

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.1757/Ahd/2015
Assessment Year : 2011-12

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| ITO, Ward-1(2)(3) 2 nd Floor Aayakar Bhavan Race Course Circle Vadodara. | Vs | Shri Jigneshbhai Shivabhai Patel PAN : AFWPP 4752 R 69, Kirti Kunj Society Opp: Kashiba Hospital Karelibaug Baroda 390 018. |
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| (Applicant) | (Responent) |
|---------------|------------------------|
| Assessee by : | Shri Manish Shah, AR |
| Revenue by : | Shri Ajay Atri, CIT-DR |

सुनवाई की तारीख/Date of Hearing : 14/06/2022
घोषणा की तारीख /Date of Pronouncement: 24 /06/2022

आदेश/O R D E R

PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER

This appeal is filed by the Revenue against order dated 2.2.2015 passed by the Commissioner of Income-tax (Appeals)-5, Vadodara relating to the Asst.Year 2011-12.

2. At the outset, it is noticed by the Bench that the appeal was filed by Income-Tax Officer, Ward-1(2)(3), Aayakar Bhavan, Vadodara, whereas assessment order under appeal was passed by Income-tax Officer, Ward-2(3), Baroda. Registry of the Tribunal has noticed this defect and by defect memo dated 15.6.2015 it was communicated to the Department that "Appellant is not correctly

shown in the Appeal Form” and directed the Department to rectify the defect within 10 days. However, the Department has not chosen to remove the defect. This appeal has been posted as many as 25 times, and on 16.2.2022, the Id.CIT-DR was directed to remove the defect and hearing was adjourned to 30.3.2022. However, the Bench was not functioning on 30.3.2022 and 13.5.2022 and the matter was adjourned to 14.6.2022. Even on that date, we do not find that the defect has been rectified by the Revenue. But vide a letter dated 4.5.2022 by Shri Pravin C. Rathod, ITO, ‘C’ Bench, for CIT(DR), ITAT-3, Ahmedabad addressed to the Asstt.Registrar, ITAT forwarded one Assessing Officer’s letter dated 27.4.2022 in which it was informed about change of jurisdiction of the AO in the case of Shri Jignesh Sivabhai Patel (assessee herein). Except this, no action was taken by the Department to remove the defect and amend the Form No.36 before us in spite of so many opportunities. Therefore, since the appeal of the Revenue is defective for non-joinder of necessary and proper parties, the same is liable to be dismissed *in limine*.

3. Be that as it may, we would look into the case of the Revenue on merits. The issue before us is whether the assessee is liable for capital gains on the handing over of the possession of the property on 31.3.2008 relevant to the Asst.Year 2008-09 or on the date of execution of Sale Deed on 30.3.2011 relevant to the Asst.Year 2011-12.

4. We find that this issue has been discussed by the Id.CIT(A) in detail in his impugned order, and allowed the claim of the assessee as follows:

“3.3.4. Clauses (v) and (vi) of section 2(47) were introduced with effect from 1.04.1988. They provide that "Transfer" includes (i) any transaction which allows possession to be taken/retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act and (ii) any transaction entered into in any manner which has the effect of transferring or enabling the enjoyment of any immovable property. Therefore, in these two cases capital gains would be taxable in the year in which such transactions are entered into, even if the transfer of immovable property is not effective or complete under the general law. This test is important to decide the year of chargeability of the capital gains. Under section 2(47)(v), any transaction involving allowing of possession to be taken over or retained in part-performance of a contract of the nature referred to in section 53A of the Transfer of property Act would come within the ambit of section 2(47)(v). That, in order to attract section 53A, the following conditions need to be fulfilled. There should be a contract for consideration; it should be in writing; it should be signed by the transferor; it should pertain to transfer of immovable property; the transferee should have taken possession of the property; lastly the transferee should be ready and willing to perform his part of the contract. That even arrangements confirming privileges of ownership without transfer of title could fall under section 2(47)(v). In present case, there is no dispute that all the aforementioned conditions are satisfied. The Assessing Officer has never doubted the genuineness of "agreement to sale" or the handing over of the possession of the land. He has merely doubted the legality of "agreement to sale" by taking recourse to the provisions of section 63 of the Bombay Tenancy and Agricultural Land Act, 1948 which prohibits sale of agricultural land to non-agriculturist. This issue is also addressed by Hon'ble Bombay High Court in the case of Chaturbhuj Dwarkadas Kapadia (Supra) wherein it was observed that section 2(47)(v) read with section 45 indicates that capital gains was taxable in the year in which such transactions were entered into even if the transfer of immovable property is not effective or complete under the general law. That means if any law prohibits registration of sale deed, that will not bar the revenue authorities to tax capital Gains on the basis of transfer of rights in property and handing over of possession of such property to the transferee. From the above discussion and decisions of judicial authorities including Apex Court, it is abundantly clear that the case of the Assessee is squarely covered by clause (v) of section 2(47). As per clause (v) the term transfer includes, any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882. Section 53A of the Transfer of Property Act, 1882 is as under:

"53A Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his

behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by : the law for the time being in force, the transferor or any person claiming \ under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right \ expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

Applying the above definition in the case of the Assessee, there is a contract to transfer for consideration an immovable property (agricultural land) in writing signed by the assessee. The transferee (M/s. Gayatri Enterprise) in part performance of the contract has taken the possession of land and in pursuance of the contract is willing to perform his part of the contract and has in fact performed his part of contract. In view of the same, it can be said that the transfer has taken place for all practical purposes in A.Y. 2008-09.

3.3.5. Ld. Authorized Representative of the assessee has also contended that the case of the Assessee is also covered by clause (vi) of section 2(47) which includes any transaction which has the effect of transferring, or enabling the enjoyment of, any immovable property. From the records, it is seen that on 31.03.2008 possession was given by the assessee to M/s. Gayatri Enterprises (possession letter duly notarized with the notary Nagin S. Gohil Registration No. 3546). Copy of this letter is attached as per Annexure "C" and the Assessing Officer had no doubts about the veracity of this document and preferred not to conduct any enquiry whatsoever from any quarter. From the Balance Sheet & ITR of M/s Gayatri Enterprise for A.Y. 2008-09, it is seen that the impugned land is being shown on the assets side. Further, the handing over of possession and the subsequent expenses were incurred by M/s. Gayatri Enterprises in respect of building an office, leveling of land, land filing, etc. which proves beyond doubt that M/s. Gayatri Enterprises was carrying out its business activities from there. The Bank Statement of M/s. Gayatri

Enterprises is placed as Annexure "H" of the paper Book. All expenses mentioned above are debited to this account. On 25.03.2009, building construction permission was received from Vadodara Municipal Corporation and the amounts of Rs.2,08,440/- + 17,880/- + 1,790/- for the said permission were paid by M/s Gayatri Enterprise by chques which are also reflected from the Bank Statement. On 04.03.2009, Non-Agriculture (NA) permission of Land was received. The transfer fees for conversion of land from agriculture to non-agriculture (Rs.1,33,540/-) was also paid by buyer M/s Gayatri Enterprise as on 20.01.2009 through cheque. All these facts clearly demonstrate that the effective possession of land as on 31.03.2008 was with M/s Gayatri Enterprise and not with appellant and therefore, appellant had rightly shown Capital Gain from transfer of the impugned agricultural land in A.Y, 2008-09. Following decisions are relied upon by the Ld. Authorized Representative which are also in favour of the assessee:

- a. CIT v. Rajasthan Mirror Mfg. Co.177 CTR169 (Raj.)*
- b. Gripwell Industries Ltd v. ITO 102 TTJ 441(Mum.)*
- c. Chaturbhuj Dwarkadas Kapadia v CIT 260ITR 491 (Bom.)*
- d. CIT v. Mormasji Mancharji Vaid 250 ITR 642 (Guj.) (FB)*

Similar view has also been taken by the jurisdiction tribunal in the case of Smt. Sandhyaben A Purohit Vs ITO [2013] 59 SOT 1 (Ahd. Trib.).

3.3.6. I am also in agreement with the Authorized Representative that the taxability of capital assets is governed by section 45 and not by section 50C. Section 50C is a computation (procedural) provision. Charging section for the purpose of taxability of capital assets is section 45. Section 45 of the Act clearly states that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income tax under the head capital gains and shall be deemed to be the income of the previous year in which the transfer took place. Once it has been held that the Capital Gain is taxable in A.Y. 2008-09 as the transfer was complete on 31.03.2008 when the possession of land was handed over by the appellant to the transferee after receiving part payment and the transferee had shown this land in its Balance Sheet and also bore all expenses relating to building and NA permission, there is no occasion to tax the Capital gains in the year under addition. Accordingly, the addition of Rs.4,09,81,319/- made by the Assessing Officer is directed to be deleted and the only effective Ground of appeal is allowed.”

5. The Id.CIT(A) clearly held that chargeability of capital gains is governed by section 45, definition of “transfer” u/s.2(47) and handing over of possession u/s.53A of the Transfer of Property Act as deemed transfer and clearly held that the capital gain is chargeable for the Asst.Year 2008-09. Whereas section 50C is computation provision, execution of sale deed in 2011 has no relevance for computing the capital gains. Further, the purchaser has taken possession of the land in 2008 and incurred all the development expenses and recorded in his books of account.

6. In view of the above discussion on the facts and finding by the Id.CIT(A), the impugned order does not require any interference by us. On this ground also the Revenue’s appeal is liable to be dismissed.

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

Order pronounced in the Court on 24th June, 2022 at Ahmedabad.

**Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER**

**Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER**

Ahmedabad, dated 24/06/2022