IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Sandeep Gosain, Judicial Member

ITA No. 558/Coch/2022
(Assessment Year: 2011-12)

Pulikkaparambil George Jacob 17/1161A, Puthiyara Road Kozhikode 673004	Vs.	The Income Tax Officer Ward - 1(1) Kozhikode
[PAN: ACUPJ7137R] **(Appellant)**		**(Respondent)**

Appellant by: Shri V.M. Veeramani, CA
Respondent by: Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing: 02.02.2023
Date of Pronouncement: 02.03.2023

O R D E R

Per Bench

This is an Appeal by the assessee agitating the Order by the Commissioner of Income Tax (Appeals)-12, Bengaluru ('CIT(A)' for short) dated 03/03/2022, dismissing his appeal contesting his assessment under section 143(3) read with section 147 of the Income Tax Act, 1961 ('the Act' hereinafter) dated 27/12/2016 for the Assessment Year (AY) 2011-12.

2. The appeal raises a single issue, i.e., the assessment of capital gain, if any, arising to the assessee for the current year. It would be relevant to recount the facts of the case in brief. Shri Jacob George, the assessee's father, along with his brother, Shri Tharian George, constituted M/s. Southern Investments (P.) Ltd. ('the Developer') as their attorney vide General Power of Attorney (GPA) dated 08/7/2010 for undertaking preliminary works in relation to construction of building/s on 41.21

cents of land jointly held by them at Kozikode (PB pgs. 17-24). Vide settlement deed dated 17/8/2010, the two brothers settled a part of their respective shares in the said land to their sons, as a result of which the subject land came to be owned by seven persons, related thus, with the assessee's share therein being 4.422 cents. A joint venture (JV) agreement for construction of building/s at the subject land was entered into by the seven co-owners with the Developer on 04/02/2011, per which the co-owners were to retain 26.09% of their undivided share in land, while the balance 73.91%, valued at Rs. 243.66 lacs, was 'transferred' to the Developer, who was obliged to construct, spanning the entire land. The residential housing project, given the name 'Rain Tree Heights', was to be completed within a period of 30 months, i.e., by August, 2013, though time was not of essence. The value of share of each co-owner, i.e., in proportion, was also determined, the assessee's share being Rs. 26.11 lacs. Both the GPA and the JV agreement were not registered. Facts to the extent stated are not in dispute, and admitted.

3. In the view of the Assessing Officer (AO), the JVA dated 04/2/2011 amounted to a transfer u/s. 2(47)(v) of the Act in view of part-performance, as defined u/s. 53A of the Transfer of Property Act, 1882 (TP Act). Reliance was placed by him on *Chaturbhuj Dwarakadas Kapadia v. CIT* [2003] 260 ITR 491 (Bom); *CIT v. Dr. T.K. Dayalu* [2011] 202 Taxman 531 (Kar); and *Jasbir Singh Sarkaria In re* [2007] 294 Taxman 196 (164 Taxman 108) (AAR-ND), as indeed on the decisions by the Apex Court in *Sardar Govindrao Mahadik v. Devi Sahai*, AIR 1982 SC 989 and *Patel Natwarlal Rupiji v. Shri Kondh Group Kheti Vishayak*, AIR 1996 SC 1088, explaining the concept of part performance under the TP Act. The assessee was successful in dislodging the same before the first appellate authority, as, as afore-noted, both the GPA and JVA were unregistered documents, so that no cognizance thereto in law could be given in view of the amendments to the Registration Act, 1908 and the TP Act vide Registration and Other Related Laws (Amendments) Act, 2001, as clarified by the Hon'ble Apex Court in *CIT v. Balbir Singh Maini* [2017] 398 ITR 531 (SC). In view of the ld. CIT(A), that however would not be of any consequence as sec.

2(47)(vi) would instead apply. The assessee's plea before him that the transaction did not materialise as the Builder-developer could not complete the building even by 2017, was met by him by stating that the project was nearly complete in October, 2018. Two, once transfer had already been taken place, i.e., in fy 2010-11, the same cannot be undone due to subsequent developments. The assessee's case before us was, accordingly, along the following lines:

a) there is no transfer u/s. 2(47)(v), as rightly pointed out by the ld. CIT(A);

b) there is no transfer u/s. 2(47)(vi) as the possession to the developer was only for the limited purpose of carrying construction, with their being no cash component involved in the transaction; and

c) in any case, the project failed, so that no transfer in law can be said to have taken place, or capital gain arisen.

4. We have heard the parties, and perused the material on record.

4.1 Section 2(47) of the Act, defining 'transfer', which is the bone of contention between the parties, and the issue arising in the instant case, reads as under:

Definitions.

2. In this Act, unless the context otherwise requires,-

(47) "transfer", in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in trade of a business carried on by him, such conversion or treatment;

(v) 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 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

4.2 Without doubt, the JVA dated 04/02/2011 being not a registered document, transfer u/s. 2(47)(v) cannot hold in view of the changed legal position consequent to

amendments to sections 17 & 49 of the Registration Act and s. 53A of the TP Act by the Amendment Act of 2001, even as explained in *Balbir Singh Maini* (supra). The legal recognition to part-performance of a contract u/s. 53A of the TP Act, co-opted in s. 2(4)(v), is no longer available where it is not in pursuance to a registered document, removing its premises. The assessee's argument of there being no part-performance by 31/3/2011, failing the transfer, would be of no consequence as even per the Revenue, the transfer in the instant case is u/s. 2(47)(vi), not impacted by the said amendments, and not u/s. 2(47)(v), which recognizes part-performance for the purpose of transfer under the Act. True, even as argued before us, the possession of the subject land allowed by co-owners to the developer is for construction, i.e., a license, but that on 73.91% of land (30.458 cents) is not on their account, but on account of transferee-developer, who is entitled thereto, available to it for disposal in it's capacity as an owner. The buyers of the constructed apartments, which are to be on the entire piece of land, as part of one project, would get complete title thereto. The transfer thereto by the Developer is in it's own right. That they would be members of a housing association, would be of no moment. It is only the construction on the balance 26.09% of land (10.752 cents) which is on account of co-owner-transferors, i.e., as consideration for the transfer of their rights in 30.458 cents of land. That is, construction on 10.752 cents of land is a consideration for the said transfer and, therefore, an essential part of the JVA itself, which thus constitutes the transfer agreement/document, representing an arrangement that sec. 2(47)(vi) speaks of. If the Developer has for any reason been subsequently unable to complete the project, the same can only be understood as a failure to deliver the consideration of the transfer. Giving example of 'sale' as defined u/s. 54 of the TP Act, it was pointed out by the Bench during hearing, that non-payment of consideration subsequent to the sale would not for that reason either cancel the agreement or make it *non est*. The recourse available in law to the transferor in such a case is to enforce the sale through a civil suit for recovery of the sale amount, and that no distinction could legally be drawn on the basis of the form of consideration, i.e., cash or in kind. There are,

clearly, existing rights in 73.91% of land vide JVA dated 04/02/2011, i.e., during the previous year relevant to the current assessment year. Non-completion of construction, i.e., as envisaged thereby, is only a non-discharge of the transfer consideration. Section 2(47)(vi) is clearly applicable in the facts and circumstances of the case, and we find ourselves in agreement and, accordingly, have no hesitation in endorsing the impugned order in this respect.

On the Bench observing so during hearing, Sh. Veeramani, the ld. counsel for the assessee, would submit that the ld. CIT(A) did not extend any opportunity to the assessee before applying sec. 2(47)(vi) – which found favour with him, to the instant case, which was confined to the non-application of s. 2(47)(v). Though, surely the ld. CIT(A) should have extended opportunity to the assessee-appellant before applying s. 2(47)(vi), the objection on that basis is without merit. This is as, being a legal issue, involving no fresh facts, with rather all the primary facts being undisputed, it could well be invoked for the first time, by either side, before us. That is, though surely in order, the same would not detain us; the assessee being free to contest the same before us, as it indeed does (*Hukumchand Mills Ltd. v. CIT* [1967] 63 ITR 232 (SC)).

4.3 Continuing further, non-delivery of consideration cannot be by itself regarded as a project failure, as where the necessary permissions, which are the responsibility of the Developer-Builder, and subject to which only the project could be undertaken, do not materialize, failing the project, as was the case in *Balbir Singh Maini* (supra). In the instant case, the GPA in fact was specifically executed only for the same. Why, even upto December, 2016, i.e., up to completion of assessment, there was admittedly no whisper of the project failing, but only of it being part-performed. And even as without doubt there could be issues leading to the project being delayed. In fact, the ld. CIT(A) clearly states, unrebutted before us, of the project being nearly complete in October, 2018. No material contradicting the same has been brought on record, or otherwise to our notice.

4.4 Be that as it may, we, yet, in the interest of justice, restore the matter back to the file of the first appellate authority for the assessee to exhibit the non-transfer u/s. 2(47)(vi) r/w s. 2(47)(i) in the undisputed facts and circumstances of the case. Reference to s. 2(47)(i) is made so as to highlight that the rights to the buyers of the apartments would stand to arise thereunder, if not u/c.(vi). Further, we say 'undisputed' with a view to clarify of no dispute *qua* facts being either observed or brought to our notice. And, further, to eliminate any scope for the said remittance leading to expanding the scope of controversy, or fresh facts or disputes being raised. No application for admission of additional evidence, it may be noted, stands made either at the first appellate stage, or even before us u/r. 29 of the Income Tax (Appellate Tribunal) Rules, 1963. All the material on record, including before the Tribunal, would though be liable to be considered. Our only purpose is to allow the assessee opportunity to state his case as regards his legal claim as to non-applicability of s. 2(47)(vi); Sh. Veeramani claiming to be not fully prepared. In so deciding, we also take note of the submission by him that the project was finally completed by the co-owners themselves, i.e., by taking-over the project, which may have computational implications.

Integral to the decision, we note, would be the point of time up to which the subsequent events could be taken cognizance of while considering for a transfer in law, i.e., 04/2/2011, or up to 31/3/2011, i.e., the end of the relevant year, or up to the due date of filing the return, or even later. As regards the project completion, we find an Agreement dated 01/9/2018 between the Developer and the Raintree Heights Apartment Owners' Association on record (PB pgs. 55-70). Per the same it is the Members of the Association, and not, as stated, the land-owners, who were handed-over the project on, as-is-where-is basis, and who are to complete the project. We are in agreement with Sh. Veeramani that the same would need to be taken into account, particularly considering that the matter is yet to attain finality, with the appellate proceedings being only in continuation of the assessment proceedings. The same, we may though clarify, would only impact the quantum of

the capital gains inasmuch as it denotes construction, which is only consideration in kind, is not discharged to that extent. The same in fact itself exhibits, if that was necessary, that the project was completed, albeit through a different agency, and there is no project failure, contradicting the claim in its respect. Further, the handing-over, as it appears, is only for the limited purpose of completing the project, though may have a bearing on the quantum of the consideration, which could therefore be reckoned with reference to the extent of construction incomplete as on 31/8/2018. It is not clear as to which areas of the project were not complete, and if it at all included that to the assessee's account, being one apartment (built-up area 1448 sq. ft.) and one car parking. A shortfall in consideration, where so, and further subject to the assessee (either individually or as part of the members' association) having not initiated any legal process for recovery of cost in relation thereto from the Developer, would entail incurring cost, i.e., to the proportionate extent. That is, has computational issues, not addressed. If construction to the extent of 10% (say) is not complete, the value of consideration would have to be scaled down to 90%, as cost in relation to the incomplete 10% stands to be incurred by the assessee. We say this only to exemplify the issue, leaving the detailed working and related issues to be clarified by the assessee and examined by the Revenue authorities. We are conscious that in view of the considerable delay, the cost that may need to be actually incurred may not be in the same proportion, but that is quite irrelevant; the capital gain, in the computation of which there is no deduction for bad debt, having arisen years earlier. Why, even the value of the constructed apartment would have witnessed significant increase over the years. Needless to add, material in support of the said claim, if any, would stand to be admitted, examined and adjudicated upon.

Inasmuch as the law envisages a decision by the first appellate authority after hearing both the parties before him, the ld. CIT(A) shall cause such verification and adjudication by the assessing authority, by remanding the matter thereto, as it may deem fit and proper in the circumstances, and finally decide the

matter/s, issuing definite findings of fact and law, per a speaking order and after hearing both the parties before him. The issue of deduction u/s. 54-F shall also be adjudicated upon in view of the Board Circular 672 dated 16/12/1993, allegedly not considered by him. Both the sides before the ld. CIT(A), as indeed he himself, may rely on case law, observing of course the principles of natural justice.

4.5 We decide accordingly.

5. In the result, assessee's appeal is allowed for statistical purposes.

Order pronounced under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(Sandeep Gosain)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: March 02, 2023
n.p./v.b.

Copy to:

1. The Appellant
2. The Respondent
3. The CCIT - (Int. Taxn), Bengaluru
4. The Sr. DR, ITAT, Cochin
5. Guard File