

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'SMC' BENCH, KOLKATA**

Before Shri Rajesh Kumar, Accountant Member

**I.T.A. No. 1106/KOL/2023
Assessment Year: 2015-2016**

***M/s. NKA Commercial Private Limited,.....Appellant
(successor of M/s. NK Enterprises (P) Ltd.
since amalgamated)
Unit 1304, Plot No. AI-4, ERGO Building,
EP/GP Block, Sector-V, Salt Lake,
Kolkata-700091
[PAN: AACCN3159Q]***

-Vs.-

***Income Tax Officer,.....Respondent
Ward-3(1), Kolkata,
Aayakar Bhawan, 4th Floor,
P-7, Chowringhee Square,
Kolkata-700069***

Appearances by:

*Shri Ankit Jalan, A.R., appeared on behalf of the assessee
Shri Amitava Sen, Addl. CIT, D.R., appeared on behalf
of the Revenue*

Date of concluding the hearing : December 18, 2023

Date of pronouncing the order: December 26, 2023

O R D E R

This appeal at the instance of assessee for assessment year 2015-16 is directed against the order of ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi dated 22.08.2023, which is arising out of the order under section 143(3) of

the Act on 16.12.2017 framed by ITO, Ward-3(1), Kolkata.

2. The only issue raised by the assessee in the various grounds of appeal is against the confirmation of addition of Rs.33,84,024/- by the ld. CIT(Appeals) as made by the ld. Assessing Officer on account of capital gain on land by invoking the provision of section 2(47)(v) of the Act in respect of the land *qua*, which a registered joint development agreement was executed with the builder M/s. Badu Road Developers LLP by assessee on 30th July, 2014.

3. The facts in brief are that the ld. Assessing Officer during the course of assessment proceedings observed that the assessee has entered into a joint development agreement with M/s. Badu Road Developers LLP on 30.07.2014 in respect of the land owned by it. The ld. Assessing Officer on the basis of said joint development agreement computed the short-term capital gain of Rs.33,84,024/- by taking the value as per stamp valuation authority as deemed sale consideration. The ld. Assessing Officer reduced the cost of acquisition, i.e. Rs.4,51,935/- from the sale consideration and computed the short term capital gain at Rs.33,84,024/- and added the same to the total income of the assessee in the assessment framed under section 143(3) dated 16.12.2017.

4. The Id. CIT(Appeals) in the appellate proceeding affirmed the order of the Id. Assessing Officer.

5. After hearing the rival contentions and perusing the material available on record, I find that the Id. Assessing Officer has computed the short-term capital gain on the basis of joint development agreement executed with the builder by the assessee in respect of land owned by it. The Id. Assessing Officer treated the same as sale consideration of land and computed the capital gain by taking into consideration the value as per stamp valuation authority and after reducing from there the cost of acquisition, a net gain of Rs.33,84,024/- was computed after invoking the provision of section 2(47)(v) of the Act. In my opinion, mere execution of joint development agreement with the builder would not result in any transfer of land by the assessee as contemplated by the provisions of section 2(47)(v) of the Act as the assessee has not allowed the possession of the plot to be taken away by the builder in part performance of a contract. It is just an agreement for carrying out construction on the plot after obtaining requisite permissions from the Government authorities and then after completion of the project, certain area has to be allotted to the assessee. Therefore, I find merit in the contention of the Id. A.R. of the assessee that the said execution of land development agreement cannot be a sale of land in favour of the builder within the meaning of section 2(47)(v) of the Act as only construction was allowed to be done by the builders after obtaining necessary approvals from competent authorities and, therefore, the capital gain has wrongly been computed and

charged to tax. The ld. A.R. relied on the decision of the Hon'ble Jurisdictional High Court in the case of PCIT –vs.- Emporis Properties Pvt. Limited reported in (2023) 151 taxmann.com 64 (Calcutta), wherein a similar issue has been decided in favour of the assessee. The Hon'ble Court in the said decision has held as under:-

“ From the Joint Development Agreement, it is crystal clear that the assessee continued to be the owner of the property throughout the development of the property and there is no transfer of ownership to the developer. This aspect, in our opinion, was rightly noted by the Tribunal. Thus reading of the entire agreement would show that there was no transfer or sale of asset under the Joint Development Agreement rather the agreement was to develop the land making it saleable and in view of the construction of the same, the developer would take a part of the stock-in-trade. Furthermore, in terms of the termination clause if the developer fails to develop the housing complex and hand over the assessee's allotted area with all common amenities and facilities within the stipulated time of four years together with grace period of one year, the Joint Development Agreement would stand determined and cancelled and the developer shall cease to have any right, title, interest under the Joint Development Agreement and the developer shall be entitled to complete the construction of the incomplete portion of the housing complex provided however the assessee shall refund the entire outstanding amount of interest-free security deposit and the cost of construction of the said housing complex and the value of the construction shall be certified by the structural engineer and architects. Thereafter the Tribunal took note of the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax vs. Balbir Singh Maini reported in [2017] 398 ITR 531 (SC). The said decision is more or less identical to the facts of the case on hand wherein one of the questions which fell for consideration was whether the transaction under the Joint Development Agreement should be envisaged as transfer exigible to tax by reference under Section 4(47)(v) of the Act read with Section 53A of the Transfer of Property Act, 1882. After taking note of the facts, the Hon'ble Supreme Court held as follows:

"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, ad that too for a specific 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."

As mentioned earlier, the facts of the case in Balbir Singh Maini (supra) was more or less identical to the case on hand and after reading the Joint Development Agreement, the Hon'ble Supreme Court found that the owner continues to be the owner throughout the agreement at any state purported to transfer rights akin to ownership to the developer. This is exactly the nature of transaction in the case on hand. That apart, the Tribunal also taken note of how the registering authorities have treated the Joint Development Agreement. The registering authorities have not treated the agreement as a deed of conveyance but have calculated the stamp duty by treating the same under Article 4, 5(f) of Schedule 1A of the Indian Stamp Act. The Explanation under Clause (vi) of Clause 5(f) states that the expression "Agreement or Memorandum of an Agreement" if relating to a sale shall include an agreement to sell or any memorandum or acknowledgement in relation to transfer or deliver of possession of immovable property with an intent to transfer right, interest in, or title to, such property at any future date. This expression was noted and the registering authorities have calculated the stamp duty on the said amount at the fixed rate and not treating it as a conveyance deed.

Thus, we are of the considered view that the Tribunal took note of the factual position and applied the correct legal principle and granted relief to the assessee.

Thus, we find no ground to interfere with the order passed by the learned Tribunal. Accordingly, appeal (ITAT/59/2023) is dismissed and the substantial questions of law are answered against the revenue.

6. On the other hand, ld. D.R. contended before us that w.e.f. A.Y. 2018-19, a specific provision has been brought on the statute book by inserting section 5A to section 45, which specifically provides for taxation of the said rights when the construction is completed and completion certificate is granted by the competent authority on the said property. Therefore, ld. D.R. submitted that prior to that taxation of the rights under

joint development agreement had to be assessed on the basis of land development agreement only.

7. After having considered the facts on record and the ratio laid down by the Hon'ble jurisdictional High Court, I am of the view that the capital gain cannot be assessed on the basis of joint development agreement executed by the assessee during the year as no possession was given to the builder in part performance of the contract but it is only permission to carry out construction on the plot. Besides I note that even as on date, no construction has been carried out on the said land due to legal hurdles. Considering these facts and circumstances, we are inclined to set aside the order of Id. CIT(Appeals) and direct the Id. Assessing officer to delete the addition.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 26/12/2023.

Sd/-

(Rajesh Kumar)
Accountant Member

Kolkata, the 26th day of December, 2023

*Copies to :(1) M/s. NKA Commercial Private Limited,
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(2) Income Tax Officer,

*Ward-3(1), Kolkata,
Aayakar Bhawan, 4th Floor,
P-7, Chowringhee Square, Kolkata-700069*

(3) Commissioner of Income Tax (Appeals),
National Faceless Appeal Centre (NFAC), Delhi;

4) *Commissioner of Income Tax-;*

(5) *The Departmental Representative*

(6) *Guard File*

TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.