

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ‘ B ‘ Bench, Hyderabad
(Through Video Conferencing)

Before Shri S.S. Godara, Judicial Member
AND
Shri Laxmi Prasad Sahu, Accountant Member

ITA Nos.852 & 853/Hyd/2018		
Assessment Years: 2009-10 and 2015-16		
Joint Commissioner of Income Tax (OSD), Holding the post of Central Circle – 1(2), Hyderabad.	Vs.	M/s. Nancy Divakar Hospital & Research Centre Private Limited, Secunderabad. PAN : AABCN1671Q.
(Appellant)		(Respondent)
Assessee by:		Shri Y.V. Bhanu Narayan Rao.
Revenue by:		Sri Y.V.S.T. Sai.
Date of hearing:		08.02.2022
Date of pronouncement:		11.02.2022

ORDER

Per S. S. Godara, J.M.

These two Revenue appeals for A.Ys. 2009-10 and 2015-16 arise against the Commissioner of Income Tax (Appeals) – 11, Hyderabad’s separate orders; both dated 22.12.2017 passed in case Nos.441/2016-17 and 013/2017-18/DCIT CC-1(2) / CIT(A)-11 Hyd involving proceedings u/s 143(3) r.w.s. 147 and 144 r.w.s. 147 of the of Income Tax Act, 1961 [in short, ‘the Act’], respectively.

Heard both the parties. Case files perused.

2. It emerges at the outset that the Revenue's latter appeal herein ITA 853/Hyd/2018 involves tax effect of Rs.38,81,323/- only as per the assessee's calculation sheet filed before us. There is no rebuttal of this clinching computation coming from the Revenue side. We thus hold that this appeal is covered by the CBDT Circular No.03 of 2018 dated 11-07-2018 and Circular No.17 of 2019 prescribing tax effect limit for filing of appeal by the Revenue before the tribunal as Rs.50 lac with retrospective effect. The Revenue's instant appeal ITA No.853/Hyd/2018 stands declined in the foregoing terms therefore.

3. We are now left with Revenue's former appeal ITA No.852/Hyd/2018 raising the following substantive grounds :

"2. The Learned CITCA) ought to have appreciated the fact that the chargeability of capital gains would arise in the Asst.Year 2009-10 and not in Asst.Year 2015-16 as the development agreement dated 05-03-2009 was never cancelled.

3. The Learned CITCA) ought to have appreciated the facts and circumstances of the case and erred in not considering the fact that as per the agreement dated 05-03-2009, the possession of the property was given to the developer and as per Sec.53A of the Transfer of Property Act, 1882 the transfer was complete in the Asst. Year 2009-10 only.

4. The Ld.CIT(A) ought to have appreciated the facts of the case as the newly introduced provisions of Sec.45(5A) were not applicable to the case on hand as the said provisions are applicable only for and from the Asst.Year 2018-19. Even the newly introduced provisions are applicable only to Individual and HUF, as such the said provisions are not applicable to this case being a Corporate Entity."

4. Both the learned representatives next invited our attention to CIT(A)'s detailed finding deleting long term capital gain in issue of Rs.11,94,23,521/- made by the Assessing Officer in his assessment order dt.30.12.2016. Lower appellate discussion this effect reads as follows:

"2. Brief facts of the case are that the appellant is engaged in the business of running Nursing home. A search & seizure action u/s.132 of the Act was carried out in the case of Mis. Amsri Builders Group on 27.12.2013. During the course of post search as well as assessment proceedings, AO observed that M/s.Amsri Builders represented by Sri. P. Amruth Prasad and Sri. U. Srinivas had entered into development agreement cum GPA vide agreement dt.05.03.2009 with Mis. Nancy Divaker Hospital & Research Centre Private Limited for the development of land admeasuring 7000 sq.yards. The total build up area as proposed in the agreement is 2,55,025.34 sq.ft and out of the same share of the appellant is 50%, ie. 1,27,562.27sq.ft. The appellant had not filed its return of income for the year under consideration. The AO had issued a notice u/s.148 of the Act. In response to the notice, filed its return of income on 05.05.2016 declaring gross loss of Rs.7610/-. The AO worked out the sale consideration @ 1200/- sq.ft works out to Rs.15,30,74,724/- . The AO completed the assessment u/s.143(3) r.w.s 147 of the Act by adopting the cost of acquisition at Rs.3,36,51,203/- being the value of the land and buildings, and made addition of Rs.11,94,23,521/- as Long term capital gains.

3. Aggrieved by the AO's action, the appellant is in appeal with the following grounds of appeal.

"1. The order passed by the Assessing Officer is erroneous and contrary to law.

2. The Assessing Officer is incorrect to adopt the development agreement for capital gains taxation in the year of agreement especially when there was neither any commencement of construction nor any efforts to construction by the developer.

3. The Assessing officer is incorrect to adopt the cost of acquisition as per balance sheet without any indexation.

4. The Assessing officer is incorrect in not recognizing the series of events and agreements without any commencement of construction.

5. The Assessing Officer is incorrect to charge interest u/s.234A and 234B.

6. Any other ground that may be urged at the time of hearing with the permission of the learned Commissioner of Income tax (A)-11."

4. During the appellate proceedings Sri. P. Samba Murthy, CA appeared and filed written submissions. Though the appellant has raised as many as 6 grounds, there is only one issue i.e addition of Rs.11,94,23,521/- as Long term capital gains.

5. The AO during the assessment proceedings has asked the appellant as to why the capital gains should not be assessed to tax on signing of the joint development agreement dt.05.03.2009. The appellant filed a detailed reply inter-alia stating that the developer could not commence the development work as per the development agreement entered into.

There was a long delay even in obtaining plan approval from the municipality. The director of the company was also examined by the AO after examining the factual as well as legal position the AO concluded as under:

"After considering all facts and circumstances, it is observed that even though the initial development agreement was entered in the year 2009, it has undergone several amendments on several times. The developer also has not made any efforts to commence the development of the project after entering into the 1st development agreement. As verified from the submissions, GHMC gave approval (which is fundamental requisite) on 24.06.2014 and the final development agreement was entered on 26.09.2014.

However, as the initial development agreement was entered on 05.03.2009, to protect the interests of the Revenue, it is decided to tax the Capital gains on accounts of joint development agreement on protective basis for the A.Y-2009-10. "

6. During the course of appellate proceedings the appellant contended as under:

"The appellants case for the above assessment year was completed under sec.143(3) r.w.s 147 of the Income tax act, 1961 on protective basis on a total income of Rs.11,94,18,922/- after making an addition of Rs.11,94,23,521/- as Long term capital gains and a tax liability of Rs.6,04,42,932/- was arrived which includes interest under sec. 234A and 234B.

The subject matter of the above addition was, as the execution of development agreement was done in the above assessment year, the same needs to be taxed in the above assessment year.

However, on representation and submission of facts and circumstances regarding non commencement of the project due to various difficulties and disputes and the appellants further submission that a fresh supplementary development agreement was executed as also plan got sanctioned during the financial year 2014-15 and further admission of the appellant that the capital gains is being offered for the assessment year 2015-16, i.e in the year in which the municipal plan got sanctioned, the exact share of built up area between the land owner and developer is known by metes and bounds and actual commencement of development work started.

The Assessment for the above assessment year was completed on protective basis which is more evident from the page no.10 para no.4.14 and also page no.11 para no.7 to protect the interest of revenue.

The assessment for the assessment year 2015-16 was taken up for scrutiny and verified for the admission of capital gains on the above subject. After finding the fact that above capital gains was

offered for taxation, the assessment was completed with some additions.

In these circumstances we bring to your kind notice that the assessment for the above assessment year was completed on protective basis and the same subject was finally subjected to tax in the assessment year 2015-16, we humbly pray before your good self to kindly delete the above addition on account of long term capital gains for the above assessment year. "

7. I have considered the assessment order, submissions of the appellant and the material placed before me. It is seen that the developer could not start developmental activity as per the agreement entered on dt.05.03.2009. Thereafter the agreement was modified by way of supplementary development agreement dt.04.02.2013. Still there was no development as planned and finally the appellant has entered into a fresh supplementary development agreement dt.26.09.2014 which included a new builder also as third party after the plan was approved by GHMC. The appellant has offered the resultant capital gains for the A.Y 2015-16 and the same has been assessed by the AO. In view of the factual position as above and also the fact that the AO himself has assessed the capital gains on protective basis only for this year, the addition made is liable to be deleted. Accordingly, the addition made by the AO is deleted."

5. Learned CIT DR vehemently contended during the course of hearing that the CIT(A) has erred in law and on facts in deleting the impugned long term capital gain addition made in the course of above stated re-assessment. He has filed a detailed paper book running into 165 pages comprising of the assessee's original development agreement cum general power of attorney dt.04.03.2009, supplementary development agreement dt.25.09.2014 along with a catena of case law :

- 1) Potla Nageswararao Vs. DCIT [2014] 50 taxmann.com 137 dt.09.04.2014 of Andhra Pradesh High Court.
- 2) CIT - 111, Pune Vs. Dr. Arvind S. Phake [2018] 89 taxmann.com 307 dt.28.02.2018 of Bombay High Court.

- 3) Adhinarayana Reddy Kummata Vs. ACIT, Circle - 11(1), Hyderabad [2018] 91 taxmann.com 360 dt.28.02.2018 of ITAT, Hyderabad Bench.
- 4) CIT Vs. Harbour View [2019] 102 taxmann.com 185 dt.24.09.2018 of Kerala High Court.
- 5) Dr. T. Achyutha Rao Vs. ACIT, Circle 13(1), Hyderabad [2007] 106 ITD 388 dt.20.09.2005 of ITAT, Hyderabad Bench.
- 6) Decision of Authority for Advance Rulings of New Delhi in the case of Jasbir Singh Sarkaria [2007] 164 taxmann.con 108 dt.30.08.2007.

6. The Revenue's case in light of the above stated material is that the assessee had very well "transferred" its capital asset vide original development agreement on 04.03.2009 only (Pages 66 to 118 in paper book). Mr. Sai invited our attention to page 85 in the department's paper book containing "development" in clauses 5.1 to 5.4 that the assessee had irrevocably transferred possession in the nature of part performance u/s 53A of the Transfer of Property Act. And that the mere fact of the Assessing Officer having made the impugned protective addition; in order to avoid double assessment, does not in any way dilute the correctness thereof once it is based on all the relevant facts as well as settled legal principles.

7. The assessee has drawn strong support from CIT(A)'s foregoing detailed discussion deleting the impugned long term capital gain addition made on "protective" basis. He has explained that once the assessee's transferee herein had failed to perform the development agreement, it had to enter into a supplementary development agreement on 25.09.2014 giving rise to long term capital gain which duly stood offered to tax in A.Y.2015-16. It

therefore sought to buttress the point that there has not been any escapement of income at all as projected at the Revenue's behest once the very capital gains had been declared in the latter assessment year in above terms. Mr. Bhanu Narayan has also quoted M/s. Seshasayee Steel (P) Ltd. Vs ACIT (2020) 421 ITR 46 (SC) that the assessee's latter agreement only amounts to transfer u/s 2(47)(v) of the Act.

8. We have given our thoughtful consideration to rival contentions and find no reason to express our concurrence with the CIT(A)'s detailed discussion supported at the assessee's behest. Suffice to say, the assessee had entered into a development agreement cum GPA dt.04.03.2009 (duly registered document) wherein the possession was irrevocably handedover to the developer party M/s. AMSRI Builders. There is further no dispute that this followed the latter supplementary agreement dt.25.09.2014 between assessee, M/s. AMSRI Builders and M/s. Rajaram Constructions which is in continuity with the first main development agreement only. That being the case, we express our due agreement with the Revenue's arguments that the assessee had indeed transferred the relevant capital asset by way of a registered development agreement cum GPA on 04.03.2009 relevant to A.Y. 2009-10. We further make it clear that such a part performance has indeed been treated as "transfer" u/s 2(47)(v) as per the hon'ble jurisdiction high court in case of Potla Nageswara Rao (supra).

9. We further find no merit in assessee's vehement contentions that once the developer had not performed the agreement hereinabove, the same stands annulled by the efflux of time. This is for the reason that the assessee has failed to pinpoint any of the specified conditions in the original agreement that "time

was essence of the contract” in light of section 55 of the Indian Contract Act, 1872. We rather note that the assessee never cancelled the said former development agreement even unilaterally as it has entered into the latter supplementary agreement on 25.09.2014 in continuity with the earlier one only. The question as to whether mere non-payment of the corresponding consideration; if any, would keep the impugned long term capital gains in abeyance has already been decided in Revenue’s favour in the case of CIT Vs. Balbir Singh Maini (2017) 398 ITR 531 (SC). Their lordships make it clear that mere “accrual” of income; when it becomes due, in such an instance gives rise to a corresponding liability of the other party.

10. We find no merit in assessee’s arguments placing reliance on Seshasayee Steels Pvt. Ltd. Vs. ACIT (supra) at the same time since the assessee had executed an irrevocable transfer of possession as against a mere licence therein. The same stands distinguished therefore.

11. The assessee lastly sought to highlight the fact that the Assessing Officer herein had made a “protective” addition of long term capital gains in light of the clinching fact that it had been substantively assessed in the latter A.Y. 2015-16. Case law *Banyan and Berry Vs. CIT (1996) 222 ITR 831 (Guj)* holds that a “protective” assessment is very much at par with the “substantive” one. We thus are of the opinion that the mere fact of the impugned addition having been made on protective basis would hardly provide any relief to the assessee in light of the overwhelming factual possession supporting the Revenue’s case in preceding paras. We therefore restore the impugned long term capital gain addition forming subject matter of the Revenue’s sole substantive grievance. Its appeal ITA 852/Hyd/2018 succeeds therefore. The Assessing Officer shall

frame consequential computation after taking into consideration the assessee's long term capital gain declared and assessed in A.Y. 2015-16 as per law.

No other ground has been pressed before us.

12. The Revenue's former appeal ITA 852/Hyd/2018 herein is allowed and latter appeal ITA 853/Hyd/2018 stands dismissed in foregoing terms. A copy of this common order be placed in respective case files. A copy of this common order be placed in the respective case files.

Order pronounced in the Open Court on 11th February, 2022.

Sd/- (LAXMI PRASAD SAHU) ACCOUNTANT MEMBER	Sd/- (S.S. GODARA) JUDICIAL MEMBER
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Hyderabad, dated 11th February, 2022.

TYNM/sps

Copy to:

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1	M/s. Nancy Divakar Hospital & Research Centre Private Limited, 9-1-87, St. John's Road, Secunderabad.
2	Joint Commissioner of Income Tax (OSD), Holding the post of Central Circle – 1(2), Hyderabad.
3	CIT(A)-11, Hyderabad.
4	Pr. CIT(Central) - Hyderabad.
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order