IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SMT P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA Nos. 1204 & 1205/Hyd/2016
Assessment Years: 2007-08 and 2009-10

Sudhakar Prasad V., Hyderabad PAN – AANPV7216L	vs.	Asst. Commissioner of Income-tax, Circle – 11(1), Hyderabad.
(Appellant)		(Respondent)

Assessee by	:	Shri K.C. Devdas
Revenue by	:	Smt. N. Swapna
Date of hearing	:	05/07/2018
Date of pronouncement	:	03/10/2018

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

Both these appeals filed by the assessee are directed against the common order dated 29/07/2016 of CIT(A) – 5, Hyderabad for AY 2007-08 and 2009-10. As the issues are common in both the appeals, the same were clubbed and heard together and we find it convenient to pass a common order.

2. Briefly the facts of the case, as taken from AY 2007-08, are, assessee deriving income from house property, remuneration and interest from firms, filed his return of income for the AY 2007-08 on 26/09/2008 admitting income of Rs. 17,05,780/- and agricultural income of Rs. 1,95,000/-. Subsequently, the case was taken up for scrutiny and an order u/s 143(3) was passed determining the income at Rs. 17,05,780/-.

2.1. Later, the case was reopened u/s 147 and a notice u/s 148 dated 28/03/2014 was issued and duly served on the assessee. In response, the assessee filed a letter dated 12/11/2014 along with the

copy of the return filed on 26/09/2008 and requested to treat the same as compliance to notice u/s 148. Against the notices u/s 143(2) and 142(1) issued by the AO, the AR of the assessee appeared and furnished written submissions.

2.2 The AO observed that the background leading to reopening of the case for the subject Assessment year is that during the course of scrutiny assessment proceedings for the Assessment year 2011-12, explaining the sources of certain investments made in the subsequent assessment years, the assessee brought out that he received certain amounts on sale of flats during the financial year 2012-13. The details of flats sold were called for and it is noticed that the assessee is one of the 41 land owners who had entered into development agreement-cum GPA, dated 13.04.2006 with a firm, M/s Sri Durga Estates (later the name and status changed to company by name M/s Trendset Builders Pvt Ltd., Hyderabad, for development of his land situated at S.No.143, Plot No.8, Nanakramguda, admeasuring 600 Sq. Yds and 60% share in Plot No.22 & 22A, admeasuring 332 Sq. Yds, in the same vicinity. As per this agreement (registered vide document No.8954/2006), the land owners are to get 40% of the built up area, by which the share of the assessee comes to 9262 Sq. Ft and 3075 Sft, aggregating to 12,337 Sft. Later on 03.11.2008 all the 41 land owners entered into another agreement with M/s Trendset Builders Pvt. Ltd., and as per which the assessee got additional developed area of 8500 Sft. AO observed, it is pertinent to mention here that though a number of supplementary deeds were made from the original development-cum AGPA deed entered in the year 2006 to the latest deed entered in the year 2010, the contents of land and the share of the developed area to the share of the landowners remained same except some modifications in allotment of developed area.

2.2 The AO further observed that in pursuance of the development agreement entered into, the assessee received the developed area

during the financial year 2011-12 and sold the flats during the same year. It is the claim of the assessee that since the developed area was handed over to him by the builder in the year 2011-12, capital gains are considered for the Assessment year 2012-13. It was also claimed that since the said developed area received during the year 2011-12 was sold in the same year, short term capital gains also were arrived at and declared along with the long term capital gains in the Assessment year 2012-13, and therefore, there is no escapement of income for the subject Assessment year 2007 -08.

2.3. AO observed that the assessee entered into a development agreement-cum-GPA with M/s Trendset Builders Pvt Ltd., for development of his land on 13.04.2006 and in pursuance of the said deed, the assessee received considerable developed area in the form of flats. As per the material available, the assessee purchased the plots in the financial years 2001-02 and 2000-01 for a consideration of Rs.30,103/ - and Rs.60,373/- respectively.

2.4 When the above facts brought out to the notice of assessee by AO, the assessee controverted that since no consideration was received in the year of agreement, either in the form of cash or developed area, there is no incidence of capital gains. The assessee contended that the development agreement cannot be treated as part performance of the Contract within the meaning of section 2(47)(v) of the Income Tax Act, 1961 to attract the provisions of section 53A of Transfer of Property Act, 1882. In support of this argument, the assessee relied on a plethora of case laws, mentioned hereunder, and submitted that the transaction cannot be treated as transaction for the purposes of charging income under the head long term capital gains:

Binjusaria Properties Ltd v. ACIT - !1'A No.157/Hyd/II
R. Vijayalakshmi v. Appu Hotels Ltd, 257 ITR 4 (Madras HC)
K. Radhika v, DCn 65 DTR 250 [Hyd. Trib)

2.5 Apart from the above contentions, the assessee also brought in another issue and made an alternate claim. It is the claim of the assessee that if it is to be presumed that the assessee got the benefit of long term capital' gains on the date of entering into development agreement, immediately it follows that the assessee has to get the benefit of exemption under capital gain accrued to the assessee. It was further contended that he has satisfied all the conditions laid down u/s 54F and in this connection the assessee relied on the following case laws:

I) CIT Vs. Rukminnamma 331 11'R 211
ii) CIT Vs. Anand Basappa 309 ITR 329
iii) CIT Vs. Geeta Duggal ITA No.1237/2011 (Delhi)
iv) Vittal Krishna Conjeevaram Vs. ITO 144 ITO 325

3. After considering the submissions as well as analysing the issue with various cases, the AO held that the capital gains consequent to entering into development agreement dt.13.04.2006 by the assessee with M/s Trendset Builders Pvt Ltd., arose in the year of entering into the development agreement, i.e., in the year 2006-07 relevant for the subject Assessment year. Therefore, the incidence of capital gains arose in the year of entering into development agreement and the gains in this case are long term capital gains, the issue left for consideration is the value to be adopted. As per the modified supplementary development agreement entered into on 12.05.2008, the assessee is to get 12,337 Sft of developed area in lieu of the land of 600 Sq.Yds and 332 Sq.Yds. The cost of acquisition of the lands, as admitted by the assessee in the computation for Assessment year 2012-13 at Rs.30,103/- and Rs.60,373/- were adopted. The indexed value of these lands comes to Rs.1,13,851/-·

3.1 As regards the quantum of exchange value that comes to the assessee, the AO observed that from the computation for the

Assessment year 2012-13, the assessee has admitted Rs. 1,616/- per Sft. of developed area, based on the value provided by the builder. Since the developed area as per the initial agreement that comes to the share of the assessee is 12,337 Sft, the value of such area is taken for the year under consideration. Accordingly, he computed the long term capital gain as under:

Total exchange value (12337 x Rs. 1,616)	Rs. 1,99,36,592
Less: Indexed cost of acquisition	Rs. 1,13,851
Long term capital gains	Rs. 1,98,22,741
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4. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

5. The CIT(A) dismissed the appeals of the assessee for both the years consideration by passing a common order, confirming the action of AO in respect of reopening of assessment, year of assessability of capital gains and deduction u/s 54F.

6. Aggrieved by the order of CIT(A), the assessee is in appeal before us raising the following grounds of appeal, which are common in both the appeals:

> *"1. The order of the Hon'ble CIT(A) is erroneous in law as well as facts of the case.*
>
> *2. The Hon'ble C1T(A) erred in upholding of the action of the assessing officer with regard to initiation of proceedings u/s.147 of the IT Act without any material on record.*
>
> *3. The Hon'ble C1T(A) erred in holding that capital gain accrued to the assesse in respect of development agreement dated 13.04.2006 for the asst. year 2007-08.*
>
> *4. The Hon'ble C1T(A) ought to have observed that the assesse declared the relevant capital gain for the asst. year 2012-13 and therefore ought to have observed that there was no escapement of income liable for tax.*

5. The Hon'ble C1T(A) erred in upholding the action of the assessing officer in rejection of claim of the assesse u/s.54F of the IT Act without any basis."

6. Any other ground will be raised at the time of hearing."

6.1 The assessee has raised the following additional grounds:

"1. The learned CIT(Appeals) erred in holding that the Appellant owned more than one residential unit when the development agreement was executed on 13.04.2006.

2. The learned C.I.T (Appeals) failed to note that the assessing officer came to a SUOMOTTO conclusion that the Appellant owned more than one residential unit as on 13.04.2006 without giving an opportunity to the Appellant, while the Appellant owned only one residential flat and two commercial properties."

7. Ground Nos. 1 & 6 are general in nature. Ground No. 2 regarding reopening of assessment u/s 147 of the Act, which is not pressed by the assessee. Further, assessee has not pressed additional grounds, hence, the same are dismissed as not pressed.

8. As regards ground no. 3, ld. AR submitted that no doubt the assessee has entered into development agreement on 13/04/2006, but, the municipal sanction of approval came on 30/04/2008. He submitted that as per section 2(47)(v), which came into existence with effect from 01/04/1988. As per section 53A of Transfer of Properties Act, mere handing over of the land will not make the transaction complete, but, the other party i.e. builder has to comply with the part of duty as per the agreement entered with the assessee. In this case, no doubt, the land was handed over in AY 2007-08, but, municipal sanction came in AY 2008-09. He submitted that the facts in the case of Potla Nageswara Rao, are that where both handing over of the land as well as municipal sanction taken place in same AY. Therefore, the facts in the said case are distinguishable to the facts of the case of the assessee. He, therefore, submitted that there is no transfer took place in AY 2007-08.

8.1 With regard to ground No. 4, he submitted that assessee has received developed portion of the property in AY 2012-13 and accordingly, the same was developed and corresponding taxes were paid in AY 2012-13 and he brought to our notice a letter submitted before ld. CIT(A) confirming the above transaction, which is placed in page 53 of the paper book. He submitted that since assessee has declared the said income in the subsequent AY i.e. 2012-13, in which, assessee has actually received the property and not in the year, in which part performance as per section 53A of the Transfer of Properties Act taken place. In this context, he relied on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Skyline Great Hills, [2016] 238 Taxman 675 (Bom).

8.2 With regard to ground No. 5 pertaining to deduction u/s 54F, he submitted that no doubt assessee owned three properties, namely, Pent house flat at Surekha Towers, Ashok Nagar, RC Puram, Hyderabad, House at Valmiki Nagar, Fateh Nagar and property at 5-5-32/2, behind Mosque, NH-9, Near Godrej Godowns, Kukatpally. He brought to our notice the remand report of AO. With regard to additional evidence submitted before the Hon'ble ITAT, as per which, AO has clearly agreed that Kukatpally property is a godown, it cannot be considered as residential property. With regard to Fateh Nagar property, he has clearly accepted that the property has only ACC sheets and it has no amenities like electricity, water and sanitation and also there is no compound wall. However, AO declined to accept the contention of the assessee by merely relying on the submission that assessee has received rents from three properties, which includes Fateh Nagar property. He submitted that merely because assessee received rent, which does not make that property as residential since this property does not have any amenities and compound wall, which shows that it is not habitable. He, therefore, submitted that residential property means, it has to be habitable. In this context, he relied on the decision of the Hon'ble Orissa High

Court in the case of CWT, Orissa Vs. K.B. Pradhan, 130 ITR 393. He, therefore, submitted that on the date of transfer assessee owns only one property, hence, assessee fulfils the conditions laid down in section 54F.

9. Ld. DR, on the other hand, submitted that assessee has handed over property in AY 2007-08 and she submitted that ownership of that property is passed on to the builder as and when the property handed over to the builder. She relied on the case of Potla Nageswara Rao and she supported the orders of AO & CIT(A). With regard to section 54F, she submitted that on the date of transfer as per the remand reports of AO, assessee owns two properties, therefore assessee is not eligible to claim deduction u/s 54F. She submitted that other conditions laid down in section 54F was not verified by the AO.

10. Considered the rival submissions and perused the material on record. We notice that assessee has entered into the development agreement with Trendset Builders Pvt. Ltd., Hyderabad on 13/04/2006 and handed over the property to the builder for development. However, as per the development agreement, part performance on the part of the builder i.e. getting municipal sanction was taken place on 30/04/2008 i.e. in AY 2009-10. Unlike Potla Nageswara Rao's case, the handing over of property and the municipal sanction has not taken place in the same AY, we cannot consider the transfer taken place in the same AY 2007-08. However, municipal sanction received on 30/04/2008, after part performance of the builder, the property can be considered as transferred in AY 2009-10. Technically, long term capital gain can be taxed in AY 2009-10 and not in the AY 2007-08. We noticed that in the case of United Bank of India & Anr. Vs. State of West Bengal & Ors., W.P. No. 21814(W) of 2017, judgment dated September 1, 2017, the Hon'ble Kolkatta High Court has distinguished dejure and defacto handing over the land for development. It held that merely entering into a development agreement for undertaking

construction activity on an immovable property would not be construed as 'transfer u/s 2(47)(v) of the I.T. Act. In essence, developer would only be having defacto possession of the property and the owner will continue to be in the lawful possession of such property until the parties meet the obligations under the agreement.

10.1 It is important to note that all the income under the head capital gains were already subjected to tax since assessee has declared the income in AY 2012-13. The Hon'ble Bomay High Court in the case of Skyline Great Hills (supra) has considered similar issue and held that since assessee stated that the assessee has already offered income to tax on the aforesaid transfer in AY 2012-13, we allow ground no. 3 of appeal taken by the assessee in deleting the addition made by the CIT(A).

10.2 Since assessee has declared income in AY 2012-13, as such, there is no loss to the revenue department. By relying on the above decision, we hold that the above income is already subjected to tax and due taxes were already paid by the assessee. Therefore, in our considered view, the same income cannot be taxed again in AY 2009-10 also.

10.3 With regard to deduction u/s 54F, since we have already adjudicated that the above income can be taxed only in AY 2012-13, since assessee has already declared the same and claimed deduction u/s 54F in the same AY, we restrain from adjudicating on 54F as the same was not claimed in this AY. However, it is only an alternate claim of the assessee and allowability of section 54F may be verified in AY 2012-13 by the respective AO considering the due process of law. Therefore, the grounds raised by the assessee are allowed.

11. With regard to the appeal for AY 2009-10, assessee has entered into revised development agreement in AY 2009-10 and there

is no change in the terms and conditions of the original development agreement and assessee was managed to negotiate to get the additional developed area as a part of sale consideration. Merely a revision of development agreement, it does not arise any capital gain, it is only enhancement in the sale consideration. In AY 2007-08, we have already adjudicated that the income if already subjected to tax in AY 2012-13, it cannot be brought to tax in AY 2007-08 and similarly, this cannot be taxed in AY 2009-10 also, as held by the Hon'ble Bomay High Court in the case of Skyline Great Hills (supra). Therefore, grounds raised by the assessee in this AY are also allowed.

12. In the result, both the appeals under consideration are allowed.

Pronounced in the open Court on 3rd October, 2018.

Sd/- **(P. MADHAVI DEVI)** **JUDICIAL MEMBER**	**Sd/-** **(S. RIFAUR RAHMAN)** **ACCOUNTANT MEMBER**

Hyderabad, Dated: 3rd October, 2018

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Copy to:-

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2) ACIT, Circle – 11(1), Hyderabad.
3) CIT(A) – 5, Hyderabad.
4) Pr. CIT - 5, Hyd.
5) The Departmental Representative, I.T.A.T., Hyderabad.
6) Guard File