

IN THE INCOME TAX APPELLATE TRIBUNAL

“SMC-C” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER

ITA Nos. 240 & 241/Bang/2019
Assessment Years :2010-11 & 2011-12

Dr. Syed Rahmatullah Azizullah, H.No. 1-655/C, Timapuri Compound, Railway Station Road, Station Bazar, Gulbarga – 585 102. PAN: AGDPS6044H	Vs.	The Income Tax Officer, Ward – 3, Kalaburagi.
APPELLANT		RESPONDENT
Assessee by	:	Shri H.N. Khincha, CA
Revenue by	:	Shri Palani Kumar, Addl. CIT (DR)
Date of hearing	:	01.05.2019
Date of Pronouncement	:	10.05.2019

ORDER

Per Shri A.K. Garodia, Accountant Member

Both these appeals are filed by the assessee which are directed against two separate orders of Id. CIT (A), Kalaburagi both dated 30.11.2018 for Assessment Years 2010-11 and 2011-12. Both these appeals were heard together and are being disposed of by way of this common order for the sake of convenience.

2. The grounds raised by the assessee for Assessment Year 2010-11 in ITA No. 240/Bang/2019 are as under.

“1. The learned Assessing Officer had erred in passing the order in the manner passed by him and the learned CIT (A) has erred in confirming the same. The orders passed being bad in law are liable to be quashed.

2.1 In any case the assessing officer had erred in re-opening the assessment by issuing the notice u/s. 148 of the Income Tax Act, 1961 and the learned CIT (A) has erred in confirming the reopening.

2.2 The condition precedent for issue of re-opening being not present, the re-opening is bad in law and therefore the impugned order passed/confirmed in consequence thereto being bad in law and liable to be quashed.

3. *In any case, the assessing officer and the learned CIT(A) have not properly appreciated the facts and circumstances of the case. On proper appreciation of the facts it would be clear that the assessing officer has erred in not considering that the transfer of property took place way back in 1995 and though sale deeds were executed, there were no further transfer of property as per the sale deeds.*

4.1 *The learned assessing officer and the learned CIT(A) have erred in not appreciating the fact that*

a. *The appellant had not received any amount / consideration during the previous year relevant to year under appeal.*

b. *That the possession of the property was handed by the appellant over way back in 1995.*

c. *That the property was in the possession of the transferee much prior to the executing of sale deeds. and the transferee had even started construction on the subject property much before the execution of sale deed.*

4.2 *The assessing officer and the leaned CIT(A) have not verified from the purchaser in this so called sale deeds as to whether they have paid this money as stated in sale deed and whether the same is recorded in its books of account of purchaser as per sale deeds.*

4.3 *Therefore considering the circumstance of the case and circumstantial evidence it can never be said that there was any transfer for computing the capital gains in the year under appeal and therefore the addition as made confirmed is to be deleted.*

5. *In any case and without prejudice the assessing officer has erred in holding that stamp duty value is to be taken as full value of consideration and the learned Commissioner has erred in confirming the same. The provision of Sec. 50C(1) of the Income Tax Act, 1961 would not be attracted in the case. In any case adopting the stamp duty value u/s. 50C(I) without compiling with all the legal formalities is also bad in law and therefore the adoption of such deemed consideration is to be deleted.*

6. *In any case and without prejudice the assessing officer has erred in holding and adopting the cost as NIL and the CIT(A) have erred in confirming the same. Even as per law, the cost to the original owner should have been adopted.*

7. *The appellant denies the liability to pay interest u/s 234A,234B and 234D of the Act. The interests having been levied erroneously are to be deleted.*

8. *In view of the above and on other grounds to be adduced at the time*

of hearing, it is requested that the impugned orders be quashed or at least the addition made to the income returned be deleted, income as returned by the appellant be accepted and interest levied u/s 234A, 234B and 234D of the Act be also deleted.”

3. Similarly, the grounds raised by the assessee for Assessment Year 2011-12 in ITA No. 241/Bang/2019 are as under.

“1. The learned Assessing Officer had erred in passing the order in the manner passed by him and the learned CIT (A) has erred in confirming the same. The orders passed being bad in law are liable to be quashed.

2.1 In any case the assessing officer had erred in re-opening the assessment by issuing the notice u/s. 148 of the Income Tax Act, 1961 and the learned CIT (A) has erred in confirming the re-opening.

2.2 The condition precedent for issue of re-opening being not present, the re-opening is bad in law and therefore the impugned order passed/confirmed in consequence thereto being bad in law and liable to be quashed.

3. In any case, the assessing officer and the learned CIT(A) have not properly appreciated the facts and circumstances of the case. On proper appreciation of the facts it would be clear that the assessing officer has erred in not considering that the transfer of property took place way back in 1995 and though sale deeds were executed, there were no further transfers of property as per the sale deeds.

4.1 The learned assessing officer and the learned CIT(A) have erred in not appreciating the fact that

a. The appellant had not received any amount / consideration during the previous year relevant to year under appeal.

b. That the possession of the property was handed by the appellant over way back in 1995.

c. That the property was in the possession of the transferee much prior to the executing of sale deeds. and the transferee had even started construction on the subject property much before the execution of sale deed.

4.2 The assessing officer and the learned CIT(A) have not verified from the purchaser in this so-called sale deeds as to whether they have paid this money as stated in sale deed and whether the same is recorded in its books of account of purchaser as per sale deeds.

4.3 Therefore considering the circumstance of the case and circumstantial evidence it can never be said that there was any transfer for computing the capital gains in the year under appeal and therefore the addition as made / confirmed is to be deleted.

5. In any case and without prejudice the assessing officer has erred in

holding that stamp duty value is to be taken as full value of consideration and the learned Commissioner has erred in confirming the same. The provision of Sec. 50C(1) of the Income Tax Act, 1961 would not be attracted in the case. In any case adopting the stamp duty value u/s. 50C(1) without complying with all the legal formalities is also bad in law and therefore the adoption of such deemed consideration is to be deleted.

6. In any case and without prejudice the assessing officer has erred in holding and adopting the cost as NIL and the CIT(A) have erred in confirming the same. Even as per law, the cost to the original owner should have been adopted.

7. The appellant denies the liability to pay interest u/s 234A and 234B of the Act. The interests having been levied erroneously are to be deleted.

8. In view of the above and on other grounds to be adduced at the time of hearing, it is requested that the impugned orders be quashed or at least the addition made to the income returned be deleted, income as returned by the appellant be accepted and interest levied u/s. 234A, 234B and 234D of the Act be also deleted.”

4. It was submitted by Id. AR of assessee that this is the claim of the assessee as noted by the AO also on page no. 6 of the assessment order that an agreement to sale was entered into by the assessee on 08.05.1995 and as per this agreement, total sale consideration was shown to be Rs. 3.75 Lakhs. He further submitted that this is true as noted by the AO also on the same page of the assessment order that this is an unregistered agreement. He further pointed out that this is also noted by the AO on same page of assessment order that as per the agreement, this amount of Rs. 3.75 Lakhs was received by the assessee on 08.05.1995 at the time of execution of agreement of sale but the sale deed could not be executed and the same were executed in three parts. The first sale deed is executed on 30.10.2009 and remaining two sale deeds were executed on 12.01.2011. He submitted that because the sale deeds were executed in the present two years i.e. Assessment Years 2010-11 and 2011-12, the AO has adopted the stamp duty value on the date of execution of sale deeds for taxing the capital gain arising out of this sale of property. Whereas this was the claim of the assessee before the AO that the transaction of sale was completed during Financial Year 1995-96 only and therefore, no capital gain is taxable in the

present two years. In support of his contention, he submitted that copy of agreement for sale is available on pages 74 to 78 of the paper book for Assessment Year 2010-11. He pointed out that this is noted in this agreement to sale that total sale consideration is determined at Rs. 3.75 Lakhs which is paid by the buyer to the seller i.e. present assessee in cash on the same date for sale of a property equal to 2 acres 20 guntas. This is also noted in same para that possession of the land under agreement for sale is delivered by the assessee seller to the buyer who is in enjoyment of the same as owner and it was agreed that no time limit is fixed for execution of sale deed in whole or bit by bit as per the convenience of the buyer or his nominee. It was submitted by Id. AR of assessee that since agreement of sale was executed in the Financial Year 1995-96 and the full payment was made by the buyer to the present assessee being seller and the possession was also handed over by the assessee seller to the buyer of the property in that year, transfer has taken place in that year only and therefore, capital gain cannot be taxed in the present year. In support of this contention, reliance was placed by him on the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Dr. T.K. Dayalu as reported in [2011] 202 Taxman 531 (Karnataka). Regarding this objection of the AO that the agreement to sale was not a registered agreement, he submitted that as per the judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini as reported in [2017] 398 ITR 531 (SC), it was held that there was amendment by way of Registration and Other Related Laws (Amendment) Act, 2001 as per which amendments were made simultaneously in section 53A of the Transfer of Property Act and sections 17 and 49 of the Indian Registration Act and as per the same, registration has been made compulsory and it was provided in section 17(1A) of the Registration Act, 1908 that the documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then they shall have no effect

for the purposes of the said Section 53A. It was submitted that in the case of CIT Vs. Balbir Singh Maini (supra), the JDA was entered during Assessment Years 2007-08 and 2008-09 and because those dates were after such amendment by the Registration and Other Related Laws (Amendment) Act, 2001, it was held by Hon'ble Apex Court in that case that the transfer has not taken place by way of JDA which was not registered. He submitted that in the present case, unregistered agreement to sale was executed by assessee on 08.05.1995 which is a date much before the Registration and Other Related Laws (Amendment) Act, 2001 and therefore, in the present case, it cannot be said that since the agreement to sale dated 08.05.1995 is not a registered agreement, it is not valid and no transfer has taken place as per this agreement coupled with receipt of entire sale consideration and handover of the possession. He also submitted that on pages 80 to 87 of same paper book is the copy of registered sale deed executed on 30.10.2009 and he pointed out that as per page no. 2 of this sale deed available on page no. 82 of the paper book, it is noted that the vendor has entered into an agreement for sale dated 08.05.1995 to sell his portion of the land for a consideration amount of Rs. 2.75 Lakhs. He submitted that hence, it is seen that the agreement dated 08.05.1995 has been duly noted in the registered sale deed also. Thereafter he submitted that remaining two sale deeds dated 12.01.2011 are available on pages 63 to 68 and 69 to 77 of the paper book for Assessment Year 2011-12 and he pointed out that in these two sale deeds also, the said agreement to sale executed earlier was taken note of. He submitted that under these facts, no capital gain is taxable in the present two years on account of these three sale deeds executed in these two Assessment Years.

5. As against this, the Id. DR of revenue made written submissions which are reproduced herein below:-

“Written Submission:-

In the above said case the Appellant has submitted a paper book on 30-04-2019 and the same has been admitted by the Hon'ble ITAT. The case is reposted to 01-05-2019. In this connection the following written submission of the Revenue may kindly be considered and taken on record;

1. One of the main arguments of the appellant before the AO and the CIT(A) against the computation of capital gain u/s 50C of the IT Act was that the assessee had entered into an agreement on 08-05-1995 for sale of immovable property of non agricultural land much before the registered sale deed dated 30-10-2009 (pertaining to the AY 2010-11) and 12-01-2011 (pertaining to the AY 2011-12).

2. As per the written submission and paper book that the possession of the immovable property was handed over to the buyer as per the agreement dated 08-05-1995 and hence the capital gain cannot be computed in the AY 2010-11 or 2011-12 as per the registered sale deed dated 30-10-2009 and 12-01-2011.

3. In this regard the following case laws may kindly be considered on behalf of revenue;

a). Suraj Lamp & Industries V State of Haryana [2011J 14 taxmann.com 103 (SC)

The Apex Court has categorically held that the immovable property can be legally and lawfully transferred / conveyed only by a registered sale deed of conveyance. It was also held that Sale Agreement / General Power of Attorney / Will do not convey title and do not amount to transfer, nor they can be recognized as valid mode of transfer on immovable property. Scope of an agreement of sale has been held in the Gist as under;

"Scope of an agreement of sale

Section 54 makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. It is, thus, clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.

Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of sections 54 and 55 and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under section 53A). According to the Act, an agreement of sale, whether with possession or without possession is not a conveyance. Section 54 enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter. "

- Conclusion:

"Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in *Asha M. Jain v. Canara Bank - 94 (2001) DLT 841J* that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of

SA/GPA/WILL are unwarranted and not justified,unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and thatit can be a valid substitute for a sale deed. Such decisions, to the extent theyrecognize or accept SA/GPA/WILL transactions as concluded transfers ascontrasted from an agreement to transfer, are not good law. [Para 15]

Immovable property can be legally and lawfully transferred/conveyed only by aregistered deed of conveyance. Transactions of the nature of 'GPA sales' or'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, norcan they be recognized a valid mode of transfer of immovable property. The courtswill not treat such transactions as completed or concluded transfers or asconveyances as they neither convey title nor create any interest in an immovableproperty. Theycannot be recognized as deeds of title, except to the limited extentof section 53A. Such transactions cannot be relied upon or made the basis formutations in Municipal or revenue records. What is stated above will apply notonly to deeds of conveyance in regard to freehold property but also to transfer ofleasehold property. A lease can be validly transferred only under a registeredassignment of lease. It is time that an end is put to the pernicious practice ofSA/GPA/WILL transactions known as GPAsales. [Para 16]

It is the well-settled legal position that SA/GPA/WILL transactions are not'transfers' or 'sales' and that such transaction cannot be treated as completedtransfers or conveyances"

Hence it is respectfully submitted that the transfer of an immovableproperty can be affected only through the sale deed.

b). Smt. Shali Moti Lal Vs CIT [2013] 35 taxmann.com 46 (Punjab and Haryana):

The Hon'ble High Court as held that date of agreement to sell cannot be treatedas date of transfer of immovable property. Even in terms of section 54 of Transferof Property Act, 1882, an agreement to sell does not create any interest inimmovable property.

c). Smt. Shoba jain Vs. CIT [2016] 75 taxmann.com 223 (Allahabad):

The Hon'ble High Court held that agreement to sell is not a transaction ofimmovable property. Transfer of property can be done only through execution ofregistered sale deed.

In view of the above, it is prayed that the case laws referred and thewritten submission may kindly be taken on record and the capital gain computedon the basis of the registered sale deeds by the AD may be upheld.”

6. He also placed reliance on the following three judicial pronouncements.
- a) Suraj Lamp & Industries (P.) Ltd. Vs. State of Haryana, [2011] 14 taxmann.com 103 (SC)
 - b) Smt. Shail Moti Lal Vs. CIT, [2013] 35 taxmann.com 46 (Punjab & Haryana)
 - c) Smt. Shobha Jain Vs. CIT, [2016] 75 taxmann.com 223 (Allahabad)
- He submitted a copy of all these three judgments.
7. I have considered the rival submissions. I find that this is the case of the assessee that the sale of the property in question has taken place in Financial Year 1995-96 as per the unregistered agreement dated 08.05.1995. Copy of this unregistered agreement is available on pages 74 to 78 of paper book for Assessment Year 2010-11. As per the same, the assessee has made an agreement to sell of the land measuring 2 acres 20 guntas for a total consideration of Rs. 3.75 Lakhs and as per the agreement, entire sale consideration was paid by the buyers to the vendor assessee in cash on that date only and assessee vendor has handed over the possession of land in question also to the buyer. When the vendor has got the payment in full and he has handed over the possession to the buyer then only because the sale deed is not executed, it cannot be said that the sale has not taken place in that year. This view is supported by the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Dr. T.K. Dayalu (supra). Thereafter, in the case of CIT vs. Balbir Singh Maini (supra) in which the Assessment Year involved was Assessment Year 2007-08 and the JDA was dated 25.02.2007. Hence in that case, Hon'ble Apex Court has noted the amendments by way of Registration and Other Related Laws (Amendment) Act, 2001 as per which it was provided that the documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 will be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement then they shall have no effect for the purposes of the said Section 53A of the Transfer of Property Act, 1882. Because of this

amendment, it was held by Hon'ble Apex Court in that case that transfer has not taken place in Assessment Year 2007-08 because the JDA was not registered. In the present case, the agreement to sale is dated 08.05.1995 and the same is much before the amendment by way of Registration and Other Related Laws (Amendment) Act, 2001 and therefore, in the present case, it cannot be said that the transfer has not taken place at the time of execution of this agreement to sale on 08.05.1995 which is supported by the payment of full consideration on the same date by the buyer to the vendor and handing over of the possession by the vendor to the buyer. In view of above discussion, I am of the considered opinion that transfer of land has taken place in Financial Year 1995-96 relevant to Assessment Year 1996-97. Only because the sale deed has been executed in present two years, capital gain cannot be brought to tax in present two years.

8. Now I examine the applicability of judgments cited by Id. DR of revenue. The first judgement is the judgment of Hon'ble Apex Court rendered in the case of Suraj Lamp & Industries (P.) Ltd. Vs. State of Haryana (supra). In this case, I find that this judgment is dated 11.10.2011 and in this judgment also, the amendment of Registration Act, 1908 by the Amendment Act 48 of 2001 with effect from 24.09.2001 requiring documents containing contract to transfer for consideration (agreements of sale, etc.) relating to any immovable property for the purpose of section 53A shall be registered has been taken note of and after taking note of this amendment, it was held that immovable property can be legally and lawfully transferred / conveyed only by a registered deed of conveyance. In para 19 of this judgment, it is also noted by the Hon'ble Apex Court that the observations in this judgment are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. In my considered opinion, based on this judgment, it cannot be said that as per the agreement to sale dated 08.05.1995, no transfer has not taken place of the land in question in that year although the assessee vendor has received the full consideration and he has handed over the possession to the buyer.

9. The next judgment cited is judgment of Hon'ble Punjab & Haryana High Court rendered in the case of Smt. Shail Moti Lal Vs. CIT (supra) and the other judgment cited by Id. DR of revenue is the judgment of Hon'ble Allahabad High Court rendered in the case of Smt. Shobha Jain Vs. CIT (supra). In the case of Smt. Shail Moti Lal Vs. CIT (supra), the facts were that the vendor assessee has received only Rs. 15 Lakhs as the amount of earnest money out of total consideration of Rs. 1.32 crores and the balance payment was received only on 24.09.2004 when the sale deed was executed and this finding of fact was also recorded by Tribunal in that case that there was no delivery of possession prior to 24.09.2004. The agreement to sale was executed in that case on 27.12.2002 after receipt of earnest money of Rs. 15 Lakhs. Under these facts, it was held that the date of agreement to sale cannot be treated as date of transfer of immovable property. This is also relevant that in this case, the date of agreement to sale is after the date of amendment in Registration Act and Transfer Property Act as noted above. Hence this judgment is also not applicable in the present case.
10. The third judgment cited by Id. DR of revenue is the judgment of Hon'ble Allahabad High Court rendered in the case of Smt. Shobha Jain vs. CIT (supra). But I am sitting in Bangalore and bound by the judgment of Hon'ble jurisdictional High Court rendered in the case of CIT Vs. Dr. T.K. Dayalu (supra) and hence, I cannot follow this judgment of Hon'ble Allahabad High Court in preference to the binding judgment of Hon'ble Karnataka High Court. As per above discussion, I have seen that none of the judgments cited by Id. DR of revenue is rendering any help to revenue in the present case and the case of the assessee is covered in favour of the assessee by the binding judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Dr. T.K. Dayalu (supra). It is also seen that the objections of the AO that the agreement to sale was not registered agreement is not a valid objection for this reason that the agreement to sale is prior to the amendment in Registration Act and Transfer Property Act by way of Registration and Other Related Laws (Amendment) Act, 2001 and therefore, this objection is also not valid in the present case. Hence I respectfully

follow this judgment of Hon'ble Karnataka High Court and hold that no capital gain is arising in these two Assessment Years because of execution of sale deeds in these two years because Transfer has already taken place in the Financial Year 1995-96 relevant to Assessment Year 1996-97 as per agreement to sale executed on 08.05.1995 coupled with receipt of entire sale consideration and handing over of possession by the assessee vendor.

11. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 10th May, 2019.
/MS/

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.