



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No.250/CTK/2015
Assessment Year : 2007-2008

Abhaya Prasad Panda, 137/A, Surya Nagar, Bhubaneswar.	Vs.	ITO, Ward -1(3), Bhubaneswar
PAN/GIR No.AIBPP 3059 M		
(Appellant)	..	(Respondent)

ITA No.214/CTK/2015
Assessment Year : 2007-2008

ITO, Ward -1(3), Bhubaneswar.	Vs.	Abhaya Prasad Panda, 137/A, Surya Nagar, Bhubaneswar.
PAN/GIR No.AIBPP 3059 M		
(Appellant)	..	(Respondent)

Assessee by : Shri Dillip Kumar Mohanty, AR
Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 03/05/ 2018
Date of Pronouncement : 7/05/ 2018

ORDER

Per N.S.Saini, AM

These are cross appeals filed by the assessee and the department against the order of the CIT(A)-1, Bhubaneswar dated 23.2.2015 for the assessment year 2007-2008.

2. The assessee has raised the following grounds of appeal:



" 1. For that the order of assessment dated 18.3.2013 as well as the order of the CIT(A)-1, Bhubaneswar dated 23.2.2015 are void, abinitio, in view of the jurisdictional error since at the time of Development agreement for development of the property, no transfer arises giving rise to any Transfer of Property U/s. 53A of the Transfer of Property Act, thereby into the mischief of 2(47) of the I.T. Act, 1961. Thus, the notice issued U/s. 147 for the impugned period are not only illegal but also without jurisdiction.

2. For that the Ld. Assessing Officer has wrongly assumed jurisdiction on the face of the fact that though the Developer Agreement was executed on 15.01.2007, but however, the delivery of possession was given only on 01.07.2007 and in furtherance to that the building plan was approved/sanctioned by the B.D.A on 04.04.2009 and under the circumstances the notice issued U/s. 148 relating to the Asst. Year 2007-08, invoking the provision of Section 2(47) of the I.T. Act, 1961 and consequential assessment thereof are not only illegal but without the sanction of law and exceeding jurisdiction.

3. For that in absence of any consideration accrued or received to the assessee at the time of entering into the Development Agreement, charging section -45 and computation section -48 are not complied with and as such there could be no computation of capital gain and therefore the present assessment including the 1st Appellate Order are without jurisdiction and or exceeding jurisdiction so also illegal and arbitrary.

4. For that without prejudice to the grounds at -3 above, in absence of any consideration accrued or received, the present computation of capital gain basing on a hypothetical value are contrary to the real income theory and hence the present assessment order as well as the 1st appellate order computing the capital gain placing reliance on the date of signing of the Development Agreement are not only ex facie illegal but also arbitrary and not sustainable on fact and law.

5. For that though the learned 1st Appellate Authority appreciated that the assessee while developing the property has received its share in lieu of the land from the developer and the entire 1/3rd super built up area towards owners share are available in the ground floor for residence and all the requirements of Section 54F having complied with, the assessee is entitled to deductions/ exemption as allowed U/s. 54F of the I.T. Act, 1961, but however, the allowance of exemption to one of the residential unit, are contrary to the provisions of law & as such illegal 85 liable to be set aside.

6. That the assessee was deprived from the benefit of reasonable opportunity of being heard and deprived from the benefit of natural justice.

7. For that the order of assessment as framed has neither been based on the facts and circumstances of the case or on points of law.



8. For that the assessment as framed are entirely perverse on fact as well as erroneous in law. Thus the assessment as framed is liable to be quashed.

9. For that though the CIT (A) appreciated the pre and post expenditure towards construction of the residential house, but however, considering part of the same and rejecting the others without a speaking order in calculating the cost of acquisition are erroneous and needs to be revised and hence liable to be set aside.

10. For that the assessee craves leave to add, alter or amend any of the grounds of appeal either before or at the time of hearing of the appeal.

11. For these and other grounds if any that will be adduced at the time of hearing, it is prayed that the assessment be quashed and the demand be annulled in the interest of justice and equity."

3. In Ground Nos.1 to 4 of the appeal, the grievance of the assessee is that the time of development agreement for development of property, no transfer arise giving rise to any transfer of right u/s.53A of the Transfer of Property Act and hence, the assessee is not liable to any capital gains tax.

4. The brief facts of the case are that the assessee entered into an agreement with the builder M/s. Odysa Home & Commercials (P) Ltd. on dt.15.1.2007 for construction and sale of 9 dwelling units on his land situated at Plot NO.137/A, Surya Nagar, Bhubaneswar. On the same day, the assessee also executed an irrevocable general power of attorney(GPA) with M/s. Odysa Home & Commercials (P) Ltd. The Assessing Officer observed that a close reading of the both the agreement and GPA lead to the conclusion that the assessee has delivered physical possession of the land to the builder on the day of execution of GPA and agreement i.e. on 15,1.2007. The power and control of land was conferred on the builder/developer under GPA. Accordingly, he held that there was transfer of capital asset within the meaning of section 2(47) of the Act



read with section 53A for transfer of Property Act. The possession of land was taken by the builder in part performance of the contract for transfer of the property. The Assessing Officer relied upon the decisions in the cases of Rubab M. S. Kazerani v. JCIT (ITAT, Mum-TM), 91 ITD 429, and Lalitha Ramaswamy v. ITO(ITAT-Mum), 75 ITD 293, etc. in support of the conclusion that the landed property was given possession on dt.15.1.2007 to the builder in part performance of the contract for transfer of property within the meaning of the provisions of section 2(47)(v). Hence, long term capital gain has arisen during the FY 2006-07.

5. The super built up area of 3 dwelling units given to the assessee by the builder is 5157 sqft. Taking into account the market price of remaining 6 flats sold to the customers, the average market price realized by the builder comes to Rs.2,219/- per sqft. Accordingly, the full value of consideration received by the assessee in the form of built up area comes to Rs.1,14,43,383/- (5157 sq ft x Rs.2,219). The builder also paid a sum of Rs.5,90,000/- to the assessee in addition to 3 flats allotted in lieu of land. Hence, total consideration received by the assessee in lieu of land is Rs.5,90,000/- in addition to 3 flats valued at Rs.1,14,43,383/-.

6. The Assessing Officer gathered the cost of land as on 1.4.1981 from the office of the District Sub-Registrar which is Rs. 1,178/- per decimal. Since the total land area handed over to the builder is 138 decimal, the Assessing Officer computed the cost of acquisition of the land given to the builder at Rs.1,62,554/-(1,178 x 138). The Assessing Officer computed the indexed cost of acquisition at Rs.8,43,707/- by taking the cost index



at Rs.519/100, The Assessing Officer also found that the assessee has invested an amount of Rs. 1,18,630/- over a period of years in constructing a two storied building in the said plot which was demolished by the builder and computed the indexed cost of improvement at Rs.4,61,221/-. Accordingly, the total indexed cost of acquisition and investment was computed at Rs. 13,04,928/- (8,43,707 + 4,61,221). After deducting the indexed cost of acquisition and investment from the total amounts received in cash and kind, the Assessing Officer arrived at the long-term capital gains of Rs.1,07,28,455/- and added the same to the income of the assessee.

7. Before the CIT(A), apart from filing additional grounds of appeal regarding delivery of possession of land, the assessee vide written submission dt.17.7.2014 has contested the AO's conclusion that delivery of the landed property was given on 15.1.2007 as part performance of contract as under:

" 1. At the outset, it is submitted that though the agreement with the developer was executed on 15.01.2007 and the General Power of Attorney was executed on the same day, but however the delivery of possession of the land was delivered to the developer/builder only on 01.07.2007, Copy of the possession letter is annexed herewith at Annexure-II.

Without prejudice to the submission at (1) above, it is respectfully submitted that the approval of the Building Plan was sanctioned by the Bhubaneswar Development Authority vide this Sanction Letter No. 4772/BP/BDA, Bhubaneswar dated 04.04.2009 only. (Annexure-III) On the facts as above, though the development agreement was executed on 15.01.2007 & the delivery of possession was given on 01.07.2007 but however, there was no development activity on the land till such time, the Building Plan was approved/ sanctioned by B.D.A. i.e. 04.04.2009.



Since the intent of the developer agreement was given effect to only after 04.04.2009, in absence of any performance, till such time, the transaction cannot be brought into the mischief of Section 53A of the Transfer of Property Act & thereby as a deemed transfer U/s. 2(47) of the I. T. Act, 1961.

In view of the facts as above, the assumption of the Assessing Officer i.e., I. T. O, Ward-1(3), Bhubaneswar that the delivery was made on the same day i.e., on the date of the execution of the agreement as well as the GPA are not correct and therefore the notice issued on the above premises of fact in reopening the completed assessment relating to the financial year 2006-07, relevant to the Asst. Year 2007-08 are not sustainable on fact and law, consequently the assessment framed are liable to be set aside/quashed only on this ground."

The appellant also made further submissions vide written note dt.16.2.2015 as under:

"In continuation to the submission of the assessee appellant in his written note of submission on dated 17.07.2014 claiming that the delivery of possession of the schedule property was delivered to the developer/builder only on 01.07.2007, the assessee appellant would like to provide the following factual details which proves that though the agreement was executed on 15.01.2007, but however, the possession was not delivered either on that date or during the financial year 2006-07. During the period 2006-07, the assessee appellant had let out the schedule property to one of the tenant M/s. Suntony Signage Pvt. Ltd., who has occupied the premises for their business for the whole of the year 2006-07 and have paid rent to the assessee appellant. The confirmation as obtained from Suntony Signage Pvt. Ltd. are annexed herewith at Annexure-I for your honour's kind perusal, record and reference. It is pertinent to submit here that on receipt of the rent as aforesaid from the tenant M/s. Suntony Signate Pvt. Ltd, the assessee has offered the same for taxation during the financial year 2006-07, relating to the Asst.Year 2007-08. The returns filed for the aforesaid period accompanied with the computation of total income by the assessee are annexed herewith at Annexure-II for your honour's kind perusal, record and reference. From the submission as above vis-a-vis the documents submitted now, it is evident that during the impugned year, the possession of the scheduled property was with the assessee appellant. It is further submitted that assessee had rented a premises for his residence at Plot No.64, Surya Nagar, BBSR for the period 30.7.2007 to 20.6.2012 (copy enclosed)"



8. The CIT(A) after considering the submissions of the assessee held as under:

"I have considered the matter. The AO has made a detailed discussion regarding the part performance of contract when the appellant executed an agreement on dt.15.1.20107 with Odyssa Home & Commercials (P) Ltd., for construction of flats in the landed property situated at Plot No.137/A, Surya Nagar, Bhubaneswar and delivered the physical possession of the land to the builder Odyssa Home and Commercials Pvt Ltd. The appellant also executed GPA in favour of the builder for the purpose on 15.1.2007 and as per the same the builder was empowered to carry out all the works necessary starting from obtaining approved plan to construct the building. Accordingly, within the meaning of section 2(47) of the Act r.w.s 53A of the Transfer of Property Act, the land was delivered to the builder Odyssa Home & Commercials (P) Ltd., in part performance of the contract.

The Assessing Officer has correctly considered that the long term capital gains has arisen on 15.1.2007 when the landed property was handed over to M/s. Odyssa Home & Commercials Pvt Ltd."

9. Before us, Id A.R. of the assessee relied on the decision of this Bench of the Tribunal in the case of Sri Laxmidhar Panda vs ACIT in ITA No.501/CTK/2014 for the assessment year 2009-2010 order dated 22.9.2017 and submitted that as the development agreement dated 15.1.2007 is not registered and, therefore, the development agreement dated 15.1.2007 having been executed after September,4, 2001, the agreement does not fall under section 53A of the Transfer of Property Act, 1882 and, consequently, section 2(47)(v) of the Act does not apply and the assessee is not liable to any capital gains tax.

10. Ld D.R. relied on the orders of lower authorities.



11. After considering the rival submissions and perusing the orders of lower authorities, we find that Hon'ble Supreme Court in the case of CS Atwal vs CIT (2017-TIOL-374-SC-IT order dated 4.10.2017 held as under:

"The effect of the amendment to Section 53 is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of Section 53A. In short, there is no agreement in the eyes of law which can be enforced under Section 53A of the Transfer of Property Act. This being the case, we are of the view that the High Court was right in stating that in order to qualify as a "transfer" of a capital asset under Section 2(47)(v) of the Act, there must be a "contract" which can be enforced in law under Section 53A of the Transfer of Property Act. A reading of Section 17(1A) and Section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in Section 53A. The ITAT was not correct in referring to the expression "of the nature referred to in Section 53A" in Section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 w.e.f. 01.04.1988. All that is meant by this expression is to refer to the ingredients of applicability of Section 53A to the contracts mentioned herein. It is only where the contract contains all the six features mentioned in Shrimant Shamrao Suryavanshi (supra), that the Section applies, and this is what is meant by the expression "of the nature referred to in Section 53A". This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression "of the nature referred to in Section 53A" would somehow refer only to the nature of contract mentioned in Section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under Section 53A after 2001 / unless the said contract is registered. This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law, obviously no "transfer" can be said to have taken place under the aforesaid document."



12. In the instant case, the undisputed facts are that the agreement dated 15.1.2007 with the builder M/s. Odyssa Home & Commercials (P) Ltd., for construction and sale of 9 dwelling units by the assessee on his land situated at Plot No.137/A, Surya Nagar, Bhubaneswar was not registered. Therefore, in view of the decision of Hon'ble Supreme Court in the case of CS Atwal, quoted above, the same would not amount to transfer u/s.53A of the Transfer of Property Act, 1882 and consequently cannot be a transfer within the meaning of section 2(47)(v) of the Act. Thus, there cannot be any capital gains in the hands of the assessee which can be brought to tax during the year under consideration. Therefore, respectfully the decision of the Hon'ble Supreme Court quoted above, we set aside the orders of lower authorities and delete the addition of Rs.1,07,28,455/- made towards long term capital gains and allow the grounds of appeal of the assessee.

13. In view of our above decision, other grounds of appeal taken by the assessee have become infructuous and hence not adjudicated.

14. The revenue has raised the following grounds of appeal in its appeal:

"1. On the facts and in the circumstances of the case, the CIT(A) is not justified in law as well as on facts by deleting addition of Rs.59,90,410/- under the head long term capital gain.

2. On the facts and in the circumstances of the case, the CIT(A) has erred in law by allowing the assessee the benefit of indexed cost of investment for the A.Y. 1972 to 1978 and 1991 to 1999.

3. On the facts and in the circumstances of the case, the CIT(A) has erred in law in not accepting the examination of findings made by the AO on the issues."



15. In view of our above decision in Ground Nos.1 to 4 of appeal of the assessee, the grounds taken by the revenue have become infructuous and hence, dismissed.

16. In the result, appeal filed by the assessee is allowed and appeal filed by the revenue is dismissed.

Order pronounced on 7 /05/2018.

Sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

sd/-

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 7 /05/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant /Assessee: Abhaya Prasad Panda, 137/A, Surya Nagar, Bhubaneswar
2. The Respondent. /Revenue: ITO, Ward -1(3), Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack