

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, Accountant Member and  
Manomohan Das, Judicial Member

**ITA No. 1008/Coch/2022**  
(Assessment Year: 2012-13)

K.P. Muhammed Ali K.P. House: 19/1866 Chalappuram Calicut 673002 [PAN:AGNPM9397F] (Appellant)	Vs.	Income Tax Officer (International Taxation) Kozhikode (Respondent)
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Appellant by:	Shri Raghunathan Palakkal, Advocate
Respondent by:	Shri Sanjit Kumar Das, CIT-DR

Date of Hearing:	16.10.2023
Date of Pronouncement:	12.01.2024

**ORDER**

Per: Sanjay Arora, AM

This is an Appeal by the Assessee arising out of order dated 25.11.2022 by the Commissioner of Income Tax (Appeals)-12, Bangalore [CIT(A)], dismissing the assessee's appeal contesting his assessment under section 143(3) of Income Tax Act, 1961 (hereinafter "the Act") dated 03.03.2015 for Assessment Year (AY) 2012-13.

2. The appeal, raising several grounds, agitates, as was also the common ground before us, the assessment of Long Term Capital Gain (LTCG) on the execution of a joint development agreement (JDA) (PB pgs. 88 - 116) and general power of attorney (GPA/PB pgs. 117-132) by the assessee with one, M/s. Plasma Developers Ltd., Bangalore, on 27.06.2011, in respect of 61.47 cents of his land at Kalathikunnu Desom, Kasaba Village, for construction of a residential complex thereat. The assessee, without prejudice, also disputes the quantum of the capital gain. Vide the

said agreement and GPA of even date, the assessee 'transfers' his rights in 62% of the land in lieu of 38% of the developed area to be constructed, over a period of time, covering the entire land, envisaged to yield 75,818 sq.ft. of built up area – Annexure C to the JDA. The issue is if it indeed amounts to a transfer u/s. 2(47) of the Act.

3. The issue stands discussed and considered extensively by both the Revenue authorities. We proceed by enlisting the respective cases, i.e., excluding the quantification aspect, as under:

*Assessee's case:*

a). Possession given as per the Joint Development Agreement was not absolute possession and constituted only a "License" to enter upon the property for the purpose of development in terms of the JDA.

b. It was the specific stipulation - as agreed to by both parties - that nothing in the agreement shall be construed as delivery of possession in part performance of any agreement of sale under section 53A of the TP Act.

c. That the property continues to be in the possession and enjoyment of the assessee which is clear from the fact that the assessee is responsible for payment of all taxes till date of conveyance of the property into the names of third parties.

d. At the time of agreement, no consideration is paid and all rights of the developer will vest only after the construction is over *and the area earmarked for the appellant is handed over* and therefore no capital gain arises during the year in which the JDA is executed.

e. It is also submitted that on the part of the appellant, as and when he had executed assignment deeds in favour of the various parties who have purchased the appellant's share of apartments, he had conceded capital gains in his returns of income which are verifiable. (emphasis, supplied)

*Revenue's case:* The same is with reference to the different clauses of the JDA and GPA, reproduced in their orders by the Revenue authorities, further relying on the decisions in *Prameela Krishna v. ITO* [2014] 42 taxmann.com 185 (Kar); *CIT v. Dr. T.K. Dayalu* [2011] TIOL-559-HC-KAR-IT; and *Chaturbhuj Dwarkadas Kapadia v. CIT* [2003] 260 ITR 491 (Bom).

4. Before us, the assessee would emphasize that the construction was finally completed only in 2017, and occupancy certificate obtained on 20/6/2017, only upon which could the building be regarded as habitable. Two, both the JDA and GPA are unregistered and, therefore, no cognizance thereto in law, in view of the amendment to sections 17 & 49 of the Registration Act 1908, and section 53A of the Transfer of Property Act, 1882 by the Registration & Other Related Laws (Amendment) Act, 2001, can be given, even as explained in *Balbir S. Maini v. CIT* [2017] 398 ITR 531 (SC). The Revenue would upon this, claim transfer u/s. 2(47)(vi) of the Act, placing reliance on the recent decision of the Coordinate Bench in *P. George Jacob v. ITO* (in ITA No. 558/Coch/2022, dated 02/3/2023).

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

5.1 Section 2(47), which reads as under, defines 'transfer' under the Act inclusively, so that it is not exhaustive, and would include within its ambit transactions that may be alien to the concept of transfer under the general law, viz. Transfer of Property Act, 1882 (TPA):

**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.

*(emphasis, ours)*

Even as pointed out by the Assessing Officer (AO), the law stands amended w.e.f. 01.04.1989 to include clauses (v) and (vi) with a view to avoid rampant abuse of the tax law by conferring privilege of ownership without conforming to the requirement of law, viz., execution of conveyance deed, duly registered, with a view to eschew it being regarded as transfer and, thus, liable to capital gains tax. The transferee's right is protected by executing irrevocable power of attorney, as indeed Will, by the transferor, precluding thus persons claiming through him. This has been a subject matter of deliberation by the Hon'ble High Courts, as in *Chaturbhuj Dwarkadas Kapadia* (supra); *Prameela Krishna* (supra), to cite two. We may, for the sake of completeness of our order, reproduce from the former; the amendment having its genesis in the decision in *Alapati Venkataramiah v. CIT* [1965] 57 ITR 185 (SC) – holding a transfer under the Act as implying an effective conveyance of the capital asset, coupled of course with the practices afore-noted, whereby there was a transfer for all practical purposes though tax was avoided on the sole ground of the transaction being not completed by way of a sale deed:(pgs. 491-92)

‘Clauses (v) and (vi) were introduced in section 2(47) of the Income-tax Act, 1961, with effect from April 1, 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, 1882, 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 the immovable property is not effective or complete under the general law. 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). 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. Even arrangements confirming privileges of ownership without transfer of title could fall under section 2(47)(v). Section 2(47)(v) was introduced in the Act from the assessment year 1988-89 because prior thereto, in most cases, it was argued on behalf of the assessee that no transfer took place till execution of the conveyance. *Assesseees used to enter into agreements for developing properties with builders and under the 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.'*

We may next reproduce some of the clauses of the JDA and GPA – which derives it's authority from Cl. 13 of the JDA, as under:

### *Joint Development Agreement*

#### Area Entitlements

11.1 The Owner is entitled to the constructed area, common area and car parking area, which are more fully set out in the Annexure 'A' hereto and (hereinafter referred to as the Owners Constructed Area) in lieu of the Owner having agreed to convey 62% of the undivided share in the Schedule Property or such undivided share in the Schedule Property corresponding to the constructed area falling to the share of the Developers and the Owner will be entitled to enjoy, retain, lease or mortgage, gift or dispose of their Constructed Area in the Multi-storied commercial/residential building/s constructed on the Schedule Property,

11.2 On the Developer delivering the Owners' Constructed Area, *the Developer or its nominees* will be entitled to the remaining of the Saleable area, terrace area, garden area, common area, surface car parking area, basement car parking area constructed by the Developer along with corresponding undivided share in the Schedule Property. The Developer will be entitled to enjoy, retain, lease or mortgage gift or dispose of their respective shares in the Commercial / Residential complex constructed on the Schedule Property.

11.3 *The respective parties shall alone be entitled to the proceeds of their respective shares and will be responsible for the payment of all statutory dues for such receipts;*

11.4 Statement of Area sharing is attached as Annexure C.

#### *Irrevocable General Power of Attorney*

11. *To deliver possession of the 62% of the undivided right title and interest and share in the schedule property along partly constructed / fully constructed Apartments, commercial space and the car park space thereon, and to receive the consideration for sale/transfer/conveyance, as also advances, earnest money/deposits, part payments and balance payments in regard to the sale/ conveyance/transfer and to issue receipts and acknowledgements thereof.*

12. *To execute and register sale deeds, conveyance deeds, lease deeds, transfer deeds, etc. with a Company / Association or other persons in respect of the Developer's share of 62% of partly constructed / fully constructed apartments/commercial space and the car park*

space thereon along with proportionate share of undivided right, title and interest in the schedule property upon completion and delivery of the Owner's Constructed Area, i.e., 38% of the Super Built up Area.

5.2 In the facts of the instant case, 38% of the built-up area is the consideration – which can equally be in kind, for the transfer of 62% of the land. Nothing therefore turns on no part thereof, as argued by the assessee, being in cash. Permission to enter the land for construction is thus an imperative of the transaction inasmuch as that only would enable the developer to perform his part of the contract. It was, thus, both his right and obligation to enter the land and construct the proposed residential complex. Further, as long as it is willing to perform its part of contract, satisfying the ingredients of section 53A of the TP Act, nothing turns on the delay attending its performance, which may be for reasons beyond its control. Emphasizing on the construction being not completed within 36 months would thus not be of much consequence. The assessee, in any case, has the right to specific performance as indeed has the Developer. If anything, it only shows time to be not of essence. Reference toward this may also be made to Cl. 10 of the JDA, wherein, vide Cls. 10.2 & 10.3, extension of the time period is envisaged, should the occasion so arise. No compensation for the delay, as contemplated u/c. 10.4, is reported to have been, despite delay, claimed, much less charged. There is, further, no estoppel against law and, therefore, to state in the agreement that the transaction shall not be construed as delivery of possession would be by itself to no avail. That apart, JDA is to be read along with GPA, clauses 11 & 12 of which, reproduced hereinbefore, make it abundantly clear that the developer's rights over the said property extends only to 62% thereof, and which is not conditional or, at best, conditioned only by the performance of his part of the contract, which is understandable inasmuch one cannot be prejudiced by his own wrong. Two, it is only construction of the residential complex, as envisaged, that the consideration could be delivered to the assessee, completing the transaction, as indeed to the buyers of residential flats over 62% of the

land, clearly specified, or realize his investment by selling them to the extent not already sold during the construction period.

5.3 So, however, and without doubt, the 2001 amendments to the Registration and the TP Acts alter the entire complexion of the matter inasmuch as no contract transferring rights in an immovable property (IP), where unregistered, as is admittedly the case, can be recognized in law, i.e., u/s. 53A itself, so that protection thereunder to the transferee is in law not available. Section 2(47)(v), which seeks to extend the benefit, i.e., the said protection, of section 53A of the TP Act, so as to construe the same as a 'transfer' under the Act, would, thus, w.e.f. 24/9/2001, be valid only *qua* registered agreements. This aspect, specifically raised by the assessee before the Id. CIT(A) (per Gd. 3), stands omitted to be taken into account by the said authority in his adjudication, finding statement neither in the 'statement of the case' at para 4.2, nor accordingly answered while rendering his decision vide para 4.3, of his order, which accordingly is based on section 2(47)(v) of the Act r/ws. 53A of the TP Act. That is to say, the 2001 amendments have not been taken into account in the impugned order, nor indeed in the judgements, *inter alia*, in *Chaturbhuj Dwarakadas Kapadia* (supra), relied upon by the Revenue.

5.4 At the same time, however, even as explained in *P. George Jacob* (supra) section 2(47)(vi) would equally stand to be attracted. The constraining factor of registration of a contract would not prevail, as it does in case of s. 2(47)(v) of the Act. This was put to Shri Palakkal, the learned counsel for the assessee, allowing him time to meet the Revenue's case with reference to section 2(47)(vi) and, further, reliance on the order by the Coordinate Bench in *P. George Jacob* (supra). No submission in this regard was made by him; the assessee resting his case with reliance on the decision in *Balbir S. Mani* (supra). The same is, firstly, principally with reference to section 2(47)(v) of the Act and, besides, on facts, a case of project failure, leading to the Hon'ble Apex Court finding that there was in fact no accrual of

income, placing reliance for the purpose on the decisions in *E.D. Sasoon and Co. Ltd. v. CIT* [1954] 26 ITR 27, 51(SC); *Morvi Industries Ltd. v. CIT* [1971] 82 ITR 835 (SC); and *CIT v. Excel Industries Ltd.* [2013] 358 ITR 295 (SC), also reproducing there-from. That is to say, the same turned on the basis of an absence of any real income. As regards s. 2(47)(vi), also pleaded, though found inapplicable in that case, the same, as a reading of the judgement would show, was in view of the peculiar facts of the case, wherein the agreement was subject to obtaining necessary permissions and clearances, since denied. It is this that led the Hon'ble Court to state of the possession as having been allowed for the limited purpose of construction. In fact, for the first two tranches, where agreement succeeded, the capital gain was not disputed.

The instant, on the contrary, is not a case of project failure, but of a delay in its completion, with we having found time to be not of essence of the agreement. Rather, the assessee – even though there is no material on record to substantiate the same, admits capital gain on execution of assignment deeds in favour of the buyers of the apartments constructed on 62% of the subject land, i.e., that falling to the share of the developer. This is apparently so done to save on stamp duty, which would otherwise stand to be levied twice, i.e., firstly, on registration of the agreement on the basis of which rights to the parties arise, being the JDA and GPA, and then, again, on transfer of title to the buyers of the flats, since constructed. *Qua* delay, how, one may ask, the assessee know at the time of filing his return for the year that there would be a delay?

5.5 The law in the matter is patently clear, so that any agreement or arrangement or a transaction in any other manner, which has effect of transferring or enabling the enjoyment of an immovable property, would stand fall within the ambit of transfer u/s. 2(47) of the Act. Further, it is well-settled that income is to be taxed in the hands of the right person and for the right year, and it is being offered to tax in the hands of another person or year would be of no moment in law, for which, apart from sections

3-5 of the Act, we may refer to some decisions, viz. *CIT v. British Paints (I) Ltd.* [1991] 188 ITR 44 (SC); *CIT v. Chunilal V. Mehta & Sons P. Ltd.* [1971] 82 ITR 54 (SC).

5.6 Under the circumstances, in our clear view, the transaction between the assessee and Plasma Developers Ltd. vide the documents afore-referred, constitutes a transfer u/s. 2(47)(vi) of the Act, liable to capital gain for the current year.

5.7 This leaves us with the issue of quantification of the capital gain liable to be taxed for the current year. No dispute in this regard stands raised before us and, accordingly, not responded to by the other side. So, however, the assessee having raised a specific ground in this respect, which was not specifically stated as not pressed, we consider it incumbent on us to opine there-upon to the extent the same admits of no two views, i.e., is in complete consistence and harmony with the facts of the case and the law in the matter. We do this taking guidance from the decision in *CIT v. Walchand & Co. P. Ltd.* [1967] 65 ITR 381 (SC), wherein it stands held that the Tribunal is to deal with and determine the questions which arise out of subject matter of the appeal in light of the evidence, and consistently with the justice of the case. The subject land is stated to have been acquired prior to 01.04.2001. Where so, without doubt, the fair market value as on that date shall be deemed as the cost of acquisition, and toward which the sale deed of lands in proximity of the subject land, preferably matching in size, on or close to that date, is to be adopted. The said cost would further stand to be indexed in terms of section 48. Similarly, for the sale consideration – which has been adopted at the agreed rate between the parties, which would though need to be compared with the stamp value as on the transfer date, i.e., 27.06.2001, in view of section 50C r/ws. 48 of the Act, and the higher of the two taken as the sale consideration. The onus to prove his claims, as preferred, would though be on the assessee. The AO shall decide in accordance with law per a speaking order upon allowing the assessee a reasonable opportunity to present his case.

5.8 We decide accordingly.

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

*Order pronounced in the open court on January 12, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963*

Sd/-  
(Manomohan Das)  
Judicial Member

Sd/-  
(Sanjay Arora)  
Accountant Member

Cochin, Dated: January 12, 2024

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar  
ITAT, Cochin