IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "A", KOLKATA
[Before Hon'ble Shri M.Balaganesh, AM & Shri S.S.Viswanethra Ravi, JM]

ITA No.2854/Kol/2013
Assessment Year : **2007-08**

I.T.O., Ward-30(1), Kolkata	-versus-	Smt. Maya Sanyal Kolkata (PAN:AATPS 0946 G)
(APPELLANT)		(RESPONDENT)

ITA No.2810/Kol/2013
Assessment Year : **2007-08**

A.C.I.T., Circle-17, Kolkata	-versus-	Smt. Indrani Sanyal Kolkata (PAN:AATPS 0947 H)
(APPELLANT)		(RESPONDENT)

For the Appellant : Shri Sallong Yaden, Addl. CIT
For the Respondent : Shri I.Banerjee, FCA

Date of Hearing : 07.12.2016.
Date of Pronouncement : 21.12.2016.

ORDER

Per Shri M.Balaganesh, AM

These appeals of the revenue arise out of the order of the Learned CIT(A) in Appeal No. 697 & 701/CIT(A)-XIV/2011-12 and 274/CIT(A)-XIV/Kol/10-11 dated 06.08.2013 and 24.09.2013 respectively for the Asst Year 2007-08 passed against the orders of assessment framed by the Learned AO u/s 143(3)/147 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Both the appeals involve identical issues and hence they are taken up together for the sake of convenience.

2. The facts of Smt Maya Sanyal are considered herein and decision rendered thereon would apply with equal force to Smt Indrani Sanyal also.

3. The only issue to be decided is as to whether the ld CITA is justified in deleting the levy of capital gains in the year under appeal in the facts and circumstances of the case.

4. The brief facts of this case is that the assessee along with her daughter in law Smt Indrani Sanyal purchased the lease rights of an immovable property bearing No. A-79, Nizamuddin East, New Delhi on 13.9.93 for the consideration of Rs. 9,20,000/-. Later the status of the said property was changed to a freehold one by paying an amount of Rs. 77,548/- to the authority. On 16.7.1997, they entered into a Colloboration agreement with Mr Ikbal Singh for the development and construction of the premises. The total construction would comprise the basement , ground floor, 1st floor and 2nd floor. It was agreed upon that the total expenses for the construction was to be borne by the developer and an additional payment of Rs. 1,00,000/- was to be made by him to the assessee and her co-owner. In lieu, it was decided vide this agreement, that on completion of the construction, the assessee and her co-owner would take the rights for the 1st and 2nd floor and the developer would be the owner of the basement and ground floor of the said construction. Along with this agreement, the assessee signed a power of attorney (POA) in favour of the said developer Mr Ikbal Singh jointly with her co-owner, in order to enable him to carry on the work without any hindrance. The ld AO observed that this POA was strictly limited to the issues related to the said construction work and no rights were transferred to the developer. Further to ensure that the owner of the property does not deny the compensation to the developer after the completion of the construction, a 'Will' was signed each by the assessee and her co-owner that the basement and the ground floor of the said building would be the property of Mr Ikbal Singh after their demise.

5. The assessee submitted that the assessee and her daughter in law (other co-owner) entered into an agreement on 16.7.97 with the developer Mr Ikbal Singh for development and construction of the property for the consideration that the said developer shall incur the cost of construction and the assessee and her daughter in law shall be entitled to get 50% of the constructed area in lieu of their parting with the land to the said developer. The plant by the Delhi Municipal Authority was already sanctioned on 27.3.97. The construction was completed in Feb 1998. The assessee and her daughter in law received their share in the property on construction in Feb 1998 itself and the 2nd floor was sold in the financial year 2006-07 relevant to asst

Year 2007-08 for a consideration of Rs. 1,25,00,000/-. The assessee's share in the said consideration was Rs. 62,50,000/-. The ld AO treating the same as consideration received, computed capital gain on the sale of flat by the assessee. Similarly the ld AO also assessed capital gains in the hands of the assessee for the Asst Year 2007-08 in respect of another flat in the same property. The assessee had relied on the decision of the co-ordinate bench of Madras Tribunal in the case of N.M.A.Mohammed Haneefa vs ITO reported in (1987) 29 TTJ 213 (Mad) and Cochin Tribunal in the case of Mrs Thresiamma Abraham vs ITO reported in (1992) 42 TTJ (coch) 499 in support of her contentions. Accordingly the assessee contended that the transfer did not take place in the assessment year in question in view of the fact that development agreement in respect of the said property was entered into in the Asst Year 1998-99 coupled with registered power of attorney executed in favour of the developer and handing over of the possession of the property to the developer and hence the capital gains, if any, arose in the said assessment year and not in Asst year 2007-08. The assessee also placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of DIT (IT) vs Bidhan Chandra Banerjee in ITA No. 786 of 2008 dated 20.11.2008 wherein it was held that the transfer takes place in the year in which the possession was given to the developer for construction of the property. The assessee also placed reliance on the decision of the Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia vs CIT reported in (2003) 260 ITR 491 (Bom) .

6. The ld CITA by placing reliance on these decisions held that no capital gain can be taxed in the assessment year under appeal as the transfer took place in the year 1997 itself. The ld CITA also observed that even on merits, the assessee was able to demonstrate with reference to the registered valuer's report, the contents of which were not controverted by the ld AO that the market value of the property as on the date of receipt of the possession thereof and indexed cost thereof was more than the consideration received on sale of the property during the assessment year in question. He observed that this was not disputed by the ld AO in the remand report. The registered valuer had determined the market value of the property sold at Rs.

80,80,000/- at the time of construction. The ld AO was not able to bring on record any evidence to suggest that the market value was not correct. Therefore, he held that the market value based on registered valuer's report cannot be brushed aside. Based on these observations, the ld CITA observed that the ld AO was totally incorrect in not accepting the evidentiary value of the said collaboration agreement dated 16.7.97 since it is as much as page 1 of the collaboration agreement comprising in Rs 10 cartridge paper purchased from the stamp vendor, Shri Davinder Kumar on 5.7.1997. He further observed that the ld AO had accepted part of the narration in the said collaboration agreement with respect to the registration of the conveyance of the Plot No. A-79 , Nizamuddin East. The ld AO was also wrong in both accepting and rejecting the evidentiary value of the collaboration agreement dated 16.7.97. He finally concluded that the transfer took place on 16.7.97 and the said transaction was completed on Feb 1998 when the assessee and her co-owner received the consideration in the shape of 1st and 2nd floor of the newly constructed building. Hence the property that had been sold by the assessee in this year was virtually received in Feb 1998 as a culmination of the transfer that took place by virtue of collaboration agreement dated 16.7.97. Based on these observations, the ld CITA deleted the levy of capital gains both on facts as well as on law. Aggrieved, the revenue is in appeal before us on the following grounds :-

Smt. Maya Sanyal

"1) On the fact and circumstances of the case, the Ld.CIT(A) erred in not considering the fact that collaboration agreement was only for developing the property and there was no sale or change of ownership of property, hence capital gain, if any shall be calculated from the year 1993 only.

2) On the facts and circumstances of the case, the Ld.CIT(A) erred in not considering the fact that the collaboration agreement was not registered, and as per sec. 269AB of the Act. this agreement with developer cannot be treated as a transfer of property, for capital gain purpose.

3) On the facts and circumstances of the case, the Ld.CIT(A) erred in giving reference of a remand report of AO in para 3.6(i) of the appellate order, while no any remand report was called for during appellate proceedings.

4) That the appellant craves leave to add, alter, modify, delete or include any of the grounds of appeal.

Smt. Indrani Sanyal

"That in the facts and circumstances of the case the Ld. CIT(A) has erred in holding that no capital gain is taxable in the A.Yrs.2003-04 & 2007-08. It is a fact on the record that the basement, ground floor and 1st floor was transferred by the assessee in the

financial year 2002-03 and 2nd floor during the financial year 2006-07. Therefore, capital gain would be arisen in the A.Yrs.2003-04 & 2007-08."

7. The ld DR reiterated the findings of the ld AO and relied on the decision of Mumbai Tribunal in the case of ACIT vs Jawaharlal Agicha in ITA NO. 1844/Mum/2012 dated 28.9.2016 wherein it was held that the handing over of possession of the land to a developer for the limited purpose of developing the land will not give rise to capital gains tax under the provisions of the Income Tax Act, 1961.

8. The ld AR reiterated the submissions made before the ld CITA and relied on findings of the ld CITA. He also placed reliance on the amendment brought in the Registration Act, 1908 with effect from 24.9.2001 which stated that the unregistered development agreements cannot be construed as transfer under section 53A of the Transfer of Property Act, 1882 . He accordingly stated that since in the instant case, the development agreement was entered on 16.7.97, the amendment in Registration Act would not be applicable and hence the capital gains arose only in the year of entering into development agreement coupled with registered power of attorney executed on the same day by the assessee and her co-owner in favour of the developer. He placed reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of C.S.Atwal vs CIT reported in 378 ITR 244 (P&H) and decision of Hon'ble Bombay High Court in the case of Bertha T Almeida vs ITO reported in (2015) 53 taxmann.com 522 (Bom) dated 10.7.2014 in support of his arguments.

9. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee comprising of Collaboration / Development Agreement dated 16.7.97 (pages 1 to 19 of PB) ; Application for approval of construction of additional floor (page 11 of PB) ; Valuation report from registered valuer as on 31.3.98 (Pages 12 to 16 of PB) ; Revised computation statement with explanation (Pages 17 to 20 of PB) ; Deed of conveyance jointly executed by the assessee and other co-owner (Pages 21 to 45 of PB) and General Power of Attorney jointly executed in favour of the developer (Pages 46 to 50 of PB).

We find from the General Power of Attorney jointly executed in favour of the developer by the assessee along with her co-owner vide Clause 10, that the power is given to sell / transfer the entire basement floor and entire ground floor of the above said property bearing No. A-79, Nizamuddin East, New Delhi to any intending purchaser and to enter into any agreement with the purchaser to receive the consideration amount in full or in parts by way of cash , cheques, drafts, pay orders etc , and to issue valid legal receipts thereof, and to sign and execute all relevant documents and to get the same registered with the Sub-Registrar , New Delhi. Again Vide Clause 16 of the said registered Power of Attorney, the POA holder has got power to sign and execute the proper sale deeds in respect of the said portions in favour of the purchaser, to submit the same for registration with the Sub-Registrar, New Delhi concerned, to admit the execution thereof, and to get the same registered. Again Vide Clause 14 of the said registered Power of Attorney, the POA holder has got power to apply and obtain the necessary permissions / clearances from concerned / appropriate authorities /departments for the sale/ transfer of the said portions as mentioned hereinabove. These clauses conclusively prove that the assessee and her co-owner of the property intended to transfer the subject mentioned property in favour of the developer pursuant to the Development Agreement and Registered Power of Attorney. This act was further culminated by handing over of the possession of the property by the assessee and her co-owner in favour of the developer. These facts are not disputed by the revenue before us. The main argument of the revenue is that the sale deeds in the year under appeal and accordingly the transfer had happened during the year under appeal. We find that the reliance placed by the ld AR on the decision of the *Hon'ble Supreme Court in the case of DLF Universal Ltd vs Appropriate Authority & Anr reported in (2000) 243 ITR 730 (SC) is well founded , wherein it was held that 'immovable property means any right in or with respect to any building or part of a building which is yet to be constructed, which right accrues or arises from any transaction including that by way of any agreement or any arrangement of whatever nature or being a transaction by way of sale, exchange or lease of such building or part of a building. 'Transfer' in relation thereto means the doing of*

anything including by way of agreement or arrangement which have the effect of transferring or enabling the enjoyment of such immovable property."

9.1. We also find that the provisions of section 2(47)(v) of the Act read with section 53A of Transfer of Property Act are very clear in this regard. In the instant case, the assessee had executed a development agreement followed by registered power of attorney in favour of the developer and possession of the property was also handed over to the developer. The construction of the 1st and 2nd floor was also completed and handed over to the assessee and her co-owner in Feb 1998. We also find that the *Hon'ble Calcutta High Court in the case of DIT (IT) vs Sri Bidhan Chandra Banerjee in ITA No. 786 of 2008 dated 20.11.2008* had approved the following findings of the ld CITA in that case as below :-

> *"The fact cannot be denied that Chapter XXC of the Income Tax Act defines 'transfer' and only in the case of 'transfer' this Chapter (now abolished) comes in operation. As per Sec. 269UA(f) of Income Tax Act, Exchange is also transfer. In the instant case the assessee along with other co-owners has exchanged their 50% right on the old property with the 50% of the Constructed Area."*
>
> *The appeal was preferred by the Department before the learned Tribunal. The learned Tribunal also after taking into account all the facts and the decisions cited before it and on the basis of the materials placed before it affirmed the order so passed by the CIT(Appeals).*
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> *We do not find that there is any reason to interfere with the order so passed by the learned Tribunal since this judgement is absolutely based on the evidence and the proper appreciation of the facts and materials which were placed before the learned Tribunal and accordingly, in our considered opinion no substantial question of law is involved to admit this appeal. Hence the appeal is dismissed.*

9.2. Now let us come to the decision of the Mumbai Tribunal dated 28.9.2016 supra relied upon by the ld DR. We find that the said decision is factually distinguishable from the facts of the case before us. Let us now address the distinguishing facts of that case :-

(a) In that case, Clause 3, Clause 6 and Clause 14 of the development agreement clearly laid down that the possession shall be given to the developer only upon fulfillment of certain conditions i.e sanctioning of scheme by Slum Rehabilitation Authority (SRA) and obtaining the 'letter of intent' and other requisite permissions from the competent authorities. It has also been clarified in Clause 14 that owner (assessee) shall always be deemed to be in physical and exclusive possession of the said property until the issuance of Annexure II by SRA. It is an admitted fact on record that even till date no permission or scheme has been granted by the SRA in respect of the impugned land. Thus it was held that there could not have been any question of parting with the physical possession by the assessee with the developer.

(b) The other important aspect that cannot be ignored here is that the AO had held this transaction to be a case of transfer by erroneously presuming that development agreement was 'registered' with the concerned authorities. The correct fact has been noted by Ld CITA that impugned document was not 'registered' with the registrar under the Registration Act, 1908. This factual finding has not been negated or controverted by the ld DR before us.

In the instant case, though the Development Agreement dated 16.7.97 was unregistered, we find that it does not interfere with the validity and legal enforceability of the development agreement as simultaneously an irrevocable General Power of Attorney dt 16.7.97 was duly executed and registered with Sub-Registrar of Assurance, New Delhi in favour of the developer. We find that the ld AR had rightly relied on the amendment in the Registration Act, 1908 with effect from 24.9.2001, wherein , in order to fall within the ambit of section 53A of Transfer of Property Act, 1882, all possessory rights could be validly parted with only by means of registered document. As a result, all development agreements, in order to be capable of being eligible for transfer , u/s 2(47)(v) of the Income Tax Act must be by way of registered documents. However, this amendment in Registration Act, 1908 was only with effect from 24.9.2001 and hence would be applicable only for development agreements

entered into on or after 24.9.2001 mandating registration of the same in order to fall within the ambit of section 53A of Transfer of Property Act read with section 2(47)(v) of the Income Tax Act. The assessee and her co-owner in the instant case had entered into a unregistered development agreement dated 16.7.97 and hence the amendment with effect from 24.9.2001 in Registration Act, 1908 would not apply to the same. We also draw support from the decision of the Hon'ble Punjab and Haryana High Court in the case of C.S.Atwal vs CIT reported in (2015) 378 ITR 244 (P&H) dated 22.7.2015 which had addressed this issue in an elaborate manner.

9.3. We also find that the reliance placed by the ld AR on the decision of the Hon'ble Bombay High Court in the case of Bertha T Almeida vs ITO reported in (2015) 53 taxmann.com 522 (Bom) dated 10.7.2014 also supports the case of the assessee., wherein the head notes of the said case are reproduced below:-

> *Section 2(47) of the Income-Tax Act, 1961 – Capital gains – Transfer (Lands and Building) – Assessee entered into development agreement with builder and developer for transfer of development rights in respect of land – Developer took possession of that land and started development work – Whether said transaction was to be treated as transfer of right in property covered under section 2(47)(v) – Held , Yes [Para 4] { in favour of revenue }.*

9.4. We find that the ld DR had finally stated that the dispute before us is not in the year of taxability of capital gains but only on the computation of capital gains. We find that the assessee had placed the registered valuer's report , the contents of which were not controverted by the ld AO that the market value of the property as on the date of receipt of the possession thereof and indexed cost thereof was more than the consideration received on sale of the property during the assessment year in question. We find that the assessee had placed the computation of capital gains based on this valuation report wherein the net result only resulted in a capital loss of Rs. 84,622/- as elaborated in the ld CITA order. The ld CITA observed that this was not disputed by the ld AO in the remand report. The registered valuer had determined the market value of the property sold at Rs. 80,80,000/- at the time of construction. The ld AO was not able to bring on record any evidence to suggest that the market value was not correct. Therefore, the ld CITA held that the market value based on registered valuer's report cannot be brushed aside. We find that the ld CITA had rightly observed that the

transfer within the meaning of section 2(47) of the Act had already happened in the year 1997 itself and the execution of the sale deeds in the financial year 2006-07 is only the culmination of the transfer that took place pursuant to development agreement dated 16.7.97. We also find lot of force in the alternative argument of the assessee, without prejudice, that as per the computation placed on record by the assssee, there is no resultant capital gains that could be taxed in the year under appeal. Hence in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon hereinabove, we hold that the ld CITA had rightly deleted the levy of capital gains and had rightly held that the transfer had not taken place in the year under appeal both on law as well as on facts. Accordingly , the grounds raised by the revenue are dismissed for both the cases.

10. In the result, the appeals of the revenue are dismissed.

Order pronounced in the court on 21.12.2016.

Sd/-	Sd/-
[S.S.Viswanethra Ravi]	[M.Balaganesh]
Judicial Member	Accountant Member

Date: 21.12.2016.

R.G.(.P.S.)

Copy of the order forwarded to:

1. Smt. Indrani Sanyal, APT-59, 29/13, Ballygunge Park, Kolkata-700019.
2. Smt. Maya Sanyal, 59, Dover Court, 29/13, Ballygunge Park, Kolkata-700019.
3. I.T.O., Ward-30(1), Kolkata
4. A.C.I.T., Circle-17, Kolkata.
5. CIT-(A)- XIV, Kolkata,
6. The CIT-V, Kolkata.
7. DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches