IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1459 OF 2016

Pr.Commissioner of Income Tax-3, Mumbai. … Appellant

V/s.

Vembu Vaidyanathan … Respondent

Mr.Sham Walve for the Appellant.
Dr.K. Shivram, Senior counsel with Mr.Rahul Hakani for the Respondent.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 22, 2019.

P.C.:-

1. This appeal is filed by the revenue to challenge the judgment of Income Tax Appellate Tribunal. We have considered the following question presented by the revenue:-

> "Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in treating the gain arising from the sale of capital asset as Long Term Capital Gain without appreciating the fact that mere letter of allotment does not lead to creation of proper and effective right over the capital asset sought to be acquired, but only on execution of an agreement spelling out all the exact terms and conditions for acquisition?"

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 **Commissioner of Income-Tax, Bombay City I Vs. TATA Services Limited**[1]. 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

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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.

6. Learned counsel for the revenue has also argued that in any case the assessee was not entitled to exemption under Section 54F of the Income Tax Act, 1961 ("the Act" for short). Since the assessee had held multiple residential units which would disqualify the assessee from claiming the exemption on it as was held by the Assessing Officer. From the record we notice that before the CIT appeals the assessee had produced additional evidence to suggest that the other units previously held by the assessee were discarded earlier and that at the relevant time the assessee did not hold any other residential unit. Quite apart from it being a pure question of fact, we do not find any indication in the impugned judgment of the Tribunal though the revenue had argued such a contention in its appeal before the Tribunal.

7. In the result, the Income Tax Appeal is dismissed.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**

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