

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "F": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

ITA No. 2640/Del/2018  
Asstt. Year: 2013-14

Mr. Vinod Kumar Yadav, S/o Sh. Onkar Singh Yadav, H.No. 85-L, New Colony Gurgaon	Vs.	Income Tax Officer Ward-4(4) HSIDC Building, Udyog Vihar, Phase -V, Near Shankar Chowk, Gurgaon
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by:	Shri Ved Jain, Advocate, CA Shri Himanshu Aggarwal, CA Miss Umang Luthra, Adv.
Department by :	Smt. Rinko Singh, Addl. CIT(DR)
Date of Hearing	06/05/2019
Date of pronouncement	27/05/2019

**ORDER**

**PER AMIT SHUKLA, J.M**

The aforesaid appeal has been filed by the assessee against impugned order dated 26.2.2018, passed by the Ld. CIT(Appeals) -1 Gurgaon for the quantum of assessment passed u/s 143(3) for the assessment year 2013-14.

2. In various grounds of appeal assessee has challenged the addition of Rs. 2,12,81,250/- made by the AO as income from other sources.

3. The facts in brief are that during the year under consideration the assessee has received a sum of Rs. 2,12,81,250/- from M/s. Gopal Hi-Tech Infra Pvt. Ltd. as a non-refundable deposit under collaboration agreement for the development of land admeasuring 4 acre 2 kanal 1 Marla at Village-Garhi Alhawpur, Rewari, Haryana in pursuant to an agreement dated 11.10.2012, as per the specific clause 9 agreed between parties. The assessee has shown a full value consideration under the head long term capital gain and deduction u/s 54/54B/54D/54EC/54E was claimed and accordingly, long-term capital gain was declared at NIL. During the course of assessment proceedings AO required the assessee as to why the amount of Rs. 2,12,81,250/- declared under the head long capital gain should not be treated as income from other sources. In response the assessee filed the collaboration agreement which has been incorporated in the assessment order from pages 2 to 8; and it was further submitted that assessee has received this sum as advance from M/s. Gopal Hi-Tech Infra Pvt. Ltd. and as per the clause 6 of the said agreement the assessee was required to hand over the possession of such land only after getting the letter of intent LOI by the above builder. Further, as per clause 13, the other party was required to deliver developed share of the land after developing in all respects within the period of 33 months and further period of grace period of 2 months. The assessee's detailed reply has been incorporated in the assessment order from pages 8 to 12 of the assessment order. However, the Ld. AO after considering the collaboration agreement noted the following facts :-

- *As per clause 9 of the collaboration agreement dated 11.10.2012, the assessee has received an amount of Rs. 2,12,81,250/- (Rs. 50,00,000/- per acre on 4 acre 2 kanal 1 maria) as **Non-refundable amount**. In the said agreement*

*nowhere it has been mentioned that the said receipt of Rs. 2,12,81,250/- would be adjusted at the materialization of deal.*

- *Further, as per point No. 8 of the said collaboration agreement, it has been mentioned that out of the developed area, the developer will give to the assessee 1300 square yard per acre out of residential plots. 50% out of the developed area of sites for school, club, hospital, and 36 per cent out of built-up commercial area*
- *Further in point No. 12, it has specifically been mentioned that if the developer does not purchase the said land, the amount given as 'Non-Refundable amount' will be forfeited by the first party (by the assessee).*
- *As per clause 37 of the collaboration agreement, it has been mentioned that in case the project is not completed, the amount so given will be considered as forfeited and the present agreement will be treated as cancelled and the developer will have no right to claim in this regard.*
- *As per clause 38 of the collaboration agreement, it has been mentioned that in case of default in making the payment {by the stipulated date as given in clause No. 9 (b)}, the agreement would stand cancelled and the amount so given would be forfeited; and the developer has no right to claim of refund from the assessee."*

4. Thus, he held that the amount of Rs. 2,12,81,250/- is not taxable under the head 'capital gain', because the capital asset in question has not been transferred, therefore, it has to be taxed under the head 'income from other sources'.

5. Ld. CIT(A) has further noted that information was called form M/s. Gopal High tech Infra Developers Pvt. Ltd. who has confirmed

that the amount was given as non-refundable security. After considering the entire facts, he upheld the finding of the AO after holding and observing as under :-

*“3.7 I have carefully considered the appellant's submissions, I have also perused the documents filed by the appellant. As per the documents on record and the submissions of the appellant, it is evident that the appellant had received non refundable security of Rs. 2,12,81,250/- on account of collaboration agreement. Further, from the facts on record and the documents filed by the appellant, it is seen that the letter of intent dated 03.05.2016 issued by the DTCP and the license dated 30.01.2018 granted by the DTCP for development of land is in the name of the developer as well as the appellant.*

*3.8 It is evident from the aforesaid submissions of the appellant that the amount of Rs. 2,12,81,250/- paid as non refundable security was in addition to the consideration for the transfer of land and had nothing to do with the actual transfer of the land, consideration for which was separately fixed under the provisions of the agreement. It is evident from the contents of the agreement reproduced by the Assessing Officer in the assessment order that the payment of Rs. 2,12,81,250/- was in lieu of the appellant agreeing to enter into a collaboration agreement with the developer and the appellant agreeing to apply for license to the DTCP for conversion of the usage of said land and obtaining a license for development of commercial complex. As seen from the documents filed by the appellant, the application for obtaining the license for development of the commercial complex on the said land was filed by the appellant and other co-owners and the licenses issued by DTCP were also in the name of the appellant and other co-owners. It is evident that the payment of Rs.*

*2,12,81,250/- as non refundable security was in consideration of the appellant agreeing to perform these activities on behalf of the developer. As such the Assessing Officer was fully justified in holding that this amount of Rs. 2,12,81,250/- had nothing to do with the transfer of land under the joint development agreement and was taxable under the head income from other sources.”*

6. Thereafter he has also referred to certain decisions also, as incorporated in page 12 of the appellate order.

7. After considering the rival submissions and on perusal of the relevant findings given in the impugned order, we find that it is an undisputed fact that assessee has received a sum of Rs. 2,12,81,250/- from M/s. Gopal Hightech Infra Developers Pvt. Ltd. as a non-refundable deposit as per clause 9 of the ‘Collaboration agreement’ dated 11.10.2012. Further, as per clause 6 of the collaboration agreement, the possession was to be handed over after getting the LOI by the above developer and during the year under consideration the LOI could not be obtained due to various reasons beyond the control of both the parties. Ld. AO has held that the said amount is not covered under the head ‘capital gain’ since capital asset has not been transferred and also concluded that amount received by the assessee cannot be treated as part of the sale consideration. Before the Ld. CIT(A), assessee has also brought on record that it has entered into an agreement dated 16.3.2016 with the developer wherein both parties agreed that in order to make further efforts in getting the LOI and licence from town and country planning department, Haryana to extend the tenure of collaboration agreement to further period of 18 months. Under the collaboration agreement assessee was entitled to receive 1300 sq. yard per acre out of the residential plots and 50% of the developed area of sites for schools, clubs, hospital etc. and 36%

out of built up commercial area. The parties have also agreed in terms of clause 13 that the developer on receiving the LOI will develop and hand over the possession within 36 months with a grace period of 2 months. The developer has also applied for LOI and licence from the concerned authorities at various times, which has been pointed out by the Ld. Counsel before us as per the documents containing in the paper book. It is also a fact that during the relevant assessment year developer was not able to obtain the LOI from Govt. of Haryana for getting permission for development of land within the time specified. Finally, the developer obtained the license from the town and country planning department LC-V (9 of 2018) dated 29.1.2018, valid upto 28.1.2023, a copy of the same has been filed in the paper book from 132 to 133. Thus, it is quite clear that transfer has not taken place during the year under consideration and if at all it can be said that any sale or transfer has taken place and income has accrued, it is in the financial year 2017-18 and this fact that the transfer has not taken place has been accepted by both AO and Ld. CIT(A). Hence, the amount cannot be held to be chargeable as Capital Gain in the current assessment year. Although the assessee in the year under consideration has offered the amount received as capital gain.

8. The Ld. AO has held that in view of section 51 of the Act, if any amount is received which falls within the purview of section 51 would be taxable as income from other sources u/s 56 of the Act. Before insertion of provision of Finance Act 2015 w.e.f. 1.4.2015, section read as under :-

“Where any capital asset was on any previous occasion the subject of negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost for which the asset

was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition.”

Later on w.e.f. 1.4.2015 proviso was added which read as under:-

*“Provided that where any sum of money, received as an advance or otherwise in the course of negotiations for transfer of a capital asset, has been included in the total income of the assessee for any previous year in accordance with the provisions of clause (ix) of sub-section (2) of section 56. then. such sum shall not be deducted from the cost for which the asset was acquired or the written down value or the fair market value. As the case may be. in computing the cost of acquisition.”*

8.1 Clause ix of sub section 2 to section 56 has been brought in the statute w.e.f. 1.4.2015, which provides that;

*“any sum of money received as an advance or otherwise in the course of negotiations for **transfer of a capital asset**, if-*

*(a) Such sum is forfeited; and*

*(b) The negotiations do not result in transfer of such capital asset.*

9. Ergo, for treating the amount received as advance in the course of negotiation over the transfer of capital asset has been deemed to be income from other sources only w.e.f. 1.4.2015. Hence, the amended provision will not be applicable to the assessee as same will not have a retrospective effect for the year under consideration, that is, for the assessment Year 2013-14. Thus, said amount cannot be held to be chargeable to tax in the current year, neither u/s 45 because there is no transfer u/s 2(47)(v); nor u/s 56(2). This position has been clarified by ITAT Mumbai Bench in the case of ITO vs. Fiesta Properties (P) Ltd.

(2016) 73 taxmann.com (Mumbai) wherein the Tribunal has observed and held as under :-

*“The aforesaid provisions clearly lay down that amount of advance received for sale of property shall be treated as income u/s 56 if the same is forfeited and negotiations did not result in transfer of such capital asset. But these provisions have been inserted w.e.f 01-04-2015. These provisions are not clarificatory in nature. **These provisions lay down a substantive law creating additional tax liability upon an assessee and, therefore, this cannot have retrospective effect.** Further, with the insertion of these provisions. It becomes clear that earlier the law was not like this. Thus. for the year before us. i.e. A. Y. 2010-11 the then existing provisions of section 51 shall be applicable which clearly provides that the amount of advance received should be reduced from the cost of acquisition of asset. Thus. we reinforce the direction of the Lei. CIT(A) and direct the Assessing Officer to reduce the cost of acquisition of the property by the amount of Rs.3.74 crores on sale of the said property at the time of computation of capital gains as may be arising on account of sale of the said property.”*

10. Further the Hon'ble Supreme Court in the case of **CIT vs. Balbir Singh Maini (2017) 398 ITR 531**, have held that where for want of permissions, entire transaction of development of land envisages in joint development agreement fell through, there would be no profit or gain which arose from the transfer of capital asset which could be brought to tax u/s 45 read with section 48. The relevant observations made by the lordship in this regard reads as under: -

*"20 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 on the facts of this case, we need not go into any other factual question.*

*23. A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession alone is given under the agreement, and that too for a specific purpose -the purpose being to develop the property. as envisaged by all the parties. We are, therefore, of the view that this clause will also not rope in the present transaction.*

*24. The matter can also be viewed from a slightly different angle. Shri Vohra is right when he has referred to Sections 45 and 48 of the Income Tax Act and has then argued that some real income must "arise" on the assumption that there is transfer of a capital asset. This income must have been received or have "accrued" under Section 48 as a result of the transfer of the capital asset."*

11. Thus, this amount cannot be taxed as capital gain u/s 45 and also u/s 56 as income from other sources as noted above. The taxability of capital gain if at all would be applicable in the year in which transfer has taken place i.e. in the assessment year 2018-19 and accordingly it is in that year the taxability of this amount should

be considered. In view of aforesaid observation and finding, the appeal of the assessee is treated as allowed.

12. In the result appeal of the assessee is allowed.

Order pronounced in the Open Court on 27<sup>th</sup> May, 2019.

sd/-

sd/-

**(L.P. SAHU)**  
**ACCOUNTANT MEMBER**

**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Dated: 27/05/2019

***Veena***

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi