

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“B” BENCH “SMC” : BANGALORE**

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.677/Bang/2020
Assessment Year: 2012 – 13

Sri G. Dasaratharami Reddy No.G-1, EDENB-AU-LAC Old Madras Road Indira Nagar Bangalore 560 038.  <b>PAN NO : ACZPR1950R</b>	<b>Vs.</b>	ITO Ward 4(3)(3) Bangalore
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri S.V. Ravi Shankar, A.R.
<b>Respondent by</b>	:	Shri Ganesh Ghale, Standing Counsel

<b>Date of Hearing</b>	:	29.03.2021
<b>Date of Pronouncement</b>	:	18.06.2021

**O R D E R**

**PER B.R. BASKARAN, ACCOUNTANT MEMBER:**

The assessee has filed this appeal challenging the order dated 18.8.2020 passed by Ld.CIT(A)-1, Bengaluru and it relates to the assessment year 2012-13. The solitary issue urged by the assessee is whether the property sold by the assessee is a long term capital asset or not.

2. The facts relating to the issue are stated in brief. The assessee along with another person named Shri Diwakar Asthana had entered into an agreement on 14.12.2007 for purchasing a property located at No.17 & 18, La-Oceana, Panaji, Goa for a consideration of Rs.1.65 crores. It is pertinent to note that the stamp duty payable on said

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purchase was paid on the date of entering of “Agreement to sell” itself. The above said property was sold by both the persons (assessee and other purchaser) on 15.7.2011 for a sum of Rs.1.50 crores. The assessee’s share was 50% and accordingly, he computed long term capital loss pertaining to his share.

3. From the “agreement to sell”, it was noticed that the purchasers, (i.e, the assessee and Shri Diwakar Asthana) had paid a sum of Rs.1.48 crores on the date of entering into the “Agreement to sell”, i.e., on 14.12.2007 itself. The remaining amount of Rs.16.50 lakhs was agreed to be paid after obtaining occupancy certificate and giving possession. The Agreement to sell dated 14.12.2007 contained following recitals in this regard.

*“13. It is specially agreed and understood that the possession of the said Bungalow is not handed over to the purchasers on execution of this agreement, it will be handed over only as per clause 2(b) above.”*

*Clause 2(b) – Page 13 of the agreement of sale reads as under:*

*“(b) Rs.8,25,000/- Rs. Eight lakhs twenty five thousand only) by Demand Draft within 7 days from the date of obtaining occupancy certificate towards the completion of the said bungalow.*

*(c) Rs.8,25,000/- Rs. Eight lakhs twenty five thousand only) by Demand Draft simultaneously on handing over possession of the said Bungalow to the purchaser which shall be done either by 31.3.2008 subject to an extension of 60 days there from.”*

4. The property was finally registered in the name of the assessee and other persons on 13.8.2008 by executing a sale deed. It was noticed by the AO that the balance consideration of Rs.16.50 lakhs was paid by the purchasers only on 13.8.2008. It was also noticed that the assessee has computed long term capital loss by adopting the date of purchase of property as 14.12.2007, i.e., the date of entering of “Agreement to sell”. Since the date of sale was 15.7.2011, it was claimed to be a long term capital asset. The AO, however, took

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a different view. Since the balance consideration had been agreed to be paid only after obtaining occupation certificate and possession of property and since the assessee has paid the above said balance consideration only on the date of execution of sale deed in his favour, i.e., on 13.8.2008, the A.O. took the view that the assessee has obtained possession only on 13.8.2008. Since the said property was sold subsequently on 15.7.2011, the A.O. held that the property was held by the assessee for a period of less than 36 months. Accordingly, the AO held that the property is a shorter term capital asset and accordingly held that loss arising on sale of property is a short term capital loss. The Ld. CIT(A) also confirmed the same. Hence, the assessee has filed this appeal before us.

5. The Ld. A.R. submitted that the purchasers had retained a part amount on the date of entering of "Agreement to sell", since the seller had not obtained occupancy certificate at that point of time. Hence, it was agreed that the possession shall be taken after obtaining occupancy certificate and accordingly the balance amount shall be released. Further, it was also agreed that the occupancy certificate shall be obtained and possession shall be taken by 31.3.2008 subject to an extension of 60 days there from. He submitted that the assessee had taken possession of the property by March 2008 itself thereafter. The Ld A.R. further submitted that the A.O. was not correct in presuming that the possession was taken by the assessee on 13.8.2008 only. The Ld. A.R. submitted that the assessee had paid a stamp duty on purchase of property on the date of entering of sale agreement itself and this fact has been mentioned in the sale deed at page no.5. Further, the clause 4 of the sale deed clearly states that the vacant and peaceful possession of the Bunglow had already been handed over to the assessee earlier to the date of sale deed, meaning thereby the possession was obtained by the assessee

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much earlier to the date of sale deed. Accordingly the Ld. A.R. submitted that the tax authorities are not justified in taking the view that the possession was obtained only on 13.8.2008 i.e. the date of sale deed.

6. The Ld D.R. on the contrary, submitted that the assessee is required to pay Rs.16.50 lakhs only after obtaining occupancy certificate and possession of the Bungalow. The assessee has paid the above said amount of Rs.16.50 lakhs only at the time of entering of sale deed, which fact is emanating from clause 3 of the sale deed. Since the assessee had paid the above said amount only on the date of entering of sale deed, i.e., on 13.08.2008, the assessee could not have been given possession earlier. Accordingly, the ld. D.R. submitted that the tax authorities are justified in taking the view that the possession of the property was obtained only on 13.8.2008, in which case, the property shall constitute short term capital asset.

7 In the rejoinder, the Ld. A.R. submitted that the assessee had paid 90% of the sale consideration on the date of entering of agreement to sell and balance 10% was withheld as a token amount in order to ensure that the seller obtained occupancy certificate within the time. The Ld. A.R. further submitted that though the "Agreement to sell" states that the balance amount shall be paid after obtaining occupancy certificate and also after taking possession of the Bungalow, yet clause 4 of the sale deed dated 13.8.2008 clearly states that the possession has already been given to the assessee earlier by the seller. The Ld. A.R. submitted that the clause 4 of the sale deed cannot be ignored by the tax authorities. The Ld. A.R. further submitted that the assessee has sold the impugned property subsequently and in the said sale deed, it has been stated that the occupancy certificate was obtained on 17.3.2008. Accordingly the

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Ld. A.R. submitted that there is no reason to dispute that the assessee has obtained possession much prior to the execution of purchase deed on 13.8.2008. The bungalow was sold subsequently on 15.7.2011. The assessee should have obtained possession by 14.7.2008 in order to qualify the property as long term capital asset. He submitted that the facts and circumstances of the case would show that the assessee has obtained possession prior to 14.7.2008. Accordingly, he submitted that the tax authorities are not justified in taking the view that the property sold by the assessee is a short term capital asset.

8. I heard the rival contentions and perused the record. There is no dispute with regard to the fact that the "Agreement to sell" dated 14.12.2007 contains the clause that the balance amount of Rs.16.50 lakhs shall be paid to the seller after obtaining occupancy certificate and also after giving possession of the property. There is also no dispute with regard to the fact that occupancy certificate was obtained on 17.3.2008, which fact is evident from the subsequent sale deed executed by the assessee on 15.7.2011. There is also no dispute with regard to the fact that the balance amount of Rs.16.50 lakhs was give by the assessee only at the time of execution of sale deed on 13.8.2008. However the final sale deed dated 13.8.2008 clearly states in clause 4 that the possession of the property had already been given earlier to the assessee. This clause makes it clear that the possession was not given on the date of sale deed but it was given some time earlier.

9. I also noticed that the assessee has paid stamp duty amount on the date of entering of "agreement to sale" itself in 2007. Further the assessee has paid almost 90% of the purchase consideration on the date of entering "Agreement to sell" itself. Hence there is merit in

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the submission of Ld A.R that the balance amount of Rs.16.50 lakhs was withheld only to ensure that the sellers obtained occupancy certificate. Looking at the facts and circumstances of the case, I am of the view that there is merit in the contentions of the assessee that the possession of the property was obtained in between period, i.e., subsequent to the receipt of occupancy certificate, which was received in March, 2008 and the date of execution of sale deed on 13.8.2008. If the possession had been obtained prior to 14.7.2008, the same would constitute long term capital asset in the hands of the assessee. From the facts and circumstances of the case, I am of the view that it is quite possible that the assessee should have obtained possession prior to 14.7.2008, in which case the property should be held to be long term capital asset, since the property has been sold on 15.7.2011. Accordingly, I hold that the property is a long term capital asset in the hands of the assessee and hence the loss arising on sale of property shall be computed as long term capital loss.

10. In view of the foregoing discussions, I set aside order passed by ld. CIT(A) on this issue and direct the A.O. to compute long term capital loss on sale of the property.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 18<sup>th</sup> June, 2021

**Sd/-**  
**(B.R. Baskaran)**  
**Accountant Member**

Bangalore,  
Dated 18<sup>th</sup> June, 2021.  
VG/SPS

Copy to:

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

By order

**Asst. Registrar,  
ITAT, Bangalore.**