

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No. 42/Bang/2023
Assessment Year : 2011-12

Shri K.V. Satish Babu [HUF], 1037, K R Hospital Road, Mysuru – 570 001. PAN: AAFHK3898F	Vs.	The Income-tax Officer, Ward – 2[1], Mysuru.
APPELLANT		RESPONDENT

Assessee by	:	Shri V. Srinivasan, Advocate
Revenue by	:	Shri Sankar Ganesh K, Addl. CIT (DR)

Date of Hearing	:	18-05-2023
Date of Pronouncement	:	25-05-2023

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal is filed by assessee against order dated 05/01/2023 passed by NFAC, Delhi for A.Y. 2011-12 on following grounds of appeal:

“1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The learned CIT[A] is not justified in upholding the addition of a sum of Rs. 21,54,040/- as Income from Short term Capital Gains upholding the view that the date of entering into the joint development agreement i.e., 16/09/2010 would be the date of transfer of the said capital asset under the facts and in the circumstances of the appellant's case.

3. The learned CIT[A] is not justified in sustaining the addition of a sum of Rs. 37,05,858/- as Income from Long term Capital Gains upholding the view that the date of entering into the joint development agreement i.e., 16/09/2010 would be the date of transfer of the said capital asset under the facts and in the circumstances of the appellant's case.

4. The learned CIT[A] ought to have appreciated that the provision of section 2[47][v] of the Act were not applicable to the appellant's case for the year under appeal since the appellant had given possession over the agricultural lands to the Developer on 20/12/2012 that too after conversion of the said lands for nonagricultural purposes on 03/12/2012 and accordingly, the appellant had recognized transfer of the capital assets in the return of income filed for the assessment year 2013-14 and thus. the additions made in respect of long-term & short-term capital gains ought to have been deleted.

5. Without prejudice to the right to seek waiver with the Hon'ble CCIT/DG, the appellant denies itself liable to be charged to interest u/s. 234-A, 234-B and 234-C of the Act, which under the facts and in the circumstances of the appellant's case deserves to be cancelled.

6. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.”

2. Brief facts of the case are as under:

2.1 The assessee had entered into a Development Agreement on 16.09.2010 in respect of agricultural land which was not converted into non-agricultural purposes. The assessee had received Rs.10,00,000/- as refundable advance on 16.09.2010.

As the lands were agricultural lands, the same could not have been developed for non-agricultural purposes. Hence the possession of the same could not be given. The said lands were converted into non-agricultural purposes only on 03.12.2012 i.e., during the AY 2013-14. The assessee offered to tax under the head Capital Gains in the AY 2013-14 and had paid taxes.

2.2 The assessee received a notice u/s. 148 dated 29.10.2015 for reassessing the income filed for the assessment year 2011-12; the assessee made a request for reasons recorded for reopening, which was furnished. The same reads as under:

“The assessee is the owner of agricultural lands bearing survey Nos 331/2 Part-P2, P4, survey No.367/2A, 2B, 373/P1 and 373/P2 totally measuring 9 acres 12 guntas, situated at Belavadi Village, Kasaba Hobli, Srirangapatna Taluk, Mandya District. During the course of assessment proceedings in the assessee's case for the A.Y. 2012-13, it was seen that the assessee has entered into a Joint Development Agreement on 16.09.2010 with M/s. Dhatri Properties, a partnership firm having its office at No.S, 5-17, Budda Marga, siddhartha Nagar, Mysuru, as per which the assessee has agreed to sell 48% of the afore said lands to M/s. Dhatri Properties for a consideration of Rs.10,00,000/- and to retain 52% of the lands. The agreement entered into between the assessee and M/s. Dhatri Properties amounts to transfer as envisaged in section 2(47)(v) of the Income tax Act,1961. Since the assessee has derived capital gains during the year relevant to A.Y. 2011-12 and has not declared the same in the return of income filed on 29.11.2011. I have reason to believe that the income chargeable to tax has escaped assessment within the meaning of Section 147 of the Income Tax Act 1961.”

2.3 The assessee owned 9 acres 12 guntas of Agricultural land bearing Survey Nos. 331, 367 and 373 at Belawadi Village, Kasaba Hobli, Srirangapatna Taluk, Mandya District.

2.4 The assessee had entered into a Development Agreement with M/s. Dhatri Properties, Sidhartha Nagar, Mysore (Developer) vide

registered agreement dated 16.09.2010 in respect of the said lands for formation of sites. A sum of Rs. 10,00,000/- had been received as refundable interest free deposit.

2.5 During the assessment proceedings, the assessee submitted that he did not give possession of the lands for commencement of any work on entering into Joint Development Agreement, as the lands continued to be Agricultural lands, and under Karnataka Land Reforms Act, unless lands were converted into non-agricultural purposes, the lands could not have been put to any non-agricultural use. It was submitted that the assessee received orders for conversion issued by Deputy Commissioner, Mandya District on 03.12.2012 in respect of the subject lands and on receipt of the orders, possession of the lands were given to the developer. The assessee also produced affidavit from the developer M/s. Dhatri Properties confirming that the possession was taken by them (Developers) on 20.12.2012.

2.6 The Ld.AO passed the assessment order on 25.11.2016 u/s. 143(3) r.w.s 147 of the Act treating that the capital gains arose on the date of entering into Joint Development Agreement that is 16.09.2010 and assessed the same in the AY 2011-12.

Aggrieved by the order of the Ld.AO, assessee preferred appeal before the Ld.CIT(A).

3. The Ld.CIT(A) held as under:

“VII. CONCLUSION DRAWN BY THE CIT (APPEALS)

In the case of the taxpayer the Development Agreement was signed with Dhatri Properties through a registered agreement dated 16.09.2010 in respect of the said lands for formation of sites. A sum of Rs. 10,00,000 was received as refundable interest free deposit. The taxpayer had not given possession of lands for commencement of any work on entering into JDA, as the lands continue to

be agricultural lands and under Karnataka Land Reforms Act unless lands were converted into non-agricultural purposes, the lands could not have been put to any non-agricultural use. The orders for conversion was issued by Deputy Commissioner, Mandya district on 03.12.2012 in respect of the subject lands and on receipt of the orders, possession of the lands was given to the developer. The assessing officer completed the assessment u/s 143(3) rws 147 treating the year of transfer u/s 2(47)(v) as the current AY since the JDA made between the taxpayer and M/s Dhatri Properties was signed on 16.09.2010. The assessing officer during the course of assessment proceedings sought directions u/s 144A and the Addl. CIT, Range 2, Mysore held as under;

"On perusal of the JDA it is noticed that the assessee had granted an unqualified, uninterrupted and irrecoverable right over the land in question to the developer to commence and complete the development of the property and also the right to apply for alienation of the property after paying the conversion charges. Further, the development agreement is silent about any specific date on which the transfer shall take place. Under the circumstances, on the basis of the facts and figures available on records, it has to be assumed that the transfer of rights of the property had happened as per the provisions of section 2(47)(v) of the Act on the day on which the JDSA was entered into and accordingly the capital gain has to be taxed in that financial year only".

Considering the fact that the JDA signed on 16.09.2010 had given specific rights to the developer in Para 5.1 that, the owner gives permission to the developer to enter upon the schedule property with full right and authority to commence, carry on and complete development thereof in accordance with the permissions herein mentioned. This shall not be construed as delivery of possession under Section 53A of the Transfer of Property Act, 1882. The owner shall continue to be in possession of the schedule property till such time as the contract is discharged by performance and the developer will have only the right of entry to the schedule property for the purpose of this contract

The developer was also allowed to bring in machineries, equipments, tools, Tachies, labour force on the schedule property for carrying out the development work. The developer was also permitted to store the materials required for the development work. Since the decisions in the case of Charanjit Singh Atwal v ITO Ward — VI (1)

Ludhiyana, Dr T Achyutha v Asstt.CIT (2007) 108 TTJ (Hyd), CIT v. Dr. T.K. Dayalu [2011] 202 (Kar), Mysore Minerals Limited v. CIT [1999] 239/TR775/106, Dwarka Das Kapadia v. CIT [2003]/180 CTR (Bom.)107/260 ITR 491(Bom)/[2003] and certain other judgements and above all the facts of the case where in for all practical purposes the land was given to the developer for carrying out development work in the financial year 2010-11 itself, it is held that transfer as contemplated in sec 2(47)(v) of the Income tax is applicable in this assessment year and the assessing officer has taxed Capital Gains in this year. The assessee's argument that the Short Term and Long Term Capital Gain is taxable in the assessment year 2013-14 is not correct. The assessing officer shall give relief to the taxpayer if CG is taxed in the assessment year 2013-14. In the result the addition is upheld.

Addition upheld: 5859898/-

VIII. In the result the appeal is partly allowed.”

Aggrieved by the order of Ld.CIT(A), assessee is in appeal before this *Tribunal*.

4. The Ld.AR submitted that the assessee has granted license to the Developer to enter into the vacant property and to construct a residential complex as per the plan to be sanctioned by competent authority for the composite development of the property. It is also mentioned therein JDA that such permission given under said agreement cannot be construed as delivery of possession under section 53A of Transfer of Property Act. The Ld.AR submitted that section 2(47)(v) refers to “possession to be taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act”.

4.1 He submitted that section 2(47)(v) was introduced in the Act w.e.f. A.Y 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of conveyance. It was thus noted that, in such

scenario, assessee's used to enter into agreements for developing properties with the builders and under arrangement with the builders, they used to confer privileges of ownership without executing conveyance, and to plug that loophole, section 2(47)(v) came to be introduced in the Act.

4.2 The Ld.AR submitted that, facts of this case would show that the transferee had not performed his obligation under the agreement till 03.12.2012 and the Ld.AO taxed the capital gains in the hands of the assessee based on the date of JDA being 16.09.2010.

4.3 It is submitted that the transferee, only by his conduct and by his deeds, demonstrates that he is unwilling to perform his obligations under the agreement, then the date of agreement ceases to be relevant. In such situation, it is only the actual performance of transferee's obligations which can give rise to the situation envisaged in section 53A of the Transfer of Property Act.

4.4 It was submitted that, the condition laid down under s.53A of the Transfer of Property Act was not satisfied during the year under consideration and, therefore it is the submission of the Ld.AR that, no transfer effectuated for the year under consideration.

4.5 Referring to para 5.1, the Ld.AR submitted that the possession of the property was permissible in nature, to the extent to fulfill the necessary obligations of the transferee for conversion of the land from agricultural to non-agricultural nature. The said clause 5.1 is reproduced as under:

"5.1 That, the OWNER gives permission to the DEVELOPER to enter upon the schedule property with full right and authority to commence, carry on and complete development thereof in accordance with the permissions herein mentioned. This shall not be construed as delivery of

possession under Section 53A of the Transfer of Property Act, 1882. The OWNER shall continue to be in possession of the schedule property till such time as the contract is discharged by performance and the DEVELOPER will have only the right of entry to the scheduled property for the purpose of this contract.”

4.6 He thus submitted that the JDA is only for granting license to enter plot and start developmental activities" as narrated in clause 1.2 of JDA and that "as a result of this, the provisions of section 2 (47)(v) have no application. The Ld.AR submitted that there was no material before the Ld.AO to infer that the transferee had performed, or was willing to perform his obligations under the agreement, and yet he concludes that the conditions of section 53A are satisfied.

4.7 The Ld.AR further submitted that assessee has only received a sum of Rs. 10 lakhs by way of refundable interest free security deposit on 16.09.2010 which he has acknowledged at page 12 of the JDA. It is the submission of the Ld.AR that, the capital gains that arose from the terms of the Joint Development Agreement was offered to tax in the year 2013, as the possession was handed over on the receipt of the order of conversion dated 03.12.2012. The Ld.AR submitted that the assessing officer relied on the decision of *Hon'ble Karnataka High Court* in case of *CIT vs. Dr. T.K. Dayalu* reported in *(2011) 14 taxmann.com 120*, wherein, it is held that, capital gains will arise in the year in which full control and possession of land in question is given. It is the submission of the Ld.AR that, this particular observation of *Hon'ble Karnataka High Court* eventually favours the assessee in the present facts of the case, as the full possession was handed over to the transferee

developer on 03.12.2012 on fulfillment of the requirement of conversion of the land into non-agricultural in nature.

10. A reference was also made to the decision of *Hon'ble Bombay High Court* in case of *Chaturbhuj Dwarkadas Kapadia vs. CIT* reported in (2003) 260 ITR 491 which was followed by *Hon'ble Karnataka High Court* in case of *CIT vs. Dr. T.K. Dayalu (supra)* in arriving at this conclusion.

11. On the contrary, the Ld.DR relied on the decisions of *Hon'ble Karnataka High Court* in case of *CIT vs. Dr. T.K. Dayalu (supra)* as well as the decision of *Chaturbhuj Dwarkadas Kapadia vs. CIT (supra)*.

We have perused the submission advanced by both sides in light of records placed before us.

12. Sec.45 of the Act lays down that profits and gains arising out of transfer of 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. It is thus clear that there should be transfer during the previous year to attract charge to tax on capital gain. Sec.2(47) of the Act defines "Transfer" for the purpose of the Act.

It reads thus:

'Sec.2 (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 ; or*

- (iva) *the maturity or redemption of a zero coupon bond; or*
- (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.*

Explanation [1]: For the purposes of sub-clauses (v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA;'

13. Section 53A of the Transfer of Property Act, 1882 [TOPA] which is reproduced as under : —

"Section 53A of the Transfer of Property Act, 1882.

53A. Part performance. —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 therefore 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."*

14. The clause that was invoked by the revenue authorities in the case of the Assessee is Sec.2(47)(v) of the Act r.w 53A of Transfer of Property Act, 1882. According to the revenue authorities, the possession of land has been handed over by the assessee to the developer on execution of the agreement dated 16/09/2010, the transfer of property have taken place in view of the section 2(47)(v) of the Act r.w. section 53A of the Transfer of Property Act, 1882. In this regard, the Ld.AR contended that perusal of the agreement executed by the assessee with the developer would reveal that, there was no transfer of a capital assets in view of the provisions of section 2(47)(v) of the Act r.w. section 53A of the Transfer Of Property Act.

15. In our view, in order to attract provisions of section 53A of the Transfer Of Property Act, first and foremost, the transferee must, in part performance of the contract, have taken possession of the property or any part thereof. Secondly, the transferee (developer) must have performed or be willing to perform his part of the agreement. It is only when these two important conditions, among others, are satisfied that the provisions of section 53A of the Transfer of Property Act can be said to be attracted on the facts of a given case. We refer to the decision of *Hon'ble Supreme Court* in case of *Seshasayee Steels (P.) Ltd. v. AIT* reported in [\(2020\) 115 taxmann.com 5](#).

16. We also note that under the general law, transfer of immovable property of the value of rupees one hundred and upwards can take place only by a registered deed. If no registered deed is executed in respect of such property, legal title or ownership is not effectively conveyed to the transferee although

transferee might have paid entire consideration and/or obtained possession from the transferor in pursuance of contract of sale.

17. Further, "*Transfer*" in section 2(47), also envisages execution of registered deed in such circumstances. Capital gains become liable to be charged to tax only if they arise as a result of "transfer" of capital asset and the date on which they arise is date of "transfer". If as a result of mutual arrangement by parties or otherwise, no registered deed is executed even after transaction is completed by delivery of possession and receipt of consideration, capital gains tax would escape assessment altogether or if such execution of registered sale-deed is postponed, the capital gains tax would also be postponed. In several cases it suited the parties to complete such transactions without execution of registered deed and thereby evade payment of tax on capital gains. It is in order to plug this loophole that cl. (v) was inserted in section 2(47) to lay down that transfer would include any transaction involving allowing of 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 Transfer of Property Act. Thus, the Provisions of Sec.53A of the Transfer of Property Act, 1882 stand incorporated into the provisions of the Income Tax Act, 1961. If that be so then the Tax authorities for coming to a conclusion that provisions of Sec.53A of the Transfer of Property Act, 1882 are attracted to a particular transaction have to come to a conclusion the transaction/agreement in question is such that 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.

18. In the present facts of the case, the clause 5.1 in the JDA regarding possession clearly states that what is given is not possession contemplated u/s. 53A of the Transfer of Property Act and that it is merely a license to enter the property for the purpose of carrying out development. Therefore, invocation of the provisions of Sec.2(47)(v) in the facts and circumstances of the present case on the basis of clause 1.1 of the JDA, in our view was not proper. Further the obligation cast on the Transferee(developer) to The possession in the present is traced to the joint development agreement which is in the nature of permissive possession and not possession in part performance of agreement for sale. In the present case, there is no document by which the revenue can come to the conclusion that there was delivery of possession. The mere fact that development of the property cannot be done without possession, cannot be the basis to come to a conclusion that, possession was delivered in part performance of the agreement for sale in the manner laid down in Sec.53A of the Transfer of Property Act.

19. Similar view has been taken by *Coordinate Bench of this Tribunal* in case of *Kola Venkat Rama Naidu vs. CIT* in ITA No. 206/Bang/2020 for A.Y. 2010-11 by order dated 05.08.2022.

20. For the above reasons, we hold that there was no transfer during the previous year relevant to AY 2011-12. Therefore,

capital gain on transfer of the property cannot be assessed in AY 2011-12. The assessment of capital gain in AY2011-12 is therefore held to be bad and deleted.

In the result, the appeal filed by assessee stands allowed.

Order pronounced in open court on 25th May, 2023.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 25th May, 2023.
/MS /

Copy to:

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|---------------|------------------------|
| 1. Appellant | 4. CIT(A) |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore