

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'B', CHANDIGARH**

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.1359/Chd/2017
Assessment Year: 2008-09

The ITO
Ward-4, Panchkula

Vs. Mrs. Sunita
D/o Mohindra Singh
H.No. 90, Sec-2,
Panchkula

PAN No. COGPS0273H

(Appellant)

(Respondent)

Assessee By : Sh. Raj Bishnoi
Revenue By : Sh. Manjit Singh

Date of hearing : 19/03/2018
Date of Pronouncement : 27/03/2018

ORDER

PER B.R.R. KUMAR A.M.

The present appeal has been filed by the Revenue against the order of the Ld. CIT(A), Panchkula dt. 13/07/2017.

2. In the present appeal Revenue has raised the following grounds:

1. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is right in holding that the parties had agreed for pro-rata transfer of land when by virtue of executing the Joint Development Agreement (JDA) read with possession letter and duly registered irrevocable special power of attorney, there was a grant and assignment of all rights in the entire property in favour of Tata Housing Development Company Limited (THDC) and so 'transfer' for the purposes of section 2(47)(v) of the Income Tax Act 1961 read with Section 2(47)(ii), 2(47)(vi) Explanation below Section 2(47) and Section 269UA had taken place?*

2. *Whether on the facts and circumstances of the case and in law the Hon'ble CIT(A) is right in holding that that no possession had been given by the transferor to the transferee of the entire land in part performance of the JDA read with possession letter and irrevocable special power of attorney so as to fall within the domain of Section 53A of the Transfer of Property Act 1882 completely disregarding the facts that as per the JDA there was a grant and assignment of all rights in the entire property in favour of THDC along with handing over of physical and vacant possession?*

3. *Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that that no possession had been given by the transferor to the transferee of the entire land in part performance of the JDA so as to fall within the domain of Section 53A of the Transfer of Property Act 1882 when by virtue of the duly registered irrevocable special power of attorney, the developer was in*

complete control of the property and was in possession thereof including all rights of a defacto owner?

4 Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that the essential ingredients of Section 53A of the Transfer of Property Act 1882 were not fulfilled on the mere ground that the JDA was not registered when section 2(47) (v) of the Income Tax Act 1961 only refers to the contract of the nature referred to in section 53A of the Transfer of Property Act and the requirement of registration of agreement under section 53A of the Transfer of Property Act cannot be read into section 2(47)(v) of the Income Tax Act 1961 read with Section 2(47)(ii), 2(47)(vi), and explanation below 2(47) and Section 269UA?

5. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that the essential ingredients of Section 53A of the Transfer of Property Act 1882 were not fulfilled when the irrevocable Special Power of Attorney was duly registered and there was no requirement of the JDA being registered?

6. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that the essential ingredients of Section 53A of the Transfer of Property Act 1882 were not fulfilled by not appreciating the observations of the Hon'ble Supreme Court in the case of Suraj Lamps and Industries Pvt.Ltd Vs. State of Haryana and Anr. 183 (2011) DLT 1 (SC) and also the observations of the Hon'ble Supreme Court in order dated 01.07.2014 in the case of Sanjeev Lai etc. Vs. Commissioner of Income tax, Chandigarh & Anr. in Civil Appeal Nos. 5899-5900 of 2014 and in the case of Madathil Brothers vs. Deputy Commissioner of Income Tax (301ITR 345)?

7. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that the possession delivered, if at all, was as a licensee for the development of the property and not in the capacity of the transferee when all possible rights in the property including the right to sell etc. had been given to the builder by virtue of registered special irrevocable power of attorney?

8. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that the assessee was liable to capital gains tax only on portion of plot in respect of which sale deed has been executed and not in respect of the remaining portion of land for which no consideration had been received and in respect of JDA which stood cancelled and incapable of performance when the Hon'ble High Court had accepted the 'transfer' in respect of a portion of the piece of plot on the basis of the JDA dated 25.02.2007 but had not accepted the same JDA in respect of the remaining portion of the land particularly when the JDA and consequential consideration of transfer was for the entire piece of land?

9. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in not accepting that there was a transfer of the entire piece of land in terms of Section 2(47)(v) of the Income Tax Act 1961 read with Section 53A of the Transfer of Property Act 1882 particularly when the Hon'ble High Court has treated that transfer has taken place in respect of a portion of the same land?

10. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that the question of deduction under section 54F of the Income Tax Act 1961 does not survive when the Hon'ble High Court had itself upheld the 'transfer' in respect of a portion of the said piece of land and has thus upheld the imposition of capital gains tax on account of the income arising from the transfer of the said portion of land?

11. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in holding that the question of deduction under section 54F of the Income Tax Act 1961, does not survive when there was indeed a valid transfer of entire piece of land (capital asset) and so the issue of invoking section 54F (subject to the conditions specified therein) for claiming exemption of LTCG still remains alive?

12. Whether the Ld. CIT(A) is right in bifurcating the agreement into different portions and allowing the assessee to pay capital gains tax only when cash or money is received whereas section 45 of the Income Tax Act 1961 is a deeming provision where capital gain is liable to be taxed in the year in which transfer takes place and there is no provision under the law to allow the assessee to pay capital gains tax beyond the year in which the transfer takes place?

13. Whether the Ld. CIT(A) is right in not adjudicating on the crucial issue of applicability of section 2(47) (ii) and 2(47)(vi) of the Income Tax Act 1961 in the case of the assessee as the provisions of section 2(47)(ii) and 2(47)(vi) also make the assessee liable for capital gains under the Income Tax Act 1961 ?

14. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in not considering the contemporaneous documents pertaining to a transaction which have to be read as a whole as held by Apex Court judgment in S. Chathanatha Karyalar Vs. The Central Bank of India Ltd. in AIR 1965 SC 1856 and in the instant case these are 'Agreement to Sell', "Possession letter", "Irrevocable Special Power of Attorney" and "Resolution by the members allowing the society to enter into a contract with the developers" ?

15. Whether on the facts and circumstances of the case and in law the Ld. CIT(A) is right in not considering the "inclusive" definition of 'Transfer' in Section 2(47) and definition of "Agreement to Transfer" u/s 269 UA of Income Tax Act, 1961 and relied upon different Acts i.e. "Transfer of Property Act 1882" & "Registration Act 1908" to decide the proposition of law that 'Transfer' mandatorily requires Registration and perpetuated the 'mischief sought to be remedied by the incorporation of clauses (v) and (vi) in Section 2(47) against the Hey don's Rule?

16. Whether on the facts and circumstances of the case and in law Ld. CIT(A) is right in holding that the provisions of section 2(47) (vi) of the Income Tax Act were not applicable in absence of registered conveyance deed relying upon the decision of Supreme Court in Alapativerkatraman (57ITR 108) disregarding the subsequent decision of Supreme Court in Podar Cement Ltd. holding that the principal of Common law, transfer of property Act and Registration Act were not conclusive for interpretation of provisions of Income Tax Act?

17. Whether on the facts and circumstances of the case and in law Ld. CIT(A) is right in holding that the provisions of section 2(47)(ii) are not applicable when all the member of society surrendered their individual rights in the plots together with original purchase deeds in favour of society to be subsequently transferred to Tata Housing Development Company Limited (THDC) leading to extinguishment of rights in the plots?

18. Whether on the facts and circumstances of the case and in law Ld. CIT(A) is right in holding that there was no accrual of income in respect of remaining portion of land being unregistered when section 45 of the Income Tax Act, 1961 requires taxability in the year of transfer?

19. Whether on the facts and circumstances of the case and in law Ld. CIT(A) is right in redefining the definition of full value of consideration as contained in section 48 of the Income Tax Act by restricting the capital gain only to the amount of sale consideration received in cash pursuant to execution of the sale deeds dated 02.03.2007 and 25.04.2007 where as full value of consideration also included the monetary value of each flat proportionate to the area of each plot registered?

3. Brief facts of the case are that a Housing Society, named as The Defence Services Co-operative House Building Society Ltd., Mohali (hereinafter referred to as 'Society') consisting of 207 members was formed, which was the owner of 27.3 acres of

land in Village Kansal, District Mohali. This Society entered into a tripartite development agreement (hereinafter referred to as 'agreement') on 27.04.2007 with life Hash Builders Pvt. Ltd., Chandigarh (hereinafter referred to as 'Hash') and M/s Tata Housing Development Company Ltd., Mumbai (hereinafter referred to as THDC), by virtue of which the society would transfer its land for development in lieu of monetary consideration and also consideration in kind to the members of the society.

4. The assessee was also a member of the said society owning 300 sq. yards plot of land. This arrangement made by way of joint development agreement constituted transfer of capital asset. The total consideration a furnished flat of 1350 sq. feet as consideration in kind. The total cost of the furnished flats comes to approximately Rs, 1,08,75,000/- @ 4500 per sq. feet. The assessee has received Rs. 19,20,000/-. After allowing the cost of acquisition, the long term capital gains were computed at Rs. 89,55,000/-. In view of the above reasons, proceeding u/s 147 was initiated and notice u/s 148 was issued on 26.10.2009. And assessment was completed determining the capital gains of Rs. 89,55,000/-.

5. Before the Ld. CIT(A) the assessee has shown evidences regarding the declaration of long term capital gain at Rs. 16,50,326/- in the return filed on 17/08/2015. Which was calculated on the basis of sale consideration actually received.

5.1 Before the Ld.CIT(A) the assessee has drawn attention to the decision of Hon'ble Punjab and Haryana High Court in the case of Sh. C.S Atwal and others decided in the case of other members of another society namely Punjabi Co-operative Housing Building Society on similar and identical facts. The Hon'ble Court has summarized the conclusion at para 46 of the said order as under:-

"46. We summarize our conclusions as under.-

1. Perusal of the JDA dated 25.02.2007 read with sale deeds dated 02.03.2007 and 25.04.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties has agreed for pro-rata transfer of land.

2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.02.2007 so as to fall within the domain of section 53A of 1882 Act.

3. The possession delivered, if at all, was as a licensee for the development of the property and not in the capacity of a transferee.

4. Further Section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.02.2007 having been executed after 24.09.2001, the agreement does not fall u/s 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply.

5. It was submitted by Learned counsel for the assessee appellant that whatever amount was received from the developer, capital gain tax has already been paid on that and sale deeds have also been executed. In view of cancellation or JUA dated 25.02.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee appellants shall remain bound by their said stand.

6. The issue of eligibility to capital gains tax having been decided in favour of the assessee, the question of exemption u/s 54F of the Act would not survive any longer and has been rendered academic.

7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed.

8. Consequently, the substantial questions of law as reproduced in the beginning of the judgment are answered in the manner indicated herein before and the appeals of the assessee are disposed of accordingly."

By following the judgment of the Hon'ble Punjab & Haryana High Court, the Ld.CIT(A) directed the Assessing Officer to restrict the long term capital Gains on the amount actually received by the assessee in pursuance of the said agreement.

6. Before us during the hearing the Ld. DR relied on the assessment order and Ld. AR submitted that submitted that the action of the CIT(A) is inconsonance with the order of Hon'ble High Court in the case of C.S. Atwal & Others.

7. We have gone through the material placed before us. Since the order of the Ld. CIT(A) is based on the order of the Hon'ble High Court order in the case of C.S. Atwal(supra), we hereby uphold the order of the Ld. CIT(A).

8. In the result, the appeal of the Revenue is dismissed

Order pronounced in the open court.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER
Dated : 27/03/2018
AG

Sd/-
(B.R.R.KUMAR)
ACCOUNTANT MEMBER

Copy to: The Appellant, The Respondent, The CIT, The CIT(A), The DR