

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई  
IN THE INCOME TAX APPELLATE TRIBUNAL  
' C' BENCH : CHENNAI

श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष  
एवं ए. मोहन अलंकामणी, लेखा सदस्य

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER & SHRI  
A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.401/Chny/2018

निर्धारण वर्ष /Assessment year :2014-15

The DCIT,  
Corporate Circle 5(1),  
Chennai.

**Vs. Shri Sathak Ahmed Shaw,**  
New No.60,Old No.33,  
Veerabadran Street,  
Nungambakkam,Chennai 600 034.

(अपीलार्थी/Appellant)

**[PAN AANPS 0247 C]**  
(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mr.Salendra Mamidi,PCIT,D.R  
प्रत्यर्थी की ओर से /Respondent by : Mrs.Vidya,C.A

सुनवाई की तारीख/Date of Hearing : 03-10-2018  
घोषणा की तारीख /Date of Pronouncement : 05-10-2018

**आदेश / O R D E R**

**PER GEORGE MATHAN, JUDICIAL MEMBER**

This is an appeal filed by the Revenue against the order of the Commissioner of Income-tax (Appeals)-3,Chennai in ITA No.238/2016-17/CIT(A)-3 dated 27.10.2017 for the assessment year 2014-15.

2. Mr.Salendra Mamidi represented on behalf of the Revenue and Mrs.Vidya represented on behalf the of the Assessee.

3. It was submitted by Id.D.R that the assessee is one of the 13 co-owners entered into Joint Development Agreement (JDA) on 27.06.2006 with Srijan Reality for development of their property situated at No.137, Velachery Main Road, Chennai. As per the JDA, the assessee handed over 50% of the land consisting of 1,45,478 Sq.ft. to the developer, and the developer in turn was to hand over the 1,30,850 Sq.ft. area of constructed building consists of residential and commercial space to the land owner. It was a further submission that consequent to the JDA, the assessee had filed return of income for assessment year 2014-15 declaring capital gains. It was a submission that the Id. Assessing Officer had invoked the provisions of the section 50C of the Act and had arrived at total taxable income at 17,84,14,787/-. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A). It was a submission that the assessee had challenged the addition before the Id.CIT(A) and had submitted that the JDA was entered on 27.06.2006 and the capital gains had arisen only during the assessment year 2007-08. It was a further contention that the Id. Assessing Officer had wrongly adopted guideline value pertaining to assessment year 2014-15 and wrongly invoked the provisions of the

section 50C of the Act. Further, the assessee had relied upon the decision of Co-ordinate Bench of this Tribunal in one of the co-owner's case, namely Shri Shafiq Mohammed Shah vide ITA Nos.945 & 1331/Mds./2016 dated 11.05.2017 wherein para Nos.9 & 10 at pages 34 to 37 are extracted as follows:-

*"9. To sum up the owners have entered into an agreement for development of the property and certain rights were assigned to the developer who in turn had made the substantial payment and consequently entered into the property and thereafter the transferee has taken steps in relation to construction of the building including project plan approval on 11.04.2008, then it is to be considered as transfer under section 2(47)(v) of the Income-tax Act. The fact that the legal ownership continued with the owners to be transferred to the developer at a future distant date really does not affect the applicability of section 2(47)(v) as per the reasons assigned hereinabove. The transferee was undisputedly willing to perform its part of the contract, in this circumstance we have to hold that there is transfer under section 2(47)(v) of the Act. Thus, the possession and control of the property is already vested with the transferee and the impugned development agreement has not been duly cancelled and it is still in operation, it has to be decided that there is a transfer under section 2(47)(v) of the Act. We have to see the real intention of the parties. As per the well known cannon of construction of document, the intention generally prevails over the word used and that such a construction placed on the word in a deed as is most agreeable to the intention of the parties. There are grounds appearing from the face of the instrument affording proof of the real intention of the parties, then that intention would prevail*

*against the obvious and ordinary meaning of the words used. Entering into the property and handing over of the possession was instantaneous thus entire conspectus of the case has attracted the provision of section 45 of the Act on fulfilment of conditions laid down in section 53A of the Transfer of Property Act. In our opinion, the real intention of the parties herein is to be seen.*

10. *Accordingly, we decide the above issue relating to transfer of property under section 2(47)(v) of the Income-tax Act in favour of the Assessee. We also hold that clause (47) of section 2 was amended by the Finance Act, 1987 with effect from April 1, 1988 by inserting new sub-clauses (v) and (vi) thereunder. These two new sub-clauses provide that "transfer" includes (i) any transaction which allows possession to be retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act ; and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property. Therefore, under these two sub-clauses, the capital gain would be taxable in the year in which such transactions are entered into even if the transfer of the immovable property is not effective or complete under the general law. The assessee entered into an agreement with the builder/developer for development of the impugned land and construction of flats thereon. Also, the assessee signed a development agreement dated 27.06.2006 in favour of the builder/developer and gave possession of the property to the builder/developer. Further, the assessee acted on the impugned agreement by accepting from the builder/developer payments by cheques on different dates in the financial year 2006-07 relevant assessment year 2007-08. In view of the facts and circumstances discussed above, all the conditions of sub- clause (v) of section 2(47) are satisfied in this case and therefore, it has to be inferred*

*that a "transfer" did take place within the meaning of section 2(47)(v). The argument that the deeds in respect of the sale of flats were not registered/executed is not a relevant consideration so far as provisions of sub-clause (v) of section 2(47) are concerned. The completion of "transfer" of an immovable property as per the general law is not a requirement for the applicability of the provisions of sub-clause (v) of section 2(47). Thus, the taxability of long term capital gains only taxed in the F.Y 2006-07 relevant to A.Y 2007-08 and ordered accordingly. "*

It was a submission that the Ld.CIT(A) had placed reliance upon decision of Co-ordinate Bench of this Tribunal in the case of one of Co-owner's case wherein the issue was decided in favour of assessee. It was the contention of the Id.D.R before us that the Ld.CIT(A) had failed to consider the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs.Balbir Singh Maini (398 ITR 531 (SC) ) wherein it has been held that capital gains arising under JDA, which never materialized for want of necessary permission, was nothing but a hypothetical income. It was a further submission that the JDA was complete, in the present case, which was in the assessment year 2014-14, the income could not be assessed to tax for assessment year 2007-08.

4. In reply, the Id.A.R vehemently supported the order of the CIT(Appeals). She strongly relied upon the decision of Co-ordinate Bench of this Tribunal in the case of Shri Shafiq Mohammed Shah

referred to supra. She also placed before us the distinguished facts between the assessee's case and Shri Balbir Singh judgement of Supreme Court referred to supra is as follows:-

Shri Balbir Sing judgement	Assessee's case
The Developer not done any act in furtherance of the Contract.	The developer did so may acts in furtherance of the Contract.
The Developer not performed his part of the Contract.	The Developer did performed his part of the Contract.
The Land Owner continues to be the owner through out the Agreement and there is no transfer rights.	Transfer rights were given to the developer as per JDA.
The JDA fell through. The transaction never materialized income did not accrued at all.	The JDA not fell through. The JDA was completed and the income accrued in this case which is taxable in the A.Y.
The assessee did not acquired any right to receive income which was dependent upon the necessary permissions being obtained.	The Developer acquired the rights to receive the income on the date of signing the JDA.
The only one common point in both the case is that the JDA was not registered. But all other facts are totally different.	
The Department started to tax the capital gains on the basis of the actual registration date of residential units and commercial area in the respective assessment years as per the directions of Hon.ITAT in these's co owner case.	

5. We have considered the rival submissions. A perusal of the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs.Balbir Singh Maini (398 ITR 531 (SC) ) clearly shows that there was a case where the transaction never materialized and consequently, the Hon'ble Supreme Court had categorically held that as the transaction did not materialize, capital gains could not be taxed

on hypothetical income. In the present case, admittedly the possession of the property in compliance with the JDA had admittedly passed from the assessee to the developer during the assessment year 2007-08. This is not the case where the joint developer was barred from transferring its share in the immovable property or entering into agreements for the transfer of its share in the undivided interest and the super construction before completion of the project. In fact, as per Clause-6 of the agreement, the assessee handed over the possession of the land on receipt of the security deposit. These facts, which have been brought out in the Tribunal's order in the case of co-owner's case referred to supra, have not been disputed or dislodged by the Revenue. This being so, the principles laid down by the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Balbir Singh Maini (398 ITR 531 (SC) ) clearly do not apply to this case in so far as the transaction has gone through and more than anything else possession of the immovable property has already got transferred in line with the provisions of Sec.2(47)(v) of the Income Tax Act, 1961 during the assessment year 2007-08 itself. This being so, respectfully following the decision of Co-ordinate Bench of this Tribunal in the case of co-owner's case, The I.T.O Vs. Shri Shafiq Mohammed Shah vide order dated 11.05.2017 referred to supra, it is directed that the long term capital gains is taxable only during the assessment year

2007-08 and not during the assessment year 2014-15. Consequently, the appeal of the Revenue stands dismissed.

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

Order pronounced on 05<sup>th</sup> October, 2018, at Chennai.

Sd/-  
(ए. मोहन अलंकामणी)  
(A.MOHAN ALANKAMONY)  
**लेखा सदस्य /ACCOUNTANT MEMBER**

Sd/-  
( जॉर्ज माथन)  
(GEORGE MATHAN)  
**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai

दिनांक/Dated: 05<sup>th</sup> October, 2018.

**K S Sundaram**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF