

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

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.272/Coch/2018 : Asst.Year 2010-2011

The Asst.Commissioner of Income-tax, Circle 1(1) Non-Corporate, Kochi.	Vs.	Sri.Prince Joseph 17D Express Estate Kaloor, Kochi-682 017. PAN : AAFW2229H.
(Appellant)		(Respondent)

Appellant by : Smt.A.S.Bindhu
Respondent by : Sri.Mathew Joseph

Date of Hearing : 12.09.2018	Date of Pronouncement : 17.09.2018
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ORDER

Per George George K., JM

This appeal at the instance of the Revenue is directed against CIT(Appeals)'s order dated 21.03.2018. The relevant assessment year is 2010-2011.

2. The grounds raised by the Revenue read as follows:-

"1. The Order of the Commissioner of Income tax: (Appeals-II), Kochi, in ITA No. 09/NC/Cir-1(1)/CIT(A)-II/17-18 dated 21-03-2018, is opposed to law, facts and circumstances of the case.

2. Whether the learned Commissioner of Income Tax (Appeals) was right in allowing the assessee's appeal by applying the ratio of Hon'ble Supreme Court Judgement in the case of CIT Vs Balbir Singh Maini. In the quoted case, the joint development agreement was between a co-operative society which did not own the land but only its members owned the land.

3. *CIT(A) ought to have upheld the fact that, in this case the owner of the property himself has entered into an agreement. This agreement was a sale agreement and not a joint development agreement as in the cited case law. In the cited case law only 50% of the price agreed was paid while in the this case, 80% of the sale consideration have been paid.*

4. *CIT(A) ought to have upheld the fact that the AO established implied handing over of possession in the assessment order. The sale consideration received by the assessee has not been refunded to the buyer. The CIT(A) has ignored the arguments of the AO that dues of a particular persons (the Buyer) cannot be adjusted by a different person (the company).*

5. *For these and other grounds that may be urged at the time of hearing, it is requested that the order of the Commissioner of Income tax (Appeals) may be set aside and that of the Assessing Officer restored.”*

3. The brief facts of the case are as follows:-

The assessee is an individual. For A.Y. 2010-2011, the assessment u/s 143(3) was completed in the case of the assessee on 25.12.2013 assessing a total income of Rs.2,28,27,948. Subsequently, it was noticed by the A.O. that the assessee had entered into an agreement for sale on 12.12.2008 of his property measuring 62 cents of land at Trikkakara North village. The total sale consideration was Rs.248 lakh. It was further noticed by the Assessing Officer that assessee had received Rs.217 lakh upto the relevant assessment year. According to the A.O. there was constructive possession given to the buyer of the said property and it tantamount to transfer u/s 2(47) of the Income-tax Act r.w.s. 53A of the Transfer of Property Act,

which had resulted in capital gain taxation. The A.O. concluded that since the resultant capital gain was not offered for taxation, there was escapement of income and he issued notice u/s 148 of the I.T.Act on 16.07.2017.

3.1 The assessee in response to notice issued u/s 148 of the I.T.Act, filed a return of income disclosing the income declared in the original return of income. The assessee contended that the agreement for sale was not acted upon and the advance amount received by the purchaser was refunded. It was submitted that the assessee was the owner of the property even as on the date of assessment proceedings. It was further submitted that as per the terms of the agreement for sale, the assessee-vendor was supposed to develop the land so as to make it fit for construction by the purchaser and in view of the local agitation against the development of the property, the assessee could not fulfill the terms of the agreement and agreement for sale was cancelled. The cancellation agreement dated 04.05.2011 was also produced before the Assessing Officer. However, the A.O. rejected the objections raised for bringing to tax capital gains on the impugned property measuring 62 cents and completed the reassessment. The additions under the capital gain was based on the following finding of the A.O.:-

- (i) Substantial portion of the agreed amount has been received by the assessee. (2.17 crores out of 2.48 crores).

- (ii) There was no evidence to show that possession was not handed over.
- (iii) The unregistered sale agreement is witnessed by two persons and the cancellation agreement has no witness.

4. Aggrieved by the order of assessment, the assessee preferred an appeal to the first appellate authority. The CIT(A) by following the judgment of the Hon'ble Supreme Court in the case of *CIT v. Balbir Singh Maini [(2017) 398 ITR 531 (SC)]* held that the agreement for sale not being registered, does not have evidentiary value and cannot be termed as a sale as per the terms of provisions of section 53A of the Transfer Pricing Act and the Registration Act, as amended in the year 2001. Further, the CIT(A) noticed that the possession of the property was not handed over to the buyer as per the terms of the agreement for sale dated 12.12.2008. The CIT(A) further held the advance received from the purchaser was refunded by the assessee and the property in question still remained with the assessee. Therefore, it was concluded by the CIT(A) that there was no transfer giving rise to any capital gain. The relevant finding of the CIT(A) reads as follows:-

"I have gone through the assessment order and submission of the appellant. The assessee had made substantial cash deposits in his bank account. On being asked by the Assessing Officer, the assessee stated that the cash deposits were made out of advance received against a proposed sale of property. The Assessing Officer verified the agreement to sell vis-a-vis advance received and found that out of the total agreed sales consideration of Rs.2.48 crores, an amount of Rs.217 crores has already been received, during the year

under consideration. Since major portion of sales consideration was already received by the assessee, the Assessing officer concluded that transfer of the property was complete and he worked out the capital gain during the year under consideration.

On the contrary, the assessee stated that the agreement to sale itself contained some pre-conditions before the property was to be handed over to the buyer. However inspite of assessee's efforts, because of local resistance, those conditions stipulated in the agreement to sale could not be fulfilled and ultimately the agreement to sale had to be cancelled and the amount of advance received had to be refunded to the buyer. Till date out of receipt of advance of Rs.2.17 crores, Rs.1.80 crores has already been refunded to the said buyer. The appellant contended that the possession of the property was never handed over to the buyer, the agreement was never registered and ultimately, the proposed sale had to be cancelled altogether. The assessee contended that since property has not been sold at all, the question of capital does not arise.

Legally speaking, the appellant contended the agreement to sale has no evidentiary value as the same had not been registered and the same should have been ignored by the Assessing officer in the light of decision of Hon'ble Supreme Court in the case of CIT vs. Balbir Singh Maini.

In my opinion, since there is no evidence to prove that the possession of the property was handed over to the buyer, the agreement to sale was not registered, and later on the same was cancelled, and advance taken was refunded it cannot be said that any transfer has taken at all. Ultimately, the property could not be sold and there cannot be capital gains without sale."

5. The Revenue being aggrieved, has filed the present appeal before the Tribunal. The learned Departmental Representative relied on the grounds raised and strongly supported the reassessment order dated 23.11.2017. The learned AR, on the other hand, submitted that the possession in question of the impugned property was never handed over

to the purchaser, hence, there was no part performance of the contract as per the terms of section 53A of the Transfer of Property Act. It was further submitted by referring to the judgment of the Hon'ble Supreme Court in the case of *CIT v. Balbir Singh Maini (supra)*, that agreement for sale was unregistered and unregistered document shall not have any effect in law.

6. We have heard the rival submissions and perused the material on record. The agreement for sale dated 12.12.2008 and the cancellation of agreement dated 04.05.2011 are on record. On examining the clauses of agreement for sale, it is clear that the possession of the property is to be handed over to the buyer only when the entire sale consideration is paid by the purchaser. In the instant case, the entire sale consideration was never paid by the purchaser. The sale agreement dated 12.12.2008 was cancelled vide agreement dated 04.05.2011 and prior to the cancellation of sale agreement, substantial portion of advance received by the assessee was refunded to the intended purchaser. Further, we noticed that the agreement for sale is not a registered document. The Hon'ble Apex Court in the case of *CIT v. Balbir Singh Maini (supra)*, has held that after amendment of Registration Act, 1908 in the year 2001, unless the document containing the contract to transfer any immovable property is registered, it shall not have any effect in law. The relevant finding of the Hon'ble Supreme Court reads as follows:-

"20. The effect of the aforesaid amendment 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 Income-tax Appellate Tribunal 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, with effect from April 1, 1988. All that is meant by this expression is to refer to the ingredients of applicability of section 53A to the contracts mentioned therein. 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. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court, namely, whether under the JDA possession was or was not taken ; whether only a licence was granted to develop the property ; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of section 2(47) of the Act is not attracted to the facts of this case, we need not go into any other factual question."

6.1 In the instant case, there is no Joint Development Agreement (JDA), but only an unregistered sale agreement,

which could not be fulfilled due to external reasons and there was no handing over of possession at any point of time to the purchaser. The property in question as on the date is still with the assessee and there is no transfer of the impugned property at any point of time. Therefore, the addition made by the Assessing Officer is uncalled for and we uphold the finding of the CIT(A). It is ordered accordingly.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on this 17th day of September, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 17th September, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A) – II, Kochi.
4. The Pr.CIT-II, Kochi.
5. The DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin