

**IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “C”,MUMBAI  
BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER**

**ITA No.7350/Mum/2014 for (Assessment Year : 2011-12)**

ITO-28(2)(4), 3 <sup>rd</sup> Floor, Tower No.6, Room No. 308, Vashi Railway Station Complex, Vashi, Navi Mumbai-400703	Vs.	Shri Pandit Dasrath Jadhav Flat No. 1204, Building No. 56, Sec-54, 56, & 58, Seawood Complex, Nerul, Navi Mumbai-400706. <b>PAN: ADAPJ8258J</b>
(Appellant)		(Respondent)

Appellant by : Ms. Beena Santosh (DR)  
Revenue by : Shri Amar Gahlot (AR)  
Date of hearing : 15.11.2016  
Date of Pronouncement : 20.01.2017

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JM:**

1. This appeal u/s 253 of the Income-tax Act ('Act') is directed by Revenue against the order of Ld. Commissioner of Income-tax (Appeals) [for short 'the CIT(A)] -33 Mumbai dated 28.09.2004 for Assessment Year (AY) 2011-12. Though, the Revenue has raised as many as four grounds of appeal but as per our opinion, the only substantial ground of appeal raised by the assessee is that "*The ld. CIT(A) erred in deleting the addition of Rs. 80,82,100/- as capital gains on grant of development rights*".
2. Brief facts of the case are that the assessee filed his return of income for relevant AY on 29.08.2011 declaring total income of Rs. 7,67,6498/-. The assessment was completed u/s 143(3) of the Act on 27.01.2014. The Assessing Officer (AO) while framing the assessment besides the other addition, made the addition of Rs. 80,82,100 as capital gain on account of transfer of development rights in the land. On appeal before the ld. CIT(A), the addition was deleted by ld. CIT(A). Thus,

being aggrieved by the order of Id. CIT(A), the Revenue has filed the present appeal before us.

3. We have heard the Id. Departmental Representative (DR) for the Revenue and Id. Authorized Representative (AR) for assessee. The Ld. DR for Revenue argued that assessee entered into agreement with Shri Shamji Hari Patel (Proprietor of Ravray Developers) on 14.03.2011 for transfer of development rights in a Plot situated at Plot No. 96, Section-19, Ulwe, Navi Mumbai. The assessee was 2/3<sup>rd</sup> owner of the said land out of which 1/3<sup>rd</sup> was acquired by him vide agreement dated 18.07.2008 and remaining 1/3<sup>rd</sup> was acquired by agreement dated 11.02.2011. As per agreement, the assessee along with other 1/3<sup>rd</sup> shareholder granted development right to the builder for constructing residential + commercial building. The assessee along with other co-owner received Rs. 10,00,000/- as non-refundable deposit as monetary consideration and share of constructed plots/share of proposed building being non-monetary consideration. The cost of construction was borne by builder. The other statutory expenses were distributed equally among the parties. However, there was no such condition in the agreement dated 14.03.2011 for sharing such expenses. Thus, no service charges was payable by the assessee. The 90% project was completed till 31.03.2013 and total cost incurred till date on said project was Rs. 1.45 Crore and remaining estimated cost of Rs. 25,00,000/- was to be incurred in future to complete the project. Thus, the total cost of project was of Rs. 1.70 Crore. The total built-up project area as per Completion Certificate (C.C.) was 598.946 sq. meter consisting of 546.752 sq. meter residential and 52.194 sq. meter commercial built-up. In sq. meter total Carpet area of the project is 6602.15 sq. ft. It was further argued that as per Carpetwise area, the share of assessee is 43.63% and by applying the percentage to the total cost, the share of assessee's cost comes to Rs. 74,17,100/- beside that assessee received Rs. 6,65,000/- as monetary consideration. Thus, the assessee has received a sum of Rs. 80,82,100/-. The Ld. DR for Revenue further argued that development right of the land was transferred on 14.03.2011. Hence, the capital gain would arise in AY 2011-12. The assessee acquired 2/3<sup>rd</sup> share on 18/07/2008 and remaining 1/3 on 11.02.2011, thus, the same was Short Term Capital Asset in question held by assessee for less than 36 Month. The Ld. DR for Revenue further argued that Id. CIT(A) wrongly deleted the addition. The Id DR

relied on the decision of Chaturbhuj Dwarkadass Kapadia Vs CIT 260 ITR 491(Bom), DCIT Vs Jai Trikanand Rao [2014] taxaman.com453(Mumbai Trib) and on Andhra Network Ltd Vs DCIT [2015] taxman.com115(Hydrabad Trib). On the other hand, Id. AR of assessee supported the order of Id. CIT(A) and would argue that the assessee entered into Joint Venture Agreement dated 14.03.2011 with Ravray Developers to develop a plot owned by assessee (2/3<sup>rd</sup>) along with co-owner Shri Baliram Pawar (1/3<sup>rd</sup> owner). As per the contract of Joint Venture with the developer, the entire cost was to be borne by the builder. The builder was entitled to 50% of constructed area for sale. As per term of contract of G.P. was executed in favour of Shri Shamji Hari Patel on 29.03.2011 in order to enable him to carry out the incidental and necessary execution of work. As per the Joint Venture contract nothing happened during the relevant AY such as neither the possession was handed over nor any construction activities started nor any single unit of the project was sold and as such no taxable profit or capital gain could be accrued to the assessee. Thus, the assessee offered Nil income of the said project. The Id. CIT(A) appreciated the fact in correct perspective and allowed the appeal of the assessee holding that it was not a cast of transfer of land, rather a Joint Venture Agreement as assessee is the land owner and agree to allow the development of the land as a part of Joint Venture obligation while the other part is of construction which is to be undertaken by developer. The construction activity was not started during the year under consideration. Hence, there was no question of parting of possession to the developer. The quantification of consideration to be received by the assessee from the developer is not possible. It was further argued by Id. AR of the assessee that the condition laid down in section 53A of the Act (part performance) are not meet out in the fact of the present case. The Ld. AR of the assessee argued that no capital gain arise to the assessee for AY 2011-12 and prayed for dismissal of the appeal filed by the Revenue. The Id AR for the assessee relied on the following decision;

- (a) VijayaProduct Private Ltd Vs ACIT 134 ITD 19(Chennai)(TM )
- (b) Fibas Infratech (P) Limited Vs ITO 46 taxman.com 313(Hyderabad Tri)
- (c) CIT Vs Chemosyn Ltd 371 ITR427(Bombay)
- (d) Coromandel Cables Private Ltd Vs ACIT 71 taxman.com 346( Chennai Tri)
- (e) K Radhika Vs DCIT 13 taxman.com 92 (Hydrabad)
- (f) Genaral Glass Co Ltd Vs DCIT 14 SOT32(Mum)
- (g) CIT Vs Samhhaji Nagar CHS Ltd 370 ITR 325(Bombay)

- (h) Andhra Networks Vs DCIT 57 taxman.com 115(Hydrabad Tribunal)
- (i) DCIT Vs Jai TRikanand Rao 41 taxman.com 453(Mumbai-Tri)
- (j) Sunil Sidhrathbhai Vs CIT (1985) 23Taxman14W(SC)
- (k) Chaturbhuj Dwarkadass Kapadia Vs CIT 260 ITR 491(Bombay)

4. We have considered the rival contention of the parties and gone through the orders of authorities below. We have also gone through the various decisions relied by the parties and the written submission filed by the assessee. The AO while framing the assessment observed that the assessee entered into agreement for transfer of development right and received an amount of Rs. 6,65,000/- as reflected in the balance-sheet as a non-refundable deposit. The assessee executed agreement dated 14.03.2011 for development of plots, the assessee was asked to furnish the details of the amount received and the amount accrued on account of execution of agreement from the date of execution onward along with profit & statement of profit along with bank statement. The assessee filed his reply dated 09.12.2013 contending therein that the assessee is co-owner of plot of land admeasuring 399.99 sq. meter. The assessee entered into agreement along with co-owner with the builder. It was further contended that the builder is not required to pay the consideration, which has to construct the building on the plot and thereafter builder would get half of the constructed area and ownership of the plot. The construction of the building is not constructed/completed and none of the parties to the agreement is received the consideration. The assessee further contended that the builder has deposited Rs. 10,00,000/-, the amount is in the form of deposit and which would be a separate figure from the rest of construction while calculating capital gain. The contention of the assessee was not accepted by AO holding that on 31.03.2013, the 95% of the project was completed and till that date the cost incurred on the project was Rs. 1.45 Crore and remaining estimate of Rs. 25,00,000/- to be incurred in future, therefore, the total cost of the project is Rs. 1.70 Crore. Thus, the AO calculated the share of assessee as Rs. 74,17,000/- and also added Rs. 6,65,000/- out of non-monetary consideration. Thus, the assessee has received the total consideration of Rs. 80,82,100/-. The AO further issued a show-cause notice dated 10.01.2014 asking the assessee as to why the amount received by assessee should not be taxed as a capital gain accrued on account of Joint Venture Agreement dated 14.0-3.2011. The

assessee further submitted his reply and again contended therein that building is still under construction, no C.C. is issued. No Profit & Loss A/c or capital gain can be calculated and hence the levy of taxation not arises. The contention of the assessee was not accepted by AO holding that assessee has allowed the possession of immovable property and the action of the assessee is covered u/s 53A of the T.P. Act and computed the Short Term Capital Gain (STCG). The Id. CIT(A) while considering the contention of the assessee concluded that the contract of the assessee is not a simple and plain case on transfer of land *parse* for development to its Joint Venture Agreement, where the assessee is a land owner and agreed to allow the development of the land as a part of Joint Venture Obligation. The construction activity was not completed in the year under consideration as the date of agreement itself on 14.03.2011. The Commencement Certificate issued by CIDCO vide letter dated 29.08.2011 and therefore, there is no question of parting of possession in the right of developer during the year under consideration. The Id. CIT(A) relied upon the decision Chennai ITAT in Vijaya Production Pvt. Ltd. reported in 134 ITD 19/ [2012]17 taxman.com 223(Chennai) (TM). The Id. CIT(A) further concluded that no separate entity created for development nor possession was parted to the developer for his independent development. The Id. CIT(A) concluded that the property was not transferred to the developer. Thus, there was no question for capital gain to be assessed in the year under consideration. With regard to the non-refundable security, it was concluded that the same cannot be brought to tax independently on the capital gain arising out of transfer of land which may arise at later stage, therefore, the same cannot be brought to tax in the year under consideration. The assessee has entered in to a joint venture development agreement with the builder in the previous year relevant to the assessment year in the appeal. The assessee contributed the share of land, the assessee has received only Rs. 6,65,000/-.

5. The Hon'ble Jurisdictional High Court in *Chturbhuj Dwarkadss Vs CIT* (supra) while considering the similar ground held that , if on bare reading of the contract the AO comes to the conclusion that in the guise of the agreement to sale, a Development Agreement is contemplated, under which the development right for permission from various authorities, either under the Power Of Attorney or otherwise and in the name of assessee, then the AO is entitled to take the date of

contract as the date of transfer in view of Section 2(47)(v). The Hon'ble High Court further laid down that the contract as a whole has to be read and in case it is clear that a dichotomy is contemplated between the power of attorney authorizing the developer to deal with the property and irrevocable licence to enter upon the property is contemplated in the contract, then the date of contract would be relevant to decide the date of transfer under section 2(47)(v). In the present case the contract was entered on 14<sup>th</sup> March 2011 and the attorney was executed on 19<sup>th</sup> March 2011. Thus the date of transfer as per the spirit of the decision of the Hon'ble High Jurisdictional Court the transfer undisputedly took place in March 2011. Thus, the Id CIT(A) wrongly concluded that the transferee to perform his obligation in the year under consideration or the condition laid down under section 53A was satisfied and or the agreement was not in the nature of contract under section 53A. Under the agreement the assessee was required to execute the Power of attorney which was executed on 19.03.2011. The decision relied by the Id AR for the assessee from various Tribunal and non jurisdictional High Court are not helpful as the decision of the Jurisdictional High Court is binding precedent on us. Hence, as per our considered opinion the order passed by the Id CIT(A) is not in conformity with the guidelines of the Hon'ble High Jurisdictional Court and thus the same is set aside and the order of the AO is restored.

In the result, appeal of the Revenue is allowed.

Order pronounced in the open court on this 20<sup>th</sup> Day of January, 2017.

**Sd/-**

**(B.R.BASKARAN)**

**ACCOUNTANT MEMBER**

Mumbai; Dated 20/01/2017

S.K.PS

**Sd/-**

**(PAWAN SINGH)**

**JUDICIAL MEMBER**

**Copy of the Order forwarded to :**

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

BY ORDER,

(Asstt.Registrar)  
ITAT, Mumbai