

IN THE INCOME TAX APPELLATE TRIBUNAL

“B” BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 1396/Bang/2018
Assessment Year : 2008-09

Shri A. Krishnappa (HUF), By Kartha Dr. Srinivas, No. 1025/13, 11 th Main Road, RPC Layout, Vijayanagar, Bangalore – 560 040. PAN: AABHA1818F	Vs.	The Income Tax Officer, Ward – 3 (2) (2), Bangalore.
APPELLANT		RESPONDENT
Assessee by	:	Shri H.N. Khincha, CA
Revenue by	:	Shri R.N. Siddappaji, Addl. CIT (DR)
Date of hearing	:	13.08.2019
Date of Pronouncement	:	25.10.2019

ORDER

Per Shri A.K. Garodia, Accountant Member

This appeal is filed by the assessee which is directed against the order of Id. CIT(A)-13, Bangalore dated 01.03.2018 for Assessment Year 2008-09.

2. The grounds raised by the assessee are as under.

“1. The learned Assessing Officer had erred in passing the order in the manner passed by him and the learned Commissioner of Income tax (Appeals) has erred in partially confirming the same. The impugned order to the extent confirmed by CIT(A) being bad in law is required to be quashed.

2.1 In any case, the conditions precedent for the issue of notice u/s. 148 of the Act being absent, the re-opening of assessment was bad in law and consequently the order as passed/confirmed being also bad in law is required to be quashed.

2.2 In any case the assessing officer having not complied with legal provisions / procedure for reopening / reassessment, the consequential order becomes bad in law and liable to be quashed.

3.1 Without prejudice, the Assessing Officer had erred in concluding that

a) The appellant had sold / transferred the land during the previous

year relevant to year under appeal.

b) That the appellant is liable to pay tax on capital gains on transfer of the land.

c) The appellant had transferred the said land in the relevant previous year on an undervalued consideration and therefore provisions of sec. 50C of I.T. Act, 1961 would be applicable.

d) That a sum of Rs. 40,00,000/- is also to be taxed under the head Capital Gains.

And the learned CIT(A) has erred in confirming the same. The Conclusions drawn by the authorities below being wholly erroneous both on facts and evidence available and also on facts are to be rejected.

3.2. The authorities below have erred in not appreciating the fact that the appellant having already long back transferred the land was no more the owner of the land and in such a case the appellant could not have / did not transfer any land in the previous year relevant to year under appeal hence the provisions of section 45 of the Act are not applicable at all. The decision of authorities below that the provisions of 45 of the Act are applicable to the appellant in the year under appeal being wholly erroneous are to be disregarded and the addition as made on this count is to be deleted.

4. The learned assessing officer had erred in enhancing the Annual Letting Value of the property and the learned CIT(A) has erred in partially reducing it to 10 times of the Municipal taxes paid for the year. The enhancement as made/sustained is without any basis and evidence and in any case against the principles of natural justice is to be deleted and the income from property as returned is to be accepted.

5. The appellant also denies liability to pay interest. The interest having been levied erroneously is to be deleted.

6. In view of the above and on other grounds to be adduced at the time of hearing it is requested that the impugned order be quashed or at least the additions made/confirmed under the head capital gains and income from property be deleted and interest levied be also deleted.”

3. In course of hearing, it was submitted by Id. AR of assessee that ground no. 1 is general and ground no. 2 is not pressed. Accordingly, it is held that no adjudication is called for regarding ground no. 1 and ground no. 2 is rejected as not pressed.
4. Regarding ground no. 3, it was submitted that on page no. 56 of the paper book is the statement of total income filed by the assessee along with the return of income for Assessment Year 2008-09 and as per the same, the assessee has declared an income of Rs. 60 Lakhs under the head long term

capital gain in respect of additional compensation for land # 102-MRCR Layout. Thereafter he submitted that on pages 75 to 80 of the paper book is the copy of agreement for sale dated 01.07.1991 and on pages 81 to 88 of the paper book is the copy of supplementary agreement dated 30.12.1991. He also submitted that on pages 89 to 108 of the paper book is the copy of sale deed dated 14.03.2008 for the same land i.e. Land No. 102, MRCR Layout, Bangalore. He also pointed out that on page no. 78 of the paper book being page no. 3 of the agreement for sale dated 01.07.1991, it is noted that the vendor confirms the receipt of entire sale consideration of Rs. 40 Lakhs from the purchaser company. Reliance was placed on a Tribunal order rendered in the case of Dr. Syed Rahmatullah Azizullah Vs. ITO Nos. 240 & 241/Bang/2019 dated 10.05.2019. It was submitted that para no. 7 of this Tribunal order is relevant in which the Tribunal has considered the amendments by way of Registration and Other Related Laws (Amendment) Act, 2001 and has duly considered 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) and 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) and it was held that transfer of land has taken place at the time of execution of agreement to sale dated 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. He also submitted that in the present case also, full payment was made on the date of execution of sale dated 01.07.1991 as noted in agreement page no. 3 available on page no. 78 of the paper book. Regarding possession, it was submitted that on page no. 6 of the sale deed 14.03.2008, it is stated that the purchaser was put in possession of the said property in terms of the deed of assignment dated 29.11.1992 being the copy of deed of assignment dated 29.11.1992 available on pages 109 to 119 of the paper book as per which M/s. Unitech Ltd., purchaser as per agreement to sale dated 01.07.1991 has assigned its rights title and interest to Shri M.M. Ananthamurthy, S/o. M.S. Mahaveersa and on page no. 4 of this deed of assignment also, it is noted that the vendor i.e. the present assessee shall execute the sale deed in favour

of the assignee for the consideration of Rs. 40 Lakhs which is already paid by the assignor to the vendor as stated in the agreements dated 01.07.1991 and 30.12.1991. He submitted that hence, in the present case also, agreement to sale was executed in July 1991 and full payment was made and possession was also handed over and therefore, this Tribunal order is squarely applicable and following the same, it should be held that the AO was not justified in making addition of Rs. 40 Lakhs being the amount received consequent on agreement dated 30.12.1991 and further addition of Rs. 130.85 Lakhs by invoking the provisions of section 48 r.w.s. 50C of the IT Act. The Id. DR of revenue supported the orders of authorities below.

5. We have considered the rival submissions. We find that this issue was decided by Id. CIT(A) as per para nos. 11.7, 12 and 13 of his order and for ready reference, these paras are reproduced hereinbelow.

“11.7 In this context, it is relevant to discuss another document: the Tripartite Deed of Assignment (dated 29.11.1992), with Assessee as Vendor, Unitech Ltd as Assignor and MM Ananthmurthy as Assignee. In this Deed of Assignment, on page 6, there is an important clause which says "the entire transaction by registration of the Sale Deed in the manner stated above shall be executed by the vendors as well as the assignors in favour of the assignee within 10 days from the receipt of the N.O.C. on the assignee paying the balance of the consideration to the assignor." On the date of signing the Deed of Assignment (29.11.1992), the balance amount pending to be paid by the assignee (MM Ananthmurthy) to the assignor (Unitech Ltd.) was Rs.13,00,000/-. This was paid vide cheque dt. 31.01.2008, as evidenced at page 9 of the Sale Deed. This clearly shows that the assignor (MM Ananthmurthy) had not fulfilled his part of the contract. Thus, in terms of pre-requisites for invoking the equitable doctrine of part performance, as delineated by the Hon'ble Guahati High Court in the case of Sunil Kumar Sarkar V. Aghor Kr. Basu, (supra), there is no part performance of the contract of the nature referred to in Section 53A. Hence, it cannot be said that the transfer took place on 29.11.1992 either. Since the payment was made on 31.01.2008 in pursuance of the Deed of Assignment, part performance can be said to have been done on 31.01.2008 i.e. FY 2007-08 which again renders capital gains to be chargeable in the year under consideration i.e. AY 2008-09.

Based on the above discussion, it is concluded that possession was not given by the assessee in FY 1991-92 and the transaction by way of Agreement for sale does not constitute transfer within the meaning of section 2(47)(v) of the Act.

12. Lastly, had the assessee itself considered the transfer to have taken

place on 01.07.1991 (as is being claimed now), it would have disclosed capital gains of Rs. 40,00,000/- in FY 1991-92. However, as mentioned in the assessment Order (on page 3), this amount of Rs.40,00,000/- has not been offered to tax in any of the earlier years prior to FY 2007-08. The assessee has not disputed this fact nor raised any ground in this regard.

13. Considering the legal position, the overall facts of the case and evidences available lead to only one conclusion that intention as well as conduct of both the parties (i.e. the appellant as well as Unitech) and also their actions clearly establish the factum of transfer of the property in question on 14.03.2008 i.e. in FY 2007-08 when the Sale Deed was registered, executed and signed (by the assessee as vendor and M.M. Anant Murthy as buyer), and not on 01.07.1991 when the Agreement for Sale was signed (by the assessee and Unitech Ltd.). Since, it has been concluded that the transfer of the capital asset took place in FY 2007-08, provisions of Sec.50C are also applicable.

In view of the above, the additions made by the AO are upheld and these grounds of the appeal are dismissed.”

6. From the above paras reproduced from the order of Id. CIT(A), it is seen that this is the main basis of the order of Id. CIT(A) that possession was not given by assessee in Financial Year 1991-92 and the transaction by way of Agreement for sale does not constitute transfer within the meaning of section 2(47)(v) of the IT Act. Now we reproduce the relevant part of the Tribunal order cited by Id. AR of assessee i.e. para no. 7 from pages 137 to 138 of the paper book. This para is as under.

“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."

7. We find that in this case, it is noted by the Tribunal that in that case, sale of property in question takes place as per the unregistered agreement dated 08.05.1995. The Tribunal has duly considered the judgment of Hon'ble Karnataka High Court rendered in the case of CIT Vs. Dr.T.K. Dayalu (supra) and the judgment of the Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra) and it was held by the Tribunal that this judgement of the Hon'ble Apex Court rendered in the case of CIT Vs. Balbir Singh Maini (supra) is on the basis of the amendments by way of Registration and Other Related Laws (Amendment) Act, 2001 and therefore, if the agreement in question is executed after 2001 amendment without getting the agreement to sale registered, then such unregistered agreement to sale will not have any effect in law for the purpose of section 53A of the Transfer of Property Act, 1882. But since in that case, the agreement to sale was registered on 08.05.1995 which was much before the amendment by way of Registration and Other Related Laws (Amendment) Act, 2001, the Tribunal held that it cannot be said that the transfer has not taken place at the time of execution of 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 the present case also, the

agreement to sale was executed much before the amendment by way of Registration and Other Related Laws (Amendment) Act, 2001 and full consideration of Rs. 40 Lakhs was also paid in the same year. Now whether the possession was handed over or not is the question because this is one of the objection of the Id. CIT(A) that possession was not given by the assessee in Financial Year 1991-92. On page no. 98 of the paper book being page no. 6 of the sale deed, it is noted that the purchaser was put in possession of the said property in terms of the deed of assignment dated 29.11.1992 which was incomplete and not habitable except that the vendor had completed the bare structures and the walls, internal plastering of the walls, providing teak wood doors, windows and shutters. But the said property was not provided with water, light, sanitation, flooring etc. and the purchaser after having acquired the possession completed it at its cost the pending works in all respects. Hence, from these facts noted in the registered sale deed, it is coming out that possession was also handed over by the vendor to the purchaser and the purchaser after getting the possession got the pending works completed at its cost. Hence it is seen that this finding of Id. CIT(A) that possession was not handed over is not correct. It may be that possession might not have been handed over in July 1991 at the time of execution of agreement to sale but definitely, the possession was handed over in November 1992 when the deed of assignment was executed.

8. There is one more objection of Id. CIT(A) in para no. 12 of his order as reproduced above that the assessee has not disclosed any capital gain in Financial Year 1991-92 or in any year thereafter prior to Financial Year 2007-08. If the capital gain is arising in Financial Year 1991-92 and the same was not subject to tax, because same was not offered by assessee for tax purpose by filing return of income, then also, it cannot lead to this conclusion that capital gain has not arisen in that year merely because the same was not disclosed for tax purpose by filing the return of income. Hence in our considered opinion, this observation of Id. CIT(A) is also not relevant.
9. As per the above discussion, it comes out that the objections of the Id. CIT(A) are not valid and the Tribunal order cited by Id. AR of assessee of which para no. 7 is already reproduced above is squarely applicable in the present case

and respectfully following the same, we hold that transfer of land has taken place in Financial Year 1991-92 and if not in that year then latest by Financial Year 1992-93 when deed of assignment was executed and possession was handed over as per the facts noted in sale deed. Hence the addition made by the AO in the present year on account of sale consideration of Rs. 40 Lakhs and further addition of Rs. 130.85 Lakhs u/s. 48 r.w.s. 50C of the IT Act is not justified and hence, we delete the same. Ground no. 3 is allowed.

10. Ground no. 4 was not pressed by Id. AR of assessee and hence, the same is rejected as not pressed. Regarding ground nos. 5 and 6, no argument was advanced and hence, it is inferred that these grounds are also not pressed and dismissed accordingly.

11. In the result, the appeal filed by the assessee is partly allowed.

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

Sd/-
(PAVAN KUMAR GADALE)
Judicial Member

Sd/-
(ARUN KUMAR GARODIA)
Accountant Member

Bangalore,
Dated, the 25th October, 2019.
/MS/

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

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.