

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH,
PUNE

BEFORE SHRIS.S.VISWANETHRA RAVI, JUDICIAL MEMBER,
AND DR. DIPAK P. RIPOTE, Accountant Member

आयकर अपील सं. / ITA No.1084/PUN/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Babusha Haribhau Gade,
Gade-Vasti, A/post-Wagholi,
Tal-Haveli, Deist. Pune – 412207
Maharashtra.

PAN: BKGPG 7884 Gअपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward-12(4), Pune.

.....प्रत्यर्थी / Respondent

Revenue by : Shri S.P. Walimbe - DR
Assessee by : Shri Hari Krishnan - AR

सुनवाई की तारीख / Date of Hearing : 17.02.2022
घोषणा की तारीख / Date of Pronouncement : 29.04.2022

आदेश / ORDER

PER DR. DIPAK P. RIPOTE, AM:

This is an appeal filed by the Assessee directed against the order of Id.Commissioner of Income Tax(Appeals)-10, Pune dated 20.02.2017 for the Assessment Year 2012-13.

2. The Assessee raised following grounds of appeal:

"1. The Ld. Commissioner of Income Tax (Appeals) has erred in rejecting the contention raised by the assessee in ground number 3 to 10 before the Commissioner of Income Tax (Appeals) that no Capital Gains were chargeable in Assessment Year 2012-13.

The Ld. Commissioner of Income Tax (Appeals) should have held that no transfer of a capital asset has taken place as envisaged u/s 2(47) of the Income Tax Act, in the previous year relevant to Assessment Year 2012-13 under consideration and no Capital

Gains have arisen in Assessment Year 2012-13 in respect of the Joint Venture Agreement dated 28-09-2011.

2. *The Ld. Commissioner of Income Tax (Appeals) has failed to appreciate that no possession of the land was given, and no sale consideration was received and no final sale deed was executed in the previous year relevant to Assessment Year 2012-13 under consideration.*
3. *As the assessee has duly declared the Capital Gains, arising in respect of land given for development under the Joint Venture Agreement, in Assessment Years 2013-14 to 2017-18, subjecting the Capital Gains to tax in Assessment Year 2012-13 also, amounts to double taxation. Accordingly without prejudice, if the contention raised by the assessee that Capital Gains on transfer of land has not arisen and is accordingly not taxable in Assessment Year 2012-13, is not accepted by the Hon'ble Income Tax Appellate Tribunal it may issue directions to the Assessing Officer to exclude the Capital Gains from the income assessed for Assessment Years 2013-14 to 2017-18 in respect of the transfer of the land under Joint Venture Agreement dated 28-09-2011 and to refund the tax paid by the assessee on the said Capital Gains, alongwith the interest due thereon.*
4. *The appellant craves leave to add to or amend/modify or delete any or all of the above grounds of appeal.*

The above concise grounds were filed during the proceedings by the appellant's AR and he stated that these grounds may be adjudicated and not the one which have been filed along with the appeal memo. Accordingly, these grounds are considered.

3. Brief facts of the case are that the appellant-assessee filed return of income for A.Y. 2012-13 on 25.03.2014 showing following computation of total income :-

Particulars	Rs.	Rs.	Rs.
Income from Profit/Gains of Business/Profession			
Income from Business/Profession			
1. Capital Gain	0		0
Net Profit (Loss)			
Income from Capital Gains			
Long Term		0	
1. Sale of Agricultural Land Gat No.743 14044595			
Date of Sale :28/09/2011			
Fair Market Value as on			

01/04/2001 Rs.466620/-, Purchase
Date : 01/04/1981 with Indexation
@ 785/100

Capital Gain	3662967	
Investment of Rs.14688000 u/s 54		10381628
F-Reinvestment within 1 year from or to date of transfer towards purchase of residential property, hence deduct		10381628
Gross Total Income		Nil
Total Income		Nil

Thus, the appellant claimed in the return of income that the appellant had sold land at Survey No.743, Wagholi, Tal. Haveli, Pune on 28.09.2011. Accordingly, the appellant had shown capital gain in the return of income. However, appellant and other co-owners had entered into a registered joint development agreement on 28.09.2011 with M/s. Vyankatesh Developers. The said joint development agreement was duly registered on 28.09.2011 before the Sub-Registrar, Haveli after payment of stamp duty and registration charges.

3.1 Appellant's case was selected for scrutiny assessment. Notice u/s 143(2) dated 02.09.2014 of the I.T Act was served on the assessee. Subsequently, notice u/s 142(1) was also served. Appellant filed written submissions dated 29.12.2014 before the Assessing Officer. The assessment order was passed on 03.03.2015 after considering the appellant's submissions and after hearing the Authorized Representative of the appellant. It is mentioned in the assessment order that the appellant sold land at Wagholi, Gat No.743 on 28.09.2011 for Rs.4,21,38,000/-. In this sale consideration assessee's share is 1/3rd which works out to

Rs.1,40,46,000/-. Since it was ancestral land, for calculating long term capital gain, the assessee had considered cost of acquisition for the said land as fair market value of the land was on 01.04.1981. Appellant-assessee worked out long term capital gain of Rs.1,03,81,628/- and claimed the deduction of Rs.1,03,81,628/- u/s 54F of the I.T. Act. During the assessment proceedings, appellant-assessee submitted that he will be getting 6 flats and accordingly claimed 54F for all the 6 flats. Assessing Officer, in the assessment order, restricted the assessee's claim of deduction u/s 54F for only one flat, as all the 6 flats were separate independent residential units having separate entrances, kitchens and separate electrical supply.

4. Aggrieved by the assessment order, the appellant filed appeal before the Commissioner of Income Tax (Appeals)-10, Pune. For the first time, before the ld. CIT(A), appellant raised the ground of applicability of section 45(2) of the I.T. Act vide ground no.4 to 10. The ld. CIT(A) allowed appellant's claim for deduction u/s 54F for 6 flats as claimed by the appellant in the return of income.

4.1 The ld. CIT(A) vide para 6 of his order has dealt with ground no.4 to 10 of the appellant related to applicability of section 45(2). The relevant part of the order of ld. CIT(A) is reproduced here under: -

“(ii) I have considered the submission of the appellant and gone through the A.O's order. In fact, the impugned issue has been explained by the appellant in a very vague manner. Admittedly, he never claimed the application of section 45(2), while filing his return of income and even during the course of assessment proceeding. Therefore, it is not

understandable as to how, at this stage the order of A.O is challenged wherein, the A.O has not dealt the impugned issue in assessment proceeding neither he has expressed any opinion. The A.O's order is based on the facts, available on record and submission made in assessment proceeding. Hence, there is no infirmity in the findings. If the appellant found certain facts erroneously filed along with return of income, he had an opportunity to rectify it by filing revised return of income by 31.03.2014, however, he failed to avail the benefit as prescribed in the relevant statutes. Further, suddenly in the appeal proceeding, he took the plea that whatever facts he disclosed in the return of income are incorrect and accordingly should be treated as erroneous. However, before arriving at a conclusion, it is relevant to have a look at the provision of section 45(2) of I.T. Act, which stipulates.

Notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into, or its treatment by him as stock-in-trade of a business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him and, for the purposes of section 48, the fair market value of the asset on the date of such conversion or treatment shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset.

(iii) As evident from the above, the impugned section provides that on conversion of a capital asset into stock-in-trade, the capital gain earned on conversion as well as the profit on account of sale of the converted stock in trade will be chargeable to tax in the year of sale under two heads. First, under the capital gain head and second under the business profit head. For the purpose of claiming this benefit, the appellant was required to make such claim in the return income itself or even by filing revised return of income. However, such claim is made after a gap of three years which is nothing but an apparent case of afterthought, which is fabricated to avoid the tax liability in the year under consideration. The appellant had the knowledge of violation of section 54F with regard to taxation of capital gain on remaining 19 flats hence the impugned method was adopted to defraud the revenue. Further, without prejudice to the above, it is also not ascertainable as to whether even in the year of sale i.e. in subsequent years, capital gain tax as well as tax on business profit have been paid or not in terms of section 45(2) of I.T. Act. In fact, on this issue, the appellant has failed to bring on record any cogent material to justify his claim. Hence, the contention deserves to be rejected. Accordingly, grounds no.4 to 10 are dismissed.”

5. Aggrieved by the order of the Ld.CIT(A), the appellant assessee filed appeal before this Tribunal.

6. The Ld.AR filed a written submission which is reproduced as under :-

Quote , “

-The assessee was the co-owner having 1/3rd share in the land admeasuring 8000 M² in Gat No. 743, Wagholi, Tal-Haveli, Pune. The Co-owners have entered in to a Joint Venture Agreement dated 28-09-2011 with M/s Venkatesh Developers. The co-owners

have also issued an irrevocable power of attorney dated 28-09-2011 in favour of the developers.

2. Immediately before entering into the Joint Venture Agreement, the co-owners have converted the land into stock-in-trade.

3. (i) At the time of entering into the Joint Venture Agreement and issuing the irrevocable power of attorney, the co-owners have however not given the possession of the land to the developers. As per clause (n) on page 10 of the Joint Venture Agreement the developers have been allowed to enter the property only to carry on the development work.

(ii) As per the Joint Venture Agreement, the co-owners were to receive 53,200 sq. ft. of the constructed area in the shape of flats, as consideration for the transfer of land. Subsequently, the constructed area to be received by the co-owners was increased to 57,690 Sq. Ft. The assessee was entitled to receive 19,230 sq. ft. of the constructed area as his 1/3rd share. The said constructed area was received in Assessment Years 2013-14 to 2017-18.

(iii) As per clause (k) on page 9 and clause (w) on page 12 of the Joint Venture Agreement, the co-owners were to finally transfer the property to the prospective buyers of flats/shops or the society formed by them.

4. As per section 45(2) on conversion of land into stock-in-trade on 28-09-2011 the Capital Gains are chargeable to Income Tax in the Assessment Year in which the land in the shape of the stock-in-trade was sold or otherwise transferred.

4.1 The stock-in-trade in the shape of land has not been sold or otherwise transferred in Assessment Year 2012-13.

4.2 It is respectfully submitted that even otherwise the Capital Gains was not chargeable in Assessment Year 2012-13 even in respect of Joint Venture Agreement dated 28-09-2011, because:

(a) At the time of entering into the Joint Venture Agreement and issuing the irrevocable power of attorney, the co-owners have however **not given the possession** of the land to the developers. As per clause (n) on page 10 of the Joint Venture Agreement the developers have been allowed to enter the property only to carry on the development work.

(b) As per the Joint Venture Agreement, the co-owners were to receive 53,200 sq. ft. of the constructed area in the shape of flats, as sale consideration for the transfer of land. Subsequently, the constructed area to be received by the co-owners was increased to 57,690 Sq. Ft. The assessee was entitled to receive 19,230 sq. ft. of the constructed area as his 1/3rd share. **The sale consideration in the shape of the constructed area was received in Assessment Years 2013-14 to 2017-18.**

(b) As per clause (k) on page 9 and clause (w) on page 12 of the Joint Venture Agreement, the co-owners were required to **finally transfer the property to the prospective buyers of flats/shops**

or the society formed by them, which has not happened in Assessment Year 2012-13.

4.3 However the assessee has mistakenly declared the Capital Gains of Rs.1,03,81,628/- (before deduction u/s 54F of the Act) in Assessment Year 2012-13.

5. The assessee has received Rs.19,213 sq. ft. constructed area in the shape of 19 flats [wrongly mentioned as 25 flats by the CIT(A)] in Assessment Years 2013-14 to 2017-18. The assessee has considered that the land in the shape of stock-in-trade, in proportion to the constructed area received by him has been transferred in the year of the receipt of the constructed area. This is in accordance with the judgment of Hon'ble Mumbai Bench of the Income Tax Appellate Tribunal in case *Crest Hotels Ltd. 78 ITD 213 (Mum) (Para 11)*. Accordingly, the assessee has declared the Capital Gains of Rs.1,52,63,296/- (before deduction of Rs.52,36,787/- u/s 54F of the Income Tax Act) for Assessment Years 2013-14 to 2017-18.

6. DOUBLE TAXATION

Thus, the Capital Gains on the above transaction of the land have been declared and assessed twice. Once in Assessment Year 2012-13 on the basis of the Joint Venture Agreement dated 28-09-2011 and again at the time of the receipt of the constructed area from Assessment Years 2013-14 to 2017-18.

7. Capital Gains not chargeable in Assessment Year 2012-13.

While filing the return of income for AY 2012-13, the assessee has erroneously declared Capital Gains of Rs.1,03,81,628/- in respect of the transfer of land by way of Joint Venture Agreement dated 28-09-2011.

7.1 (i) As per the provisions of section 45(2), no capital gains have become chargeable in Assessment Year 2012-13 on conversion of land into stock-in-trade, as the Capital Gains arising on conversion of land into stock-in-trade was chargeable only in the year of the sale of the stock. No part of the stock was sold or otherwise transferred in A. Y. 2012-13.

(ii) Further even otherwise no Capital Gains has arisen in A. Y. 2012-13, on entering into Joint Venture Agreement, because no transfer/sale of land has taken place by way of the Joint Venture Agreement dated 28-09-2011 as submitted in para 4.2 above.

8. During the assessment proceedings before the Assessing Officer, the assessee however could not raise the issue of non-chargeability of the said capital gains, in Assessment Year 2012-13 mistakenly declared by him in the return of income.

8.1 During the assessment proceedings, the assessee has however inter-alia filed the copy of the Joint Venture Agreement before the Assessing Officer, vide letter dated 05-03-2015.

8.2 Nevertheless specific grounds of appeal (Ground No's.3 to 10) were raised before the Commissioner of Income Tax (Appeals), pleading

that the capital gains was wrongly/mistakenly declared in the return of income and that no Capital Gain was chargeable in Assessment Year 2012-13.

8.3 The Ld. Commissioner of Income Tax (Appeals) has rejected these pleas of the assessee and the relevant ground Nos 3 to 10 have been dismissed.

9. The assessee has challenged the impugned order of the Commissioner of Income Tax (Appeals) before the Hon'ble Income Tax Appellate Tribunal, in this regard, by way of very elaborate, descriptive and complex grounds of appeal.

11.1 It is respectfully submitted that there is no estoppel against the law. A rightful claim can be made by the assessee for the first time even before the appellate authorities including the CIT(A). In view of the judgment of the Hon'ble Bombay High Court in the case of **Pruthvi Brokers & Shareholders (2012) 349 ITR 336: 23 taxmann.com 23: 208 Taxman 498: 252 CTR 151 (Bombay)**. The assessee is allowed to make a claim before the appellate authority even if the said claim was not made by filing a revised return before the Assessing Officer. The appellate authorities are entitled to consider the claim and adjudicate the same. In this case the additional claim u/s 43B of the Act, which was not made before the Assessing Officer was made before the CIT(A), which was allowed. The Hon'ble Tribunal also upheld the claim of the assessee. In Para 18 of its judgment, the Hon'ble Bombay High Court has remarked that there was no reason to interfere with the exercise of jurisdiction by the appellate authorities in permitting to raise the new claim.

With discussion in Para 22 to Para 24 after referring to the judgment of the Hon'ble Supreme Court in case of **Goetze (India) Ltd. (2006) 157 Taxman 1(SC), National Thermal Power Co. Ltd. (1998) 229 ITR 383 (SC)** and to the judgment of Hon'ble Delhi High Court in the case of **Jai Parabolic Springs Ltd. (2008) 306 ITR 42 / 172 Taxman 258 (Delhi)**, the Hon'ble Bombay High Court have dismissed the appeal of the revenue filed against the judgment of the Hon'ble Tribunal. The above judgment in the case of **Pruthvi Brokers & Shareholders (Supra)**, has been followed by the Hon'ble Bombay High Court in the case of **Sesa Goa, 117 Taxmann.com 548 (Bombay)**.

In this regard reference can also be made to the following judgments;

- (i) **Armatic Engineering Pvt. Ltd. ITA No. 916/BANG/2017, (Annexure B of the compilation of Judgments)**
- (ii) **Jain Brothers ITA No. 1573/PUN/2016 dated 15-02-2017, (Annexure M of the compilation of Judgments)**
- (iii) **Sew Precision Joint Venture. [2013] 40 taxmann.com 515(Pune - Trib.), (Annexure U of the compilation of Judgments)**

11.2 In the written submissions filed before the CIT(A) reproduced in Para 4 from Page 5 to Page 10 of the order of the CIT(A) the assessee has clearly made mention of the conversion of capital asset into stock-in-trade [Page 6 Para (x)].

Further the fact that the assessee has converted / treated the land as stock-in-trade is clearly evident from the total business income of Rs.4,02,72,057/- declared in A. Ys. 2013-14 to 2017-18 in the returns of

income filed by him. A table in this regard is placed at Page No. 117 of the Paper Book. This fact was clearly brought to the notice of the CIT(A) by the assessee in his written submissions filed before the CIT(A). Relevant portion of the same is reproduced by the CIT(A) on Page 8 of his order. Till the appeal stage before the CIT(A), as mentioned in the said written submissions, the returns of income have been filed for A. Ys. 2013-14 to 2015-16, and the details of the assessment year wise taxes paid on the business income and the capital gains, were furnished before the CIT(A). The copies of his returns of income are placed from Page 4 to Page 20 of the Paper Book. The returns of income for A. Ys. 2016-17 and 2017-18 were filed subsequently to the proceedings before the CIT(A). The copies of these returns are placed from Page No. 21 to 30 of the Paper Book.

11.3 Although the value of the land converted into / treated as stock in trade exceeded Rupees One Crore, the assessee had not filed the Tax Audit Report u/s 44AB of the Income Tax Act as he was not properly advised in this regard.

It is further respectfully submitted that the provisions of section 44AB are applicable only if the assessee was carrying on business and his total sales / turnover or gross receipts as the case may be in business, exceeded Rupees One Crore. In the case of the assessee however, no stock was sold in A. Y. 2012-13. Thus, there was no sales, turnover or gross receipts. Therefore, the assessee was exempted from obtaining and filling the Tax Audit Report.

In its judgment in the case of ***B. K. Jhala & Associates (1999) 69 ITD 141: 64 TTJ 514 (Pune), (copy enclosed)***, the Hon'ble Pune Bench of the Income Tax Appellate Tribunal has held that the stock in trade / work in progress does not constitute "turnover" as used in Section 44AB of the Income Tax Act.

11.4 In view of the above discussion, as per sub-section (2) of the section 45 of the Act, the capital gains on conversion / treatment of the land as stock in trade shall be chargeable for the A. Y. relevant to the Previous Year in which such stock in trade is sold or otherwise transferred. It is respectfully submitted that the land in the shape of stock in trade has neither been sold or otherwise transferred by way of the joint development agreement dated 28-09-2011, and the power of attorney dated 28-09-2011. It is further respectfully submitted that the consideration in the shape of 19 constructed flats (assessee's Share) has not been received in A. Y. 2012-13. The possession of the land has also not been given to the builders M/s Venktesh Developers. As per clause (n) of the terms and conditions of the Joint Development Agreement (***Paper Book Page No. 74***) the builders have been allowed to enter the property only for carrying out the activity of the development of the project. Legal possession has not been given to the builders. As per clause (k) and (w) of the terms and conditions of the Joint Development Agreement the assessee has to finally transfer the property by executing the deed of the apartments, to the society of the unit holders and the individual unit holders. Thus, the final transfer of the land will take place only on formation of the Co-operative Society of the unit holders.

Although as per clause (t) of the terms and conditions of the joint development agreement (***Paper Book Page No. 76***) the builders M/s

Venktesh Developers will have the right to transfer the F.S.I.R./F.A.R./T.D.R. in respect of the land and the assessee has given the consent for the same, this clause however, does not in any way have the effect of completing the sale or transfer otherwise of the land in favour of the builder. As per the joint development agreement and the power of attorney, the builders have to complete the construction of the project as per the plans approved by the Municipal / Gram Panchayat Authorities, in accordance with the provisions of the Development Control Rules and Regulations, the Bombay Provisional Municipal Corporations Act, 1949 and the Maharashtra Regional Town Planning Act 1966, (reference clause A and E of the terms and condition of the Joint Development Agreement). The eventuality of selling the F.S.I. / T.D.R. if any remains available will arise only after completion of the project as per the aforementioned regulations. Moreover, the clause concerning the consent given by the assessee to the builders for sale of the F.S.I / T.D.R. is a standard clause in all the Joint Development Agreements. This cannot be taken to mean that the sale or otherwise transfer of the land has taken place in A. Y. 2012-13.

11.5 Even if it is considered that the land was not converted / treated as stock in trade and therefore subsection (2) of Section 45 is not to be applied in this case and section 45(1) r.w.s. 2(47)(iv) is to be applied, it is respectfully submitted that even then the capital gains have not arisen in A. Y. 2012-13, as held by the Hon'ble Income Tax Appellate Tribunal, Pune in the case of **Smt. Rajeshwari Surshprasad Tiwari ITA No. 330/PUN/2017, (Annexure T of the compilation of Judgments)**. In this case the question before the Hon'ble Tribunal was whether the income from Capital Gains in respect of development agreement dated 01-10-2011, is to be assessed in the A. Y. 2012-13. The assessee was entitled to receive certain constructed portion after development of the project. The assessee has granted the developers a license to enter upon the said property for enabling it to develop the property. The Hon'ble Tribunal held that the main part of the consideration i.e. the value of the constructed portion to be received by the assessee was definitely in future, that such a transaction of entering into the development agreement would not make the assessee liable to pay capital gains tax on entering into such development agreement since the property has not been developed and the assessee has not received the constructed portion which is allocated to her share. Such transaction does not amount to transfer u/s 2(47) of the Act, and in the absence of the same the assessee is not liable to pay capital gains tax u/s 45 of the Act. In Para 11 of this judgment the Hon'ble Tribunal has discussed and followed the judgment of the Hon'ble Punjab & Haryana High Court dated 22-07-2015, in **C. S. Atwal ITA No. 200 of 2013(O & M), (Annexure F of the Compilation of Judgments)**. In this judgment the Hon'ble High Court overturning the order of Tribunal held that where the development of project had to still take place and the assessee had to receive flats in the said developed project, in such cases it could not be said that the assessee had parted with the possession because the possession was handed over for the limited purpose of development of the property. The Hon'ble High Court thus, held that the assessee was not liable to pay capital gains tax on entering into such Development Agreement.

It is submitted that the above judgment of the Hon'ble Punjab & Haryana High Court has been upheld by the Hon'ble Supreme Court in the case of **Balbir Singh Maini[2017] 86 taxmann.com 94: 251 Taxman 202: 398**

ITR 531 : 298 CTR 209 (SC). It is respectfully submitted that the Hon'ble Supreme Court in this judgment has held that, there are three necessary ingredients to constitute transfer under a joint development agreement i.e., there has to be a contract between the owner and the developer, that the possession of the land should have been given to developers and some real income should have arisen to the land owner. The Hon'ble Supreme Court has further held that in order to constitute transfer under a joint development agreement, there should be a transfer of title in substance in favour of the developer and the developer should be able to enjoy the property as its owner.

The Hon'ble Income Tax Appellate Tribunal, Pune has taken similar view in the case of **Shri Deepak Shivram Pathare ITA No. 779/PUN/2014, (Annexure R of the compilation of the Judgments)** and **Dr. Arvind S. Phadke (2014) 46 taxmann.com 335 (Pune – Trib.) (Annexure I of the compilation of the Judgments)**, which have been approved by the Hon'ble Bombay High Court in the case of **Dr. Arvind S. Phake (2018)89 taxmann.com 307 (Bombay)(Annexure H of the compilation of the Judgments)**.

In its judgment in the case of **Sadik Sheikh (2019) 106 taxmann.com 334 (SC) (Annexure V of the compilation of the Judgments)**, the Hon'ble Supreme Court has held the provisions of section 2(47) would not apply to transfer of flats by merely entering into an agreement to sell the flats, which were yet to be constructed and possession was yet to be given.

12. PRAYER FOR AVOIDING DOUBLE TAXATION

As the assessee has duly declared the Capital Gains, arising in respect of land given for development under the Joint Venture Agreement, in Assessment Years 2013-14 to 2017-18, subjecting the Capital Gains to tax in Assessment Year 2012-13 also, amounts to double taxation. Accordingly **without prejudice**, if the contention raised by the assessee that Capital Gains on transfer of land has not arisen and is accordingly not taxable in Assessment Year 2012-13, is not accepted by the Hon'ble Income Tax Appellate Tribunal, it may kindly issue directions to the Assessing Officer to exclude the Capital Gains from the income assessed for Assessment Years 2013-14 to 2017-18 in respect of the transfer of the land under Joint Venture Agreement dated 28-09-2011 and to refund the tax paid by the assessee on the said Capital Gains, along with the interest due thereon.

For the proposition that such a direction is required to be issued by the Hon'ble Tribunal, reference may kindly be made to the following judgments:

- (i) **Ciba of India Ltd. [1993] 70 Taxman 505 (Bombay): [1993] 202 ITR 1 (Bombay), (Annexure D of the compilation of the Judgments),**
- (ii) **KapurchandShrimal. [1981] 7 Taxman 6 (SC), (Annexure D of the compilation of the Judgments),**
- (iii) **Mahalakshmi Textile Mills Ltd. [1967] 66 ITR 710 (SC), (Annexure D of the compilation of the Judgments),**

(iv) *Parmanand Builders (P.) Ltd. [2016] 76 taxmann.com 283 (Bombay), (Annexure D of the compilation of the Judgments) ” Unquote.*

7. The Ld. Departmental Representative (ld.DR) for the Revenue relied on the orders of Assessing Officer(AO) and ld.CIT(A). The ld.DR for the Revenue submitted that the claim of the appellant that the capital gain is not taxable in the year A.Y.2012-13 was not made before the AO and ld.CIT(A). Rather, assessee filed return of income for A.Y. 2012-13 and declared the capital gain suo-moto. Thus, appellant assessee himself accepted that there is a capital gain on transfer of land. The appellant assessee has also accepted the valuation done by Stamp Duty Officers. The ld.DR further argued that at this stage, assessee cannot raise the ground that capital gain is not taxable in A.Y. 2012-13. The ld.DR submitted that by offering the capital gain in the return of income, assessee has precluded the AO from any investigation. Therefore, ld.DR submitted that assessee's claim cannot be entertained.

7.1 The ld.DR submitted regarding the claim of the assessee about conversion of land into stock-in-trade that assessee has never made his claim before the AO. The ld.DR invited our attention to the return of income, profit and loss account filed by the assessee which was part of the paper book of the assessee. The ld.DR submitted that the profit and loss account does not contain any closing stock for A.Y. 2012-13, A.Y. 2013-14, if assessee has converted land as stock-in-trade, then it should have appeared as closing stock. But there is no closing stock. The

ld.DR further submitted that since value of the land is more than Rs.1 crore, which should have appeared as closing stock and assessee should have submitted Audit Report. However, new Audit Report has been submitted by the assessee. He further submitted that the return of income for A.Y. 2012-13, 2013-14, 2014-15, 2015-16 are all belated returns. The ld.DR submitted that since land does not appear as stock-in-trade, it proves that assessee has not converted the land into stock-in-trade. Therefore, this claim of assessee is incorrect.

FINDINGS:

8. We have considered submission of both the parties and perused the material available on record.

8.1 As per the concise grounds filed by the appellant assessee, there are two main questions to be decided. i) Whether capital gain arisen in A.Y.2012-13 with reference to Joint-Venture agreement dated 28.09.2011. ii) Whether the land was converted into stock-in-trade and accordingly Capital Gain is to be calculated as per section 45(2) of the Act.

8.2 It is a fact that assessee along with other co-owners had entered into Joint Venture Agreement dated 28.09.2011 with Venkatesh Developers. The said Joint Venture Agreement has been duly registered with Sub-Registrar, Haveli, Dist. Pune. It is also a fact that assessee has himself offered in the return of income Long Term Capital Gain on the said transaction. For

calculating Long Term Capital Gain (LTCG), assessee considered value of Rs.4,21,38,000/- as total consideration, which is the value considered for stamp duty valuation, by the Stamp duty authorities. Assessee claimed that his share is 1/3rd of Rs.4,21,38,000/- and calculated the LTCG. The calculation submitted by the assessee has been reproduced in the earlier part of this order. It is also a fact that assessee has never raised the ground before the AO that LTCG is not taxable in the Assessment Year 2012-13 as no actual possession has been given to the developer. Though this ground was raised before the ld.CIT(A), however, ld.CIT(A) has not discussed this ground in the appeal order.

8.2.1 The Ld.AR has relied on the order of Hon'ble ITAT Pune Bench in the case of Rajeshwari Tiwari ITA No.330/Pun/2017 .Hon'ble ITAT Pune while deciding the said case has relied upon the decision of Hon'ble High Court of Punjab & Haryana in the case of C.S.Atwal v/s Cit ITA No.200 of 2013 judgement dated 22/07/2015.

The decision of Hon'ble Punjab and Haryana High Court in the case was upheld by Hon'ble SC in Civil Appeal No.15645 of 2017, the lead case being Balbir Singh Maini.

Hon'ble High Court observed that the facts needs to be ascertained in each case.

The Appellant assessee has filed copy of JDA (page 32-77) including English translation. As per clause k of the said JDA , the

owner has agreed to transfer the impugned property by sale deed in the name of proposed Co-Operative society and/ or in the name of individual prospective buyers. As per the said JDA the owner has only granted right to Developer to enter the impugned property for the purpose of development. As per JDA, the developer has given Rs.1 crore as deposit. No other consideration paid. It transpires from the JDA that there is no actual transfer of land and assessee has not received any consideration also. It is also observed from the copies of the returns of Income filed by the assessee in the paper book, that the assessee has shown Long Term Capital Gain from sale of the impugned land in subsequent years as and when the assessee has received consideration. Assessee has also paid Tax on the said Long term capital gain. Therefore, in the facts and circumstances of this case it is held that there is no capital gain chargeable in AY 2012-13 on the impugned Joint Development agreement. Thus ground number 1 is allowed.

8.3 Another issue for consideration is whether the appellant has converted the land into stock-in-trade as claimed. It is a fact that this issue was not raised before the AO. Therefore, the AO had no opportunity to verify the assessee's said claim. This Bench made a specific query to the Authorized Representative(AR) of the assessee to demonstrate assessee's claim of conversion of land into stock-in-trade by showing the entries in the relevant books of accounts. The AR admitted that no books of accounts have been maintained

as the assessee is not aware of accounting. The AR was requested by the Bench to show closing stock in A.Y.2012-13 & 2013-14 in the profit and loss account submitted by the assessee in the paper book. The AR admitted that no closing stock has been shown in the profit and loss account for A.Y. 2012-13 & 2013-14, as assessee is not aware about the accounting. Thus, it is an admitted fact that assessee could not demonstrate conversion of land into stock-in-trade by showing entries in the books of accounts. As per accounting, whenever land is converted into stock-in-trade, it shall appear as closing stock at the end of the year in which it was converted into stock-in-trade. In the case of the assessee it should have appeared as closing stock for the A.Y. 2012-13 and 2013-14. However, we have verified from the profit and loss account filed by the assessee in the paper book that it does not appear as closing stock for the A.Y. 2013-14. The assessee has not filed profit and loss account for the A.Y.2012-13. It is also an admitted fact that no Audit Report has been filed means no Audit has been carried out. It is observed that for A.Y. 2014-15, the assessee has shown sales of Rs.1,96,32,700/-, but, though the sale is more than One Crore, no Audit Report is filed by the assessee. No Balance Sheet has been filed by the assessee for the A.Y. 2012-13. Thus, the assessee has not filed any evidence to substantiate his claim that the impugned land was converted as stock-in-trade before entering into Joint Venture Agreement. Therefore, assessee's claim that land was converted

as stock-in-trade before entering into Joint Venture Agreement is hereby rejected. Therefore, section 45(2) is not applicable in the case of the assessee. Therefore, this ground raised by the assessee is dismissed.

8.4 In Ground No.3, the assessee claimed that there will be double taxation if LTCG is taxed in the AY 2012-13. The assessee also claimed that assessee has disclosed capital gains arising in respect of the impugned land given for development under Joint Venture Agreement for A.Y. 2013-14 to 2017-18. To substantiate the claim, assessee filed copies of the Returns of Income for those years. We have perused the returns of Income filed by the assessee. It is a fact that the assessee has shown LTCG in subsequent years. However, we have already held that LTCG does not arise in AY 2012-13, hence this ground is academic in nature, hence dismissed.

9. In the result, appeal of the assessee is partly allowed.

Order pronounced on 29th April, 2022.

Sd/-
(SHRI S.S.VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 29th April, 2022 / SGR*

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-4, Pune.
4. The Pr. CIT-2, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे / ITAT, Pune.