आयकर अपीलीय अधिकरण न्यायपीठ नागपूर में ।
IN THE INCOME TAX APPELLATE TRIBUNAL, NAGPUR

(Through Virtual Court)

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.412/NAG/2019
निर्धारण वर्ष / Assessment Year : 2012-13

Assistant Commissioner of Income Tax,
Central Circle – 1(3), Nagpur

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Ajay Vasantrai Trivedi,
Udyog Bhavan, Nikalas Mandir Road,
Itwari, Nagpur – 440012

PAN : ABJPT2454K

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.413/NAG/2019
निर्धारण वर्ष / Assessment Year : 2012-13

Assistant Commissioner of Income Tax,
Central Circle – 1(3), Nagpur

.....अपीलार्थी / Appellant

बनाम / V/s.

Shri Ashok Vasantrai Trivedi,
Udyog Bhavan, Nikalas Mandir Road,
Itwari, Nagpur – 440012

PAN : AAEPT9305K

.....प्रत्यर्थी / Respondent

Assessee by : Shri K.P. Dewani
Revenue by : Shri Kailash G. Kanojiya

सुनवाई की तारीख / Date of Hearing : 01-02-2024
घोषणा की तारीख / Date of Pronouncement : 21-02-2024

आदेश / ORDER

PER S.S. VISWANETHRA RAVI, JM :

These two appeals filed by the Revenue against the common order dated 31-10-2019 passed by the Commissioner of Income Tax (Appeals)-3, Nagpur ['CIT(A)'] for assessment year 2012-13.

2. Since, the issues raised in both the appeals are similar basing on the same identical facts. Therefore, with the consent of both the parties, we proceed to hear both the appeals together and to pass a consolidated order for the sake of convenience.

3. First, we shall take up appeal in ITA No.412/NAG/2019 for A.Y. 2012-13.

4. The Revenue raised eight grounds of appeal amongst which the only issue emanates for our consideration is as to whether the CIT(A) justified in deleting the addition made by the AO on account of Long Term Capital Gain in respect of development agreement by holding no transfer of capital asset u/s. 2(47)(v) of the Act.

5. The brief facts relating to the issue on hand are that the assessee is an individual, engaged in the business of distribution of stationary. The assessee filed return of income on 31-03-2013 declaring a total income of Rs.1,63,290/-. A search action was conducted in the case of M/s. Concrete Developers u/s. 132 of the Act on 01-12-2015. During the said search a joint development agreement entered between assessee and

others and M/s. Concrete Developers was seized for property at Mouza Somalwada CTS No. 504, Nagpur was seized. In pursuance of the same a notice u/s. 153A r.w.s. 153C of the Act was issued requesting the assessee to file return of income within 30 days from the date of receipt of such notice. The assessee filed a letter on 18-11-2017 enclosing return of income which was filed on 31-03-2013 stating it to be treat the same as in response to the notice u/s. 153A r.w.s. 153C of the Act. The AO opined regarding the agreement of joint development agreement that the assessee has given possession of the land to the developer and all the conditions of sub-clause (v) of section 2(47) of the Act are satisfied, by inferring so, such possession constitutes transfer u/s. 2(47) of the Act, determined Long Term Capital Gain in the hands of the assessee by determining total income of the assessee at Rs.3,19,26,123/- vide its order dated 14-12-2017 passed u/s. 143(3) r.w.s. 153C of the Act. Aggrieved by the order of AO, the assessee preferred an appeal before the CIT(A).

6. A contention was raised that no transfer of land affected during the year under consideration as per the Joint Development Agreement and no consideration was also received in the year under consideration. Considering the same, the CIT(A) placing reliance on the order of Mumbai Tribunal in the case of Mrs. Aarti Sanjay Kadam reported in 172 ITD 362 (Mum.), which in turn, considering the decision of Hon'ble High Court of Bombay in the case of Chaturbhuj Dwarkadas reported in 260 ITR 491 (Bom.), held that the assessee therein is liable to tax for capital gain in the year of receipt of constructed area and not in the year of entering into development agreement. Further, placing reliance on the order of Hyderabad Bench in the case of Fibars Infratech Pvt. Ltd. reported in 98

DTR 281, the CIT(A) directed the AO to delete the addition made on account of Long Term Capital Gain by holding that the same cannot be assessed to tax in the year under consideration vide para 5.3.9 of the impugned order. Having aggrieved by the order of CIT(A), the Revenue is before us.

7. The ld. DR, Shri Kailash G. Kanojiya submits that the CIT(A) erred in deleting the addition made by the AO without considering the Joint Development Agreement entered between the assessee and M/s. Concrete Developers. The CIT(A) erred in holding that there is no transfer in A.Y. 2012-13 and not liable to pay capital gain tax. The ld. DR placed on record the modified agreement of Joint Development, Construction and Sale dated 05-08-2011 and referred to paras 3, 6, 7 and 9. He vehemently argued that the CIT(A) failed to appreciate that the provisions u/s. 2(47) r.w.s. 45 which indicates that the capital gain is taxable in the year in which such transactions are entered. He submits that the CIT(A) has failed to appreciate that in terms of section 45(1) of the Act, the transfer of capital asset would attract the capital gain tax, is not depend upon the receipt of consideration. Further, he argued that the CIT(A) erred in holding the assessee is correctly declared the capital gains on sale of immovable property in the A.Y. 2018-19 and supported the order of AO. He prayed to allow the grounds raised by the Revenue and quash the impugned order.

8. The ld. AR, Shri K.P. Dewani submits that the assessee's consideration is 42.5% of share in the property, was received in June, 2017 and declared Long Term Capital Gain in the return of income for A.Y. 2018-19. He submits that the appellant-revenue assessed the capital gain

in the hands of the assessee for A.Y. 2018-19 and the assessee has been subjected to tax. He vehemently argued that the appellant-revenue cannot agitate the capital gain should be assessed in the year under consideration as the Joint Development Agreement entered therein, if so, it will amount to double taxation of income already subjected to tax in A.Y. 2018-19. The ld. AR drew our attention to written submissions and reiterated the same. He supported the order of CIT(A) and prayed to dismiss the grounds raised by the appellant-revenue.

9. Heard both the parties and perused the material available on record. The short point arises is as to whether any transfer of property effected, if so, in which year the Long Term Capital Gain is to be assessed, whether it is in the A.Y. 2012-13 being the year in which the modified Joint Development Agreement executed or in the year where the assessee received his share in the form of constructed area which was offered to tax in A.Y. 2018-19. On perusal of the modified Joint Development Agreement as placed on record by the ld. DR, clause 3 reads that in consideration of the owner transferring development right and authority to the developer to deal with the said property, the developer shall construct a portion of the building for the owner's which shall be in proportion of 42.5% out of the total built-up area of the proposed building, from and out of his own expenses and in accordance with the same amenities and attached specifications as would be made available to the remaining portion of the building. We note it is clear from the above narration where the donor has given a property for development to the developer and the developer shall construct building for owners with his own expenses which clearly establishes that no consideration was paid on to the assessee in the year

under consideration and the assessee will get his share only the constructed area. The CIT(A) observed that in the impugned order that the developer has given possession of constructed area to the assessee in June, 2017 vide para 5.3.3 of the impugned order. Further, clause 6 of the modified Joint Development Agreement which explains that the owners has confirmed the license and permission given to the developer by the previous owner to enter upon the said property in accordance with the permission herein mentioned. Further, clause 7, wherein, it describes that the owners has given registered general power of attorney to the developer in respect of the said property giving all the general power in respect of obtaining sanction of the layout and building plan and to appear before the various authorities for mutation and sanction on behalf of the owners which clearly shows that no possession whatsoever given by the assessee to the developer and it was only general power of attorney to obtain requisite permissions and sanctions on behalf of the assessee to carry out the development. We note vide para 9 of the modified Joint Development Agreement that the assessee shall have first choice of reserving their 42.5% built-up area which also supports the arguments of ld. AR.

10. The ld. AR placed on record the decision dated 10-02-2023 of Hon'ble High Court of Bombay in the case of Late Bharat Jayantilal Patel in Writ Petition No. 1612 of 2022 and by referring to para 7 of the said decision, the ld. AR submits that the facts in the present case are identical to the facts of the case before Hon'ble High Court of Bombay, argued that the license for the purpose of developing the land into flats and selling the same, such license cannot be said to be possession within the meaning of section 53A of the Transfer of Property Act, 1882. He submits that, in

order to come to such conclusion by the Hon'ble High Court of Bombay, placed reliance on the decision of Hon'ble Supreme Court in the case of Seshasayee Steels (P.) Ltd. reported in (2020) 115 taxmann.com 5 (SC). For better understanding the relevant portion of the decision of Hon'ble High Court of Bombay is reproduced as under :

> *"7. The Apex Court in Seshasayee Steels (P.) Ltd. (supra), held that Section 53A of the Transfer of Property Act, 1882 would not be attracted in a case where a license was given to another for purposes of development of the flats and selling the same and that granting such a license could not be said to be granting possession within the meaning of Section 53A. It was held:*
>
> > *"11. In order that the provisions of Section 53A of the T.P. Act be attracted, 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 must have performed or be willing to perform his part of the agreement. It is only if these two important conditions, among others, are satisfied that the provisions of Section 53A can be said to be attracted on the facts of a given case.*
> >
> > *12. On a reading of the agreement to sell dated 15-5-1998, what is clear is that both the parties are entitled to specific performance. (See clause 14)*
> >
> > *13. Clause 16 is crucial, and the expression used in clause 16 is that the party of the first part hereby gives 'permission' to the party of the second pat to start construction on the land.*
> >
> > *14. Clause 16 would, therefore, lead to the position that a license was given to another upon the land for the purpose of developing the land into flats and selling the same. Such license cannot be said to be 'possession' within the meaning of Section 53A, which is a legal concept, and which denotes control over the land and not actual physical occupation of the land. This being the case, Section 53A of the T.P. Act cannot possibly be attracted to the facts of this case for this reason alone.*
>
> *8. Learned Counsel for the Petitioner, vehemently, urged that even in the present case there was a development agreement executed between the owners including the Petitioner and the developer, namely, Sai Ashray Developers Pvt Ltd., which had permitted the said developer to develop the property belonging to the owners only as a 'licensee'. Reliance in this regard was placed upon the clause 10(i) of the development agreement, which reads as under:*
>
> > *"10. DEVELOPERS' RIGHTS, ENTITLEMENTS, DECLARATIONS AND OBLIGATIONS*
> >
> > *On and from execution hereof and subject to the fulfillment of all the terms and conditions to be performed and complied with by them under this Agreement, the Developers shall have rights and be entitled to do the following, at its own costs and expenses:*

(i) To enter into the said properties as an exclusive licensee for the purpose of development of the said Properties thereon with their own sources and cost as per the permission/NOC that may be given by the Local Authorities and the Applicable law;

9. Applying the principle as crystallized by the Apex Court reproduced herein above, to the facts of the present case, it can be seen that the development agreement permitted construction on the land in question only as a licensee which did not have the effect of transmitting possession in favour of the licensee within the meaning and spirit of Section 53A of T.P. Act. If that is so, then there would be neither any tangible material nor any reason for the assessing officer to believe that 'any income chargeable to tax had escaped assessment' and the action of the assessing officer, therefore, would be without jurisdiction."

11. On careful reading of the above, we note that the Court held that section 53A of the Transfer of Property Act, 1882 would not be attracted in a case where a license was given to another for the purpose of development of flats and selling the same and granting such license could not be said to be granting possession within the meaning of section 53A of the Transfer of Property Act, 1882. In the present case also, as discussed above, clause 6 of the modified agreement of Joint Development, Construction and Sale clearly shows that the owners which includes the assessee confirmed the license and permission given to the developer by the previous owner to enter into upon the said property. The said license to the developer is personal and under no circumstances the developer shall transfer the same to any third party. Therefore, the argument of ld. DR is not acceptable that the license and permission is a right itself gives rise transfer of property u/s. 2(47)(v) of the Act. Further, clause 3 of the said agreement establishes that the developer shall construct a portion of building for the owners in proportion of 42.5% out of total built up area of the proposed building which supports the case of the assessee no capital gain arose in the year under consideration, but it could be in the year in which possession of share of assessee in the proposed building is given.

Further, clause 7 reads that the owners including the assessee given a registered power of attorney to the developer, in order to obtain the sanction of layout, building plan and to appear before various authorities for mutation on behalf of the owners and to do all general acts, deeds and things in the name of owners to commence and complete the development of the said property as per the terms and conditions mentioned in the said agreement. Therefore, as per the said agreement, the owners has permitted the said developer to develop the property belonging to the owners only as a licensee which did not have the effect of transfer of property to the licensee. Further, the developer has given possession of the assessee's share in June, 2017 which is evident from para 5.3.3 of the impugned order which is also not disputed by the ld. DR. The CIT(A) clearly recorded that the assessee offered the capital gain in the year in which share in the constructed area is given to the assessee, which is subjected to tax in A.Y. 2018-19 which is also not disputed by the ld. DR. If we accept the contention of the ld. DR that the capital gain was rightly determined by the AO in A.Y. 2012-13, certainly, it amounts to double taxation, having offered the same in A.Y. 2018-19, as rightly pointed by the ld. AR. Therefore, the facts and circumstances of the case before the Hon'ble High Court of Bombay is similar and the ratio laid down by the Hon'ble Court is applicable to the facts on hand. Thus, we find no infirmity in the order of CIT(A) in holding that there is no transfer u/s. 2(47)(v) of the Act and no capital gain is chargeable thereon in the year under consideration. Thus, the grounds raised by the Revenue fails and are dismissed.

12. In the result, the appeal of Revenue is dismissed.

ITA No. 413/NAG/2019.

13. We find that the facts in ITA No. 413/NAG/2019 are identical to ITA No. 412/NAG/2019 except the variance in amount. Since, the facts in ITA No. 413/NAG/2019 are similar to ITA No. 412/NAG/2019, the findings given by us while deciding the appeal of Revenue in ITA No. 412/NAG/2019 would *mutatis mutandis* apply to ITA No. 413/NAG/2019, as well. Accordingly, the appeal of Revenue is dismissed.

14. To sum up, both the appeals of Revenue are dismissed.

Order pronounced in the open court on 21st February, 2024

Sd/-	Sd/-
(Inturi Rama Rao)	(S.S. Viswanethra Ravi)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 21st February, 2024.
रवि

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-3, Nagpur
4. The CIT(Central), Nagpur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, नागपूर, / DR, ITAT, Nagpur.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति// True Copy//

आदेशानुसार / BY ORDER,

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune