 20(3)(2) Wd. 20(3)(2), Mumbai - ITA No: 4853/Mum/2016 [2018-LL-814-8]*

*In the given judgment, the assessee Shri Sanjay kumar Footermal Jain is individual filed the return of income for AY 2012-13 declaring Total Income of Rs. 6,84,760/- on 17-06-2012, the sources of income are under Capital gain and Income from other sources. In the course of scrutiny assessment u/s 143(3), the AO has disallowed claim of long term capital gain on sale of godown of Rs. 5,71,282/-on the ground that the capital gain arisen out of sale of the original assets ie godown has not being held for the period more than 36 months.*

*The LD AO has treated entire capital gain on sale of long term capital assets as short term capital gain and added Rs.86,82,000/-.*

*CIT(A) confirmed the action of the AO against which assessee is in further appeal before ITAT.*

*The assessee has purchased the long term capital asset being godown as per agreement dt 24-04-2008. On going through the agreement, it is evident that the assessee has made initial payment of Rs. 1,26,000/- as against purchase consideration of Rs. 12,26,000/- with the promise to make the balance of payment on or before 03-05-2008, as against the agreement for sale and part payment dt. 24-04-2008, the transferor has transferred all the right, title and interest in the favour of the transferee including five shares*

*under share certificate no. 1/87 bearing distinctive no.11 to 15 allotted to transferor by the society*

*In the instant case it is crystal clear that by virtue of agreement for sale dated 24-04-2008, and making a part payment, the assessee has acquired irrevocable tight, title and interest including possession in the house property in the form of Godown. The registration of the property which was done subsequently on 11-07-2008 was only a formality. And therefore the period of 36 months of holding of long term capital Assets should be reckoned from 24-04-2008 and not from 11-07-2008 as wrongly adopted by the LD AO.*

*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.*

*c) The decision pronounced by ITAT, D Bench, Mumbai in case of ITO 30(2)(3) vs. Smt. Meeta Bhavesh Ganatra, Mumbai ITA No: 5149/Mum/2017[419 Taxpundit261]*

*In the given judgment, the assessee purchased 7 Nos. of Industrial Galas at Malad, Mumbai from one Builder viz. Homeland Realtors arid Developers Private Limited in the year 2007 jointly with her husband Mr. Bhavesh Natwarlal Ganatra at an agreed consideration of Rs.53,75,700/- Homeland Realtors Mid Developers Private Limited issued the Allotment Letters to the assessee in 2007 allotting the specific Galas with specific Galas with corresponding galas marked on the floor plan.*

*The assessee sold the said 7 Nos of Galas in FY 2012-13 for an aggregate consideration of Rs. 2,12,00,000/- The Id. AO reckoned the date of possession of the said industrial Galas in the hands of the assessee and accordingly determined the holding period of the same to be less than three years and consequently held the gains arising from the sale of said industrial Galas are to be taxed as only short term capital gains.*

*The Id. AO consequently also denied the benefit of indexation of the cost claimed by the assessee. Accordingly, the Id. AO determined the short term capital gain of Rs. 75,16,750/- while computing the assessment.*

*CIT(A) held that the holding period should be considered from the date of allotment of galas on 22/10/2007. Since these galas were held for more than 36 months before the sale, the resultant gain is*

*Long Term Capital Gain. Therefore, the AO is directed to assess the capital gain on sale of 7 nos. of galas by the appellant as Long Term Capital Gain after computing the same as per isE TAX DEPAR law*

*ITAT confirm the stand of Ld. first appellate authority to the extent that the resultant gains were Long-Term Capital Gains in nature. They find that the Id. CIT(A) had rightly granted relief to the assessee in the facts and circumstances of the case which, in their considered opinion, requires no interference. Accordingly, the grounds raised by the revenue are dismissed.*

*d) The decision pronounced by High Court, New Delhi in case of CIT-Xvi v/s. K. Ramakrihnan, ITA No. 114 of 2014 & CMA No. 4959 of 214 (2014 LL-0318-42, 363 ITR 59)*

*In the given judgement the Revenue claims to be aggrieved by the order dated May 17, 2013, of the Income-tax Appellate Tribunal (ITAT). The Revenue's appeal questioning the deletion of Rs. 55,72,612 by the Commissioner of Income-tax (Appeals) was dismissed. It is urged that the findings of the Tribunal, in effect upholding the assessee's contention that the amount sought to be taxed was in fact a long-term capital gains is not justified. The learned counsel submitted that the circumstance of the case especially the relevant dates set out in paragraph 7 of the impugned order, it could not be said that the assessee had acquired interest of the kind that can enable him to say that he "held" the asset for more than 36 months to entitle him to the benefit of long-term capital gain.*

*This court is of the opinion that having regard to the findings recorded by the Tribunal, the assessee had acquired the beneficial interest to the property at least 96 per cent. In view of the reasons the courts is satisfied that the Tribunal's impugned In view of the reasons the courts is satisfied that the Tribunal's impugned order does not disclose any error calling for interference.*

*GROUND NO. 2: INITIATION OF PENALTY PROCEEDINGS U/S 271 (1) (C) OF THE INCOME TAX ACT, 1961:*

*The Learned AO at the time of passing the assessment order levied penalty u/s 271(1)(c) for furnishing inaccurate particulars of income. Our client hereby request you to drop the penalty proceedings u/s 271(1)(c) based on the following judgments pronounced by the ITAT in case of ITAT, E Bench, Mumbai in case of The DCIT 8(3), Mumbai v/s. Tristar Jewellery Exports Private Limited [ITA No: 6435/Mum/2013]*

*In the above mentioned judgment, appeal had been filed by the department against the order of CIT (A) in deleting the penalty of Rs. 11.94,545/-. The AO levied the penalty in question qua the addition made. The Learned CIT(A) deleted the penalty, holding that the penalty was not leviable on addition made on estimation basis and that it did not stand confirmed that the assessee had willfully submitted inaccurate particulars to conceal its income. The Hon'ble ITAT, in the order deleted the addition made, in toto. Therefore, the very basis of the levy of penalty in question no longer survives. Accordingly, the grievance of the department is rejected and the order of the Ld.CIT(A) deleting the penalty is upheld. In light of the aforesaid facts and all the decided judgments by Hon'ble Supreme Court, various High Courts and Income Tax Appellant Tribunals we hereby humbly pray your honour to consider the premises as long term capital asset & drop the penalty proceedings initated u/s. 271(1)(c) of the Act,"*

**7.** After considering the detailed submissions and considering the Assessment Order and discussing the same in detail by the Ld.CIT(A) in his order, Ld.CIT(A) dismissed the appeal filed by the assessee with the following observations: -

*"[1.5.3] Therefore, on the basis of factuality or factual matrix and legality of the case as per holding period/actual period of Occupancy over the assets being less than 36 months, AO's order is quite justified. Once the impugned assessment order fulfills the both criteria of legality as well as factual matrix of the case, I do not see any reason to apply case laws as relied upon by the assessee.*

*In fact assessee has no where during the assessment proceedings or appellate proceeding has ever disputed the facts pertaining to actual possession of assets being less than 36 months and the case laws relied upon; do not pertain to provisional allotment without specifying the space/carpet area of the office floor applied for. Assessee's contention is based only on rights created by way of provisional allotment in pursuance of its application made to Bharat Diamond Bourse BKC and the said provisional allotment letter did not specify any floor/ carpet area / tower/ parking slot or share to be allotted at a later date. Even the said building of Bharat Diamond Bourse was completed only in 2009 for which MMRDA Mumbai finalized the lease agreement only on 31.03.2010. Then how can a property be said to be under assessee's physical possession prior to*

*2010 even when final allotment of shares along with the said space in Tower -B along with parking slot got allotted in 29.07.2010 ?. The said property with 200 shares was sold on 19.5.2012 wherein parking lot was not transferred. However, assessee instead of taking proportionate value of purchase consideration took entire purchase value for Capital Gain computation.*

*In view of facts and circumstances narrated above, assessee's appeal in Gr No 1 fails as assessment order passed u/s 143(3) of the Act for AY 2013-14 is hereby sustained."*

**8.** Aggrieved assessee is in appeal before us and filed the revised grounds of appeal which is reproduced below: -

*"1. The learned NFAC erred in denying the Appellant the benefit of indexation on the cost by holding that the capital gains earned by the Appellant from the transfer was not long term capital gains but short term capital gains.*

*2. The Appellant craves leave to add, amend, alter or delete any or all the above grounds of appeal."*

**9.** At the time of hearing, Ld. AR brought to our notice relevant facts from the orders of the Assessing Officer and Ld.CIT(A) and he submitted that no doubt the sale agreement was made on 19.12.2012, however, it is relevant to notice that right on the property was given in the year 1998. In this regard he brought to our notice Page No. 60 of the paper book which is ledger extract of the assessee company in the books of the Bharat Diamond Bourse wherein it was clearly brought on record that assessee was given a provisional area allotment of 900 sq.ft and it is clearly given details of amount collected by them starting from 31.08.1999 onwards and also it clearly indicated office number as BC4021.

**10.** Further, with regard to lease deed registered with MMRDA dated 31st March, 2010, he submitted that it is only a renewal of the lease deed. what is relevant is the actual allotment of office space to the assessee which the Bharat Diamond Bourse allotted the same in the year 1999 and assessee has held the right of occupation from the date of such allotment. The final sanction of occupation of area and allotment of shares has happened subsequently.

**11.** As far as in the given case what is relevant is the right of the assessee held from the date of provisional allotment is relevant. In this regard he submitted that on the similar facts, the Coordinate Bench in the case of M/s. Suresh Brothers *v.* ACIT in ITA.No. 553/Mum/2016 dated 18.10.2019 decided the issue in favour of the assessee and he brought to our notice Para No. 10 of the order. Copy of the order is placed on record. He further relied on the order of Coordinate Bench in the case of Anita D. Kanjani *v.* ACIT in ITA.No. 2291/Mum/2015 dated 13.02.2017.

**12.** On the other hand, Ld.DR submitted that the assessee has occupied area and sold the saleable area to the extent of 892 sq.ft. However, the ledger extract submitted by the assessee shows the area as 900 sq.ft. In

this regard he brought to our notice Page No. 16 of the Paper Book and he relied on the findings of the lower authorities.

**13.** In the rejoinder Ld. AR submitted that the area declared in the ledger extract from the Bharat Diamond Bourse is only the provisional allotment not the final allotment.

**14.** Considered the rival submissions and material placed on record, we observe from the record that assessee transferred the office No. BC4021 in Bharat Diamond Bourse, Bandra Kurla Complex, Bandra (E), Mumbai to M/s. Veer Gems on 19.05.2012. The office which assessee was transferred which belongs to Bharat Diamond Bourse which is a trade body of diamond merchants and Bharat Diamond Bourse has constructed the complex of buildings knowns as Bharat Diamond Bourse at Bandra Kurla Complex. The assessee being the member of Bharat Diamond Bourse has applied for allotment of office space at the above said building complex and Bharat Diamond Bourse allotted to the assessee by letter of allotment of equity shares and grant of occupancy rights dated 29.07.2010 and duly registered with the sub-registrar of Assurances, Mumbai Suburban District which comprises of block of shares of 892 equity shares of ₹.1000 each fully paid and office premises No. BC4021

admeasuring 624 sq.ft carpet area equivalent of 892 build-up area on the fourth floor in "B" Tower central wing of the complex which was constructed in the year 2009 on all that piece and parcel of land situated within the complex.

**15.** The dispute arose in this case is relating to date of acquisition of the right over the property by the assessee. As per the record submitted before us from the books of Bharat Diamond Bourse clearly indicates that assessee has been allotted office space and subsequently made several payments commencing from 31.08.1999 as per ledger extract. It is brought to our notice in the similar facts and grounds of appeal raised in appeal before Coordinate Bench in M/s. Suresh Brothers v. ACIT (supra). The Coordinate Bench has considered and adjudicated exactly similar facts on record and for the sake of clarity it is reproduced below: -

> *"10. We shall now advert to the claim of the revenue that the date of acquisition of the occupancy rights in the property were to be reckoned from 02.08.2010 i.e the date on which occupation rights were vested with the assessee, vide a registered document. As is discernible from the records, the revenue in order to fortify its aforesaid claim, had observed, that as Bharat Diamond Bourse itself had acquired the leasehold rights from MMRDA on 31.03.2010, therefore, the date of acquisition of the occupancy rights in the aforesaid property could not be related to a date prior to the same. We are unable to accept the aforesaid misconceived view of the revenue. Although the „lease deed" between Bharat Diamond Bourse and MMRDA was formerly registered on 31.03.2010, but the construction of the property was in progress much before that date. On a perusal of the records, it stands revealed that Bharat Diamond*

*Bourse had entered into two lease agreements in the months of March, 1993 and May, 1993 with MMRDA, on the basis of which it had acquired two pieces of the land on lease, on which construction was subsequently carried out. On the basis of the aforesaid facts, it can safely be concluded, that the A.O is not correct in observing that Bharat Diamond Bourse had acquired the leasehold rights of the land only on 31.03.2010. In the backdrop of the aforesaid facts, the claim of the A.O that Bharat Diamond Bourse had acquired the leasehold rights only on 31.03.2010 falls to ground. As regards the view of the A.O that as equity shares and occupancy rights in relation to the property were allotted in August 2010, therefore, the acquisition of rights in the property were bestowed on the assessee only from the said date, we are afraid does not find favour with us. In our considered view, for determining the holding period of the property, the date on which the valid title of the property was conferred upon the assessee would not be relevant. Admittedly, a valid title towards the aforesaid property was vested with the assessee on the basis of the registered document, dated 02.08.2010, however, the same would not be conclusive for determining the holding period of the property under consideration. On the basis of our aforesaid observations, we are unable to persuade ourselves to subscribe to the claim of the revenue that the acquisition of the property under consideration was to be reckoned from 02.08.2010 i.e. the date on which the valid title of the rights in the property got vested with the assessee on the basis of a registered document and equity shares were allotted in its favour.*

11. *As pursuant to the final and binding allotment carried out by lottery system, the assessee vide allotment letter dated 03.12.1999 was allotted the property under consideration i.e Office No. EE6011, Bharat Diamond Bourse (built up area of 5,750 sq. ft.), therefore, it can safely be concluded that a right towards the aforesaid property got vested with the assessee from the said date. Also, as is discernible from the records, the assessee as on the date of allotment had parted with substantial portion of consideration towards the cost of acquisition of the property under consideration. Our aforesaid view is further fortified from the observation of the CIT(A), wherein he had observed, that a transfer application dated 22.11.2000 filed by a different concern for transfer of its property was allowed by Bharat Diamond Bourse from the beginning. As such, the aforesaid fact in itself evidences that the said transferor concern on 22.11.2000*

*was vested with a right which could be transferred in favour of a third party. On the basis of our aforesaid deliberations, we are of the considered view that as the case of the assessee is no different from the aforesaid concern, therefore, it can safely be concluded that pursuant to the final and binding allotment of the office premises i.e EE6011, Bharat Diamond Bourse (built up area of 5,750 sq. ft.) on 03.12.1999, the assessee got vested with the ownership of the rights in respect of the property under consideration. Our aforesaid view is supported by the judgment of the* ***Hon'ble High Court of Bombay*** *in the case of* ***PCIT-3, Vs. Vembo Vaidyanathan (2019) 261 taxman 376 (Bom)****. Issue raised by the revenue in its appeal before the Hon"ble High Court was, as to whether the Tribunal was justified in reckoning the acquisition of the property from the date of letter of allotment which though did not lead to creation of any proper and effective right over the capital asset, and not from the date on which the „agreement" which spelled out the exact terms and conditions for acquisition was executed. It was observed by the Hon"ble High Court, that the CBDT vide its Circular No. 471, dated 15.10.1996 had clarified that when an assessee purchases a flat to be constructed by Delhi Development Authority (D.D.A) for which allotment letter is issued, date of such allotment would be the relevant date for the purpose of capital gain tax as the date of acquisition. Further, referring to the clarification issued by the CBDT, vide its Circular No. 672, dated 16.12.1993, it was observed by the Hon"ble High Court, that the Board had clarified that if the terms of the schemes of allotment and construction of flats/houses by the co-operative societies or other institutions were similar to the terms of allotment and construction by D.D.A, then on the same basis the acquisition of the property was to be related to the date on which the allotment letter was issued. On the basis of its aforesaid observations, the Hon'ble High Court had dismissed the appeal of the revenue. In the backdrop of our aforesaid deliberations, we are of the considered view that as no infirmity emerges from the order of the CIT(A), who we find had rightly concluded that the date of acquisition of the property under consideration was to be reckoned from the date of the allotment letter i.e 03.12.1999, therefore, we uphold his order."*

**16.** Respectfully following the above said decision, since the issue is exactly similar and facts are also identical, we are of the view that date of

acquisition of the property was to be reckoned from the date of the allotment i.e in the F.Y. 1998-99. Respectfully following the above decision, we allow the ground raised by the assessee.

**17.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 10th November, 2022

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|---|---|
| Sd/- | Sd/- |
| **(KULDIP SINGH)** | **(S. RIFAUR RAHMAN)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai / Dated 10.11.2022
Giridhar, Sr.PS

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)
**ITAT, Mum**