

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

**Income Tax Appeal No.89 of 1999  
Date of Order: 17th January, 2014**

**Mrs. Madhu Kaul, House No.2042, Sector 15-C.  
Chandigarh**

**...Appellant**

**Versus**

**Commissioner of Income Tax, Chandigarh  
and another.**

**..Respondents**

**CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA  
HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON**

**Present: Mr. Alok Mittal, Advocate  
for the petitioner.  
Ms. Urvashi Dhugga, Advocate,  
for the respondents.**

**RAJIVE BHALLA, J.**

The appellant challenges correctness of order, dated 15.03.1999 (Annexure P-3), passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh. The substantial questions of law that arise for adjudication are as follows;-

- “(i) Whether in the facts and circumstances of the case, the orders annexure P-1, P-2 and P-3 are legally sustainable?*
- (ii) Whether in the facts and circumstances of the case, the capital gains arising in the instant is long term capital gain or short term capital gain?*
- (v) Whether in view of correct interpretation of provisions of Section 2(29A); Section 2(29B);*

*Section 2(42A); Section 2(42B) and Section 2(47)(ii) of Income Tax Act, 1961, the capital gain arising in the present case can be termed as long term capital gain?"*

The appellant filed a return of income declaring a net taxable income at Rs.60,830/-. The return was selected for scrutiny. The assessee's claim for treating Rs.2,38,609/- received from sale of flat no.421, Sector 44-A, Chandigarh, as a long term capital gain, was rejected by treating it as a short term capital gain. The assessee filed an appeal before the Commissioner of Income Tax (Appeals), which was dismissed on 06.08.1991. An appeal filed before the Income Tax Appellate Tribunal was dismissed on 15.03.1999.

Counsel for the assessee submits that the flat was allotted on 07.06.1986, vide letter, conveyed on 30.06.1986. The first installment was paid on 04.07.1986. The flat was sold on 05.07.1989, i.e., after 36 months. The sale, therefore, results in long term capital gain. It is further contended that right, to hold flat came to vest in the assessee upon allotment and at the latest upon payment of Rs.7500/- on 04.07.1986. The sale of the said flat on 05.07.1989, reveals that the assessee held the capital asset for a period exceeding 36 months. It is further submitted that identification of the flat or physical delivery of possession is irrelevant as right to hold property stands

crystalised upon allotment and payment of the first installment. The allotment of a particular flat and delivery of its possession would relate back to the allotment and payment of the first installment. The appellant having held the flat from 04.07.1986, the date of payment of first installment to 05.07.1989, fulfills the parameters of a long term capital gain, thereby rendering the impugned orders illegal and void. It is further contended that the question of law framed in the present appeal has been answered in favour of the assessee in ITA NO.140 of 2000 (*Vinod Kumar Jain v. Commissioner of Income Tax, Ludhiana and others*), decided on 24.09.2010.

Counsel for the revenue *per-contra* submits that mere allotment and or payment of the first installment without identification of the flat or delivery of possession has been rightly held not to confer any right vis-a-vis flat no.421, Sector 44-A, Chandigarh, which was allotted to the assessee, on 30.11.1988. It is further submitted that the allotment letter could be cancelled at any time and it does not confer any right in any specific unit but merely confers a right to be allotted a unit. The definition of transfer contained in Section 2(47) of the Income Tax Act, 1961 has to be read against the assessee and, therefore, the appeal may be dismissed.

We have heard counsel for the parties and perused the impugned order.

The Income Tax Appellate Tribunal has held that as a specific flat was allotted to the assessee, on 30.11.1988, the allotment letter or payment of first installment does not entitle the appellant to claim a long term capital gain. A similar controversy came up for adjudication in ITA No.140 of 2000 (*Vinod Kumar Jain v. Commissioner of Income Tax, Ludhiana and others*), decided on 24.09.2010. The point for consideration in the aforesaid case was whether capital gain arising from allotment of flat on 27.02.1982, under a scheme framed by DDA, though, the actual flat was allotted and possession was delivered on 15.05.1986 was a long term capital gain as the flat was sold on 06.01.1989. After considering Sections 2(29-A),(42A) read with Section 54 of the Income Tax Act, 1961 as well as Circular No.471, dated 15.10.1986, it was held as follows:-

11. Section 2(14) defines capital asset. Under Section 2(29A) long term capital asset is one which is not a short term capital asset. According to Section 2(42A) short term capital asset at the relevant time meant, a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer. A conjoint reading of aforesaid provisions leads to one

conclusion that a capital asset which is held by the assessee for 36 months would be termed as a long term capital asset and any gain arising on account of sale thereof would constitute long term capital gain.

12. It would also be advantageous to refer to Circular No. 471, dated 15.10.1996 [162 ITR (st.) 41] issued by CBDT on which heavy reliance has been placed by the assessee whereby instructions have been issued regarding treatment of capital gains tax in case of a flat purchased under Self-Financing Scheme. It reads thus:-

“CIRCULAR NO. 471

Capital gains tax- Whether investment in a flat under the Self-Financing Scheme of the Delhi Development Authority would be construction for the purpose of ss.54 and 54F of the IT Act, 1961.

15/10/1986

CAPITAL GAINS

SECTIONS 54, 54F.

Secs. 54 and 54F of the IT Act, 1961, provide that capital gains arising on

transfer of a long-term capital asset shall not be charged to tax to the extent specified therein, where the amount of capital gain is invested in a residential house. In the case of purchase of a house, the benefit is available if the investment is made within a period of one year before or after the date on which the transfer took place and in case of construction of a house, the benefit is available if the investment is made within three years from the date of transfer.

2. The Board had occasion to examine as to whether the acquisition of a flat by an allottee under the Self-Financing Scheme of the Delhi Development Authority amounts to purchase or its construction by the Delhi Development Authority on behalf of the allottee. Under the Self-Financing Scheme of the Delhi Development Authority the allotment letter is issued on payment of the first instalment of the cost of construction. The allotment is final unless it is cancelled or the allottee

withdraws from the Scheme. The allotment is cancelled only under exceptional circumstances. The allottee gets title to the property on the issuance of the allotment letter and the payment of instalments is only a follow-up action and taking the delivery of possession is only a formality. If there is a failure on the part of the Delhi Development Authority to deliver the possession of the flat after completing the construction, the remedy for the allottee is to file a suit for recovery of possession.

3. The Board have been advised that under the above circumstances, the inference that can be drawn is that the Delhi Development Authority takes up the construction work on behalf of the allottee and that the transaction involved is not a sale. Under the Scheme, the tentative cost of construction is already determined and the Delhi Development Authority facilitates the payment of the cost of construction in instalments subject to the conditions that the allottee has to bear the increase, if any,

in the cost of the construction. Therefore, for the purpose of capital gains tax, the cost of the new asset is tentative cost of construction and the fact that the amount was allowed to be paid in instalments does not affect the legal position stated above. In view of these facts, it has been decided that cases of allotment of flats under the Self-Financing Scheme of the Delhi Development Authority shall be treated as cases of construction for the purpose of capital gains.”

13. On careful reading of the Circular issued by the Board, para 2 thereof describes the nature of right that an allottee acquires on allotment of flat under Self-Financing Scheme. According to it, the allottee gets title to the property on the issuance of an allotment letter and the payment of instalments is only a consequential action upon which the delivery of possession flows.”

We find no distinction between the opinion recorded in the aforesaid judgment and the controversy in the present



case. Admittedly, the flat was allotted to the appellant on 07.06.1986, vide letter conveyed to the assessee on 30.06.1986. The assessee paid the first installment on 04.07.1986, thereby conferring a right upon the appellant to hold a flat, which was later identified and possession delivered on a later date. The mere fact that possession was delivered later, does not detract from the fact that the allottee was conferred a right to hold property on issuance of an allotment letter. The payment of balance installments, identification of a particular flat and delivery of possession are consequential acts, that relate back to and arise from the rights conferred by the allotment letter.

In view of what has been recorded hereinabove, we have no hesitation in holding that the Income Tax Appellate Tribunal has erred in holding that the transaction does not envisage a long term capital gain. Consequently, we allow the appeal, set aside order dated 15.02.1999 and answer the substantial questions of law in favour of the assessee.

**(RAJIVE BHALLA)**  
**JUDGE**

**17<sup>th</sup> January, 2014**  
**nt**

**(DR. BHARAT BHUSHAN PARSOON)**  
**JUDGE**