

IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC – A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER

ITA No.2278/Bang/2018
Assessment year : 2006-07

Smt. Lakshmi Swarupa, A 03, Vaishnavi Orchids, KPC Layout, Kasavanahalli, Bengaluru – 560 035. PAN: AXZPS 3438E	Vs.	The Income Tax Officer, Ward 4(4), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Lokesh Jain, CA
Respondent by	:	Shri Vikas K. Suryavamshi, Addl.CIT(DR)((ITAT), Bengaluru.

Date of hearing	:	03.10.2018
Date of Pronouncement	:	12.10.2018

ORDER

This is an appeal by the assessee against the order dated 28.12.2015 of the CIT(Appeals)-7, Bengaluru relating to assessment year 2006-07.

2. The only issue that arises for consideration in this appeal is as to whether there was transfer of capital asset by the assessee during the previous year relevant to AY 2006-07 and whether the capital gain on such transfer can be brought to tax in AY 2006-07.

3. The assessee is an individual. She owned a property bearing 2862 sq.ft. in Munnekolala Village, Bangalore East Taluk, Bangalore [hereinafter referred to as "the property"]. She entered into a registered Joint Development Agreement [JDA] in respect of the property with M/s. Sradda Builders [the Builder], a partnership firm dated 29.3.2006. As per the JDA, the assessee would get 30% of the built-up area and proportionate undivided share of land and the builder would be entitled to 70% of built-up area and proportionate undivided share of land. The builder would incur all costs of construction of the built-up area.

4. Clause 1 of the JDA provides as follows:

“1) PERMISSION FOR DEVELOPMENT:

1.1) The Owner is in possession and enjoyment of the Schedule Property. The Owner hereby authorize the Promoter for the purpose of development, to enter upon the Schedule Property and develop the same, however the authority so granted does not in any manner be construed as delivery of possession by the Owner in part performance of this agreement under Section 53-A of the Transfer of Property Act or under Section 2(47)(iv) of the Income Tax Act, 1961.

1.2) The Owner hereby agrees not to interfere or interrupt in the course of construction and development of the Schedule Property and/or commit any act or omission having the effect of delaying or stopping the work that has to be done under this Agreement. However, the Owner shall always be entitled to inspect the progress of the work and type of work which is being done on the Schedule Property.”

5. The Assessee did not file return of income for AY 2006-07. Based on the information obtained from the Sub-Registrar's office about the JDA, the AO issued notice u/s.148 of the Income Tax Act, 1961 (Act) to the Assessee. The assessee did not participate in the reassessment proceedings and therefore the reassessment was completed by the AO

u/s.144 of the Act to the best of his judgment. The AO adopted the value of the property as per the value determined by the Sub-Registrar for stamp duty and registration charges and determined Capital gain.

6. Before CIT(A), the Assessee submitted that there was no possession delivered in part performance in the manner contemplated by Sec.53A of the Transfer of Property Act and therefore there was no transfer during the relevant previous year. The Assessee also pointed out that legal possession of the property was given to the developer only on 22.4.2006 and filed a confirmation from the developer in this regard. The Assessee pointed out that what was given to the developer under the JDA was only a license to enter the property for the purpose of carrying out development, which was not legal possession as contemplated u/s.53A of the Transfer of Property Act. The Assessee also brought to the notice of the CIT(A) that subsequently, the Assessee entered into an MOU dated 16.8.2006 whereby the Assessee instead of receiving built up area as contemplated under the JDA received a sum of Rs.15 lacs in lieu of his right to obtain built up area. The Assessee also pointed out that she had filed a return of income declaring capital gain in AY 2007-08 because the date of transfer was only on 16.8.2006 whereby the Assessee agreed to sell the property outright and received considered in a sum of money in lieu of built up area of construction as was originally envisaged under the JDA. The Assessee submitted that there was no transfer during the previous year relevant to AY 2006-07 because under JDA dated 29.3.2006, there was no delivery of possession in part performance of the agreement for sale in the manner contemplated by Sec.53A of the Transfer of Property Act.

7. The above submission of the Assessee were not accepted by the CITA) and he confirmed the order of the AO holding that there was a transfer within the meaning of Sec.2(47)(v) of the Act during the previous

year by virtue of the JDA dated 29.3.2006. The following were the relevant observations of the CIT(A):-

“6.7 It is clear that clause (v) of section 2 (47) of the Income tax Act in referred in such a manner that transactions of the nature referred to in section 53A of transfer of property will be considered as deemed transfer to levy tax on it. It also mean that capital gain tax would be levied on the deemed transfers particularly with reference to the provisions when registration of documents in support of transfer of legal title of immovable properties from transferor to transferee has taken place. The underlying principle which emerged from section 53A of Transfer of property Act is that the transferor shall be debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or continued in possession ,and hence we may infer that provision contained in section 53A of transfer of property is mainly to protect the interest of the transferee who has already performed his right to perform his part of job as per the terms of contract greed and not to decide about the validity and taxability of deemed transfer under the income tax Act. Hence the inherent necessity of referring Sec 53A of TP Act in the income tax Act while drafting the provisions under section 2(47)(v) was to levy tax on transfer made in a peculiar circumstances wherein the actual purpose of-transfer of capital assets from the transferor to transferee might be served whereas the registration of backup documents such as agreement of sale /contact of sale would take place at later stage. Thus Section 53A is acting subordinate or explanatory provision to interpret section 2(47)(v) of the Income tax Act, 1962. However, in the case of Appellant, the such agreement has already taken place or even for argument sake if the Appellant plea is considered then also the agreement has preceded the possession.

"HIGH COURT OF KARNATAKA in the case of COMMISSIONER OF INCOME TAX & ANR. vs. DR. T.K. DAYALU(Supra) while deciding the following questions that "Whether the Tribunal was correct in holding that there was no transfer during the current assessment year despite the assessee handing over the possession of the immovable property to the builder who had in turn

handed over the part of the consideration amount which would amount to transfer attracting capital gains tax ? and Whether the Tribunal was correct in holding that the capital gains tax should be levied only on completion of the entire transaction when the super built-up area is handed over to the assessee as per the agreement ?"

also held that :

"The question to be decided is the year in which Rs. 45 lakhs received by the assessee under the agreement dt. 26th Jan., 2006 (sic-1996) as modified by the subsequent agreements is to be taxed. It is not disputed that the assessee had received capital gain in the year 1997-98 and having regard to the finding of fact that the possession of the property has been handed over on 30th May, 1996, we hold that appropriate assessment year in which the capital gain is to be taxed is 1997-98. There is no merit in the contention of learned counsel appearing for the assessee that since the entire project has been completed in the year 2003-04, the tax on capital gain has to be made in that year. It is now well-settled that the date on which possession was handed over to the developer is relevant and in the present case, it is not disputed that assessee has already received a sum of Rs. 45 lakhs in addition to the structures which would enable to put up construction.

7. In the case of Appellant, the JDA does not indicate that the possession was not given later on. Even the MOU produced by the Appellant shows that the possession was given to the builder and the amount of consideration was to be agreed upon by both the parties.

7.1 In view of the above it is held that although the Appellant has disclosed the capital gains, as per her own calculations in the A.Y 2007-08 but it was liable to be taxed in the current A.Y i.e. 2006-07 because the JDA was executed in the F.Y. 2005-06 relevant to A.Y 2006-07."

8. Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal. The learned counsel for the Assessee reiterated submissions made before the CIT(A). He also submitted that even in the decision of the Hon'ble Karnataka High Court in the case of *Dr. T.K. Dayalu*

in ITA No.3209/2015 judgment dated 20.6.2011, the Hon'ble Court has observed that it is the date on which legal possession is handed over that a transfer u/s.2(47)(v) of the Act can be said to have taken place. It was pointed out by him that in the light of the confirmation of the builder that possession was taken by him only on 22.4.2006, there was no basis for applying the ratio laid down in the case of Dr. T.K. Dayalu (supra). It was submitted that license to enter the property cannot be equated to legal possession which is the *sine qua non* for applying the provisions of Sec.2(47)(v) of the Act. The learned DR relied on the order of the CIT(A).

9. I have carefully considered the rival submissions. Sec.45 of the Act lays down that profits and gains arising out of transfer of capital asset effected in the previous year shall be chargeable to income tax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. It is thus clear that there should be transfer during the previous year to attract charge to tax on capital gain. Sec.2(47) of the Act defines "Transfer" for the purpose of the Act. It reads thus:

"Sec.2 (47) "transfer", in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein ; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in trade of a business carried on by him, such conversion or treatment ;
or

(iva) the maturity or redemption of a zero coupon bond; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part

performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation [1]: For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA;"

10. The clause that was invoked by the revenue authorities in the case of the Assessee is Sec.2(47)(v) of the Act. Under the general law, transfer of immovable property of the value of rupees one hundred and upwards can take place only by a registered deed. If no registered deed is executed in respect of such property, legal title or ownership is not effectively conveyed to the transferee although transferee might have paid entire consideration and/or obtained possession from the transferor in pursuance of contract of sale. "Transfer" in section 2(47) also envisaged execution of registered deed in such circumstances. Capital gains become liable to be charged to tax only if they arise as a result of "transfer" of capital asset and the date on which they arise is date of "transfer". If as a result of mutual arrangement by parties or otherwise, no registered deed is executed even after transaction is completed by delivery of possession and receipt of consideration, capital gains tax would escape assessment altogether or if such execution of registered sale-deed is postponed, the capital gains tax would also be postponed. In several cases it suited the parties to complete such transactions without execution of registered deed and thereby evade payment of tax on capital gains. It is in order to plug this loophole that cl. (v) was inserted in section 2(47) to lay down that transfer would include any

transaction involving allowing of possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of Transfer of Property Act. Thus, the Provisions of Sec.53A of the Transfer of Property Act, 1882 stand incorporated into the provisions of the Income Tax Act, 1961. If that be so then the Tax authorities for coming to a conclusion that provisions of Sec.53A of the Transfer of Property Act, 1882 are attracted to a particular transaction have to come to a conclusion the transaction/agreement in question is such that the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee, has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract.

11. In the present case, the clause in the JDA regarding possession clearly states that what is given is not possession contemplated u/s.53A of the Transfer of Property Act and that it is merely a license to enter the property for the purpose of carrying out development. Further, the subsequent MOU dated 16.8.2006 and delivery of legal possession on 22.4.2006 clearly shows that there was no transfer within the meaning of Sec.2(47)(v) of the Act during the previous year relevant to AY 2006-07. Therefore, invocation of the provisions of Sec.2(47)(v) in the facts and circumstances of the present case on the basis of clause-1 of the JDA, in my view was not proper. The possession in the present is traced to the joint development agreement which is in the nature of permissive possession and not possession in part performance of agreement for sale. In the present case, there is no document by which the revenue can come to the conclusion that there was delivery of possession. The mere fact that

development of the property cannot be done without possession cannot be the basis to come to a conclusion that possession was delivered in part performance of the agreement for sale in the manner laid down in Sec.53A of the Transfer of Property Act. Such possession as I have already held is on behalf of the Assessee and not in the independent capacity of purchaser of the property.

12. For the reasons given above, I hold that there was no transfer during the previous year relevant to AY 2006-07. Therefore, capital gain on transfer of the property cannot be assessed in AY 2006-07. The assessment of capital gain in AY 2006-07 is therefore held to be bad and deleted.

13. In the result, appeal of the Assessee is allowed.

Pronounced in the open court on this 12th day of October, 2018.

Sd/-
(N.V. VASUDEVAN)
Judicial Member

Bangalore,
Dated, the 12th October, 2018.
/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
ITAT, Bangalore.