

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No.270 of 2013 (O&M)
Date of decision: July 31, 2015

Punjabi Cooperative House Building Society

.....Appellant

Vs.

The Commissioner of Income Tax, Chandigarh and another

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE FATEH DEEP SINGH**

Present: Ms.Radhika Suri, Advocate with Ms. Rinku Dahiya, Advocate
for the appellant.

Ms. Urvashi Dhugga, Advocate for the revenue.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.270 of 2013 and 50 of 2014 as the issue involved in both the appeals is common. However, the facts are being extracted from ITA No.270 of 2013.

2. ITA No.270 of 2013 has been filed by the assessee-appellant under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 29.7.2013, Annexure A.3 passed by the Income Tax

Appellate Tribunal, Chandigarh 'B' Bench Chandigarh (in short, “the Tribunal”) in ITA No.556/Chd/2012 for the assessment year 2007-08.

3. Briefly, the facts as narrated in ITA No.270 of 2013 necessary for adjudication of the controversy involved may be noticed. The appellant- assessee is a society formed on 23.4.1998. It purchased land measuring 21.2 acres in Village Kansal for an amount of ₹ 6,16,07,029/-. The purchase price was contributed by the members of the society. The society allotted plots measuring 500 square yards to 65 members, 1000 square yards to 30 members and four plots of 500 square yards were retained by the society. It entered into a tripartite Joint Development Agreement dated 25.2.2007 (in short, “JDA”) with Hash Builders Private Limited, Chandigarh (for brevity “HASH”) and Tata Housing Development Company Limited, Mumbai (THDC). Under the JDA, it was agreed that HASH and THDC (“the developers”) shall undertake development of 21.2 acres of land owned and registered in the name of the society in respect of which it would give development rights in lieu of consideration. The agreed consideration was to be disbursed by THDC through Hash to each individual member of the society having plot size of 500 square yards partly in monetary terms (₹ 82.50 lacs in cash) and balance in terms of built up property (one flat measuring 2250 square feet). Clause 4 of the JDA provided the following schedule:-

- a) Payment of ₹ 3 lacs per plot holder of 500 square yards and ₹ 6 lacs per plot holder of 1000 square yards upon execution of the JDA as adjustable advance.
- b) Payment of ₹ 12 lacs per plot holder of 500 square yards and ₹24 lacs per plot holder of 1000 square yards to be made upon execution of the JDA against execution of a registered sale deed

by the society in favour of THDC for land of equivalent value being 3.08 acres having specific Khasra nos. as mentioned in the JDA.

c) Payment of ₹ 18 lacs per plot holder of 500 square yards and ₹ 36 lacs per plot holder of 1000 square yards to be made within two months of execution of the JDA against execution of another registered sale deed by the society in favour of THDC for land of equivalent value being 4.62 acres.

d) Payment of ₹ 24.75 lacs per plot holder of 500 square yards and ₹ 49.50 lacs per plot holder of 1000 square yards to be made within six months from the date of execution of the JDA or within two months from the date of the approval of the plans/design and drawings and grant of final licence to develop whereupon construction can commence, whichever was later, against execution of another registered sale deed by the society in favour of THDC for land of equivalent value being 6.36 acres.

e) Balance payment of ₹ 24.75 lacs per plot holder of 500 square yards and ₹ 49.50 lacs per plot holder of 1000 square yards to be made within two months from the date of payment as per clause (d) above, towards full and final settlement of payments after adjustment of the advance/earnest money against execution of another registered sale deed by the society in favour of THDC for land of equivalent value being 7.14 acres.

f) Each member having plot of 500 square yards was entitled to receive one built up apartment having super area of 2250 square feet and each member having plot of 1000 square yards was entitled to two built up apartments having super area of 2250 square feet after transfer of land in the name of THDC. Allotment letters were to be issued by THDC within two months from the date of obtaining approval to commence construction at the site. Copies of the minutes of the Executive Committee of the society dated 4.1.2007 and JDA dated

25.2.2007 are attached as Annexures A.1 and A.2 respectively with the appeal. Clause 14 of the agreement further provided that in case of termination of the JDA, lands registered in the name of THDC upto the date of termination shall remain with THDC and the balance lands to be transferred shall not be transferred in favour of THDC.

4. The developers made payments only upto clause (c) above i.e. upto second installment and till date only part of the land measuring 7.7 acres i.e. 3.08 acres plus 4.62 acres having specific khasra nos. as mentioned in the JDA and plan attached thereto have actually been registered in the name of THDC. Subsequently, substantial disputes arose between the society on the one hand and the developers on the other with regard to further payments to be made in terms of the JDA i.e. from clause (d) onwards. The appellant, who had been allotted 1000 square yards of plot in the society was, as per the JDA, entitled to receive monetary consideration of ₹ 3,30,00,000/- and four furnished flats of 2250 square feet each. The appellant actually received proportionate amount of ₹ 66 lacs.

5. For the previous year relevant to the assessment year 2007-08, the appellant filed original return of income at nil after claiming deduction under Section 80P of the Act. In the original return, the appellant did not offer to tax any amount under the JDA on the ground that there was no transfer to THDC during the year under consideration and also because ownership as well as possession of the land still vested in the society.

6. The Assessing Officer vide order dated 29.12.2010, Annexure A.1 passed under Section 143(3) of the Act held that since as per the JDA, there was grant and assignment of various rights in the property by the appellant in favour of THDC alongwith handing over physical and vacant

possession, the same tantamount to “transfer”. The Assessing Officer framed a protective assessment holding that the appellant was liable to capital gains on the entire consideration receivable of ₹ 234 crores relating to transfer of land and construction of 126 flats. The Assessing Officer also taxed the appellant on substantive basis on the amount receivable under the Joint development agreement on consideration of ₹ 7,35,00,000/- relating to the four plots of which it was owner. The Assessing Officer applied the provisions of Section 2(47)(v) of the Act read with Section 53A of the Transfer of Property Act, 1882 (in short, “the 1882 Act”) which provides that any transaction involving allowing the possession of any immovable property to be taken or retained in part performance of contract of the nature referred to in Section 53A of the 1882 Act shall be treated as “transfer” for purposes of the Act. Since the JDA was signed on 25.2.2007 i.e. during the previous year relevant to assessment year 2007-08, the Assessing Officer computed chargeable capital gains in that year. It was also held that there was 'transfer' within the meaning of sub sections (ii) and (vi) of Section 2 (47) of the Act. The appellant challenged the order passed by the assessing Officer before the Commissioner of Income Tax (Appeals) [CIT (A)]. Vide order dated 12.12.2011, Annexure A.2, the CIT(A) upheld the order passed by the Assessing Officer in framing substantive assessment on a consideration of ₹ 7,35,00,000/- which was the amount receivable for the four plots owned by the appellant under the JDA. The revenue and the appellant filed appeals before the Tribunal. The appellant on the basis of the terms of the JDA and subsequent material events contended before the Tribunal that the action of the Assessing Officer in bringing to tax the entire

consideration receivable under the JDA under the head 'capital gains' was legally unsustainable. Vide order dated 29.7.2013, Annexure A.3, the Tribunal upheld the order of the Assessing Officer bringing to tax the entire consideration receivable under the JDA as liable for tax under the head 'capital gains' following its order passed in the case of ***C.S.Atwal vs. ITO*** in relation to the four plots owned by the Society. In nut shell, the Tribunal held that technically there was transfer in terms of Section 2(47)(v) of the Act read with Section 53A of the 1882 Act. The entire consideration receivable under the JDA was thus held to be taxable in the hands of the appellant. The Tribunal also affirmed the determination of notional value of flat by applying rate of ₹ 4500 per square feet. The issue of allowability of exemption under section 54F of the Act was rejected by the Tribunal following tis order in ***C.S.Atwal's*** case and the exemption under Section 54 of the Act was denied on the ground that the same was available only in the case of residential house and as the asset transferred was a plot, the exemption under section 54 could not be granted.

7. We have heard learned counsel for the parties.

8. In our recent judgment dated 22.7.2015 rendered in ITA No.200 of 2013 (***C.S.Attwal vs. The Commissioner of Income Tax, Ludhiana and another***), the following issues emerged for consideration:-

- i) scope and legislative intent of Section 2(47)(ii), (v) and (vi) of the Act;
- ii) the essential ingredients for applicability of Section 53A of 1882 Act;
- iii) meaning to be assigned to the term “possession”?
- iv) whether in the facts and circumstances, any taxable capital gains arises from the transaction entered by the assessee?

After considering the relevant statutory provisions and the case law, the following conclusions were drawn:-

1. Perusal of the JDA dated 25.2.2007 read with sale deeds dated 2.3.007 and 25.4.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land.
2. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.2.2007 so as to fall within the domain of Section 53A of 1882 Act.
3. The possession delivered, if at all, was as a licensee for the development of the property and not in the capacity of a transferee.
4. Further Section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.2.2007 having been executed after 24.9.2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2 (47)(v) of the Act does not apply.
5. It was submitted by learned counsel for the assessee-appellant that whatever amount was received from the developer, capital gains tax has already been paid on that and sale deeds have also been executed. In view of cancellation of JDA dated 25.2.2007, no further amount has been received and no action thereon has been taken. It was urged that as and when any amount is received, capital gains tax shall be discharged thereon in accordance with law. In view of the aforesaid stand, while disposing of the appeals, we observe that the assessee appellants shall remain bound by their said stand.
6. The issue of exigibility to capital gains tax having been decided in favour of the assessee, the question of exemption under Section 54F of the Act would not survive any longer and has been rendered academic.

7. The Tribunal and the authorities below were not right in holding the assessee-appellant to be liable to capital gains tax in respect of remaining land measuring 13.5 acres for which no consideration had been received and which stood cancelled and incapable of performance at present due to various orders passed by the Supreme Court and the High Court in PILs. Therefore, the appeals are allowed.”

9. In view of the above, it is considered appropriate that the matter is remanded to the Tribunal to pass fresh orders after hearing learned counsel for the parties and in view of the conclusions noticed herein above. Ordered accordingly. The appeals stand disposed of.

(Ajay Kumar Mittal)
Judge

July 31, 2015
'gs'

(Fateh Deep Singh)
Judge