

आयकर अपीलिय अधिकरण, पटना न्यायपीठ, पटना
IN THE INCOME TAX APPELLATE TRIBUNAL PATNA BENCH, PATNA
श्री चन्द्र मोहन गर्ग, न्यायिक सदस्य एवं श्री एल.पी.साहु, लेखा सदस्य के समक्ष ।

BEFORE SHRI CHANDRA MOHAN GARG, JM
AND
SHRI L.P. SAHU, AM

आयकर अपील सं./ITA No.261/PAT/2018

(निर्धारण वर्ष / Assessment Year :2015-2016)

Jalalpur Developers Pvt. Ltd., At-Badi Badalpara, Khagaul, Patna-801105	Vs.	ACIT(OSD), Ward-2(1), Patna
स्थायी लेखा सं./PAN No. : AACCCJ 4319 G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by	:	Shri Abhinandan Kumar, AR
राजस्व की ओर से /Revenue by	:	Shri Abhay Kumar, DR
सुनवाई की तारीख / Date of Hearing	:	27/06/2019
घोषणा की तारीख/ Date of Pronouncement	:	28/06/2019

आदेश / ORDER

Per Bench:

This appeal is filed by the assessee assailing the order of Commissioner of Income Tax (Appeals)-1, Patna, dated 09.07.2018 for the assessment year 2015-2016, on the following grounds of appeal :-

1. For that Id. CIT(A) erred in treating the sale proceeds of three flats amounting to Rs. 975000.00/- of the year ignoring the facts that the flats were given possession in the next assessment year i.e. A.Y 2016-17 and the same were accounted for by the assessee in the next assessment year and taxes were accordingly deposited by the assessee.
2. For that the Id.CIT(A) has estimated income @10% of the sale value of three flats after rejecting books of A/c without allowing loss of Rs. 14,30,943/- consisting of administrative and construction expenses.
3. For that the Ld. CIT(A) had erred in not allowing administrative and construction expenses.
4. For that the Id. CIT(A) erred in not considering the deposited taxes on the income from of these three flats in the next

assessment year i.e. A.Y. 2016- 17 as it will double taxation for the same income.

5. For that any other ground may be raised at the time of hearing of appeal.
2. Brief facts of the case are that the assessee is a Private Limited Company deriving its income from the business of Real Estate Development. Return of income for the assessment year 2015-16 had been filed on 04/03/2016 declaring a loss of Rs. 14,30,943/-. The case was selected for scrutiny and in the course of scrutiny assessment, the AO treated the sales proceeds of three flats amounting to Rs.97,50,000/- and also adopted 10% of the net profit, against which the assessee appealed to the CIT(A) and the CIT(A) in appeal upheld the findings of AO and dismissed the appeal of the assessee.
3. Now, the assessee is in further appeal before the Tribunal.
4. Ld. AR submitted before us that the assessee had already shown the income from sale of three flats in the next assessment year 2016-2017 and had accordingly paid the taxes on it before the passing of assessment order u/s.143(3) of the Act for A.Y.2015-2016. However, the CIT(A) relying on the provisions of Section 2(47) of the Income Tax Act r.w.s.53A/54 of the Transfer of Property Act, failed to appreciate the fact that the section 2(47)(v) of the Act speaks about transfer of possession of the property. Accordingly, Ld. AR prayed for allowing the appeal of the assessee.
5. On the other hand, Ld. DR relied on the orders of authorities below.
6. After hearing the both the sides and carefully perusing the material available on record along with the paper book filed by the assessee, we

find that the AO in the assessment proceedings noted the assessee had to disclose its sale consideration in its account in the year under consideration, as the assessee had already received sales proceeds from these flats on the date of execution of sale deed which too have been executed during the current year. Further the AO estimated the net profit @10% of sales revenue and as the net profit has been determined on estimate basis on total sales revenue after invoking the provisions of section 145(3) of the Act, the AO did not allow the loss shown by the assessee in the profit & loss account and the return. In the appellate proceedings, the CIT(A) placing reliance on the various judicial pronouncements observed that in absence of any provision to the contrary, the concept of sale of an immovable property which is included in the express "capital asset" as defined under Section 2(14) of the Act, has to be gathered from Section 54 of the Transfer of Property Act, 1882. Finally, the CIT(A) held that there would be transfer of flat covered by the three sale deeds in question during the period under consideration making the assessee liable for payment of taxes in the previous year relevant to assessment year under consideration. Ld. AR before us submitted that since the possession were not transferred to the purchasers during the A.Y.2015-2016, therefore, the sales of the three flats were shown in the A.Y.2016-2017. It was further submitted by the Ld. AR that the said three flats owner were given possession in the F.Y.2015-2016 and therefore sale amount of three flats were accounted for in the A.Y.2016-2017 and taxes were deposited accordingly. During the course

assessment year i.e. A.Y. 2016- 17 as it will double taxation for the same income.

5. For that any other ground may be raised at the time of hearing of appeal.

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5. On the other hand, Id. DR relied on the orders of authorities below.

6. After hearing the both the sides and carefully perusing the material available on record along with the paper book filed by the assessee, we

of hearing, the Bench asked the assessee as to when the registration was done. In reply, the Id. AR of the assessee submitted that the registration was made in the financial year 2014-2015 and the possession was handed over in the next year. From the orders of both the authorities below, we find that as the assessee has failed to disclose the sale consideration of flats in the books of accounts in the impugned year, therefore, the AO has rightly invoked the provisions of Section 145(3) of the Act and made estimation, to which the CIT(A) has stamped with the view of the AO. In our opinion, both the authorities have taken just and plausible view, which cannot be interfered with. Our view also support by the decision of Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini, [2017] 86 taxmann.com 94 (SC), wherein the Hon'ble Supreme Court has held as under:-

"It is also well-settled that the protection provided under section 53A is only a shield, and can only be resorted to as a right of defence. An agreement of sale which fulfilled the ingredients of section 53A was not required to be executed through a registered instrument. This position was changed by the Registration and Other Related Laws (Amendment) Act, 2001. Amendments were made simultaneously in section 53A of the Transfer of Property Act and sections 17 and 49 of the Indian Registration Act. By the aforesaid amendment, the words 'the contract, though required to be registered, has not been registered, or' in section 53A of the 1882 Act have been omitted. Simultaneously, sections 17 and 49 of the 1908 Act have been amended, clarifying that unless the document containing the contract to transfer for consideration any immovable property (for the purpose of section 53A of 1882 Act) is registered, it shall not have any effect in law, other than being received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by a registered instrument. [Para 19]

The effect of the aforesaid amendment is that, on and after the commencement of the Amendment Act of 2001, if an agreement, like the JDA in the present case, is not registered, then it shall have no effect in law for the purposes of section 53A. In short, there is no agreement in the eyes of law which can be enforced under section

53A of the Transfer of Property Act. This being the case, that the High Court was right in stating that in order to qualify as a 'transfer' of a capital asset under section 2(47)(v), there must be a 'contract' which can be enforced in law under section 53A of the Transfer of Property Act. A reading of section 17(1A) and section 49 of the Registration Act shows that in the eyes of law, there is no contract which can be taken cognizance of, for the purpose specified in section 53A

The ITAT was not correct in referring to the expression 'of the nature referred to in section 53A' in section 2(47)(v) in order to arrive at the opposite conclusion. This expression was used by the legislature ever since sub-section (v) was inserted by the Finance Act of 1987 with effect from 1-4-1988. All that is meant by this expression is to refer to the ingredients of applicability of section 53A to the contracts mentioned therein. It is only where the contract contains all the six features mentioned in *Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi* [2002] 3 SCC 676, that the section applies, and this is what is meant by the expression 'of the nature referred to in section 53A'

This expression cannot be stretched to refer to an amendment that was made years later in 2001, so as to then say that though registration of a contract is required by the Amendment Act of 2001, yet the aforesaid expression 'of the nature referred to in section 53A' would somehow refer only to the nature of contract mentioned in section 53A, which would then in turn not require registration. As has been stated above, there is no contract in the eye of law in force under section 53A after 2001 unless the said contract is registered. 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 sub-clause (v) of section 2(47) is not attracted on the facts of this case, there is no need to go into any other factual question. [Para 20]

However, the High Court has held that section 2(47)(vi) will not apply for the reason that there was no change in membership of the society, as contemplated. One cannot agree with the High Court on this score. Under section 2(47)(vi), any transaction which has the effect of transferring or enabling the enjoyment of any immovable property would come within its purview. The High Court has not adverted to the expression 'or in any other manner whatsoever' in sub-clause (vi), which would show that it is not necessary that the transaction refers to the membership of a cooperative society. It is, therefore, necessary to see whether the impugned transaction can fall within this provision. [Para 21]

The object of section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression

'enabling the enjoyment of' takes colour from the earlier expression 'transferring', so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact. [Para 22]"

Since in the impugned case, the property has got registered in the financial year 2014-2015, therefore, the assessee should offer income in the current assessment year, which has not been shown by the assessee.

Respectfully following the decision of the Hon'ble Supreme Court in the case cited above, we uphold the findings of CIT(A) and dismiss the appeal of the assessee.

7. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 28/06/2019.

Sd/-

(C.M.GARG)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(L.P.SAHU)

लेखा सदस्य / ACCOUNTANT MEMBER

पटना / Patna; दिनांक Dated 28/06/2019

प्र.कु.मि/PKM, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
Jalalpur Developers Pvt. Ltd.,
At-Badi Badalpura, Khagaul,
Patna-801105
2. प्रत्यर्थी / The Respondent-
ACIT(OSD), Ward-2(1), Patna
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पटना / DR, ITAT, Patna
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, पटना / ITAT, Patna