IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD 'A' BENCH, HYDERABAD.

BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER AND
SHRI L. P. SAHU, ACCOUNTANT MEMBER

ITA Nos.516 & 517/Hyd/2021
(Assessment Year : 2012-13)

Dy. Commissioner of Income Tax
(International Taxation)-2,
Hyderabad. .....Appellant.

Vs.

1. Arudra Vellanki, Hyderabad.
   PAN ALTPV 7612F
2. Padmavathi Vellanki, Hyderabad.
   PAN ALUPV7612E .....Respondents.

Appellant By : Shri Sunil Goutam, (D.R.)
Respondent By : Shri M.V. Joshi, C.A. for D.Shshank, Adv.

Date of Hearing : 07.04.2022.
Date of Pronouncement : 08.04.2022.

O R D E R

Per Shri S.S. Godara, J.M. :

These twin Revenue's appeals for Asst. Year 2012-13 arise from the Commissioner of Income Tax (Appeals)-10, Hyderabad's separate orders both dt.27.07.2021 passed in case Nos. ITBA/ APL / S / 250 / 2021-22 / 1034454959(1) and ITBA/ APL / S / 250 / 2021-22 / 1034459213(1),

respectively in proceedings under Section 250 of Income Tax Act, 1961 ('the Act') respectively.

Heard both the parties. Case file perused.

2. We notice at the outset that Revenue's instant appeals suffer from 66 days delay in filing. Mr. Goutham submitted that due to the outbreak of pandemic covid 19 unable to get the documents from the department which caused the impugned delay in filing of the instant appeal. Case law Collector Land Acquisition Vs. Mst. Katiji & Ors, 1987 AIR 1353 (SC) and University of Delhi Vs. Union of India, Civil Appeal No.9488 & 9489/2019 dated 17th Dec., 2019, hold that such a delay; supported by cogent reasons, deserves to be condoned so as to make way for the cause of substantial justice. We accordingly hold that the Revenue's impugned delay of sixty six days is neither intentional nor deliberate but due to outbreak of Covid-10 only. The same stands condoned.

3. The Revenue's identical sole substantive grievance raised in both these appeals reads as under :

" 1. The CIT(A) erred in directing the Assessing Officer to compute the capital gains on transfer of assessee's share of land by adopting the SRO value of the land for Assessment Year 2012-13, ignoring the fact that the actual sale consideration received by the assessee is value of her rights over the constructed area.

2. The CIT(A) ought to have appreciated the fact that on the date of entering into the Joint Development Agreement, the assessee acquired the rights over the constructed area and hence the market value of the assessee's share of constructed area should be adopted as the sale consideration for the purpose of capital gain in the hands of the assessee."

4. Mr. Goutam invited our attention to the CIT(A)'s detailed discussion under challenge as follows :

9. The Grounds of appeal No. 3 and 4, appeal against the AO's adoption of SRO value of the proposed constructed space as on the date of JDA instead of the SRO value of the land transferred and rely on section 50D. The year of assessability is discussed in the above paras while dealing with Ground of appeal No.5. What is chargeable to tax as LTCG is discussed below. With respect to the above, the AR of the appellant has submitted the following written submissions which are reproduced below for the sake of clarity.

"As per para No.7 of page 11 of JDA, it is mentioned as follows:

"It is agreed that the transactions conducted under this Joint Development Agreement shall be deemed to have been completed only upon the developer handing over the specified super built up areas and proportionate parking areas to the owners".

The assessment for the AY 2012-13 was reopened u/s 147 of the I.T.Act and Notice u/s 148was issued on 22-01-2019. During the assessment proceedings, we have explained all the facts of the case and provided all the information to substantiate our claim. However, without giving reasonable opportunity, which is mandatory as per the sec.144 of the I.T.Act, 1961, AO has completed the assessment by adopting the sale value (SRO value) of proposed constructed space to be allotted to the assessee as per the Joint Development Agreement(JDA) which is uncertain as on the date of JDA.

In this connection, we would like to bring to your kind notice that the judgement given by the Hon'ble ITAT, Bench B of Bangalore, in the case of Asst. CIT, Mangalore vs. assessee on 18-03-2016.

"The issue in this case is the date of transfer which is held as the date of signing of JDA. There is no finding regarding the working of capital gains. There is no dispute about the issue of application of sec.2(47) since the appellant is also admitting that, it is liable for capital gains as on the date of JDA. Hence, the case law in the case of Dr. Tt.K. Dayalu decided by Hon'ble Karnataka High Court is followed. The issue that arises now is, what is the value of consideration to be adopted for computation of capital gain. The AO held that since the appellant is entitled to receive certain area of constructed building in lieu of transfer of portion of land, the estimated value of likely investment into the built up area is the consideration for the purpose of capital gains.

The crux of the argument of the appellant is that it is a pure estimation. JDA is a kind of contract agreement wherein the appellant would get this share of constructed property after completion of the project and the uncertainty of developer not completing the project or not honoring his commitment are always there till the project is completed. The possibility of termination of contract itself for any reason cannot be ruled out. That being the case, estimating the value of property even before it is received by the appellant, is not realistic. Hon'ble Karantaka High Court held that there is a transfer on the date of JDA. If transfer is deemed, then what can be taxed, is the market value of the property on the date of transfer. What the appellant received on the date of JDA is only the right to receive particular area of constructed building and not the building perse. The value of this building in physical form may vary from time to time, till the date of completion and handing over. The right to receive the area can at the best be equated with the market value of the property handed over to the developer with a clear understanding to complete the project and hand over the appellant's share in future. Under these circumstances, it is argued by the appellant that the capital gains do arise in the hands of the appellant on the date of JDA and the value of consideration is the market value which can be ascertained from guidance value. It is also informed by the appellant that in fact, actual

construction is still going on till date. It may be noted that, only their right has been extinguished while entering into Joint development agreement. Appellant has duly computed the long term capital gains for the extinguishment of right in the land by adopting the fair market value as per the guidance value.

According to Sec. 50D of the I.T.Act, 1961,

"Where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing as a result of such transfer".

The assessee is having 1000 sq. yds of land of which 55 percent is foregone for development as per JDA cum GPA document No.8575/2011. The assessee calculated the capital gains on 550 sq. yds i.e., 55% of land foregone (1000 sq. yards) @ 22000 per sq. yards amounting to Rs. 1,21,00,000/- and paid tax amounting to Rs. 33,91,710/- accordingly.

The appellant relied on the decision in the case of G. Sailaja vs. Income Tax Officer ITA Nos. 51 & 579/Hyd/2016, 716/Hyd/2015 & 52/Hyd/2016, wherein the Tribunal held that,

"As regards the enhancement of the income by the CIT (A), we find that the AO has adopted the SRO value of the land on the date of transfer for the purpose of computing the short term capital gains, while, the CIT (A) has adopted the estimated value of the property adopted by the parties to the development agreement, for registering the development agreement. In the development agreement, the estimated value of the property is mentioned as Rs.8.80 crores. In our opinion, the CIT (A) has clearly erred in adopting this value for computation of the short term capital gains. At the time of development agreement, what is transferred by the assessee is only her share of the land and not the entire super structure along with the land. The estimated value of the property as mentioned in the development agreement is clearly for the land as well as the super structure to be built up on such land which is given for development. Though the development agreement does mention the period of completion of the project, it certainly remain uncertain as to whether the construction would be completed within the stipulated period. The market condition and the market rate when the constructed area is handed over to the assessee may also vary and it may be more or less than the estimated value of the property. Therefore, the same cannot be adopted for the computation of the capital gains. In our view, the value adopted by the AO i.e. Rs.2200 per sft being the SRO value of the land on the date of transfer is reasonable and correct. We, therefore, uphold the order of the AO on the computation of the short term capital gains.

In the case of Adinarayana Reddy Kummeta vs. ACIT, the Hon'ble ITAT of Hyderabad held that, for computation of capital gains. As per the agreement, assessee has parted with only 50% of the impugned property. However, AO has taken the cost of construction of the properties which are given in lieu at the time of completion of the project and gave certain discount so that the value is fixed at 1097 per sft. This is not a correct method. Since the agreement was entered into in May, 2008 either the cost of the land (at 50% of 266.66 sq. yds.,) should have been considered for sale consideration or the probable value of the cost of construction on that date has to be considered. It is not proper on the part of the AO to consider the subsequent cost which may involve escalation of cost from 2008 to 2013. Therefore, I direct the AO to consider the probable cost of construction as on May 2008 or the SRO value of the land-in-question on the date of agreement should be considered as full value of consideration for the purpose of computation of capital gains on the transfer of 50% of the land holding for development. Therefore, while upholding the reopening of assessment and also bringing to tax the capital gains in the impugned year, the issue whether the land is short term capital asset or long term capital asset and the value for considering the capital gains computation is restored to the file of the AO for fresh examination. ***Needless to say that assessee should be given due opportunity. For this purpose, the order of AO and CIT(A) on the above issues are set aside to be re-done as per the facts and law.*** *In case the property was held to be long term capital asset, assessee may be eligible for consequent benefit u/s 54/54F of the Act, which should be considered on the facts of the case. Assessee is free to raise necessary arguments in this regard before the AO. Grounds of assessee are considered partly allowed for statistical purposes".*

In the case of ACIT vs. R. Srinivasa Rao ITA No.1786/H/12, 1787/H/12, 1789/H/12, 1806/H/12, 1807/H/12, 1808/H/12, 1809/H/12 & 1703/H/12, the Apex Court stated that full value of consideration cannot be ascertained in the year of entering into Development Agreement, as the same is in the womb of future.

9.1 The facts of the case are similar to the facts in the case of G. Sailaja vs. Income Tax Officer ITA Nos. 51 & 579/Hyd/2016, 716/Hyd/2015 & 52/Hyd/2016, and the legal principles laid down in the above cited judicial precedents apply to the case of the appellant. For the AY 2012-13, what is determinate is that the appellant has executed a deed in favour of the developer and has handed over possession of the land, which is the capital asset. Cost of the constructed space is actually valued at Rs. 600/- per sq.ft., as per the SRO and the market value was determined at Rs. 2,200/- per sq.ft. However, no construction has taken place on the said capital asset.

9.2 The Act describes sources of income and prescribes methods of computing income. The definition of income in Sec. 2(24) is inclusive and not exhaustive, it adds

artificial categories(including capital gains) to the natural computation of "income" without throwing any light on the general concept of the word. "Income" includes not only those things which the interpretation clause declares that it shall include, but such things as the word signifies according to its natural import.

9.3 Income was defined as under in the CIT vs. Shaw Wallace, (59 IA 206, 6 ITC 178) part of which is reproduced below.

> *"Income ..... in this Act connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but must be done, whose object is the production of a definite return,....."*

The event of construction as well as allotment of constructed space lies in the womb of the future. The construction which happened later cannot be an ascertainable/certain event as on the date of transfer.

9.4 In view of the above, the AO's computation of the proposed built up/constructed space at Rs. 2,200/- per sq.ft., cannot be correct, legally as well as factually. However, the transfer of land has taken place in AY 2012-13 and not in 2013-14, and hence the AO is directed to compute LTCG on transfer of appellant's share of land at SRO value for AY 2012-13. The appellant therefore is liable to pay capital gains on transfer of land which is a definite and ascertained taxable event for AY 2012-13.

Mr. Goutam vehemently argued during the course of hearing that the CIT(A) has erred in law and on facts in directing the Assessing Officer to go by the SRO value of the relevant capital asset in the year of transfer i.e. Assessment Year 2012-13 than in light of the value of the constructed area which formed the actual sale consideration in assessee's hands. We find no merit in Revenue's stand herein in as section 50C(1) of the Act stipulates that the assessing authority shall determine fair market value of the

capital asset as per the corresponding stamp price or SRO price only. Mr. Goutam sought to draw a distinction herein that it is section 50B which is sought to be applied in the learned lower authorities' proceedings. We note that we are in Assessment Year 2012-13 whereas section 50D applies from 1.4.2013 only without having any retrospective effect. We therefore hold that the CIT(A) has rightly directed the Assessing Officer to go by SRO value of the relevant capital asset in the year of transfer. The Revenue's identical sole substantive ground herein stand rejected accordingly.

5. These Revenue's twin appeals are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 8th April, 2022.

Sd/-	Sd/-
(L.P. SAHU)	**(S.S. GODARA)**
Accountant Member	Judicial Member

Hyderabad, Dt. 08.04.2022.

* Reddy gp

Copy to :

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2.	DCIT (International Taxation)-2, Hyderabd.
3.	C C I T (IT & TP), Bengaluru.
4.	CIT(IT & TP), Hyderabad.
5.	DR, ITAT, Hyderabad.
6.	Guard File.
7.	CIT(A)-10, Hyderabad.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.