

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

Before Sh. Bhavnesh Saini, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

(Through Video Conferencing)

ITA No. 7256/Del/2019 : Asstt. Year : 2011-12

ITA No. 241/Del/2019 : Asstt. Year : 2013-14

Sh. Shiv Kumar Jatia, B-50, Gulmohar Park, New Delhi-110049	Vs	Income Tax Officer, Ward-10(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AABPJ7582K		

Assessee by : Sh. C. S. Aggarwal, Sr. Adv.

Revenue by : Sh. Prakash Dubey, Sr. DR

Date of Hearing: 10.03.2021

Date of Pronouncement: 26.04.2021

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the order of the Id. CIT(A)-4 , New Delhi dated 01.08.2019 for the A.Y. 2011 -12 and the order of the Id. CIT (A)-60, Mumbai dated 30.11.2018 for the A.Y. 2013-14.

2. The relevant part of the Assessment Order required for adjudication of the issue is as under:

"It is noticed that the transactions of sale of shares were subject to Securities Transaction Tax (STT). Long-Term Capital Gain on transaction of sale of shares, where the transactions have suffered STT, is exempt from tax u/ s 10 (38) of the Act. Under the scheme of the Income Tax Act, where income from a particular source is exempt from tax (i.e. incomes

exempt under section 10), the gain or loss from transactions such source des not enter into the computation of income as the same gets excluded at the threshold itself. Therefore, loss from such source is not available for set off or for carry forward for set-off against income chargeable to tax. Therefore, while the computation of Long Term Capital Gain/Loss on the sale off the said shares is accepted as correct, the aforesaid net Long Term Capital Loss (Rs.4,45,74,513 /-) shall not be carried forward for set-off against Long Term Capital Gain, if any, in the succeeding years."

3. The Id. CIT (A) supported the action of the Assessing Officer relying on the FAQ dated 04.02.2018 issued by CBDT. The question 23 of the said instructions is as under:

"Q23. What will be the treatment of long-term capital loss arising from transfer made between 1st February, 2018 and 31st March, 2018?"

Ans.23 . As the exemption from long- term capital gains under clause (38) of section 10 will be available for transfer made between 1st February, 2018 and 31st March, 2018, the long- term capital loss arising during this period will not be allowed to be set-off or carried forward."

4. Aggrieved the assessee filed appeal before us.

5. The Id. AR mainly argued referring to the provisions of the Act viz. Section 10(38), Section 71 and Section 74.

6. The Id. DR argued on the issue of what constitutes income as per Section 2 (24), provisions of Section 10 (38) which deals with "incomes not included in total income" and argued that when "X" income derived from source "Y" is not taxable, the loss incurred under the similar transactions of "Y" is not

allowable. The arguments of the Id. Sr. DR are summarized as under:

"1. The main issue in this appeal is whether loss from sale of long term capital share on which security transaction tax has been paid should be allowed to be carried forward for set off even though the income from such transfer of long term capital asset is exempt u/ s 10 (38). In this context the attention of the Hon' ble Bench is drawn to the scheme of computation of income and envisaged under the I.T. Act, 1961.

2. Under the scheme of the Income Tax Act, 1961, all the receipt by assessee are to be first considered from the angle of whether they carry an obligation to be returned to the payer or not. If they entail the obligation to be returned, genuine receipt from explained sources does not partake the nature of income and is normally not taxable as such. If it has no obligation to be returned, the receipts are normally to be considered as income. In this background, kind attention of the Bench is drawn to Section 2 (24) of the Income Tax Act, 1961 which defines income for the purposes of the Act. The word 'income' is of the widest amplitude and it must be given its natural and grammatical meaning. It may be appreciated that definition of the income as envisaged in section 2(24) is an inclusive definition. The purpose of the definition is not to limit the meaning of income' but to widen its net and the several clauses therein are not exhaustive of the meaning of income. Hon' ble Supreme Court has laid down the word "Income" is of widest amplitude and must be given its natural grammatical meaning. Thus even if a receipt does not fall within the specific ambit of

section 2 (24), it may still be income if it partakes the nature of income. Kind attention is drawn to CIT Vs G.R. Karthikeyan (SC) 201 ITR 866 in this regard, in the case of the assessee the receipt from sale of long term asset clearly is income in the hand of the assessee in term of section 2(24) read with the definition of transfer as defined u/s 2(47) of the I.T. Act. 1961.

3. The receipt then has to be considered from the view of specific provision of exemption under Chapter III of the Income Tax Act, 1961. The Privy Council in its landmark judgment in Gopal Saran Narain Singh vs CIT (1935) 3 ITR 237 PC] laid down that "anything that can be properly described as income is taxable under the Act unless expressly exempted". Chapter III explicitly provides for the income which does not form part of total income. If the receipt is covered by the provisions of Chapter III, particularly Section 10, then even if the receipt is in nature of the income it cannot be assessed as income. Only the receipts which have passed the above tests are to be assessed as income of an assessee as per the provisions of Chapter IV for computing the total income of an assessee. The question of setting of losses or carry forward of losses provided for under Chapter VI of the I.T. Act, 1961 will arise only when the computation of income is so done.

4. Now kind attention is drawn to 10(38) of the I.T. Act, 1961 for the purpose of analyzing whether the receipt would form the part of total income of assessee or not, it is reproduced as under:

"10 (38) any income arising from the transfer of a long- term capital asset, being an equity share in a company or a unit of an equity oriented fund where—

(a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and

(b) such transaction is chargeable to securities transaction tax under that Chapter:

[Provided that the income by way of long- term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB.]

Explanation. — For the purposes of this clause, "equity oriented fund" means a fund—

(i)) where the investible funds are invested by way of equity shares in domestic companies to the extent of more than — [sixty- five] per cent of the total proceeds of such fund; and

(ii)) which has been set up under a scheme of a Mutual Fund specified under clause (23D):

Provided that the percentage of equity shareholding of the fund shall be computed with reference to the annual average of the monthly averages of the opening and closing figures."

5. Thus it may be appreciated that what is envisaged to be exempt u/s 10 (38) is not gain from sale of long term asset but "income from transfer of long term asset", the nature of the

asset being equity share in a company or a unit of equity oriented fund. It is important to appreciate the fine difference between " income" and " gain". Any receipt in the nature of income is envisaged as the income under the scheme of the Act. Gain essentially means the surplus of income over the deduction allowable while computing the gain or profit under Chapter IV of the Income Tax Act, 1961. Thus if any receipt does not pass or clear the test of exemption, the Act does not provide for any computation or deduction for computation of the gain or profit arising from such income unless specifically provided by the relevant section exempting such income from tax. Loss essentially is to excess of allowable deduction over the receipt in the nature of income. Thus if the receipt itself is exempt, the question of considering the expenses incurred for earning that receipt/ income does not arise unless specifically provided for in the provisions which exempt or exclude such income from part of total income for the assessee. Thus in the case of the assessee if the income from the transfer of long term asset being equity share is exempt under Section 10(38) then there is no mandate to compute to long term capital gain or loss for the purposes of Section 10(38). In case the interpretation that it is the capital gain which is exempt u/ s 10(38) is taken, then such interpretation would be not in harmony with scheme of Act for computation of income of assessee. Needless to say such an interpretation would also unsettled the trite legal position whereby losses from agricultural activities and earning dividend will also be claimed for setoff. To summarize the Hon' ble Bench may kindly appreciate that the allowability of deduction for income exempt under Section 10 (38) cannot be done selectively only when the expenses exceed the income. Thus it does not

matter whether an assessee had gain or loss from transfer of long term capital asset being equity share in a company where such transaction is chargeable to STT, since the entire receipt from such transfer is exempt under Section 10(38).

Kind attention is also drawn to section 14 A of the Act, which provides that "for the purpose of computing total income under Chapter IV, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of total income under this Act".

6. *Thus, if the contention of the assessee is agreed to, it will amount to rendering the provisions of Section 14 A infructuous, since expenditure incurred by assessee in relation to income not forming part of his total income will stand to be allowed against taxable income of the assessee. Further, the judicial precedence so set, will also pave way for claiming the expenditure against other exempt income to be claimed against taxable income and will make the section 14A completely infructuous. Such interpretation is clearly not in line with the established procedure of Harmonious Interpretation as laid down by the Hon'ble SC in the landmark cases of:*

1) *Sri Sankari Prasad Singh Deo vs Union Of India [1951 AIR 458, 1952 SCR 89] wherein the Honourable Supreme Court enunciated the Doctrine of Harmonious Construction.*

2) *CIT VS Hindustan Bulk Carriers in case no. Appeal (Civil) 7966-67 of 1996 wherein the Honourable Supreme Court as held as follows:*

"A construction which reduces the statute to a futility has to be avoided. A statute or any enacting provision therein must be so construed as to make it effective and operative on the principle expressed in maxim ut res magis valeat quam per eat i.e. a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties A statute is designed to be workable and the interpretation thereof by a Court should be to secure that object unless crucial omission or clear direction makes that end unattainable. (See Whitney v. Commissioner of Inland Revenue (1926) AC 37 p. 52 referred to in Commissioner of Income Tax v. S. Teja Singh (AIR 1959 SC 352), Gursahai Saigal v. Commissioner of Income Tax, Punjab (AIR 1963 SC 1062).

The Courts will have to reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.

If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility, and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result The principles indicated in the said cases were reiterated by this Court in Mohan Kumar Singhania v. Union of India (AIR 1992 SC 1). The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute.

6.6 *The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare clause with other parts of the law and the setting in which the clause to be interpreted occurs. [See R. S. Raghunalh v. State of Karnataka and Anr. (AIR 1992 SC 81)]. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty of the Court to avoid a head on clash between two sections of the same Act. [See Sultana Begum v. Prem Chand Jain (AIR 1997 SC 1006)] Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonize. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.*

6.7 *The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus construction that reduces one of the provisions to a "useless lumber" or 'dead letter' is not a harmonized construction. To harmonize is not to destroy."*

7. *The intention of the legislature is that every provision should remain operative. But where two provisions are contradictory, it may not be possible to effectuate both of them and in result, one shall be reduced to futility as against the settled basic principle of ut res mcigis valeat qauam pereat. Therefore, such a construction should be allowed to prevail by which the existing inconsistency is removed and both the provisions remain in force, in harmony with each other.*

Thus it is prayed that the order of the Assessing Officer and the CIT(Appeals) may kindly be upheld."

7. Heard the arguments of both the parties and perused the material available on record.

8. Provisions of Section 2(14), Section 10(38), Section 71 and Section 74 are examined.

Section 2(14) :

"As per S. 2(24) of the Income Tax Act, 1961, unless the context otherwise requires, the term "income" includes-

(i) profits and gains;

(ii) dividend;

(iia) voluntary contributions received by a trust created wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes or by an association or institution referred to in clause (21) or clause (23), or by a fund or trust or institution referred to in sub-clause (iv) or sub-clause (v) or by any university or other educational institution referred to in sub-clause (iiiad) or sub-clause (vi) or by any hospital or other institution referred to in sub- clause (iii ae) or sub-clause (via) of clause (23C) of section 10 or by an electoral trust.

Explanation: For the purposes of this sub-clause, " trust" includes any other legal obligation.

(ii)) the value of any perquisite or profit in lieu of salary taxable under clauses (2) and (3) of section 17;

(iiii) any special allowance or benefit, other than perquisite included under sub- clause (iii), specifically granted to the assessee to meet expenses wholly, necessarily and exclusively for the performance of the duties of an office or employment of profit;

(iiib) any allowance granted to the assessee either to meet his personal expenses at the place where the duties of his office or employment of profit are ordinarily performed by him or at a place where he ordinarily resides or to compensate him for the increased cost of living;

(iv)) the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid;

(iva) the value of any benefit or perquisite, whether convertible into money or not, obtained by any representative assessee mentioned in clause (iii) or clause (iv) of sub-section (1) of section 160 or by any person on whose behalf or for whose benefit any income is receivable by the representative assessee (such person being hereafter in this sub-clause referred to as the " beneficiary") and any sum paid by the representative assessee in respect of any obligation which, but for such payment, would have been payable by the beneficiary;

(v) any sum chargeable to income-tax under clauses (ii) and (iii) of section 28 or section 41 or section 59;

(va) any sum chargeable to income-tax under clause (iiia) of section 28;

(vb) any sum chargeable to income-tax under clause (iiib) of section 28;

(vc) any sum chargeable to income-tax under clause (iiic) of section 28;

(vd) the value of any benefit or perquisite taxable under clause (iv) of section 28;

(ve) any sum chargeable to income-tax under clause (v) of section 28;

(vi) any capital gains chargeable under section 45;

(vi) the profits and gains of any business of insurance carried on by a mutual insurance company or by a co-operative society, computed in accordance with section 44 or any surplus taken to be such profits and gains by virtue of provisions contained in the First Schedule;

(vii) the profits and gains of any business of banking (including providing credit facilities) carried on by a co-operative society with its members;

(vii) Omitted

(ix)) any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature whatsoever.

Explanation: For the purposes of this sub-clause,-

(i)) "lottery" includes winnings from prizes awarded to any person by draw of lots or by chance or in any other manner whatsoever, under any scheme or arrangement by whatever name called;

(ii)) "card game and other game of any sort" includes any game show, an entertainment programme on television or electronic mode, in which people compete to win prizes or any other similar game;

(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees;

(xi) any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy.

Explanation: For the purposes of this clause, the expression "Keyman insurance policy" shall have the meaning assigned to it in the Explanation to clause (10D) of section 10;

(xii) any sum referred to in clause (va) of section 28;

(xiia) the fair market value of inventory referred to in clause (via) of section 28;

- (xiii) any sum referred to in clause (v) of sub-section (2) of section 56;*
- (xiv) any sum referred to in clause (vi) of sub-section (2) of section 56;*
- (xv) any sum of money or value of property referred to in clause (vii) or clause (viiia) of sub-section (2) of section 56 ;*
- (xvi) any consideration received for issue of shares as exceeds the fair market value of the shares referred to in clause (viib) of sub-section (2) of section 56;*
- (xvii) any sum of money referred to in clause (ix) of sub-section (2) of section 56;*
- (xviiia) any sum of money or value of property referred to in clause (x) of sub-section (2) of section 56;*
- (xviiib) any compensation or other payment referred to in clause (xi) of sub-section (2) of section 56;*
- (xviii) assistance in the form of a subsidy or grant or cash incentive or duty drawback or waiver or concession or reimbursement (by whatever name called) by the Central Government or a State Government or any authority or body or agency in cash or kind to the assessee other than,-*
- (a) the subsidy or grant or reimbursement which is taken into account for determination of the actual cost of the asset in accordance with the provisions of Explanation 10 to clause (1) of section 43; or*
- (b) the subsidy or grant by the Central Government for the purpose of the corpus of a trust or institution established by the Central Government or a State Government, as the case may be;*

Income tax is a charge on 'Income', so its important to understand the meaning of the term 'Income' under S. 2(24) of the Income Tax Act. There are various important case- laws on interpretation of the term 'Income', which also needs to be reviewed."

Section 10(38):

"10(38) any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust where—

(a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and

(b) such transaction is chargeable to securities transaction tax under that Chapter :

Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB :

Provided also that nothing contained in sub- clause (b) shall apply to a transaction undertaken on a recognised stock exchange located in any International Financial Services Centre and where the consideration for such transaction is paid or payable in foreign currency:

Provided also that nothing contained in this clause shall apply to any income arising from the transfer of a long-term capital asset, being an equity share in a company, if the transaction of acquisition, other than the acquisition notified by the Central

Government in this behalf, of such equity share is entered into on or after the 1 st day of October, 2004 and such transaction is not chargeable to securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004 (23 of 2004):

[Provided also that nothing contained in this clause shall apply to any income arising from the transfer of long- term capital asset, being an equity share in a company or a unit of an equity oriented fund or a unit of a business trust, made on or after the 1st day of April, 2018.]

Explanation.—For the purposes of this clause,—

(a) "equity oriented fund" means a fund—

(i)) where the investible funds are invested by way of equity shares in domestic companies to the extent of more than sixty- five per cent of the total proceeds of such fund; and

(ii)) which has been set up under a scheme of a Mutual Fund specified under clause (23D):

Provided that the percentage of equity share holding of the fund shall be computed with reference to the annual average of the monthly averages of the opening and closing figures;

(b) "International Financial Services Centre" shall have the same meaning as assigned to it in clause (q) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005);

(c) "recognised stock exchange" shall have the meaning assigned to it in clause (ii) of the Explanation 1 to sub-section (5) of section 43"

Section 71:

"[Set off of loss from one head against income from another.

71. (1) *Where in respect of any assessment year the net result of the computation under any head of income, other than "Capital gains", is a loss and the assessee has no income under the head "Capital gains", he shall, subject to the provisions of this Chapter, be entitled to have the amount of such loss set off against his income, if any, assessable for that assessment year under any other head.*

(2) *Where in respect of any assessment year, the net result of the computation under any head of income, other than "Capital gains", is a loss and the assessee has income assessable under the head "Capital gains", such loss may, subject to the provisions of this Chapter, be set off against his income, if any, assessable for that assessment year under any head of income including the head "Capital gains" (whether relating to short-term capital assets or any other capital assets).*

[(2 A) Notwithstanding anything contained in sub-section (1) or sub-section (2), where in respect of any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss and the assessee has income assessable under the head "Salaries", the assessee shall not be entitled to have such loss set off against such income.]

(3) Where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss and the assessee has income assessable under any other head of income, the assessee shall not be entitled to have such loss set off against income under the other head.]

[(3 A) Notwithstanding anything contained in sub- section (1) or sub- section (2), where in respect of any assessment year, the net result of the computation under the head "Income from house property" is a loss and the assessee has income assessable under any other head of income, the assessee shall not be entitled to set off such loss, to the extent the amount of the loss exceeds two lakh rupees, against income under the other head.]

[(4) Where the net result of the computation under the head "Income from house property" is a loss, in respect of the assessment years commencing on the 1st day of April, 1995 and the 1st day of April, 1996 , such loss shall be first set off under sub- sections (1) and (2) and thereafter the loss referred to in section 71 A shall be set off in the relevant assessment year in accordance with the provisions of that section.]"

Section 74:

"[Losses under the head "Capital gains".

74. *[(1) Where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss to the assessee, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—*

- (a) *in so far as such loss relates to a short-term capital asset, it shall be set off against income, if any, under the head "Capital gains" assessable for that assessment year in respect of any other capital asset;*
- (b) *in so far as such loss relates to a long-term capital asset, it shall be set off against income, if any, under the head "Capital gains" assessable for that assessment year in respect of any other capital asset not being a short-term capital asset;*
- (c) *if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on.]*

(2) No loss shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed.

(3) [Omitted by the Finance Act, 2002, w.e.f. 1-4-2003.]”

9. On concurrent reading of the provisions of the Sections quoted above, we find that the Section 74 has not been made and cannot be made *otiose*. The provisions of Section 10(38) and Section 74 have to be read harmoniously but not antagonistically. We hold that the decision of the Id. CIT (A) is on incorrect interpretation of the provisions of the Act and hence cannot be sustained.

ITA No. 241/Del/2019 A.Y. 2013-14

10. The relevant facts are as under:

- ❖ Date of agreement with the builder - 01.09.2004
- ❖ Date of sale - 01.05.2012
- ❖ The last installment paid by the assessee - 18.05.2009

11. The Assessing Officer held that since the assessee has paid last installment on 18.05.2009 , he acquired the right on the property only on 18.05.2009 and since the property was sold on 01.05.2012, the gains are treated as short term capital gain and taxed accordingly.

12. The Id. CIT (A) held that the assessee has not created any right in the property by making periodic payments from 2004 to 2009 to the developer. The right of the assessee would be created in the any property only after signing of the conveyance deed. To be a long term capital asset, the asset has to be "held" by the assessee for more than 36 months immediately preceding the date of transfer. It was also held the agreement between the assessee and the builder

13. Heard the arguments of both the parties and perused the material available on record.

14. We find that as per the definition of capital asset under section 2 (14), any kind of property held by an assessee would come within the definition of ' capital asset'. Any right which could be called property would be included in the definition of 'capital asset'. It does not define the words ` any kind' but provides for the types of properties which are to be excluded

from the definition of capital asset, incidentally, interest in an under construction flat is not one of the exclusions. Property is a bundle of rights and one of the rights is the ability to transfer such property by the owners to a third party. Thus, to understand what kind of property can be considered a capital asset, it would be appropriate to refer to the definition of transfer in Section 2(47) of the Act.

15. Section 2 (47)(v) and (vi), and Explanation 2 make it adequately clear that possession, enjoyment of immovable property, as well as an interest in any asset are all transferable "capital assets". Explanation clarifies that " the transfer includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement or otherwise. Thus, rights or interests in a property are kinds of property that are transferable capital assets. Hence, booking rights or rights to purchase the apartment or rights to obtain title to the apartment are also capital assets that can be transferable.

16. A contract for sale of flat was capable of specific performance and was also and therefore, a right in an uncompleted building or a flat was clearly a property as contemplated by Section 2 (14). P&H High Court in case of Vinod Kumar Jain v. Commissioner of Income-tax, [2010- 195 TAXMAN 174 (PUNJ. & HAR.) has ruled that the right to acquire property through "agreement for sale" under section 54 of Transfer of Property Act is an actionable claim which is capable of being

transferred. Thus, it is a capital asset under section 2 (14) as per the provisions of the Income-tax Act, 1961 . The period of holding is to be reckoned from the date of first agreement while calculating capital gain on sale of such property.

17. From the facts of the case, the assessee having paid Rs.63 ,30,963 /- to the builder has transferred the buying right to the seller. The seller has paid the remaining amount of Rs.2 ,82,326 /- to the builder subsequently. The AO held that as per the clause in the purchase agreement which states this agreement shall not be assigned by the apartment allottee without prior permission of the Company and came to the conclusion that the assessee never vested with the right to the property and hence the assessee could not have sold the rights. On going through the facts of the case, we find that what the assessee has sold is the right and the right arises when the assessee enters into an agreement with the builder in the year 2004-05. Since, such right accrued in the year 2004-05 and the sale took place on 01.05.2012 , it attains the nature of sale of Long Term Capital asset and the gains will have to be treated as "Long Term Capital Gains". The AO is directed to compute the LTCG after taking into consideration, the amount received on account of sale as per the documents (to verify the figure of Rs.1 ,17,18 ,792/- or Rs.1,20,01 ,118/-). The AO shall also verify and consider the deduction of Rs. 1,80,000 /- paid to the broker. With regard to income from other sources of Rs.1 , 47,142/-, the AO is hereby directed to verify from the records whether the amount was offered to tax income from other sources or not and examined whether the correct figure is Rs.1 ,47,143 /- or Rs.1,37,143/- and recomputed the taxable income.

18. As a result, the appeals of the assessee are allowed.

Order Pronounced in the Open Court on 26/04/2021.

Sd/-

(Bhavnes Saini)
Judicial Member

Dated: 26/04/2021

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR