**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH, 'F': NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND**
**Ms. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.1787/DEL/2018**
**[Assessment Year: 2013-14]**

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| Sh. Virender Yadav,<br>RRA Taxindia,<br>D-28, South Extension, Part-1,<br>New Delhi-110049 | Vs | Income Tax Officer,<br>War-4(4),<br>Gurgaon |
| **PAN-ABKPY6758Q** | | |
| Assessee | | Revenue |

| | |
|---|---|
| Assessee by | None |
| Revenue by | Ms. Princy Singla, Sr. DR |

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| **Date of Hearing** | **09.02.2023** |
| **Date of Pronouncement** | **16.02.2023** |

**ORDER**

**PER SHAMIM YAHYA, AM,**

This appeal by the assessee is directed against the order of ld. CIT (Appeals)-1, Gurgaon, dated 08.01.2018 for the Assessment Year 2013-14.

2. The grounds of appeal reads as under:-

*"1) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of the Ld. A.O. in making an addition of an amount of Rs.2,00,00,000/- by treating the receipt of non-refundable security as income from other sources and that too by recording incorrect facts and findings and by disregarding the evidences I submissions filed by the assessee and without providing adequate opportunity of being heard and in violation of principles of natural justice.*

*2) That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the addition of Rs.2,00,00,000/- is*

*bad in law and against the facts and circumstances of case and without considering the material placed on record and by recording incorrect facts and findings.*

*3) That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in passing the impugned"*

3. Brief facts of the case are that brief facts are that during the course of assessment proceedings, the Assessing Officer noted that the assessee had shown proprietary capital at Rs.2,13,92,981/- by introducing fresh capital of Rs. 2 cr. In this regard, the assessee submitted that he had received Rs. 2 Cr. from M/s Hope Buildcon Pvt. Ltd. The appellant submitted that he along with his brother had entered into a collaboration agreement with Ms Hope Buildcon Pvt. Ltd with regard to development of land for commercial purposes and as a part of this agreement, the assessee had received non refundable security of Rs.02 Cr. The relevant provisions of the agreement have been re-produced on pages 2, 3 & 4 of the assessment order. The Assessing Officer observed that the amount of Rs. 02 Cr. was a non refundable security. The same was required to be taxed as income of the appellant. The assessee contended that during the year under consideration there was no transfer of land and as such no capital gains had reason in the hands of the appellant. The Assessing Officer held that the assessee had received a non refundable security of Rs. 2 Cr. from the developer which is not related either to the execution of development or transfer of land. The Assessing Officer accordingly held that the amount of Rs. 2 Cr. was taxable under the head 'income from other sources and added the same to the total income of the assessee.

4. Against the above order, the assessee appealed before the Ld. CIT(A). The Ld. CIT(A) noted the submission of the assessee. The Ld. CIT(A) also obtained remand report from the Assessing Officer. After considering the remand report, assessee's reply and rejoinder of the assessee, the Ld. CIT(A) affirmed the action of the Assessing Officer by holding as under:-

> *"I have carefully considered the facts of the case and the submissions of the appellant. I have also perused the documents filed by the appellant and the documents obtained from M/s Hope Buildcon Pvt. Ltd by the Assessing Officer. As per the documents on record and the submissions of the appellant, it is seen that the appellant had received Rs. 2 Cr. on account of the collaboration agreement. As per the submissions of M/s Hope Buildcon Pvt. Ltd filed before the Assessing Officer in response to notice under section 131 the amount of Rs. 2 Cr. was paid under the collaboration agreement on account of following issues:-*
>
> > *The company has paid the amount of Rupees Two Crore to Mr. Virender Yadav under two collaboration agreements as consideration to granting to the company rights to develop the project land along with rights to sell, lease, assign, alienate, transfer deal with or dispose off the developer's share under this agreement, the developer shall, in addition to the construction and development of owner's share, pay the said consideration to owners at the time of execution of this agreement as non refundable security deposit.*
>
> *5.10 It is evident from the aforesaid submissions of the developer that the amount of Rs. 2 cr. paid as non refundable security was in addition to the consideration for the transfer of land and had nothing to do with the actual transfer of the land, consideration for which was separately fixed under the provisions of the agreement. It is evident from the contents of the agreement reproduced by the Assessing Officer in the assessment order that the payment of Rs. 2 cr. was in lieu of the appellant agreeing to enter into a collaboration agreement with the developer and the appellant agreeing to apply for license to the DTCP for conversion of the usage of said land and obtaining a license for development of commercial complex. As seen from the documents filed by the appellant, the application for obtaining the license for development of the*

*commercial complex on the said land was filed by the appellant and his brother and the license no. 130 and license no.131 issued by DTCP were also in the name of the appellant and his brother. It is evident that the payment of Rs. 2 Cr. is non refundable security was in consideration of the appellant agreeing to perform these activities on behalf of the developer. As such the Assessing Officer was fully justified in holding that this amount of Rs. 2 Cr. had nothing to do with the transfer of land under the joint development agreement and was taxable under the head income from other sources. Reference in this regard may be made to the following case laws:,*

4.1. The Ld. CIT(A) referred following case laws:-

i. GS Homes & Hotesl Pvt. Ltd. vs CIT (2016) (141 DTR 201)

ii. New Mangalore Port Trust vs ACIT (2016) 157 ITD 399 (Bang.) (Trib.)

5. Against the above order, the assessee is in appeal before us.

6. The ld. counsel for the assessee submitted that identical order of the Ld. CIT(A) and in identical case, this ITAT in the case of Mr. Vinod Kumar Yadav vs ITO in ITA No.2640/Del/2018, vide order dated 27.05.2019 has deleted the addition. The Ld. Counsel for the assessee submitted that similar proposition has been laid down in the ITAT order in the case of Jeet Ram vs ITO in ITA No.6301/Del/2016, vide order dated 24.02.2020. Furthermore, the ld. counsel for the assessee has relied upon the order of the ITAT Bangalore in the case of M/s Chaitanya Properties Pvt. Ltd. in ITA No.52/Bang/2013, vide order dated 12.02.2015. By referring to these case laws, the ld. counsel for the assessee pleaded that in identical situation, the amount received as non-refundable security deposit has been held to be not taxable till the payment is due. In this regard, the ld.

counsel for the assessee has referred to the Ld. CIT(A)'s order, in the case of Mr. Vinod Kumar Yadav vs ITO (supra) and submitted that the ITAT had dealt with the order of the Ld. CIT(A) which is verbatim the same in the present case. Hence, the ld. counsel for the assessee submitted that since in identical situation, which has been held by the ITAT that this is not refundable and is not taxable in the impugned assessment. He submitted that the issue covered in favour of the assessee.

7. We have carefully considered the submissions and perused by the records. We note that the ITAT in the case of Vinod Kumar Yadav (Supra) has reproduced the order of Ld CIT(A) in the order of the Tribunal at pages 4 and 5, which reads as under:-

> *"3.7 I have carefully considered the appellant's submissions, I have also perused the documents filed by the appellant. As per the documents on record and the submissions of the appellant, it is evident that the appellant had received non refundable security of Rs. 2,12,81,250/- on account of collaboration agreement. Further, from the facts on record and the documents filed by the appellant, it is seen that the letter of intent dated 03.05.2016 issued by the DTCP and the license dated 30.01.2018 granted by the DTCP for development of land is in the name of the developer as well as the appellant.*
>
> *3.8 It is evident from the aforesaid submissions of the appellant that the amount of Rs. 2,12,81,250/- paid as non refundable security was in addition to the consideration for the transfer of land and had nothing to do with the actual transfer of the land, consideration for which was separately fixed under the provisions of the agreement. It is evident from the contents of the agreement reproduced by the Assessing Officer in the assessment order that the payment of Rs. 2,12,81,250/- was in lieu of the appellant agreeing to enter into a collaboration agreement with the developer and the appellant agreeing to apply for license to the D'I'CP for conversion of the usage of said*

*land and obtaining a license for development of commercial complex. As seen from the documents filed by the appellant, the application for obtaining the license for development of the commercial complex on the said land was filed by the appellant and other co-owners and the licenses issued by DTCP were also in the name of the appellant and other co-owners. It is evident that the payment of Rs. 2,12,81,250/- as non refundable security was in consideration of the appellant agreeing to perform these activities on behalf of the developer. As such the Assessing Officer was fully justified in holding that this amount of Rs. 2,12,81,250/- had nothing to do with the transfer of land under the joint development agreement and was taxable under the head income from other sources.*"

8. The Tribunal after considering the submissions elaborately on the subject and after exhaustive discussions and placing reliance on several case laws has come to the conclusion that amount cannot be taxed as capital gain u/s 45 and also u/s 56 as income from other sources. The order of the ITAT may be gainfully referred as under:-

*"7. After considering the rival submissions and on perusal of the relevant findings given in the impugned order, we find that it is an undisputed fact that assessee has received a sum of Rs. 2,12,81,250/- from M/s. Gopal Hightech Infra Developers Pvt. Ltd. as a nonrefundable deposit as per clause 9 of the 'Collaboration agreement' dated 11.10.2012. Further, as per clause 6 of the collaboration agreement, the possession was to be handed over after getting the LOI by the above developer and during the year under consideration the LOI could not be obtained due to various reasons beyond the control of both the parties. Ld. AO has held that the said amount is not covered under the head 'capital gain' since capital asset has not been transferred and also concluded that amount received by the assessee cannot be treated as part of the sale consideration. Before the Ld. CIT(A), assessee has also brought on record that it has entered into an agreement dated 16.3.2016 with the developer wherein both parties agreed that in order to make further efforts in getting the LOI and licence from town and country planning department, Haryana to extend the tenure of collaboration agreement to further period of 18 months. Under the collaboration agreement assessee was entitled to receive 1300 sq. yard per acre out of the residential plots and 50% of the*

*developed area of sites for schools, clubs, hospital etc. and 36% out of built up commercial area. The parties have also agreed in terms of clause 13 that the developer on receiving the LOI will develop and hand over the possession within 36 months with a grace period of 2 months. The developer has also applied for LOI and licence from the concerned authorities at various times, which has been pointed out by the Ld. Counsel before us as per the documents containing in the paper book. It is also a fact that during the relevant assessment year developer was not able to obtain the LOI from Govt. of Haryana for getting permission for development of land within the time specified. Finally, the developer obtained the license from the town and country planning department LC-V (9 of 2018) dated 29.1.2018, valid upto 28.1.2023, a copy of the same has been filed in the paper book from 132 to 133. Thus, it is quite clear that transfer has not taken place during the year under consideration and if at all it can be said that any sale or transfer has taken place and income has accrued, it is in the financial year 2017-18 and this fact that the transfer has not taken place has been accepted by both AO and Ld. CIT(A). Hence, the amount cannot be held to be chargeable as Capital Gain in the current assessment year. Although the assessee in the year under consideration has offered the amount received as capital gain.*

*8. The Ld. AO has held that in view of section 51 of the Act, if any amount is received which falls within the purview of section 51 would be taxable as income from other sources u/s 56 of the Act. Before insertion of provision of Finance Act 2015 w.e.f. 1.4.2015, section read as under :-*

> *"Where any capital asset was on any previous occasion the subject of negotiations for its transfer, any advance or other money received and retained by the assessee in respect of such negotiations shall be deducted from the cost for which the asset was acquired or the written down value or the fair market value, as the case may be, in computing the cost of acquisition."*

*Later on w.e.f. 1.4.2015 proviso was added which read as under:-*

> *"Provided that where any sum of money, received as an advance or otherwise in the course of negotiations for transfer of a capital asset, has been included in the total income of the assessee for any previous year in accordance with the provisions of clause (ix) of sub-section (2) of section 56. then. such sum shall not be deducted from the cost for which the asset was acquired or the written down value or the fair market value. As the case may be. in computing the cost of acquisition."*

*8.1 Clause ix of sub section 2 to section 56 has been brought in the statute w.e.f. 1.4.2015, which provides that;*

> *"any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if-*
>
> *(a) Such sum is forfeited; and*
>
> *(b) The negotiations do not result in transfer of such capital asset.*

*9. Ergo, for treating the amount received as advance in the course of negotiation over the transfer of capital asset has been deemed to be income from other sources only w.e.f. 1.4.2015. Hence, the amended provision will not be applicable to the assessee as same will not have a retrospective effect for the year under consideration, that is, for the assessment Year 2013-14. Thus, said amount cannot be held to be chargeable to tax in the current year, neither u/s 45 because there is no transfer u/s 2(47)(v); nor u/s 56(2). This position has been clarified by ITAT Mumbai Bench in the case of ITO vs. Fiesta Properties (P) Ltd. (2016) 73 taxmann.com (Mumbai) wherein the Tribunal has observed and held as under :-*

> *"The aforesaid provisions clearly lay down that amount of advance received for sale of property shall be treated as income u/s 56 if the same is forfeited and negotiations did not result in transfer of such capital asset. But these provisions have been inserted w.e.f 01-04-2015. These provisions are not clarificatory in nature. These provisions lay down a substantive law creating additional tax liability upon an assessee and, therefore, this cannot have retrospective effect. Further, with the insertion of these provisions. It becomes clear that earlier the law was not like this. Thus. for the year before us. i.e. A. Y. 201011 the then existing provisions of section 51 shall he applicable which clearly provides that the amount of advance received should be reduced from the cost of acquisition of asset. Thus. we reinforce the direction of the Lei. CIT(A) and direct the Assessing Officer to reduce the cost of acquisition of the property by the amount of Rs.3.74 crores on sale of the said properly at the time of computation of capital gains as may be arising on account of sale of the said property."*

*10. Further the Hon'ble Supreme Court in the case of CIT vs. Balbir Singh Maini (2017) 398 ITR 531, have held that where for want of permissions, entire transaction of development of land envisages in joint development agreement fell through, there*

*would be no profit or gain which arose from the transfer of capital asset which could be brought to tax u/s 45 read with section 48. The relevant observations made by the lordship in this regard reads as under: - "*

> *20 This being the case, and it being clear that the said JDA was never registered, since the JDA has no efficacy in the eye of law. obviously no "transfer" can be said to have taken place under the aforesaid document. Since we are deciding this case on this legal ground, it is unnecessary for us to go into the other questions decided by the High Court namely. whether under the JDA possession was or was not taken; whether only a licence was granted to develop the property; and whether the developers were or were not ready and willing to carry out their part of the bargain. Since we are of the view that sub-clause (v) of Section 2(47) of the Act is not attracted on the facts of this case, we need not go into any other factual question.*
>
> *23. A reading of the JDA in the present case would show that the owner continues to be the owner throughout the agreement, and has at no stage purported to transfer rights akin to ownership to the developer. At the highest, possession alone is given under the agreement, and that too for a speciJic purpose -the purpose being to develop the property. as envisaged by all the parties. We are, therefore, of the view that this clause will also not rope in the present transaction.*
>
> *24. The matter can also be viewed from a slightly different angle. Shri Vohra is right when he has referred to Sections 45 and 48 of the Income Tax Act and has then argued that some real income must "arise" on the assumption that there is transfer of a capital asset. This income must have been received or have "accrued" under Section 48 as a result of the transfer of the capital asset."*

*11. Thus, this amount cannot be taxed as capital gain u/s 45 and also u/s 56 as income from other sources as noted above. The taxability of capital gain if at all would be applicable in the year in which transfer has taken place i.e. in the assessment year 2018-19 and accordingly it is in that year the taxability of this amount should be considered. In view of aforesaid observation and finding, the appeal of the assessee is treated as allowed."*

9. Upon careful consideration, we find ourselves in agreement that on similar facts, this Tribunal has taken decision in favour of the assessee.

In this view of the matter, we respectfully follow the precedent and set-aside the order of the authorities below and delete the additions.

10. In the result, the appeal of the assessee stands allowed.

Order pronounced in the open court on 16th February, 2023.

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| **Sd/-** | **Sd/-** |
| **[ASTHA CHANDRA]** | **[SHAMIM YAHYA]** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

**Delhi;** Dated: 16.02.2023.

*Shekhar,*

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi