

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI SAKTIJIT DEY, HON'BLE VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No. 6093/Del/2015
(Assessment Year: 2008-09)**

R.C. Nirula & Sons HUF, A-2, Anand Niketan, New Delhi (Appellant) PAN: AAAHR6050F	Vs. Asst. Commissioner of Income Tax, Circle-52(1), New Delhi (Respondent)
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Assessee by :	Shri Gaurav Jain, Adv Shri Praveen Kumar, CA
Revenue by:	Shri Manish Kumar Davas, Sr. DR
Date of Hearing	10/06/2024
Date of pronouncement	12/06/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA No.6093/Del/2015 for AY 2008-09, arises out of the order of the Commissioner of Income Tax (Appeals)-18, New Delhi [hereinafter referred to as 'Ld. CIT(A)', in short] in Appeal No. 267/14-15 dated 11.09.2015 against the order of assessment passed u/s 143(3)/147 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 03.03.2014 by the Assessing Officer, ACIT, Circle-32(1), New Delhi (hereinafter referred to as 'Ld. AO').

2. The assessee has raised the following grounds of appeal before us:-

"1. That on facts and in law, Ld. Commissioner of Income tax (Appeals) [Ld.CIT(A)] has erred in confirming the assessment of capital gain on transfer of booking rights in immovable property in AY 2008-09 as Short Term Capital Gain (STCG) (Rs. 52,80,000/-)

as against the same being correctly assessable in AY 2009-10 as Long Term Capital Gain (LTCG) (Rs.36,29,880/-) as returned by the assessee . In AY 2009-10, the LTCG has been assessed on protective basis and this issue is in appeal before the Hon'ble ITAT for AY 2009-10.

2. That the Ld. CIT(A) has erred in considering the date of agreement to sell 08.03.2008 as the date of transfer on mere receipt of 10% advance, whereas the transfer took place in the next year only pursuant to completion of full and final payment, on handing over of original documents and on transfer of booking by builder in the name of the buyer i.e. in AY 2009-10. There is no transfer of the capital asset involved in AY 2008-09.

3. The core issue to be decided in this appeal is with regard to the year of transfer of capital asset pursuant to the agreement to sale and consequentially decide whether it is short-term or long-term capital gain.

4. We have heard the rival submissions and perused the material available on record. The return for assessment year 2008-09 was filed by the assessee declaring total income of ₹1,14,04,810/-. The income disclosed by the assessee comprised of income from house property, capital gain and other sources. The assessment was completed u/s 143(3) of the Act determining total income of the assessee at ₹1,30,20,280/-. The assessee had booked one Villa bearing No. B-221 in Florence Marvel, Sushant Lok-III, Gurgaon with the builder M/s Ansal Buildwell Limited vide allotment letter dated 09.04.2005. Thereafter, before the property was completed and the possession handed to the assessee, the assessee entered into an agreement to sell dated 08.03.2008 for subsequent transfer of the booking rights subject to terms and conditions in the agreement with one Shri Ardaman Singh for total consideration of Rs. 1,57,50,000/-. As per the said agreement to sell, the assessee only received 10% advance deposit of Rs. 15,75,000/- on account of earnest money. It was only an agreement to

sell wherein all the rights of the buyer were subject to transfer in favour of the buyer on compliance of conditions precedent in the said agreement, viz:

- As per Clause 2 of the agreement, the final payment of the consideration to be completed between the parties on or before 30.04.2008;
- As per Clause 2, transfer of allotment rights in the records of the builder in the name of the buyer, on refusal of the transfer by the builder, the assessee had to refund the complete advance of Rs. 15,75,000/- to the buyer;
- As per Clause 3, even on receipt of confirmation/NOC from the builder, the seller/assessee had no obligation to transfer the booking rights. The assessee had right of refusal subject to refund of double the amount of advance received;
- As per Clause 8, water, electricity, security deposit and such charges after transfer was to be borne by the buyer and such charges were to be borne by buyer after transfer and not from date of agreement to sell.

These clauses clearly indicate that transfer was to happen on future date on fulfillment of conditions under the said agreement. There was no transfer of booking rights on the date of agreement to sell.

5. Also, clause 16 of the allotment letter dated 09.04.2005 with Ansal Buildwell Limited lays down the restrictive condition for transfer that the buyer i.e. assessee is not entitled to transfer/encumber his rights under the said agreement till the sale of the house in his favour is completed except with prior written consent of the Builder. For the sake of convenience, the said clause 16 of allotment letter dated 9.4.2005 is reproduced below:-

"16. The buyer is not entitled to transfer/encumber his rights under this allotment till the sale of the house in his favour is completed except with prior written consent of the builder on payment of outstandings and such administrative charges as may be specified by the builder in this behalf. The subsequent transferees shall be bound by the terms of this allotment in all respects"

6. As seen from the terms of the said agreement to sell, it was only an agreement to sell wherein transfer of booking rights were to be completed subsequently on fulfillment of certain conditions, more particularly - (i) the receipt of entire consideration, and (ii) receipt of NOC from builder. As on the date of Agreement to Sell, the assessee (seller herein) had only received 10% advance deposit as earnest money subject to conditions and compliances to be done. Time limit for final payment and transfer was agreed upto 30.04.2008 which fell in the next year i.e. AY 2009-10. Assessee had no power to transfer without prior written consent of builder. So, transfer was subject to consent of builder which happened in subsequent year. If builder does not give consent then assessee has to refund money. If builder gives consent and assessee does not sell, even then assessee could close the transaction by refunding double the amount received. All these conditions show that the agreement to sell was a conditional & cancellable one. The agreement to sell did not constitute transfer and was subject to compliance by the buyer, assessee and Ansal Buildwell Limited. The transfer was only to take place after compliance by buyer of buyer's obligations and receipt of NOC from the Builder and at the choice of assessee who had choice of refund of advance as above.

7. It is pertinent to note that as per the terms of agreement to sell, the final payment of the agreed sale consideration was received on 25.4.2008 as per copy of receipt dated 25.04.2008 issued by the assessee. Pursuant to assessee's letter dated 25.04.2008 to the Builder after receiving full consideration to transfer his booking rights in the

said property in the name of the buyer in their records, in terms of clause-16 of the allotment letter dated 9.4.2005, the Builder transferred the booking rights in the name of the buyer on 2.5.2008 as per their transfer letter dated 2.5.2008. As the transfer took place in May 2008 on transfer of allotment in the name of the buyer i.e Shri Ardaman Singh by the builder, the assessee in AY 2009- 10 declared Long Term Capital Gains (LTCG) at Rs. 36,29,880/- which is evident from the computation noted in the Page 5 of the assessment order for AY 2009-10.

8. During the course of assessment proceedings for AY 2009-10, based on the agreement to sell dated 8.3.2008, Ld. AO held that the transfer of rights in the said property took place in AY 2008-09 and as such capital gain thereon is taxable in AY 2009-10 as LTCG on protective basis and as Short Term Capital Gains (STCG) in AY 2008-09 on substantive basis.

9. Based on the said findings in AY 2009-10 assessment, Ld. AO computed LTCG in AY 2009-10 at Rs.56,55,405/- on protective basis and issued notice u/s 148 of the Act in AY 2008-09. In the reassessment order in AY 2008-09, Ld. AO assessed the STCG at Rs.52,80,000/-. The Ld. AO held that, since subject matter of transfer is booking rights and not immovable property, therefore provisions of section 2(47)(v) were not applicable requiring condition of handing over possession, but section 2(47)(ii) shall be applicable which require condition of relinquishment of asset. As per the Ld. AO there was relinquishment of rights and, therefore transfer took place in AY 2008-09.

10. On appeal by assessee against order u/s 147/143(3) in AY 2008-09, Ld. CIT(A) confirmed the assessment of the capital gain in AY 2008-09 as STCG applying section 2(47)(vi) on the following grounds:-

- a. When there is intention to convey rights in the agreement to sell, it is safe to say that the rights to obtain title/ booking rights emanated from the agreement. When such rights can be located in the buyer's agreement the date of acquisition of capital asset must be considered the date of signing of the said agreement;
- B. By virtue of this agreement to sell, there is transfer of actionable rights;
- C. Although transfer of immovable property may be conditional, nevertheless there is parting of an interest in the property i.e. Booking Rights as admitted by the assessee. The Ld. AR before us submitted that no such admission was made by the assessee;
- D. The agreement has the effect of parting of that right at the time of agreement which has been actuated by subsequent conduct.
- E. The Ld. CIT(A) has applied clause (vi) of section 2(47) and Explanation 2 to section 2(47) of the Act to conclude transfer on the date of Agreement to Sell.

11. The Ld. CIT(A) chose to distinguish the decision of the Hon'ble Punjab and Haryana High Court relied by the assessee in the case of the Smt. Sahil Moti Lal versus CIT reported in 35 taxmann.com 46 (P & H) by stating that it is factually distinguishable on the ground that the same relates to transfer of immovable property, whereas the present case involves transfer of booking rights. It was submitted as per section 45 of the Act, any profit or gain arising from transfer of capital assets is chargeable to income tax under the head "Capital Gain" as the income of the previous year in which transfer took place. As per section 2(47) of the Act, "transfer" in relation to a capital asset includes the sale, exchange or relinquishment of the asset or the extinguishment of rights therein. It speaks about transfer which has the effect of transferring or

enabling the enjoyment of any immovable property. The capital asset here being 'booking rights of Villa', transfer of the same happens on the extinguishment or transfer of the rights therein in favour of the other person which on facts of assessee's case happened in AY 2009-10 as detailed herein. Mere receipt of small 10% advance in terms of agreement to sell subject to conditions precedent cannot possibly be treated on same footing as sale/ extinguishment/ transfer at time of agreement to sell under any of the clauses of section 2(47) of the Act. The extinguishment of the rights of the assessee in respect of the said capital asset and the transfer thereof took place in AY 2009-10 when:

- i) full and final payment towards sale consideration was received on 25.04.2008 and original documents were handed over to the buyer;
- ii) the assessee wrote to the Builder to substitute its name by name of Shri Ardaman Singh, the buyer, in the records of the Builder vide letter dated 25.4.2008;
- iii) the Builder confirmed vide their letter dated 2.5.2008 that the property stood transferred in their records on 2.5.2008.

12. The agreement to sell was not a transfer and was subject to compliance of conditions by the buyer and by the Builder. The transfer was only to take place after compliance by buyer of buyer's obligations and after permission to transfer by Ansal Buildwell Limited. As borne out from clause-2 and 3 of the agreement to sell read with clause-16 of the allotment letter -

- a. The Agreement to sell specifically mentions that balance payment and transfer is to be done up to 30.4.2008 i.e. in FY 2008-09 relevant to AY 2009-10;
- b. On refusal of the transfer by the builder or delay beyond 30.04.2008, the seller (assessee herein) had the right to cancel

the agreement to sell and to refund the advance of Rs. 15,75,000/- to the buyer; and

c. even if permission is granted by the Builder, the seller has the right to refuse transfer of the booking right on payment of double the advance received. This shows that the agreement was cancellable.

13. Thus, in totality of facts and circumstances of the assessee's case as stated above, there was no transfer. The assessee was vested with entire rights in the property until consideration was received and NOC was issued by the Builder. Thus there was no extinguishment/ relinquishment of rights of the assessee. If this Agreement to sell is transfer, then capital gains shall be leviable on all the agreement to sell even on receiving small advance/earnest money which is clearly not the case. It is commonly known that an agreement to sell is just an agreement stating certain conditions to be fulfilled by both the parties involved before any valid transfer happens on its basis. Thus, there was no transfer within the meaning of section 2(47) (ii) of the Act. However, the Ld. CIT(A) has confirmed the transfer in AY 2008-09 on the ground that the case of the assessee falls under clause (vi) read with Explanation 2 to section 2(47) of the Act on the ground that by virtue of this agreement to sell, actionable rights are transferred to the buyer. In none of the cases relied upon by the Ld. CIT(A) or the Ld. AO, it is held that mere agreement to sell amounts to transfer in absence of any transfer or extinguishment of rights in the property.

14. The Ld. AR argued that the Ld. CIT(A) erred in applying the provisions of section 2(47)(vi) of the Act. In support of this, he placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh Maini reported in 398 ITR 531 (SC). The Ld. AR also placed reliance on the decision of the Hon'ble Gujarat High Court in the case of Ushaben Jayantilal Sodhan Vs. ITO reported in 407 ITR 276

(Guj). Further, he relied on the decision of the coordinate bench decision of the Ahmedabad Tribunal in the case of ACIT Vs. Shree Ami office Owners Association reported in 199 ITD 670 (Ahdbd Trib.).

15. Per contra, the Ld. DR heavily relied on the elaborate observations made by the Ld. CIT(A) in his order.

16. The following facts are undisputed and indisputable:-

- a. Pursuant to the agreement to sell dated 08.03.2008, the assessee received only 10% advance deposit of Rs. ₹15,75,000/- on account of earnest money deposit;
- b. The agreement to sell would get fructified subject to fulfillment of various conditions as stipulated in the beginning of his order ;
- c. The assessee was holding only booking rights in the building, which was sought to be transferred/ assigned in favour of the Shri Ardaman Singh for total consideration of ₹1,57,50,000/-;
- d. The final payment of the consideration was to be paid to the assessee on or before 30.04.2008 as per clause 2 of agreement to sell. The final payment of agreed consideration for booking rights was received by the assessee only on 25.04.2008;
- e. The assessee had no power to transfer the booking rights without prior written consent of by the builder M/s Ansal Buildwell Limited. Hence, it is very clear that the transfer of booking rights is subject to consent of the builder;
- f. The consent was given by the builder on 02.05.2008, wherein, the builder had transferred the booking rights in the name of Shri Ardaman Singh on 02.05.2008. The evidence to this effect is enclosed at page 25 of the Paper Book.

17. Hence, apparently, the transfer of capital asset (i.e. booking rights in the property) happened only on 02.05.2008, which fall in AY 2009-10 and the assessee would be justified to disclose long-term capital gain for AY 2009-10 as transfer becomes complete in AY 2009-10.

18. We find that the Id CIT(A) had applied the provisions of section 2(47)(vi), which reads as under:-

"Section 2(47) "transfer", in relation to a capital asset, includes,—

(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."

19. It is pertinent to note that the capital asset concerned here is the Booking rights of Villa. The transfer of such booking rights had happened on 02.05.2008 based on a consent/ NOC given by the builder to the assessee. Hence, the extinguishment of right had happened on 02.05.2008 in terms of section 2(47)(ii) of the Act for AY 2009-10.

20. Let us now examine the applicability of the decision of the Hon'ble Supreme Court in the case of CIT Vs. Balbir Singh maini (supra). The relevant observations made thereon are reproduced hereinbelow:-

"22. The object of Section 2(47)(vi) appears to be to bring within the tax net a de facto transfer of any immovable property. The expression "enabling the enjoyment of" takes color from the earlier expression "transferring", so that it is clear that any transaction which enables the enjoyment of immovable property must be enjoyment as a purported owner thereof. The idea is to bring within the tax net, transactions, where, though title may not be transferred in law, there is, in substance, a transfer of title in fact.

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, and 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.

24 to 27.

28. In the present case, the assessee did not acquire any right to receive income, inasmuch as such alleged right was dependent upon the necessary permissions being obtained. This being the case, in the circumstances, there was no debt owed to the assesseees by the developers and therefore, the assesseees have not acquired any right to receive income under the JDA. This being so, no profits or gains "arose" from the transfer of a capital asset so as to attract Sections 45 and 48 of the Income Tax Act."

(emphasis supplies by us)

21. Hence, the ratio of the aforesaid decision of the Hon'ble Supreme Court would be squarely applicable to the facts of the instant case inasmuch as the transfer of booking rights contemplated in the agreement to sell dated 08.03.2008 was dependent upon the permission to be granted by the builder, which happened only on 02.05.2008 and thereby the transfer of booking rights would be completed only in AY 2009- 10.

22. Further the Hon'ble Gujarat High Court in the case of Ushaben Jayantilal Sodhan reported in 407 ITR 276 (Guj) had an occasion to deal with the similar issue under consideration. The relevant observations made thereon are reproduced herein below:-

16. We must, however, view these transactions in the context of the provisions contained in the Act instead of confining its effect to the Transfer of Property Act and the Registration Act. As noted, Section 2(14) of the Act defines "capital asset" inter alia as a property of any kind held by an assessee. Section 2(47) of the Act defines "transfer" in relation to a capital asset to include sale, exchange or relinquishment of the asset or extinguishment of any rights therein. The term "transfer" defined u/s.2(47) of the Act, thus, has a much wider connotation, as compared to the common parlance understanding or even under the Transfer of Property Act, under which the term "transfer of property", as

noted earlier, has a narrower sweep. It is, perhaps, possible to argue that the agreement to sale gives rise to a capital asset. Upon execution of the agreement to sale, the intending purchaser gets a certain right to insist that the title of the property be transferred if he performs his part of the obligation arising out of the agreement. If the seller is unwilling to do so, the intending purchaser may also successfully bring a suit for specific performance by demonstrating that he was and had always been ready and willing to perform his part of the obligations arising out of the agreement. Under an agreement to sale, thus, the seller binds himself to do or not to do certain things in reciprocation of the purchaser performing his part of the obligations. Correspondingly, it may be stated that the seller's right to freely deal in the property in question gets curtailed. It may, therefore, also be possible to argue that upon execution of such an agreement, there was extinguishment of certain rights of the owner and to that extent, there was a transfer of capital asset. The crucial question, however, still begs the answer is can it be stated that the agreement to sale transfers the property in question within the meaning of Section 2(47) of the Act ?

17. In our opinion, the answer has to be in the negative. As discussed earlier, the agreement to sale an immovable property is in the nature of bilateral contract between the seller and the buyer. Under such agreement, the seller agrees to transfer the title in the property to the buyer, upon the buyer performing his part of the obligations, mainly, revolving around the payment of sale consideration on agreed terms. Such agreement to sale, however, has to culminate into a registered sale deed, so as to transfer the title of property in question from the seller to the buyer. There may be multiple reasons why such eventuality may never arise and these reasons could be entirely different from the seller refusing to perform his part of the obligations arising out of the contract or for some such reason, the transaction running into legal controversies. Some of the imaginable reasons could be the inability of the seller to clear the title of the property due to which the contract may be frustrated or rescinded with mutual consent or the refusal or inability of the purchaser to pay the sale consideration.

18. An agreement to sale immovable property does not cast obligations only on the seller. It is based on reciprocal promises to be performed by both sides. If the purchaser fails to discharge his obligations arising out of the contract, then the agreement may as well not culminate into a final sale deed. Depending on the terms of agreement, the seller may either forfeit the earnest money, rescind the contract or in a given case, sue for specific performance or damages. These are but, a few illustrative examples to appreciate that there can be a wide gap between an agreement to sale and an actual instance of sale being evidenced under a sale deed. To therefore hold that upon mere execution of an agreement to sale of the immovable property itself gets transferred into the purchaser, even within the extended definition of Section 2(47) of the Act, would be incorrect.

23. In view of the aforesaid observations in the facts and circumstances of the instant case and respectfully following the aforesaid judicial precedents, we hold the transfer had indeed happened only in AY 2009-10. Hence, we direct the Id AO to delete the capital gain addition made in AY 2008-09 and convert the addition made in AY 2009-10 from protective basis to substantive basis. Accordingly, the grounds raised by the assessee are allowed.

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

Order pronounced in the open court on 12/06/2024.

-Sd/-
(SAKTIJIT DEY)
VICE PRESIDENT

-Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 12/06/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi