

# What's New

## News Flash



March 2014

***The period of holding for the purpose of calculation of capital gains on transfer of rights to acquire an immovable property should be considered from the date of the Agreement to buy, and not from the date of allotment/ confirmation letter***

### Facts

- Gulshan Malik<sup>1</sup> (the taxpayer) had booked an apartment (immovable property) by making a payment of a booking amount to DLF Universal Limited (the seller). The chronological sequence of the relevant events are summarised below:

Event	Date
Application for allotment	31 July 2004
Payment of booking amount	3 August 2004
Allotment/ confirmation letter issued by the Seller	6 August 2004
Buyer's agreement	4 November 2004

- On 2 November 2007, the taxpayer had entered into a sale agreement with a buyer to sell the rights to acquire the immovable property.
- In the return of income, the taxpayer offered to tax the gains earned on the sale of the rights in the immovable property as long-term capital gains, the period of holding being 39 months and 2 days starting from the booking date to the date of sale agreement. The taxpayer also claimed exemption under section 54 of the Income-tax Act, 1961 (the Act), as the proceeds from the aforesaid sale were invested in the purchase of a residential house within the prescribed time limit.
- In the assessment order, the said income was assessed as short-term capital gains by the Tax Officer (TO), since the period of holding was determined as 35 months and 28 days starting from the date of signing of the agreement to the date of sale of the rights in the immovable property (i.e. less than 36 months). Consequently, exemption under section 54 of the Act was also denied.
- The appellate authorities upheld the order of the TO, and treated these gains as short-term capital gains on the following grounds:
  1. The taxpayer did not have the possession of the immovable property, and hence only the rights in the property were transferred, and not the title in the property.

2. The rights in the property were created in favour of the taxpayer only when it was purchased by the taxpayer by way of an agreement entered with the seller.
  3. The allotment /confirmation letter clearly stated that no rights would accrue to the allottee until the agreement was signed by the parties concerned.
- Aggrieved by the order of the Income-tax Appellate Tribunal (the Tribunal), the taxpayer chose to appeal before the High Court.

### **Issue under consideration**

Whether the booking rights as to the immovable property accrued to the taxpayer on the date of booking or on the date of signing of the agreement with the seller?

### **High Court's ruling**

The Delhi High Court held as follows:

- Relying on the definition of the terms 'capital asset' and 'transfer', booking rights or rights to purchase or obtain title to a property were capital assets capable of being transferred.
- A right or an interest in an immovable property can accrue to a buyer only by way of an agreement. Only an agreement which intended to convey these rights can be considered as a source of accrual of rights to the buyer.
- The allotment/ confirmation letter clearly stated that no rights would accrue to the allottees until an agreement was signed by the parties concerned. Hence, the date of acquisition of the capital asset i.e. the immovable property would be the date of the signing of the agreement.
- There cannot be any parity between the application /confirmation letter and the agreement, as the confirmation letter itself stated that no rights would accrue to the allottee until the agreement was signed by the parties concerned.

Based on the specific facts, particularly, as to the contents of the allotment/confirmation letter, the Delhi High Court recognised the date of signing of the agreement to buy to be the source of accrual of rights in the property, as opposed to the date on which the initial booking amounts were paid or the date on which an allotment/confirmation letter was issued.

### **PwC observations**

- It is worthwhile to note that the High Court, in the given facts, recognised the agreement date as the date on which the rights in an immovable property accrues to the buyer, as against the date of application/confirmation letter. This was particularly driven by the fact that the application /confirmation letter specifically stated that no rights would accrue to the allottee until the agreement was signed.
- The Delhi High Court observed that the conveyance of a property or the doctrine of part performance are not the only ways which result in the creation of enforceable rights. In view of Explanation 2 to section 2(47) of the Act, even the right or an interest in a property could be a transferable capital assets.

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