

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI

BEFORE SHRI ABY T VARKEY (JUDICIAL MEMBER)
AND
SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

ITA No. 1101/MUM/2022
Assessment Year: 2017-18

The Dy. CIT, Central Circle-6(4),
Room No. 1925, 19th floor, Air
India Building, Nariman Point,
Mumbai-400021.

Vs. Shri Narendra Gehlaut,
875, Sector – 17B, Gurgaon,
Haryana, 122 001.

Appellant

PAN NO. AAZPG 9630 K
Respondent

Assessee by : Mr. K. Gopal
Revenue by : Mr. Jasdeep Singh, CIT-DR

Date of Hearing : 09/06/2023
Date of pronouncement : 31/07/2023

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 24.02.2022 passed by the Ld. Commissioner of Income-tax (Appeals)-54, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2017-18, raising following grounds:

1. *"On the facts and in the circumstances of the case, the learned CIT(A) has erred in holding that flat No C-3501 was allotted to the assessee on 23.04.2013 and not on 31.10.2015, as no verifiable evidence has been submitted by the assessee in support of his claim that*



the flat No C-3501 was allotted to him on 23.04.2013?"

2. *"On the facts and in the circumstances of the case, whether the learned CIT(A) was justified in holding that flat No C-3501 was allotted to the assessee on 23.04.2013, thereby allowing the claim of the assessee, without considering the fact that the loan sanction letter dated 31.03.2015 mentions that the "disbursal amount" of Rs 13,45,88,871/- is for the property i.e. C-2901 and not Flat No C-3501 for which the assessee has claimed benefit of interest paid of Rs 3,19,28, 276/- to the lender, in the computation of capital gain? "*
3. *"On the facts and in the circumstances of the case, whether the learned CIT(A) was justified in holding that flat No C-3501 was allotted to the assessee on 23.04.2013 thereby allowing the claim of the assessee without considering the fact that in the absence of any verifiable details that the amount of Rs. 11,33,10,868/- was paid for Flat No. 3501, from F.Yr. 2013-14 to F.Yr. 2016-17, the same cannot be considered as correct and therefore, no cost of acquisition can be allowed to the assessee in respect of sale of Flat No. C-3501?"*
4. *"On the facts and in the circumstances of the case, whether the learned CIT(A) was justified in deleting the addition of Rs 11,53,38,145/- on account of unexplained investment w/s 69B of the Act by observing that Rs 22.86 crores as mentioned in MOU dated 14.12.2016 is nothing but the consolidated payment received from assessee as well as the lender of the assessee, without considering the fact that the loan sanction letter dated 31.03.2015 mentions that the "disbursal amount" of Rs 13.45.88,871/- is for the property i.e. C-2901 and not Flat No C-3501?"*
5. *"On the facts and in the circumstances of the case, whether the learned CIT(A) was justified in deleting the addition of Rs 13,88,737/- u/s 56(2)(vi) without considering the fact that the assessee has not reported the same as liability?"*
6. *"On the facts and in the circumstances of the case, whether the learned CIT(A) was justified in deleting the addition of Rs 2,78, 000/- on account of*



unexplained money w/s 69A of the Act, without considering the fact that during the assessment proceedings the assessee had not submitted any documentary evidences to establish the source of cash found during the search at assessee's residential premises?"

2. Briefly stated, facts of the case are that a search and seizure action u/s 132 of the Income-tax Act, 1961 (in short 'the Act') was carried out in the case of "Indiabulls" Group on 13.07.2016. The assessee being a part of the said group was also searched u/s 132 of the Act. In the search action at the residential premises of the assessee located at, Delhi, cash of Rs.2,78,000/- was found. For the year under consideration, the assessee filed return of income on 28.07.2017 declaring total income of Rs.12,94,54,166/-. The return was selected for scrutiny and statutory notices under the Act were issued and complied with. This is the assessment year corresponding to the previous year in which search was conducted and therefore, this was abated assessment year for the purpose of section 153A of the Act. During the scrutiny proceedings, the Assessing Officer noticed 'long term capital gain'(LT CG) of Rs.8,98,59,373/- declared by the assessee on transfer and assignment of provisional reservation rights in a flat No. C-3501, which was booked by the assessee in an apartment namely "BLU Estate & Club", Worli (Mumbai). In the assessment order passed u/s 143(3) of the Act on 31/12/2018 , the assessing Officer made following additions:



(a) The assessing Officer disallowed assessee's claim of LTCG amounting to Rs. 8,96,59,373/- on transfer of rights in flat and assessed the same as 'Short term capital gain (STCG)' of Rs. 13,99,61,282/-.

(b) The Assessing Officer declined claim of interest of Rs. 3,19,28,276/- as cost of acquisition, which was paid on housing loan borrowed for acquiring right in the flat,.

© In respect of flat, the developer confirmed the payment received from the assessee of Rs.22,86,49,013/- whereas the assessee while computing the LTCG shown purchase cost incurred at Rs.11,33,10,868 /- only and therefore, the difference amount of Rs.11,53,38,145/- was held by the Assessing Officer as not recorded in the books of accounts and assessed as unexplained investment within the meaning of section 69B of the Act.

(d) The Assessing Officer also observed that the assessee acquired entire right in property against part payment only and neither paid the balance amount of Rs.13,88,737/- for acquisition of the said rights and nor reported the same as liability in his books of accounts . This difference was held to be benefit received by assessee and taxable as income falling under the provisions of section 56(2)(vii) of the Act.

(e) The Assessing Officer also held the cash found at the residence of the assessee amounting to Rs.2,78,000/- as



unexplained in absence of source explained thereof along with documentary evidence.

2.1 On further appeal, the Id CIT(A) allowed relief to the assessee deleting all addition/disallowance. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

3. Before us, the Ld. DR has filed a written note prepared by the Assessing Officer in respect of the additions.

4. The Ld. Counsel of the assessee filed a Paper Book containing pages 1 to 50 and also filed additional Paper Book containing pages 51 to 58.

5. The ground No. 1 and 2 of the appeal of the Revenue relates to the issue of capital gain on sale of flat No. C-3501 in apartment namely 'BLU Estate & Club', Worli, Mumbai. In these grounds, the dispute is whether the capital gain on transfer of rights in said flat is LTCG or STCG. The dispute is also regarding claim of interest paid on loan taken for investment in said flat as part of cost of acquisition.

5.1 Brief facts qua the issue in dispute are that during the course of assessment, for evidence of sale of rights in flat, the assessee filed a copy of Memorandum of Understanding (MOU) dated 14/12/2016, which was executed between assessee and buyers, for



transfer of rights in said flat i.e. C-3501 (a copy of which is placed on Paper Book pages 42 to 48 of the Paper Book). The Assessing Officer noted that as per MOU, the assessee vide application dated 23.04.2013 applied for a provisional reservation of residential flat No. C-3501 with the Developer of BLU Estate & Club, Worli, Mumbai, i.e. Indiabulls Infra Estate Ltd. The MOU further mentions that the allotment was made against consideration value of Rs.23,05,37,750/-, which was confirmed by the developer. The allotment of the flat was done by the developer on 31.10.2015 as recorded in the MOU dated 14.12.2016. The assessee stated to have paid an amount of Rs.22,80,40,013/- to the developer towards the above reservation rights availed till 14.12.2016 (the date on which such rights have been transferred by the assessee). In the MoU dated 14.12.2016, the assessee claimed to have received consideration of Rs.14 crores from purchasers namely (1) Visaria Securities Pvt. Ltd. (2) Shri Kamal Mavji Visaria and (3) Mavji Lalji Visaria. While computing the capital gain the assessee has shown cost of acquisition at Rs.14,52,39,144/- which consists of Rs.11,33,10,868/- paid to the developer and Rs.3,19,28,276/- paid as interest to the bank/financial institution for housing loan during the F.Y. 2013-14 to F.Y. 2016-17. On further indexation, the indexed cost of acquisition was computed to Rs.16,36,12,777/-. Accordingly, the assessee after reducing the indexed cost of acquisition Rs.16,36,12,777/- out of deemed sale consideration i.e. market value of the rights transferred for stamp duty purpose at



Rs.25,32,72,150/-, computed long term capital gain of Rs.8,96,59,373/-, as under:

	Particulars	Cost	Indexed Cost
1.	Amount paid in FY 2013-14	6,62,55,210	7,93,79,245
2.	Amount paid in FY 2014-15	4,70,55,658	5,16,96,890
	Paid to developer	11,33,10,868	13,10,76,135
4.	Amount paid in FY 2015-16 (interest)	1,49,46,436	1,55,54,802
5.	Amountpaid in FY 2016-17(interest)	1,69,81,840	1,69,81,840
	Interest Cost	3,19,28,276	3,25,36,642
	Total cost	14,52,39,144	16,36,12,777

	Sale consideration	25,32,72,150
	Less : indexed Cost of acquisition	16,36,12,777
	Long term Capital Gain	8,96,59,373

5.2 The assessee however has considered the allotment of the said flat C-3501 on 23.04.2013. Since, the flat has been transferred by the assessee on 14.12.2016, therefore, the assessee considered holding of the rights for more than the period of 36 months and treated the gain on transfer of said right as LTCG, whereas the Assessing Officer has referred to the MOU dated 14.12.2016, wherein it has been mentioned that the said flat No. C-3501 has been allotted to the assessee on 31.10.2015. According to the date of allotment noted in MOU, the period of holding of the rights in the said flat is less than 36 months i.e. from 31.10.2015 to 14.12.2016, therefore, the Assessing Officer rejected the contention of the assessee of the LTCG and held the gain on transfer of the rights of



the flat as STCG. The Assessing Officer also rejected the claim of interest as part of cost of acquisition. Before the Assessing Officer in absence of any further clarification, he treated the gain as STCG(short term capital gain) and also disallowed the claim interest of cost of acquisition. The STCG has been computed by the Assessing officer as under:

	Sale consideration	25,32,72,150
	Less: Cost paid to Developer	11,33,10,868
	STCG	13,99,61,282

5.3 On further appeal, the Ld. CIT(A), after considering the remand report of the Assessing Officer on the additional evidences filed by the assessee, deleted the additions made by the Assessing Officer observing as under:

“6.3.1 The facts of the case are that the appellant had booked flat No. C-3501 at Indiabulls BLU, Worli, Mumbai from the developer, Indiabull Infraestate Ltd. vide application dated 23.04.2013. The consideration agreed for purchase of the flat was Rs.23,05,37,750/-. As per MOU dated 14.12.2016, the rights in Flat No C-3501 were transferred for a lumpsum consideration of Rs. 14,00,00,000/- to purchasers i.e. (1) Visaria Securities Pvt. Ltd... (2) Shri Kamal Mavji Visaria and (3) Shri Mavji Lalji Visaria. In the MOU dated 14.12.2016, it was mentioned that till 14.12.2016, the appellant had paid Rs.22,86,49,013/- to the developer and the balance amount of Rs.13,88.737/- remained payable to the developer. While calculating long term capital gain, the appellant has taken cost of the property at Rs. 11,33,10,868 (payment made to the developer). Further, an amount of Rs.3, 19,28,276/- was also taken as cost of acquisition as interest paid to bank on housing loan. Thus, the total cost of acquisition of the property was taken at Rs. 14,52,39,144/- and the indexed cost was worked out



at Rs. 16,36,12,777/-. The market value of the property was taken at Rs.23.48,98,517/- and the long term capital gain was worked out at Rs.8,96,59,373/-.

During the remand report proceedings, the AO has verified the allotment letter and the sources of funds for purchase of property. After verification of the additional evidences submitted by the appellant, the AO has stated that the appellant had paid Rs.2,00,00,000/-vide cheque No.876744 dated 22.04.2013. from the bank account with HDFC Bank Ltd for 'booking of Flat No.C-3501. Tower C in the project Indiabulls BLU, Worli, Mumbai. The allotment letter was issued by the developer, Indiabulls Infrastate Ltd. On 23.04.2013. Thus, the flat was booked by the appellant on 23.04.2013 and the date of allotment was 23.04.2013. The AO has further stated that the assessee was eligible for long term capital gain in respect of the above mentioned property.

On perusal of the loan agreement and loan sanction letter dated 3103.2015 issued by India Bulls Commercial Credit Ltd., loan of Rs.25,88,87,000/- was sanctioned @10.5% p.a. On verification of the details submitted by the appellant, it is seen that the appellant had paid Rs.2,00,00,000/- on 23.04.2013, Rs.4,52,55,210/- on 23.10.2013 and Rs.4,70,16,940/- on 26.11.2014 by cheque from HDFC Bank Ltd. Further, an amount of Rs. 13,45,88,871/- was disbursed by IICL Ltd on 31.03.2015 to the developer. Indiabulls Infrastate Ltd. Thus, the total payment of Rs.24,68,61,021/- was made by the appellant in respect of purchase of flat to the developer till 24. 12.2016. Thus, the appellant in fact has paid more amount than the amount of Rs.22,86,49,013/- as mentioned in the MOU dated 14. 12.2016.

6.3.2 From the above facts, it is seen that Flat No. C-3501 was allotted to the appellant on 23.04.2013 and not on 31.10.2015. The appellant has paid total amount of Rs.24,68,61,021/-, Thus, the appellant has rightly computed long term capital gain in respect or sale of flat by taking the date of allotment on 23.04.2013. In view of the above facts, the addition of Short Term Capital Gain of Rs. 13,99,61,282/- made by the AO is deleted.”



5.4 Before us, the Ld. DR referred to the MOU dated 14.12.2016 for transfer of rights to the buyer and submitted that the flat in question i.e. Flat No. C-3501 was allotted to the assessee on 31/10/2015 only. The Ld. DR also referred to the copy of the allotment letter dated 31.10.2015 issued by the developer i.e. M/s Indiabulls Infra Estate Ltd. which is available on page 33 of the Paper Book. According to the Ld. DR in view of the documentary evidences, the period of holding of the rights in the flat being less than 36 months, the Assessing Officer has correctly assessed the gain as short term capital gain. The Ld DR further referred to the loan sanction letter dated 31/03/2015, available on paper book page 12-32 and submitted that said loan was sanctioned in respect of Flat No. C-2901 and not C-3501, therefore, the interest cost is not in relation to flat C-3501.

5.5 The Ld. Counsel of the assessee on the other hand referred to the flat application form available on page 3 to 8 of the Paper Book and submitted that the assessee had applied for purchase of flat under consideration on 23.04.2013. The Ld. Counsel also referred to the receipt issued by the developer dated 23.04.2013 for payment of sum of Rs.2 crores towards the booking of Unit No. C-3501, available on page 10 of paper book. The Ld. Counsel also referred to the allotment letter dated 23.04.2023 issued by the developer in respect of Flat No. C-3501, which is available on page 11 of the Paper Book. The Ld Counsel of assessee submits that the allegation



of the Ld. AO, by relying on the sanction Loan agreement/sanction letter dated 31.03.2015, that the assessee had booked Unit C-2901, is incorrect. The assessee states that the contention of the Department that the assessee had acquired provisional rights in flat C-2901, is not correct as the assessee had never booked two flats and the same was clarified by the assessee during the course of appellate proceedings vide letter dated 11.11.2021 (annexed at Pages 49-50 of the Paper Book) as well as during the remand proceedings. Further, the assessee during the remand proceedings before the AO, furnished a letter dated 01.12.2021 wherein confirmation letter dated 26.11.2021 from the Developer i.e. IndiaBulls intrasestate ltd, as well as from Bank/financial institution i.e. the Indiabulls Commercial Credit Ltd. (ICCL), which had given housing loan to the assessee (annexed at Page 51 - 54 of the Additional Paper Book). It was further stated that the said housing loan was closed by ICCL and same could be clearly seen from the closure account annexed at Pages 55 - 58 of the additional paper book. Thus, it was contested that the entire consideration paid was only towards the said Unit C-3501, which was allotted to the assessee on 23.04.2013 and therefore, the assessee is justified in claiming the gains arising on the sale of the rights in the said unit as Long Term Capital Gains (LTCG).

5.6 Further, the ld counsel of assessee further reiterated that the assessee had made an application with Indiabulls Infraestate Ltd,



for provisional allotment of the flat No. C-3501 on 23.04.2013 for an agreement value amounting to Rs.23,05,37,750/- On the very same day itself, the assessee received a receipt from the Developer, acknowledging the receipt of Rs.2,00,00,000/- from the assessee towards Unit No. C-3501, as well as an allotment letter dated 23/04/2013 for the said unit. According to the Id Counsel , this was first allotment letter issued by the Developer, however, the Ld. AO relied on the subsequent allotment letter dated 31.10.2015 and considered the same to be the date on which the said unit was allotted to the assessee. Thus, the Ld. AO computed short term capital gains at Rs. 13,99,61,282/- as against long term capital gains amounting to Rs.8,96,59,373/- claimed by the assessee. The assessee submits that the date of first allotment dated 23/04/2013, on which initial booking amount was paid, ought to have been taken as date of accrual of rights in the said unit. As the assessee has held the said right in flat for more than 43 months, the same constitutes as long term capital asset and the assessee has rightly claimed the gains arising out of sale of rights of the said unit as long term capital gain.

5.7 The Id counsel further relied on the decision of the Hon' ble Supreme Court in the case of **Gurbax Singh v. Kartar Singh [2002] 254 IT 112 (SC)** wherein it was held that "... it is well-settled that a document on subsequent registration will take effect from the time when it was executed and not from the time of its



registration." Further, the assessee also relies upon the decision of the Hon'ble Bombay High Court in **PCIT v. Vembu Vaidyanathan [2019] 413 IT 248 (Bombay)** wherein it was held that:

"5. This aspect was further clarified by the 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 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."

5.8 In the rejoinder, the Ld. DR submitted a note prepared by the Assessing Officer while filing scrutiny report to the Commissioner of Income-tax. In the said report, the Assessing Officer has rebutted the factual finding recorded by the Ld. CIT(A). The relevant part of the said note as reproduced as under:

"In this case, it is seen from the loan sanction letter dated 31.03.2015 issued by Indiabulls Infrastructure Credit Ltd-



Transaction date 31.03.2015 that the 'Disbursal Amount of Rs. 13,45,88,871/- is for a property under description as under -

Flat No. C-2901, 29 Floor, Tower No. C, Indiabulls BLU, GanpathraoKadam Marg, Near Worli Circle, Mumbai-400 013 (hereafter referred as C-2901), which has a carpet area of "8294**

2. However, as per the disbursement details prepared, it is seen that the loan has been sanctioned by M/s. Indiabulls Commercial Credit Ltd and not by Indiabulls Infrastructure Credit Ltd. As per this, the amount of Rs. 13,45,88,871/- has been disbursed to Indiabulls Infraestate Ltd. (hereafter referred as IFL) on 31.03.2015 as per the following details

Instrument Type	DD/Cheque Amount	Favouring	Account Number	Short Pay	Bank Name	FinnoneFavouring	IFSC Code	Branch Name
RTGS	134588871	INDIABULLS INFRAESTATE LIMITED	000480200000110	YES	YES BANK LTD	INDIABULLS INFRAESTATE LIMITED	YES80000004	MUMBAI

3. Further, the EMI details in respect of aforesaid loan are as under -

EMI Start Date	05-Apr-2015	EMI Cycle	05	PEMI	0
EMI Due Date	05-May-2015	EMI Amount	2584576	Mode of Payment	DAS IB

3.1 As per the loan sanction letter dated 31.03.2015, the EMI amount of Rs.25,84,676/-is payable every month during the loan tenure of 240 months.

4. During the assessment proceedings as well as the appellate proceedings, the assessee claims the aforesaid loan is payment towards property at C-3501, 35 Floor, Tower No. C, Indiabulls BLU, GanpathraoKadam Marg. Near Worli Circle, Mumbai-400 013 (hereafter referred as Flat No. C-3501). whereas the loan disbursal document states it to be for Flat No. C-2901, 29* floor, Tower No. C, Indiabulls BLU. GanpathraoKadam Marg, Near Worli Circle, Mumbai-400 013 of which apparently the carpet area is 8294 sq. ft. even though the details of measurement in square meter or square feet is not stated in the disbursal document as stated above. The carpet area of the Flat C-3501, which is sold as per the MOU dated 14. 12.2016 is 4323 sq. ft.

5. The assessee submitted two declarations dated 26.11.2021 from M/s. Indlabulls Infrastate Ltd. and Indiabulls Commercial Credit Ltd. In the declaration dated 26.11.2021 by Ms.



Indiabulls Infrastate Ltd. it is submitted that Shri Narendra Gehlaut had been initially allotted C-2901, but on his request C-3501 was allotted to him w.e.f. 23.04.2013. In the other declaration of M/s. Indiabulls Commercial Credit Ltd., it is submitted that the loan documentation vide Account No. HLLVRA00223143 was prepared for Unit No. C-2901, but they were later informed that Shri Narendra Gehlaut had finally chosen Unit No. C-3501 in the said project. The extracts of the said submissions are reproduced as under On request, we hereby confirm that Unit bearing No. C-2901 situated at 29 Level, IndiabullsBlu, GanpatreoKadam Marg, Lower Parel, Mumbai - 400 013 was originally identified by Shri Nerendra Gehlaut. However, on his request, unit no. C-3501 was allotted to him w.e.f. 23.04.2013.*

We further confirm that Shri Narendra Gehlaut did not hold the units i.e. Unit No. C-2901 and Unit No. C-3501 together, at any given point of time.

Sd/-

*For IndiabullsInfraestate Limited**

"To whomsoever it may concern

Dated: 26.11.2021

It is hereby confirmed that a home loan was granted to Shri Narendra Gehlautvide Loan Account No. HLL VRA00223143 for a maximum amount of Rs. 258, 887,000/-.

Shri Narendra Gehlaut had opted for Unit No. C-2901 initially in Project IndiabullsBlu, 29 Level, IndiabullsBlu, GanpatraoKadam Marg, Near Worli Circle, Mumbai - 400 013 and loan documentation was prepared accordingly. However, we were later informed he had finally chosen Unit No. C-3501 in the said project.

We hereby confirm that the said loan was closed on 21.2.17.

Sd/-

For Indiabulls Commercial Credit Limited”



6. The above facts show that the assessee is claiming Long Term Capital Gains in respect of sale of property being Flat No. C-3501 whereas the loan disbursal document states that the loan was sanctioned for Flat No. C-2901. In this regard, following issues are noticed :

- i. No verifiable evidence has been submitted by the assessee in support of its claim that the Flat No. C-3501 was allotted on 23.04.2013, except the fact a certificate dated 23.04.2013 from IFL. **It may be mentioned that the assessee is a related party of this group concern and such a self-supporting certificate is not verifiable/reliable document.**
- ii. As regards the bank statement of assessee (HDFC Bank) evidencing payment of Rs. 2 crores vide Cheque No.876744 dated 23.04.2013 to IFL, it does not establish that this payment of Rs.2 crores was paid for Flat No.3501 as claimed by the assessee as per the above certificate dated 23.04.2013 of IFL. It may also be noted that the source of this payment is an amount of Rs.2 crores received by the assessee from Revati Infrastructure on 18.04.2013. Further, from the bank statement of the assessee it is also seen that the assessee has also made a similar payment of Rs.7.5 crore to M/s. Aspire Promoters (Pvt.) Ltd. on 30.04.2013. The source of this payment is an account of credit entry of Rs.7.5 crore on 29.04.2013 from Revati Infrastructure.
- iii. **No details of the procedure followed in respect of the change of flat has been submitted by the assessee as compared to similar procedure, if any, being followed by the assessee in respect of other cases for change of flat.** It may be mentioned in the certificate dated 26.11.2021, issued by M/s. Indiabulls Commercial Credit Ltd., inter alia, it is stated that Shri Narendra Gehlaut had opted initially for Unit No. C-2901, but they were later informed that the assessee had finally chosen Unit No. C-3501 in the said project. No details when this change and in what manner (whether by any verifiable mail or any such verifiable evidence) was intimated with respect to this change. However, it is confirmed that Shri Narendra Gehlaut had initially opted for Flat NO. C-2901. But no details and circumstances in which and when he was allotted C-2901 and when he



opted out of C-2901 and was subsequently allotted C-3501 has been submitted by him. It is worth mentioning that loan sanction letter dated 31.03.2015 for Unit No. C-2901 is subsequent to provisional allotment of Unit No. C-3501 vide letter dated 23.04.2013. Therefore, certificate dated 26.11.2021 issued by both IL & ICCL is self-contradictory, inasmuch as assessee's opting for flat No C-3501 cannot be an occasion prior to date of loan sanction letter dated 31.03.2015, which clearly mentions details of property towards which loan was sanctioned i.e. C-2901.

- iv. Further, in the certificate dated 26.11.2021 submitted by IFL, it is inter-alia stated that it is confirmed that Shri Narendra Gehlaut did not hold both the Unit No. C-2901 and Unit No. C-3501 together, at any given point of time thereby admitting that Shri Narendra Gehlaut held the Flat No. 2901 at some point of time, the details which are not submitted by the assessee. The Loan Disbursal Certificate dated 31.03.2015 clearly mentions that Flat No. 2901 was held by Shri Narendra Gehlaut.*
- v. Further, on perusal of the first page of the impugned Application Form (Page 1 -18- page numbering made by this Office) submitted by the assessee, vide which it has been claimed that the Flat No. 3501 was allotted to him on 23.04.2013 does not indicate any amount or cheque number vide which the so called payment was made, which is very unlikely in respect of booking of a flat. No such requirement of terms and payment conditions has also been indicated in the Payment Plan CLPP - Toner 'C" (Page 12 of the Application Form) of this Application Form to demonstrate that an amount of Rs. 2 crore payment was required as a pre-booking amount for booking either Flat No. C-2901 and C-3501, or this payment of Rs. 2 crores was payment for some other purpose which has been given a colour of payment received for the booking of Flat No. C-3501. It is seen that the signature of the assessee is on two different dates (i.e. 23.04.2013 and 23.04.2016) on different pages of the same form as under raising doubt that this document was signed on 23.04.2013.*



Sr. No.	Page Number	Date of Signature
1	1	23.04.2013
2	2	23.04.2016
3	3	23.04.2016
4	4	23.04.2016
5	5	23.04.2016
6	6	23.04.2013
7	7	23.04.2016
8	8	23.04.2013
9	9	23.04.2013
10	10	23.04.2013
11	11	23.04.2013
12	12	23.04.2013
13	13	23.04.2016
14	14	23.04.2013
15	15	23.04.2016
16	16	23.04.2013
17	17	23.04.2016
18	18	23.04.2013

(vi) Para 3 of the MOU dated 14.12.2016 in respect of the sale of Flat No. C-3501 reads as under -

"Simultaneously upon execution hereof the Allottee has handed over to the Purchasers the Letter of Allotment dated 31st October 2015 in original. Save and except the Letter of Allotment the Allottee has no other document or paper in his possession or control in respect of the Premises."

As per the above para, the letter of Allotment dated 31.10.2015 has been considered as the only document or paper showing possession or control in respect of Flat No. C-3501.

(vii) As per para 3 of the Application Form (at Page No. 14) under the head "Price details". the following condition has been mentioned -

"Apart from an addition to the sale price of the said Unit, the applicant shall pay the following amounts to the company -

(a) Rs.50,000/- (Rupees Fifty Thousand) towards legal charges and towards cost of preparing and engrossing this agreement - no such details were furnished regarding this payment either for Flat No. C-3501 or C-2901, which is the flat allotted to the assessee as per the loan disbursement document.

7. The above facts do not establish the claim by the assessee that the Flat No. C-3501 was allotted to him on 23.04.2013 as no verifiable evidence has been submitted in this regard, whereas the verifiable Loan Disbursal Document dated 31.03.2015 clearly states that the loan amount was disbursed



for Flat No. C-2901 and not C-3501. This Loan Disbursement document is considered to be verifiable because as per this document an amount of loan of Rs. 13,45,88,871/- was disbursed by Indiabulls Infrastructure Credit Ltd. to M/s. Indiabulls Infrastate Ltd. vide their Reference No. 471337 to the applicant Shri Narendra Gehlaut. Further, the above issues noticed at SI No. (i) to (vi) does not support the correctness of the claim of the assessee regarding the allotment of Flat No. C-3501 to him on 23.04.2013.

8. Therefore, in view of the facts mentioned above, the so-called Provisional Reservation of Apartment for Flat No.C- 3501 on 23.04.2013 has not been established by the assessee.

9.

10 Therefore, the decision of the CIT(Appeal) is not acceptable in holding that the Flat No. C-3501 was allotted to the assessee on 23.04.2013 and not on 31.10.2015, and therefore, the second appeal is required to be filed on this issue.”

5.9 We have considered the rival submission of the parties on the issue in dispute. The first issue in dispute before us is whether the right in the flat namely, C-3501 was held by the assessee for a period of more than 36 months or not. The Assessing Officer has referred to MOU dated 14.12.2016 for transfer of rights in the said flat, wherein it is recorded that the flat was allotted to the assessee by the developer on 31.10.2015. A copy of said allotment letter dated 31.10.2015 is also enclosed and available on Paper Book page 33. The contention of the assessee is however that the assessee had applied for allotment of the flat on 23.04.2013 and accordingly it was allotted to him on 23.04.2013. The assessee has referred to allotment letter dated 23.04.2013 available on Paper Book Page 11 as first allotment letter. The contention of the assessee that



Sub: Reply to remand report proceeding in case of Shri Narendra Gehlaut ("the assessee") having PAN AAZPG9630K for AY 2017-18

DIN: ITBA/COM/F/17/2021-22/1037124761(1) dated 22.11.21

*With reference to your query relating to interplay between Unit No. C-2901 and C-3501, **it is submitted that the assessee had originally opted for Unit No. C-2901 but later shifted to Unit No. C- 3501. The request of the assessee was entertained by the Developer and relevant documents were accordingly modified.***

However, it is just a matter of chance that documentation with the lender continued in old unit number. However, records of the developer were perfectly aligned and both the parties had always mutually consented for Unit No. C-3501. A confirmation thereto from the Developer is enclosed here-with as Annexure-1.

The factual position regarding shifting of unit was duly communicated during the course of assessment proceedings vide Annexure-VI of our submission dt. 21.12.18. A copy of the same is enclosed here-with as Annexure-2. The said factual position is also evident in the Application Form made by the assessee to the Developer where-in; it is mentioned on the First Page itself that the assessee is shifting Unit from C-2901 to C-3501. A copy of the same is enclosed as Annexure-3.

It is important to note that the assessee did not take possession of immovable property and only relinquished his allotment rights. Hence, there was no occasion for the lender to get its records corrected. And once the rights were sold, the lender got its money back and closed the assessee's loan account. Confirmation from the lender regarding the same is enclosed here-with as Annexure-4. In the humble submission of the assessee, incorrect Unit no. in the lender's records does not vitiate assessee's argument that he got the allotment rights on 23.04.2013. More so, when agreement between the assessee and the Developer is absolutely clear about the unit number.

We humbly request your good-self to consider the facts of the assessee's case rationally while giving due consideration to business realities."



5.10 The assessee has also filed a letter from the India Bulls Infra Esate ltd (now known as Indiabulls Real Estate) that assessee did not hold both the units i.e. Unit No. C-2901 and Unit No. 3501 together at any given point of time and initially the assessee booked Unit No. 2901 which was later on his request changed to Unit No. C-3501. The assessee has also filed a letter from the banker i.e. Indiabulls Commercial Credit Ltd. that initially loan was sanctioned for Unit No. C-2901, however later on, the assessee informed that Unit No. C-3501 was chosen. The said loan was closed on 21.02.2017. In view of the above facts, it seems that initially the assessee had been allotted Unit No. C-2901 and later on the same has been changed to C-3501 on the request of the assessee and accordingly provisional allotment letter has been issued on 31.10.2015 for flat C-3501, which has been referred in the MOU dated 14/12/2016 for transfer of the right in the said flat. It is clearly mentioned that the said flat was allotted to the assessee on 31.10.2015. This document has been signed by the assessee as well as buyers/purchasers of the rights in the flat. In the said MOU, there is no mention of any prior allotment of the flat C-3501 on 23.04.2013. Therefore, the allotment letter prepared and submitted by the assessee dated 23.04.2013 does not seem to be an authentic copy. Further, para 3 of the MOU dated 14.12.2016 in respect of the sale of Flat No. C-3501 reads as under -

"Simultaneously upon execution hereof the Allottee has handed over to the Purchasers the Letter of Allotment dated 31st



October 2015 in original. Save and expect the Letter of Allotment the Allottee has no other document or paper in his possession or control in respect of the Premises."

5.11.As per the above para, the letter of Allotment dated 31.10.2015 has been considered as the only document or paper showing possession or control in respect of Flat No. C-3501 and there is no reference of any allotment letter dated 23/04/2013 .

5.12.This fact of allotment dated 31/10/2015 , also gets supported from the loan sanction letter dated 31.03.2015 which is in respect of flat No. C-2901. It is to be noted here that the assessee i.e. flat owner, Developer, Bank/ financial institution, all are part of same 'Indiabulls' group and therefore possibility of making documents at their convenience can't be denied. The authenticity of the receipt of Rs. 2.00 lakhs dated 23/04/2013 mentioning flat No. C-3501 and allotment letter dated 23/04/2013 are therefore not reliable. Further, during the course of hearing before us, the ld counsel of the assessee was asked as the immovable property rights have been transferred by the assessee in favour of the purchasers parties for a value more than Rs. 100/- and thus as per Transfer of Immoveable Property Act, 1882 , the sale transaction must have been registered before the stamp duty authorities and the said document might have details of date of allotment of flat C-3501 to the assessee, but no such copy of registered sale deed was filed before us. In the caselaws relied upon by the assessee, it is held that date of allotment of flat should be taken as date of construction of property



for the purpose of section 54F of the Act, but in the instant case issue is determination of date of allotment itself. There is no dispute on the ratio laid down in caselaws, accordingly those caselaws are distinguishable. Before the Ld. CIT(A), it was submitted that for computing the holding period for capital gain, the period should be taken from the date of the application of the flat however, we do not agree with the said contention of the assessee. The rights of the assessee arise in the said flat only on the allotment and not by way of filing application. The confirmation letter filed from the developer as well as from the bank also shows that the flat No. C-3501 was not allotted initially to the assessee though the developer has submitted a letter that assessee has not held two units in the said building at any point of time. Before us, the issue is only in respect of holding period of the right in flat No. C-3501 and therefore, we are not concerned whether the assessee had purchased both the properties i.e. C-2901 and C-3501. That might be a matter for investigation by the Assessing Officer. On appreciation of the factual evidences produced before us, we are of the view that the flat C-3501 has been allotted to the assessee on 31.10.2015 as mentioned in the MOU dated 14.12.2016, which is a document signed by the buyer as well as seller of the rights, therefore, the holding period of the rights in Flat C-3501 is less than 36 months and thus gain arising from transfer of said rights is short term capital gain (STCG) only.



5.13 In view of aforesaid discussion, we set aside the finding of the Ld. CIT(A) on the issue in dispute and uphold the finding of the Assessing Officer to treat the gain on transfer of right in the Unit C-3501 as short term capital gain.

6. The next issue is regarding the rejection by the Assessing Officer for claim of the interest paid on loan for purchase of the property as part of cost of acquisition.

6.1 Before us, the Ld. Counsel of the assessee submitted that since right in flat were acquired by way of funds borrowed from the Bank/financial institution, therefore, the interest paid towards such loan should be included in the total cost of acquisition of right. In support of claim, the assessee relied on the decision of the Tribunal in Jodhpur Bench in the case of Gyatri Maheshwari v. ITO. (supra), which was cited before the Ld CIT(A). The relevant part of the decision reproduced by Ld CIT(A) is extracted as under:

"it is very much clear that if the property is purchased from borrowed funds then consideration for the purchased amount, the interest on borrowed fund also has to be paid. The amount of interest paid by the assessee constitutes the actual cost to the assessee for that property. To exclude the interest amount from the actual cost of the assets/property would lead anomalous result. The interest amount should be definitely added to the actual cost of the property. Respectfully following these legal propositions and on basis of our observations as held herein, we reverse the findings of the Id. CIT(A) and hold that the interest paid to bank for acquiring capital asset would be eligible as part of cost of acquisition."



6.2 On the contrary, the Ld. DR submitted that interest is not allowable as cost of acquisition to the assessee for two reasons. **Firstly**, the documentary evidences of loan sanction letter is not in respect of the Flat C-3501 and therefore, the assessee can't be allowed deduction of the interest paid as cost of acquisition for housing loan taken for Flat No. C-2901. **Secondly**, he submitted that interest paid on housing loan in respect of right acquired in flat is a financial liability of the assessee and not part of the cost of acquisition. He submitted that said interest payment is allowable under the head 'income from house property' as revenue expenditure and therefore, cannot be included as part of capital expenditure for computing cost of acquisition.

6.3 We have heard rival submission of the parties and perused the relevant material on record. We find that the issue of interest paid on housing loan whether eligible for deduction as cost of acquisition while computing long-term capital gain hasn't decided by the Tribunal Delhi bench in order dated 30/09/2015 in the case of ACIT Vs Sunil Batra in ITA No. 3644 /Del/2011 for assessment year 2007-08. The tribunal relied on the decision of the Hon'ble Supreme Court in the case of CIT Vs Tata Iron and steel Co Ltd(231 ITR 285 SC) . The Hon'ble Supreme Court held that cost of the asset and cost of raising money for purchase of the asset, are two different transactions. The relevant finding of the Hon'ble Supreme Court is reproduced as under:



“We are of the view that Mr. Murthy is right in his contention on this aspect of the matter. Coming to the question raised, we find it difficult to follow how the manner of repayment of loan can affect the cost of the assets acquired by the assessee. What is the actual cost must depend on the amount paid by the assessee to acquire the asset. The amount may have been borrowed by the assessee, but even if the assessee did not repay the loan it will not alter the cost of the asset. If the borrower defaults in repayment of a part of the loan, the cost of the asset will not change. What has to be borne in mind is that the cost of an asset and the cost of raising money for purchase of the asset are two different and independent transactions. Even if an asset is purchased with non-repayable subsidy received from the Government, the cost of the asset will be the price paid by the assessee for acquiring the asset. In the instant case, the allegation is that at the time of Commissioner Of Income-Tax vs Tata Iron And Steel Co. Ltd. on 17 December, 1997 Indian Kanoon - <http://indiankanoon.org/doc/1182664/> 1 repayment of loan, there was a fluctuation in the rate of foreign exchange as a result of which, the assessee had to repay a much lesser amount than he would have otherwise paid. In our judgment, this is not a factor which can alter the cost incurred by the assessee for purchase of the asset. The assessee may have raised the funds to purchase the asset by borrowing but what the assessee has paid for it, is the price of the asset. That price cannot change by any event subsequent to the acquisition of the asset. In our judgment, the manner or mode of repayment of the loan has nothing to do with the cost of an asset acquired by the assessee for the purpose of his business. We hold that the questions were rightly answered by the High Court. The appeals are dismissed. There will be no order as to costs.”

6.4 Though in above case, the issue was impact of fluctuation of foreign currency loan borrowed for purchase of the asset, but the same analogy apply for interest for money borrowed purposes of capital asset , which in the case of the assessee is right in the flat. Thus following the decision of the Hon'ble Supreme Court (supra), the interest claimed as cost of acquisition is not allowable.



6.5 Further we note that the loan sanction letter filed by the assessee is in respect of another flat i.e. C-2901 and not in respect of the flat in relation to which capital gain has been declared by the assessee. The clarification letter issued subsequently by the banker or financial institution does not seem to be part of a regular practice of the bank or financial institution. In the case of the assessee the developer and the financial institution both being part of the same group, of which the assessee is part, otherwise in normal course no bank can give loan against the property which was not owned by the assessee and also will not transfer loan against one property to another property without making changes in the loan sanction letter or issuing revised sanction letter. In the case, the documents produced do not give confidence of authenticity.

6.6 Accordingly, the finding of the Ld. CIT(A) on the issue in dispute is set aside and finding that of the Assessing Officer is restored. The ground No. 1 & 2 of the appeal of the revenue are accordingly allowed.

7. The ground No. 3 and 4 of the appeal relate to addition of Rs.11,33,10,868/- treated by the Assessing Officer as unexplained investment u/s 69B of the Act.

7.1 Brief fact qua the issue in dispute are that in the allotment letter dated 31.10.2015, available on Paper Book page 33, it is



mentioned that against the total consideration amount of Rs.23,05,37,750/- of the right in the said flat, the developer already received Rs.22,86,49,013/- against booking of the flat whereas in the computation of the capital gain the assessee has shown to have incurred amount of Rs.11,33,10,868/-. Therefore, according to the Assessing Officer, the difference of Rs.11,53,38,145/-, which was part of purchase cost, but it was not recorded by the assessee in the books of accounts, therefore same was held as unexplained investment by the Assessing Officer. The Ld. CIT(A) however deleted the addition observing as under:

“6.3.3 The AO has made addition of Rs. 11,53,38, 145/- u/s.69B in respect of unexplained investment on the basis of amount of Rs.22,86,49,013/- mentioned in MOU dated 14.12.2016. During the appellate proceedings, appellant has submitted evidence of total payment of Rs.24,68,61,021/- made to M/s. Indiabull Infrastate Ltd in respect of purchase of flat. The source of such payment is loan taken from IICL and saving account of the appellant. Thus, source of entire payment for purchase of flat has been satisfactorily explained by the appellant. Therefore, addition of Rs. 11,53,38,145/- made by AO u/s.69B is deleted.”

7.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. Though the Ld. CIT(A) has mentioned that the assessee has made payment of Rs.24,68,01,021/- to 'Indiabulls Infra Ltd'. in respect of purchases of the flat, however no such detail has been provided by the assessee before us. The assessee has only provided amount paid of



Rs. 11,33,10,868/- and claimed as part of the cost of acquisition detail of which is reproduced as under:

Coat of acquisition

Particulars	Cost	Indexed Cost
Amount paid in FY 2013-14	662,55,210	793,79,245
Amount paid in FY 2014-15	470,55,658	516,96,890
Paid to developer	1133,10,868	1310,76,135
Amount paid in FY 2015-16 (Interes	149,46,436	155,54,802
Amount paid in FY 2016-17 (Interes	169,81,840	169,81,840
Interest Cost	319,28,276	325,36,642
Loan paid by ICCI to Developer	1837,86,057	1837,86,057
Loan repaid by the Buyer	(1837,86,057)	(1837,86,057)
Total (A)	1452,39,144	1636,12,777

7.2.1 The assessee also contended that loan amount of Rs. 18,37,86,057 was disbursed by the Financial Institution to the developer. If we take that amount into account, the amount paid by the assessee would exceed the total agreement value of the flat. The assessee while calculating sale consideration of Rs. 25,32,72,150/- mentioned that he has received refund of Rs. 11,32,72,150/- from the developer along with premium of Rs. 14,00,00,000/- received from the buyers/purchasers. When we take into all these amount we find that figure are not reconciling with claims made before the lower authorities for claim of payments towards property. In the circumstances, we do not have any alternative except to restore this issue back to the file of the Assessing Officer with a direction to the assessee to produce all the documentary evidence in support of that payment of Rs.24,68,81,021/-, which was made by the assessee to Indiabulls Infra Estate Ltd., alongwith ledger account of the



assessee appearing in the books of account of developer and banker/financial institution. The Assessing officer is at liberty to make any inquiry required in the matter but shall provide opportunity of being heard to the assessee. The ground of appeal of Revenue is accordingly allowed for statistical purposes.

8. The ground No. 5 of the appeal of the assessee relates to addition of Rs.13,88,037/- u/s 56(2)(vii) of the Act. According to the Assessing Officer against consideration of the flat i.e. agreement value ,which was to be paid by the assessee to the developer a part amount has only been paid and the balance amount of Rs.13,88,037/- has been neither shown to have paid nor shown as liability in its books of accounts and therefore immovable property has been received by the assessee for amount less than the market value of the property ,thus, the difference was held to be deemed income in the hands of the assessee u/s 56(2)(vii) of the Act.

8.1 Before us, the Ld. Counsel of the assessee submitted that provision of section 56(2)(vii) of the Act are not applicable to the facts of the present case because the assessee acquired the right in said property in financial year 2013-14. He further submitted that the assessee has not received any immovable property during the year under consideration, but has later sold the rights pertaining to said unit during the previous year relevant to the financial year 2017-18. In view of the same addition u/s 56(2)(vii) of the Act is not applicable in the case of the assessee.



8.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The relevant provision of section 56(2)(vii) of the Act are reproduced as under:

“.. (vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009 but before the 1st day of April, 2017,-

(b) any immovable property,-

(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property; (ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property;”

8.2.1 On perusal of the above provisions it is evident that deemed income u/s 56(2)(vii) of the Act can be considered at the time of the receipt of the property in the hand of the assessee since in the year under consideration the property has not been received and therefore, provisions of section 56(2)(vii) are not applicable in the case of the assessee in the instant assessment year. The ground of the Revenue is accordingly dismissed.



9. The ground No. 6 of the appeal relates to addition of Rs.2,78,000/- in respect of cash which was found from the residence of the assessee. The Assessing Officer made the addition for the reason that no explanation regarding source of cash was made before the Assessing Officer. Before the Ld. CIT(A), the assessee has explained that it was having a opening cash balance of Rs.53,73,750/- which was duly disclosed in the return of income filed for the assessment year 2016-17. It was explained that cash was kept in house for meeting expenses in the nature of medical expediencies and other household expenses. The Ld. CIT(A) deleted the addition observing as under:

“7.3 The facts recorded in the assessment order and the submissions of the appellant have been carefully considered.

During the appellant proceedings, the appellant had submitted copy of IT for A. Y.2016-17 and stated that cash in hand available was Rs.53,73.750/- and the source of cash found of Rs.2,78,000/- was the cash in hand available with the appellant. The appellant has been successful in explaining the source of cash of Rs.2,78,000/- as the part of cash in hand available with the appellant. In view of the above discussion, the addition of Rs.2,78.000/- made u/s.69A by the appellant is deleted.

Thus, Ground No.7 is allowed.”

9.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The Ld. DR could not controvert availability of cash in hand on more than Rs.53,00,000/- in the hands of the assessee which was supported by way of income-tax return for assessment year 2016-17.



Therefore, we do not find any error in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground of the Revenue is accordingly dismissed.

10. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

Order pronounced in the open Court on 31/07/2023.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 31/07/2023

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai